



## Support Plan Terms and Conditions

PLEASE READ THIS AGREEMENT CAREFULLY BEFORE PURCHASING OR USING NAGIOS ENTERPRISES' SUPPORT SERVICES. BY PURCHASING OR USING NAGIOS ENTERPRISES' SERVICES, YOU SIGNIFY YOUR ASSENT TO THIS AGREEMENT. IF YOU ARE ACTING ON BEHALF OF AN ENTITY, THEN YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO ENTER INTO THIS AGREEMENT ON BEHALF OF THAT ENTITY. IF YOU DO NOT ACCEPT THE TERMS OF THIS AGREEMENT, THEN YOU MUST NOT PURCHASE OR USE NAGIOS ENTERPRISES' SUPPORT SERVICES.

This **Support Plan Terms and Conditions Agreement** ("**Agreement**") is a legal agreement between Nagios Enterprises, LLC ("**Nagios Enterprises**") and the purchaser or user of Nagios Enterprises support services ("**Customer**"). The effective date of this Agreement ("**Effective Date**") is the later of the date that Customer signs or accepts this Agreement or two (2) business days after the date that Customer purchases Nagios Enterprises' support services.

### 1 DEFINITIONS

For the purposes of this Agreement, the following terms shall have the following meanings:

- 1.1 Supported Software.** Nagios and Nagios Enterprises branded products.
- 1.2 Supported System.** Configurations and installations of Supported Software.
- 1.3 Support Plan Level.** The level of support as specified in one or more of the following documents: (a) invoice from Nagios Enterprises to Customer, or (b) executed sales quotation from Nagios Enterprises to Customer, or (c) a purchase order from Customer to Nagios Enterprises.
- 1.4 Support Guidelines.** Guidelines for the provision of support services for Supported Systems.
- 1.5 Support Service.** Telephone, email, and web-based support services provided to Customer for Supported Systems as specified by the Support Plan Level and Support Guidelines.
- 1.6 Software Update.** Any enhancement to the current version of the Supported Software that Nagios Enterprises generally releases or generally makes available at no additional cost to Nagios Enterprises' other customers subscribing to the same Support Plan Level. A Software Update is any new version of the Supported Software denoted by a change in the version number (e.g. 3.0.6 to 3.0.7). Customer is responsible for acquiring, at their own cost, any updated or additional hardware, network resources, and software necessary to implement or use any Software Update.
- 1.7 Support Team.** Nagios Enterprises' team of technical support specialists, which provide Support Services relating to the Supported Software and Supported Systems.
- 1.8 Support Technician.** A member of the Support Team.
- 1.9 Support Request.** A request for Support Services made by the Customer via telephone call, email, or web submission to the Support Team.
- 1.10 Initial Term.** One (1) year period starting at the Effective Date. If you have multiple Supported Systems, Nagios Enterprises reserves the right to change the length of a particular term, and prorate Support Fees as necessary, so that the terms for all Supported Systems begin and end on the same date.
- 1.11 Renewal Term.** Any annual term beyond the Initial Term. The Support Plan Level that Customer selects for the Supported System may be renewed for successive one (1) year periods commencing at the end of the Initial Term.
- 1.12 Support Fee.** The then-current list price for the applicable Supported System and the Support Plan Level purchased. Support Fees for any Renewal Terms are subject to change based on Nagios Enterprises' then-current pricing in effect; however, in no event will a Support Fee for a Supported System at the same Support Plan Level during any Renewal Term increase by more than 7% over the Initial Term or any preceding Renewal Term without Nagios Enterprises providing Customer with at least sixty (60) days notice prior to the expiration date of the Initial Term or the then-current Renewal Term. All Support Fees are due annually in advance of the term covered.

## 1 SERVICE

Subject to the terms of this Agreement and full payment of Support Fees as set forth in Section 4 of this Agreement, Nagios Enterprises will provide Customer with telephone, email, and web-based support services (the "Support Service") for Supported Systems as specified in the Support Plan Level and in accordance with the guidelines set forth in the Support Guidelines and Section 5 of this Agreement.

## 2 EXCEPTIONS TO SERVICE

**2.1** Unless expressly provided by mutual agreement of Nagios Enterprises and Customer in writing and/or by the terms of a Support Plan Level, Support Services do not include support which is necessitated as a result of the following causes:

**2.1.1** accident, neglect, misuse, abuse or default of or by the Customer, Customer's employees or agents, or any third party; or

**2.1.2** any fault in attachments or associated products, components, hardware, or software (whether or not supplied by Nagios Enterprises or its affiliates) which do not form part of the Supported Software covered by this Agreement and/or under the relevant Support Plan Level; or

**2.1.3** Customer's failure to abide by Section 5 of this Agreement; or

**2.1.4** Customer's failure to install the most recent Software Update made available to Customer, which Nagios Enterprises affirms to Customer resolves the failure reported by Customer; or

**2.1.5** any fault in the Supported Software caused by the failure of any products or components not supplied by Nagios Enterprises or its affiliates; or

**2.1.6** any fault in Supported Software which has been modified or damaged in any manner by any person of entity other than Nagios Enterprises; or

**2.1.7** an act of God, lightning, fire, flood, war, act of violence or any similar occurrence.

**2.2** Unless expressly provided by mutual agreement of Nagios Enterprises and Customer in writing and/or by the terms of a Support Plan Level, Support Services do not include:

**2.2.1** the support of non-Supported Software ("Other Software") and non-Supported Systems ("Other Systems"), even though they may have been supplied by Nagios Enterprises or its affiliates; or

**2.2.2** customization or integration of new version or updates of the Supported Software; or

**2.2.3** the support of any modified or customized version of the Supported Software; or

**2.2.4** the support of any attachments or associated products which do not form part of the Supported Software and Supported Systems.

## 3 PAYMENT

**4.1 Fees and Expenses.** Support Fees are stated in United States Dollars, must be paid in United States Dollars, and are exclusive of out-of-pocket expenses. Customer will reimburse Nagios Enterprises for reasonable expenses incurred in connection with the performance of Support Services involving travel. Unless otherwise stated in this Agreement, any renewal of this Agreement will be at the same price per Supported System paid during the initial term. The parties agree that the terms of this Agreement will govern future purchases by Customer of additional units of any or all of the Support Services listed herein. Unless otherwise agreed by the parties in writing, during the term of this Agreement, such additional units can be purchased and renewed at the rates set forth herein, exclusive of expenses, if any.

**4.2 Invoices.** If Customer is paying by credit card, Customer authorizes Nagios Enterprises to bill Customer's credit card for the Support Services for the Initial Term and for the amount due at the time of renewal. If Nagios Enterprises has approved Customer to be invoiced, Nagios Enterprises will invoice Customer for the Fees at the time of execution of this Agreement and upon the submission of any future purchase order. Any and all payments made by Customer pursuant to this Agreement are non-refundable. Customer will make payment within thirty (30) days of the date of the invoice; provided, however, that Support Fees for Support Services are due prior to the delivery of such Support Services. Nagios Enterprises reserves the right to suspend or cancel performance of all or part of the Support Services and/or change its credit terms if actual payment has not been received within sixty (60) days of the invoice date.

**4.3 Taxes.** All Support Fees are exclusive of any Taxes. Customer will pay to Nagios Enterprises an amount equal to any Taxes arising from or relating to this Agreement, including without limitation, sales, service, use or value added taxes, which are paid by or are payable by Nagios Enterprises. "Taxes" means any form of taxation, levy, duty, customs fee, charge, contribution or impost of whatever nature and by whatever authority imposed (including without limitation any fine, penalty, surcharge or interest), excluding, however, any taxes based solely on the net income of Nagios Enterprises. If Customer is required under any applicable law or regulation, domestic or foreign, to withhold or deduct any portion of the payments due to Nagios Enterprises, then the sum payable to Nagios Enterprises will be increased by the amount necessary so that Nagios Enterprises receives an amount equal to the sum it would have received had Customer made no withholdings or deductions.

## **1 CUSTOMER'S OBLIGATIONS**

**1.1** During the continuance of this Agreement, the Customer shall:

### **1.1.1 Facilities.**

**1.1.1.a** Provide Nagios Enterprises with full, safe and prompt access to the Supported Software, Supported Systems, and other Customer information, systems, and software ("**Customer Information**") as reasonably requested by Nagios Enterprises to enable Nagios Enterprises to carry out its obligations under this Agreement. Customer understands and agrees that the completeness and accuracy of and extent of access to the Customer Information provided to Nagios Enterprises may affect Nagios Enterprises' ability to provide Support Services. Customer will obtain any third party consents necessary to grant Nagios Enterprises access to Customer Information that is subject to proprietary right of, or controlled by, any third party. Customer may, for legitimate security concerns, deny Nagios Enterprises certain access to Customer Information and the Supported Systems, provided, however, that Nagios Enterprises shall be relieved from performing Support Services which reasonably require such access.

**1.1.1.b** Make available to Nagios Enterprises, free of charge, all facilities and services reasonably required by Nagios Enterprises to enable Nagios Enterprises to provide the Support Services under this Agreement.

**1.1.1.c** Provide such telecommunication facilities as are reasonably required.

### **1.1.2 Use and Care.**

**1.1.2.a** Save for discrete additions generally recognized as being compatible with the Supported Software and Supported Systems, not make any modifications to the Supported Software or Supported Systems without Nagios Enterprises' prior consent.

**1.1.2.b** Ensure that Supported Software and Supported Systems are used in a proper manner, in accordance with the Supported Software user manuals and by competent trained employees only or by persons under their supervision.

**1.1.2.c** Test all updates and modifications to the Supported Software and Supported Systems prior to implementing them in Customer's environment in accordance with best computing practices. NAGIOS ENTERPRISES WILL NOT BE RESPONSIBLE FOR LOSS OF OR DAMAGE TO DATA OR LOSS OF USE OF ANY OF THE CUSTOMER'S COMPUTER OR NETWORK SYSTEMS.

### **1.1.3 Notification and Information.**

**1.1.3.a** Make available to Nagios Enterprises, free of charge, such information as may be necessary to enable Nagios Enterprises properly to conduct email and telephone diagnosis as part of the Support Service, and in addition, such programs, operating manuals and information to enable Nagios Enterprises properly to perform its obligations under this Agreement .

**1.1.3.b** Use its best endeavors to provide staff familiar with the Customer's programs and operations, which staff shall co-operate fully with Nagios Enterprises personnel operating the Support Service (the "**Technicians**") in the diagnosis of any malfunction of the Supported Software or Supported Systems.

**1.1.3.c** Keep full backups and copies of any of the Supported Software, Supported Systems, databases, configuration, and computer records in accordance with best computing practices before requesting Support Services from Nagios Enterprises. Customer acknowledges they are responsible for re-loading their own application software, computer data, and records after any such Support Services have been provided. It is the Customer's responsibility to backup data on the Supported Systems. NAGIOS ENTERPRISES WILL NOT BE RESPONSIBLE FOR LOSS OF OR DAMAGE TO DATA OR LOSS OF USE OF ANY OF THE CUSTOMER'S COMPUTER OR NETWORK SYSTEMS.

**1.2** To receive Support Service, the Customer is responsible for complying with the following:

**1.2.1** Conform to the Support Guidelines. Conform to any and all guidelines specified in the Support Guidelines, which may be updated from time to time. Customer is responsible for ensuring they are aware of and follow the latest Support Guidelines published on Nagios Enterprises' web site.

**1.2.2** Prepare for the Support Request. The Customer can help the Support Team serve them better if the Customer has the following information when the Support Request is made: the Customer's customer number; and the current version of the Supported Software being used.

**1.2.3** Explain the problem to the Support Team. The Customer should describe the problem the Customer is having with the Supported Software or Supported System. Let the Support Team know what errors occurred and when they occurred; what was being done when the errors occurred; and what steps have already been taken to solve the problem.

**1.2.4** Cooperate with the Support Technician. Pay careful attention to the Support Technician and follow the Support Technician's directions.

**1.2.5** If the Support Technician is unable to resolve the problem over the phone or via email, the Support Technician will recommend to the Customer the next course of action to be taken.

UNTIL THE CUSTOMER HAS COMPLIED WITH THE ABOVE PROCEDURES, NAGIOS ENTERPRISES CANNOT PROVIDE THE CUSTOMER WITH SERVICE.

## **2 TERM AND TERMINATION**

**2.1 Term.** The term of this Agreement and the provision of Support Services hereunder begins on the Effective Date and continues for the period of the Initial Term. Thereafter, the term for the Support Services may be renewed before commencement of the next Renewal Term. If Customer does not use any Support Services purchased during the then-current term, such Support Services will be forfeited.

**2.2 Termination.** If Customer or Nagios Enterprises materially breaches the terms of this Agreement, and such breach is not cured or remedied within thirty (30) days after written notice of the breach is given to the breaching party, then the other party, by giving written notice of termination to the breaching party, may terminate this Agreement; provided, however, that no cure period will be required for a breach of Section 11 hereof. Nagios Enterprises reserves the right to terminate this Agreement and all Support Services at any time within thirty (30) days after written notice to Customer; provided, however, that Nagios Enterprises refunds Customer any and all pro-rated Support Fees for the remainder of the then-current term at the time Support Services terminate. Without prejudice to any other right or remedy of Nagios Enterprises, in the event either party terminates this Agreement, Customer will pay Nagios Enterprises for all Support Services provided up to the effective date of termination.

**2.3 Effect of Termination.** If this Agreement is terminated for any reason, Sections 4, 6.3, 8, 9.2, 10, 11, 12.2, 13, 14, and 15 of this Agreement will survive such termination.

## **3 CONTINUING BUSINESS**

Nothing in this Agreement will be understood to preclude or limit Nagios Enterprises from providing software, materials, or services for itself or other clients, irrespective of the possible similarity of such software, materials or services to those which might be delivered to Customer.

## **4 LIMITATION OF LIABILITY AND DISCLAIMER OF DAMAGES**

**4.1 Limitation of Liability.** FOR ALL EVENTS AND CIRCUMSTANCES, NAGIOS ENTERPRISES AND ITS AFFILIATES' AGGREGATE AND CUMULATIVE LIABILITY ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING WITHOUT LIMITATION ON ACCOUNT OF PERFORMANCE OR NON-PERFORMANCE OF OBLIGATIONS, REGARDLESS OF THE FORM OF THE CAUSE OF ACTION, WHETHER IN CONTRACT, TORT (INCLUDING WITHOUT LIMITATION NEGLIGENCE), STATUTE OR OTHERWISE WILL BE LIMITED TO DIRECT DAMAGES AND WILL NOT TO EXCEED THE AMOUNT THAT CUSTOMER PAID TO NAGIOS ENTERPRISES UNDER THIS AGREEMENT DURING THE TWELVE (12) MONTHS IMMEDIATELY PRECEDING THE FIRST EVENT GIVING RISE TO LIABILITY.

**4.2 Disclaimer of Damages.** NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT, IN NO EVENT WILL NAGIOS ENTERPRISES OR ITS AFFILIATES BE LIABLE TO CUSTOMER OR ITS AFFILIATES FOR: ANY CLAIM BASED UPON A THIRD PARTY CLAIM; ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL, INDIRECT, EXEMPLARY OR PUNITIVE DAMAGES, WHETHER ARISING IN TORT, CONTRACT, OR OTHERWISE; OR FOR ANY DAMAGES ARISING OUT OF OR IN CONNECTION WITH ANY MALFUNCTIONS, DELAYS, LOSS OF DATA, LOST PROFITS, LOST SAVINGS, INTERRUPTION OF SERVICE, LOSS OF BUSINESS OR ANTICIPATORY PROFITS, EVEN IF NAGIOS ENTERPRISES OR ITS AFFILIATES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

## 5 REPRESENTATIONS AND WARRANTIES

**5.1 General Representations and Warranties.** Nagios Enterprises represents and warrants that: (a) the Support Services will be performed in a professional and workmanlike manner by qualified personnel; and (b) it has the authority to enter into this Agreement with Customer.

**5.2 Disclaimer of Warranty.** EXCEPT AS EXPRESSLY PROVIDED IN THIS SECTION 9, THE SUPPORT SERVICES AND THE SOFTWARE ARE PROVIDED "**AS IS**" AND WITHOUT WARRANTIES OR CONDITIONS OF ANY KIND, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE. THE WARRANTIES IN THIS SECTION 9 ARE THE SOLE AND EXCLUSIVE WARRANTIES (EXPRESS OR IMPLIED) WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY NAGIOS ENTERPRISES, ITS AFFILIATES, DEALERS, DISTRIBUTORS, AGENTS OR EMPLOYEES WILL CREATE A WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF ANY WARRANTY PROVIDED HEREIN. NAGIOS ENTERPRISES DOES NOT GUARANTEE OR WARRANT THAT THE USE OF THE SERVICES OR SOFTWARE WILL BE UNINTERRUPTED OR ERROR FREE.

## 6 LICENSE AND OWNERSHIP

**10.1 Marks.** No right or license, express or implied, is granted hereunder for the use of any of Nagios Enterprises' trade names, service marks or trademarks. Customer hereby grants Nagios Enterprises a non-exclusive, perpetual, royalty-free license to use Customer's name, Customer's logo artwork, and the name of any product or service that results from the Support Services covered by the Agreement in Nagios Enterprises' advertising, press, promotion, and similar public disclosures. This provision will survive the termination and or completion of this Agreement subject to the confidentiality provisions set form in Section 11.

**10.2 Freedom to Use Ideas.** The ideas, methods, concepts, know-how, structures, techniques, inventions, developments, processes, discoveries, improvements and other information and materials developed in and during the course of this Agreement may be used by either party, without an obligation to account, in any way that party deems appropriate, including by or for itself or its clients or customers, notwithstanding anything to the contrary contained in this Agreement.

## 1 CONFIDENTIALITY

Customer and Nagios Enterprises agree to maintain the confidentiality of Nagios Enterprises' pricing and product roadmap as well as other proprietary information received by the other party that is marked confidential, including non-public technical and business information for a period of two (2) years after the termination of this Agreement. This section shall not apply to any publicly available or independently developed information.

## 2 REPORTING AND INSPECTION

**2.1 Reporting.** Customer will promptly notify Nagios Enterprises if the number of Supported Systems exceeds the number of Supported Systems for which Customer has paid the applicable fee. In its notice, Customer will include both the number of additional Supported Systems and the date(s) on which such Supported Systems were put into use. Nagios Enterprises will invoice Customer for the applicable Support Services for such Supported Systems on a pro-rata basis and Customer will pay for such Support Services in accordance with this Agreement.

**2.2 Inspection.** During the term of this Agreement and for one (1) year thereafter, Nagios Enterprises or its designated agent may inspect and review Customer's facilities and records in order to verify Customer's compliance with this Agreement. Any such inspection and review will take place only during Customer's normal business hours and upon no less than ten (10) days prior written notice from Nagios Enterprises. Nagios Enterprises will give Customer written notice of any non-compliance, including the number of underreported Supported Systems, and Customer will have fifteen (15) days from the date of such notice to make payment to Nagios Enterprises for the applicable Support Services provided to the underreported Supported Systems. If Customer had underreported the number of Supported Systems by more than ten percent (10%), Customer will also pay Nagios Enterprises for the cost of such inspection.

## 3 EXPORT RESTRICTIONS

Customer acknowledges that Nagios Enterprises may supply Customer with technical data, technology, and software (collectively "Deliverables") that are not only subject to the export control laws and regulations of the United States ("U.S."), but may also be

subject to the export control laws and regulations of the country in which the Support Services are purchased. Customer agrees to abide by all applicable export control laws and regulations.

Under such laws and regulations, the Support Services purchased may not be sold, leased or otherwise transferred to restricted end-users or to restricted countries. In addition, the Support Services may not be sold, leased or otherwise transferred to, or utilized by, an end-user engaged in activities related to weapons of mass destruction, including but not necessarily limited to, activities related to the design, development, production or use of nuclear materials, nuclear facilities, or nuclear weapons, missiles or support of missile projects, or chemical or biological weapons. The Customer understands that applicable requirements or restrictions may vary depending on the Support Services delivered and may change over time and that, to determine the precise controls applicable to the Support Services acquired, it may be necessary to refer to relevant laws and regulations.

Nagios Enterprises will not be responsible for compliance by Customer with applicable export obligations or requirements for such Deliverables. Client agrees to defend and indemnify Nagios Enterprises against any demands, notices, fines, penalties, sanctions, claims, liabilities and costs, including attorneys fees, which result from Customer's breach of any representation or warranty herein. The indemnification provisions of this Section shall survive the expiration or termination of this Agreement. In the event that Customer breaches this Section 13, Nagios Enterprises may terminate this Agreement and its obligations hereunder without liability to Customer.

#### **4 GOVERNING LAW**

This Agreement is made in and shall be governed in all respects by the laws of the United States and of the State of Minnesota without regard to its conflict of laws provisions. The parties agree that any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be venued in the state or federal courts located in the State of Minnesota and the parties consent to the exclusive jurisdiction of said courts. In the event the Uniform Computer Information Transactions Act (UCITA) or any similar federal or state laws or regulations are enacted, it will not apply to this Agreement, and the governing law will remain as if such law or regulation had not been enacted.

#### **5 MISCELLANEOUS**

**5.1 Notices.** Notices must be in English, in writing, and will be deemed given when delivered by hand or five (5) days after being sent to the respective addresses indicated on the first page hereof or to the facsimile numbers set forth below, using a method that provides for positive confirmation of delivery; provided that any notice from Customer to Nagios Enterprises includes a copy sent to: Nagios Enterprises, 1295 Bandana Blvd. N., Suite 165, Saint Paul, MN 55108; Facsimile: (651) 204-9103.

**5.2 Right To Refuse Service.** Nagios Enterprises reserves the right to refuse any Customer access to Support Services for any reason, including, but not limited to Customer's use of Support Services in a manner prohibited by Section 13 of this Agreement. In the event that Nagios Enterprises refuses to provide Customer with Support Services, Nagios Enterprises agrees to refund Customer pro-rated Support Fees paid by Customer to Nagios Enterprises, less any fees incurred by Nagios Enterprises at the time the Support Fees were collected from and/or refunded to Customer.

**5.3 Assignment.** This Agreement is binding on the parties to this Agreement, and nothing in this Agreement confers upon any other person or entity any right, benefit or remedy of any nature whatsoever, save for the parties' affiliates as expressly provided in this Agreement. This Agreement is assignable by either party only with the other party's prior written consent, which will not be unreasonably withheld. Notwithstanding the foregoing, Nagios Enterprises may assign this Agreement to its affiliate, subsidiary or pursuant to a merger or a sale of all or substantially all of such party's assets or stock upon written notice and without the prior approval of Customer.

**5.4 Changes; Additional Services.** The scope of the Support Services and the Support Guidelines are subject to change based upon Nagios Enterprises' then-current maintenance and support policies. Nagios Enterprises shall use commercially reasonable efforts to notify Customer at least thirty (30) days prior to any material changes in Support Services. You agree to pay Nagios Enterprises at Nagios Enterprises' then-current rates, for all additional maintenance and professional services rendered and which are not covered by the Support Fees. Nagios Enterprises agrees not to bill Customer for any additional services outside the Support Services without a purchase order from Customer. Notwithstanding the above, during an emergency situation, any oral or written request by any employee of Customer for services not covered by the Support Fees will serve as a purchase order for the requested services.

**5.5 Force Majeur.** Except with respect to the payment of Fees owing under this Agreement, neither party will be liable for nonperformance or delays of its obligations under this Agreement caused by acts of God, wars, riots, strikes, fires, floods, earthquakes, government restrictions, terrorist acts or other causes beyond its reasonable control. If such delay is caused by circumstances beyond the reasonable control of the party so delaying, the party shall be entitled to a reasonable extension of time for the performance of such obligations.

**5.6 Subcontracting.** Nagios Enterprises may subcontract the Support Services provided under this Agreement to third parties or any of its authorized service providers or affiliates without the prior approval of Customer; provided, however, that subcontractors must agree to keep any proprietary information received from Nagios Enterprises or Customer confidential. Customer acknowledges and agrees that to provide the Support Services, it may be necessary for Customer Information to be transferred between Nagios Enterprises, its affiliates, and/or subcontractors, which may be located worldwide.

**5.7 Independent Contractor.** Nagios Enterprises is an independent contractor and nothing in this Agreement will be construed to create an employee relationship between Customer (or any Customer personnel) and Nagios Enterprises (or any Nagios Enterprises personnel). Each party shall be solely responsible for the payment of all federal, state or local taxes payable with respect to all amounts paid to Nagios Enterprises under this Agreement. Nothing contained in this Agreement shall be construed or applied to create a partnership.

**5.8 Non-solicitation.** Customer agrees not to solicit or hire any personnel of Nagios Enterprises with whom Customer has had contact in connection with this Agreement; provided that Customer may hire and individual employed by Nagios Enterprises who, without other solicitation, responds to advertisements or solicitations aimed at the general public.

**5.9 Dispute Resolution.** If Customer is not satisfied with the Support Services provided by Nagios Enterprises, Customer agrees to give Nagios Enterprises a written description of the problem(s) and to make a good faith effort to amicably resolve the problem with Nagios Enterprises before commencing any proceeding. Nagios Enterprises also agrees to make a good faith effort to amicably resolve any problem with Customer before commencing any proceeding. No claim or action, regardless of form, arising out of this Agreement may be brought by either party more than one (1) year after the cause of action has accrued.

**5.10 Headings.** All headings contained in this Agreement are inserted for identification and convenience, and will not be deemed part of this Agreement for purposes of interpretation.

**5.11 Severability.** If any provision of this Agreement is for any reason declared to be invalid or unenforceable, the validity and enforceability of the remaining provisions shall not be affected thereby. Such invalid or unenforceable provision shall be deemed modified to the extent necessary to render it valid and enforceable, and if no modification shall render it valid and enforceable, this Agreement shall be construed as if not containing such provision and the rights and obligations of the parties shall be construed and enforced accordingly; provided, however, that if Sections 4, 8, 10 and 13 cannot be modified to be valid and enforceable, this Agreement will be deemed invalid in its entirety.

**5.12 Waiver.** The delay or failure of either party to exercise any rights hereunder will not constitute or be deemed a waiver or forfeiture of such rights. No waiver will be valid unless in writing and signed by an authorized representative of the party against whom such waiver is sought to be enforced.

**5.13 Complete Agreement.** This Agreement constitutes the exclusive terms and conditions with respect to the subject matter hereof, notwithstanding any different or additional terms that may be contained in the form of purchase order or other document used by Customer to place orders or otherwise effect transactions hereunder. This Agreement represents the final, complete and exclusive statement of the agreement between the parties with respect to subject matter hereof and all prior written agreements and all prior and contemporaneous oral agreements with respect to the subject matter hereof are merged therein. Any claim relating to the provision of the Support Services by Nagios Enterprises, its affiliates and their personnel will be made against Nagios Enterprises alone.

**5.14 Amendment.** This Agreement may not be amended, supplemented or modified except by a written instrument signed by the parties hereto, which instrument makes specific reference to this Agreement.

**5.15 Counterparts and Facsimile Signature.** This Agreement may be executed in counterparts, each of which will be deemed an original and all of which will constitute one and the same instrument. The parties may exchange signature pages by facsimile and such signatures will be effective to bind the parties.

**5.16 Waiver of Trial Jury.** TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, EACH PARTY WAIVES THE RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED UNDER THIS AGREEMENT.