

MASTER SERVICES AGREEMENT

This Master Services Agreement (“**Agreement**”) is made and entered into as of _____, 201_ (the “**Effective Date**”), by and between Hewlett-Packard Company (“**HP**”), a Delaware corporation having a place of business at 6750 Navigator Way, Suite 200, Goleta, CA 93117 (“**HP**”), and [_____] a [_____] corporation with offices at [_____] (“**Customer**”).

HP makes available a private cloud infrastructure software known as the HP Helion Eucalyptus Enterprise Edition (the “**Eucalyptus EE**”), which enables customers to establish their own cloud computing environments.

Customer wishes to use the Eucalyptus EE, and HP intends to license the Eucalyptus EE to Customer, subject to the terms and conditions of this Agreement and the Software Subscription Agreement attached hereto as Exhibit A, and incorporated herein by this reference (the “**Subscription Agreement**”).

Customer wishes to obtain certain support and maintenance services in relation to the Eucalyptus EE, and HP intends to provide the support and maintenance services, subject to the terms and conditions of this Agreement and the Subscription Agreement.

In connection with the Eucalyptus EE, Customer wishes to obtain certain professional services, as may be agreed by the parties and set forth in the Statements of Work (as defined below) to be executed by the parties from time to time, and HP intends to provide such services subject to the terms and conditions of this Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. DEFINITIONS.

1.1 “**Change Order Request**” shall have the meaning ascribed to it in Section 3.2 of this Agreement.

1.2 “**Confidential Information**” means (i) with regard to HP, the Licensed Software, Documentation, Upgrades, and all other source code, source documentation, object code, inventions, know-how, ideas, programs, utility programs, and Information and Intellectual Property Rights related to, connected with or arising out of the Licensed Software, (ii) with regard to Customer, Customer’s Information, Customer Materials and any non-public information regarding the business or business partners of Customer, in whole and in part, and (iii) with regard to either party, all the terms and conditions of this Agreement and all discussions and negotiations related thereto and all information exchanged pursuant hereto and any other information, technical data, or know-how, including, but not limited to, that which relates to research, product plans, products, services, customers, markets, software, software code, software documentation, developments, inventions, lists, trade secrets, processes, designs, drawings, engineering, hardware configuration information, marketing or finances, which is designated in writing to be confidential or proprietary, or if given orally, is designated at the time of disclosure as confidential or proprietary. Notwithstanding the foregoing, Confidential Information does not include information, technical data or know-how which (i) is shown by written record to be in the public domain at the time of the disclosure or becomes available to the public thereafter without restriction, and not as a result of the act or omission of the receiving party, (ii) is rightfully obtained by the receiving party from a third party without restriction as to disclosure, (iii) is shown by written record to be lawfully in the possession of the receiving party at the time of the disclosure, (iv) is approved for release by written authorization of the disclosing party, or (v) is shown by written record to be developed independently and separately by the receiving party without use of the disclosing party’s Confidential Information.

1.3 “**Customer Materials**” shall have the meaning ascribed to it in Section 3.3 of this Agreement.

1.4 “**Delivery**” means delivery of the Licensed Software and Documentation, by HP, for use by Customer.

1.5 “**Documentation**” means all documentation and information in connection with the installation, use, operation, modification, support and maintenance of the Licensed Software made available by HP to Customer including, without limitation, any on-line help files, written instruction manuals or written correspondence, including emails.

- 1.6 “**HP Materials**” shall have the meaning ascribed to it in Section 5 of this Agreement.
- 1.7 “**Indemnifying Party**” shall have the meaning ascribed to it in Section 9 of this Agreement.
- 1.8 “**Indemnified Party**” shall have the meaning ascribed to it in Section 9 of this Agreement.
- 1.9 “**Information**” means any technical, or business information in written, graphical, oral, or other tangible or intangible forms, including but not limited to, specifications, drawings, tools, samples, reports, compilations, records, data, computer programs, models, and secrets.
- 1.10 “**High Risk Activities**” shall have the meaning ascribed to it in Section 14 of the Subscription Agreement.
- 1.11 “**Intellectual Property Rights**” means all current and future worldwide patents and other patent rights (including patent applications and disclosures), utility models, copyrights, moral rights, mask work rights, trade secrets, know-how and all other intellectual property rights.
- 1.12 “**Licensed Software**” means the Eucalyptus EE and any modifications, customizations, enhancements or extensions thereto including, without limitation, any Upgrades thereof.
- 1.13 “**Quote Form**” means the HP standard quote form provided by HP to the Customer.
- 1.14 “**Primary Contact**” shall have the meaning ascribed to it in Section 3.4 of this Agreement.
- 1.15 “**Professional Services**” shall have the meaning ascribed to it in Section 2 of this Agreement.
- 1.16 “**Services**” means collectively the Professional Services and the Support Services.
- 1.17 “**Statement of Work**” shall have the meaning ascribed to in Section 3.1 of this Agreement.
- 1.18 “**Subscription**” shall mean the right to use the Licensed Software and receive the Support Services, during the Subscription Period, in accordance with the terms and conditions of this Agreement.
- 1.19 “**Subscription Fees**” shall have the meaning ascribed to it in Section 4.1(a) of this Agreement.
- 1.20 “**Subscription Period**” shall have the meaning ascribed to it in Section 8.1 of this Agreement.
- 1.21 “**Support Services**” shall have the meaning ascribed to them in Section 8 of the Subscription Agreement.
- 1.22 “**Terminating Party**” shall have the meaning ascribed to it in Section 8.2 of this Agreement.
- 1.23 “**Upgrade**” shall have the meaning ascribed to it in Section 9.1 of the Subscription Agreement.

2. SCOPE OF THE AGREEMENT.

2.1 General. Customer’s use of the Licensed Software shall be governed by the terms and conditions of this Agreement and the Subscription Agreement. In connection with Customer’s use of the Licensed Software, HP agrees to provide Support Services in accordance with the Subscription Agreement. HP shall Deliver the Licensed Software to Customer, and perform the services specified in each Statement of Work (the “**Professional Services**”) in accordance with the terms and conditions of this Agreement and of each Statement of Work.

2.2 Relationship of the Parties. HP is performing the Services as an independent contractor, is not an employee, agent, joint venturer or partner of Customer, and has no authority to bind Customer by contract or otherwise. HP acknowledges and agrees that its personnel are not eligible for or entitled to receive any compensation, benefits or other incidents of employment that Customer makes available to its employees. HP is solely responsible for all taxes, expenses, withholdings, and other similar statutory obligations arising out of the relationship between HP and its personnel and the performance of Services by such personnel.

3. PROFESSIONAL SERVICES.

3.1 Statements of Work. From time to time, Customer and HP may execute statements of work, substantially in the form attached hereto as Exhibit B, that describe the Professional Services to be performed by HP, including any work product to be delivered by HP (as executed by the parties, a “*Statement of Work*”). Each Statement of Work will expressly refer to this Agreement, will form a part of this Agreement, and will be subject to the terms and conditions contained herein. Nothing herein shall obligate either party to perform or accept any Professional Services unless and until the parties have mutually agreed to a Statement of Work.

3.2 Changes to Statement of Work. Customer may submit to HP written requests to change the scope of Services described in a Statement of Work (each such request, a “*Change Order Request*”). HP may, at its discretion, consider such Change Order Requests, but HP has no obligation to do so. If HP elects to consider such a Change Order Request, then HP will promptly notify Customer if it believes that the Change Order Request requires an adjustment to the fees or to the schedule for the performance of the Professional Services. In such event, the parties will negotiate in good faith a reasonable and equitable adjustment to the fees and/or schedule, as applicable. HP will continue to perform the Professional Services pursuant to the existing Statement of Work and will have no obligation to perform any Change Order Request unless and until the parties have agreed in writing to such an equitable adjustment.

3.3 Customer Responsibilities. In connection with each Statement of Work, Customer will: (i) provide qualified personnel who are capable of performing Customer’s duties and tasks under the Statement of Work; (ii) provide HP with access to Customer’s sites and facilities during Customer’s normal business hours and as otherwise reasonably required by HP to perform the Services; (iii) provide HP with such working space and office support (including access to telephones, photocopying equipment, and the like) as HP may reasonably request; and (iv) perform Customer’s duties and tasks under the Statement of Work, and such other duties and tasks as may be reasonably required to permit HP to perform the Services. Customer will also make available to HP any data, information and any other materials required by HP to perform the Services, including, but not limited to, any data, information or materials specifically identified in the Statement of Work (collectively, “*Customer Materials*”). Customer will be responsible for ensuring that all such Customer Materials are accurate and complete.

3.4 Designated Contacts. Each party will designate in each Statement of Work an individual who will be the primary point of contact (the “*Primary Contact*”) between the parties for all matters relating to the Services to be performed thereunder. A party may designate a new Primary Contact by written notice to the other party.

4. PAYMENTS.

4.1 Fees and Expenses.

(a) Based on the level of Support Services that Customer subscribes to as part of the Subscription (as described in the Subscription Agreement), Customer will pay HP the license and support fees set forth on the Quote Form (“Subscription Fees”).

(b) For HP’s performance of Professional Services, Customer will pay HP fees calculated in accordance with the terms set forth in the applicable Statement of Work.

(c) Customer will reimburse HP for all reasonable and customary travel, lodging and other related expenses incurred by HP or its personnel in connection with the performance of the Services. At Customer’s request, HP will provide Customer with receipts and other reasonable supporting documentation for such expenses.

4.2 Payment Terms. HP shall invoice Customer all Subscription Fees (plus applicable shipping charges and taxes) immediately upon the execution of this agreement with specifics described on the Customer’s Quote Form (Exhibit C). Customer shall pay each such invoice within thirty (30) days of the receipt of the applicable invoice, and License Key will be delivered upon payment of the entire Subscription Fees. All payments shall be made in U.S. dollars. Travel related expenses will be estimated as part of the Statement of Work. Any invoice not paid when due will accrue interest at the rate of one and one-half percent (1.5%) per month or the maximum amount permitted by law, whichever is lower.

4.3 Taxes. All fees, expenses and other amounts payable to HP hereunder do not include any sales, use, value added or other applicable taxes, tariffs or duties, payment of which will be the sole responsibility of Customer (excluding any taxes based on HP’s net income). Customer will promptly reimburse HP for any such amounts that HP pays on Customer’s behalf.

5. OWNERSHIP.

Subject to Customer's rights in the Customer Materials, HP will own all rights, title and interest in and to the Licensed Software and any other software programs or tools, utilities, technology, processes, inventions, devices, methodologies, specifications, documentation, techniques and materials of any kind used or generated by HP in connection with performing Services (collectively "**HP Materials**"), including all Intellectual Property Rights therein. If and to the extent the HP Materials include any modifications, customizations, enhancements or extensions to the Eucalyptus EE, all such modifications, customizations, enhancements or extensions will be deemed licensed to Customer subject to and in accordance with the terms and conditions of the Software Subscription Agreement. Customer will have no rights in the HP Materials except as expressly agreed to in writing by the parties. Nothing in this Agreement will be deemed to restrict or limit HP's right to perform similar services for any other party or to assign any employees or subcontractors to perform similar services for any other party; provided that HP complies with its obligations under Section 6 with respect to Customer Confidential Information.

6. CONFIDENTIAL INFORMATION.

6.1 Use and Disclosure Restrictions. Each party will not use the other party's Confidential Information except as necessary for the performance or enforcement of this Agreement and will not disclose such Confidential Information to any third party except to those of its employees and subcontractors who have a bona fide need to know such Confidential Information for the performance or enforcement of this Agreement; provided that each such employee and subcontractor is bound by a written agreement that contains use and nondisclosure restrictions consistent with the terms set forth in this Section. Each party will employ all reasonable steps to protect the other party's Confidential Information from unauthorized use or disclosure, including, but not limited to, all steps that it takes to protect its own information of like importance.

6.2 Exclusions. The foregoing obligations will not restrict either party from disclosing the other party's Confidential Information: (i) pursuant to the order or requirement of a court, administrative agency, or other governmental body, provided that the party required to make such a disclosure gives reasonable notice to the other party to contest such order or requirement; (ii) to its legal or financial advisors; (iii) as required under applicable securities regulations; and (iv) subject to customary restrictions, to present or future providers of venture capital and/or potential private investors in or acquirers of such party.

6.3 Injunctive Relief. The parties agree that any breach by either party or any of its officers, directors, or employees, of any provision of this Section 6 may cause immediate and irreparable injury to the other party and that, in the event of such breach, the injured party will be entitled to seek injunctive relief as well as any and all other remedies available at law or in equity.

7. REPRESENTATIONS AND WARRANTIES.

7.1 General. Each party hereby represents and warrants as of the Effective Date and at all times throughout the term of this Agreement: (a) it has the full corporate right, power and authority to enter into this Agreement and to perform its obligations hereunder; (b) the execution of this Agreement by such party and performance of its obligations thereunder comply with all applicable laws, rules, and regulations; and (c) when executed and delivered, this Agreement will constitute a legal, valid and binding obligation of such party, enforceable against it in accordance with its terms.

7.2 Services Warranty HP warrants that the Services will be performed in a good and workmanlike manner consistent with applicable industry standards. This warranty will be in effect for a period of thirty (30) days from the completion of any Services. As Customer's sole and exclusive remedy and HP's entire liability for any breach of the foregoing warranty, HP will, at its sole option and expense, promptly re-perform any Services that fail to meet this limited warranty or refund to Customer the fees paid for the non-conforming Services.

7.3 Warranty Disclaimers. THE EXPRESS WARRANTIES IN SECTION 5.2 ARE IN LIEU OF, AND HP DISCLAIMS, ALL OTHER WARRANTIES, REPRESENTATIONS OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NONINFRINGEMENT WITH RESPECT TO THE SERVICES PERFORMED UNDER THIS AGREEMENT.

8. TERM AND TERMINATION.

8.1 **Subscription Period.** This Agreement is effective for a period of one (1) or three (3) years from the date that Customer downloads the Licensed Software or such other term expressly set forth in the Quote Form (the “**Initial Period**”). At the end of the Initial Period, Customer may renew this Agreement, and its Subscription, for successive one or three year periods (each such term, a “**Renewal Period**” and with the Initial Period, the “**Subscription Period**”) by paying the then-current Subscription Fees to HP, unless HP gives Customer written notice of its intent to terminate 30 days prior to the end of the then-current Subscription Period.

8.2 **Termination.** This Agreement or a Statement of Work may be terminated by a party (“**Terminating Party**”) if the other party (a) breaches any material provision of this Agreement or the applicable Statement of Work and does not cure or remedy such breach within thirty (30) days after receipt of written notice of breach from the Terminating Party; or (b) becomes the subject of a voluntary or involuntary petition in bankruptcy or any proceeding relating to insolvency, receivership, liquidation, or composition for the benefit of creditors, if such petition or proceeding is not dismissed with prejudice within sixty (60) days after filing. Unless otherwise provided in this Agreement, termination shall become effective thirty (30) days after issuance of a written notice of termination to the other party by the Terminating Party. Additionally, this Agreement will terminate automatically if Customer fails to comply with any of the limitations or other requirements described in the Subscription Agreement.

8.3 **Effect of Termination.** Upon the termination of this Agreement or the Statement of Work by either party: (i) each party will promptly return to the other party all Confidential Information of the other party in its possession or control; (ii) Customer will, within thirty (30) days after receipt of HP’s invoice, pay all accrued and unpaid fees and expenses; and (iii) the licenses granted under the Subscription Agreement shall automatically terminate and Customer must immediately uninstall and return the Licensed Software, including all Documentation and original media to HP. This shall not limit or affect any remedy available to HP for Customer’s breach of this Agreement.

8.4 **Survival.** Termination of this Agreement for any reason shall not affect the obligations accrued prior to the effective date of termination. Moreover, the rights and obligations of the parties contained in Sections 2.2, 4, 5, 6, 7, 8.3, 8.4, 9, 10, 11 and 12 will survive the expiration or termination of this Agreement or any Statement of Work.

9. INDEMNIFICATION. Each party (an “**indemnifying party**”) will defend (or settle), at its expense, any action brought against the other party (an “**indemnified party**”) by a third party to the extent that it is based upon a claim for infringement of third party’s intellectual property rights, bodily injury, personal injury (including death) to any person, or damage to tangible property resulting from the negligent acts or willful misconduct of the indemnifying party or its personnel hereunder or related to the Services provided under this Agreement, and will pay any costs, damages and reasonable attorneys’ fees attributable to such claim that are awarded in final judgment against the indemnified party (or are payable in settlement by the indemnified party); provided that the indemnified party: (i) promptly notifies the indemnifying party in writing of the claim; (ii) grants the indemnifying party sole control of the defense and settlement of the claim; and (iii) provides the indemnifying party, at the indemnifying party’s expense, with all assistance, information and authority reasonably required for the defense and settlement of the claim. The indemnifying party will have no obligation under this Section to the extent any claim is based on the negligent acts or willful misconduct of the indemnified party or its employees or subcontractors. If a claim alleging infringement is brought or HP believes one may be brought related to the Licensed Software or if the Licensed Software is found by a court of competent jurisdiction to infringe a third party’s intellectual property rights, HP may, at its option, (i) procure for Customer the right to continue using the Licensed Software, (ii) replace or modify the Licensed Software to make it non-infringing, or (iii) in the event (i) or (ii) are not commercially reasonable, terminate this Agreement, accept return of the infringing software and refund to Customer the fees paid for such infringing software, less depreciation calculated on a straight line eighteen (18) month basis. Notwithstanding the foregoing, HP assumes no liability for infringement claims with respect to Licensed Software: (i) based on any changes or modifications to the Licensed Software made, in whole or in part, as per Customer’s specifications; (ii) that is modified after delivery by Customer; (iii) combined with other products, processes or materials where the alleged infringement relates to such combination; (iv) where Customer continues allegedly infringing activity after being notified thereof or after being informed of modifications that would have avoided the alleged infringement; or (v) where Customer’s use of the Licensed Software is not strictly in accordance with this Agreement. THE FOREGOING PROVISIONS OF THIS SECTION 9 STATE THE ENTIRE LIABILITY AND OBLIGATIONS OF HP AND THE EXCLUSIVE REMEDY OF CUSTOMER, WITH RESPECT TO ANY ACTUAL OR ALLEGED INFRINGEMENT OF ANY PATENT, COPYRIGHT, TRADE SECRET, TRADEMARK OR OTHER INTELLECTUAL PROPERTY RIGHT BY THE LICENSED SOFTWARE.

10. LIMITATION OF LIABILITY. IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER PARTY OR TO ANY THIRD PARTY FOR ANY SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES (INCLUDING LOSS OF USE, DATA, BUSINESS OR PROFITS) OR FOR COSTS OF PROCURING SUBSTITUTE SERVICES, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE SERVICES OR THE LICENSED SOFTWARE

PROVIDED BY HP, HOWEVER CAUSED AND REGARDLESS OF THE THEORY OF LIABILITY, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. HP'S TOTAL LIABILITY TO CUSTOMER, FROM ALL CAUSES OF ACTION AND ALL THEORIES OF LIABILITY, WILL BE LIMITED TO AND WILL NOT EXCEED THE AMOUNTS PAID TO HP BY CUSTOMER UNDER THIS AGREEMENT FOR THE SERVICE OR SOFTWARE GIVING RISE TO ANY LIABILITY HEREUNDER.

11. NON-SOLICITATION. During the term of this Agreement and for a period of twelve (12) months thereafter, Customer will not recruit or otherwise solicit for employment any HP employees or subcontractors who participated in the performance of Services without HP's express prior written approval.

12. GENERAL PROVISIONS.

12.1 Assignment. Customer shall not transfer or assign any of its rights or delegate any of its obligations, in whole or in part, under this Agreement whether through sale of substantially all assets, reorganization, merger, reverse merger or similar assignment or change of control, without the prior written consent of the other party, which shall not be unreasonably withheld. Any purported transfer, assignment, or delegation by either party without such prior written consent shall be null and void ab initio and of no force or effect.

12.2 Governing Law. This Agreement will be governed and construed in accordance with the laws of the State of California, excluding its body of law controlling conflicts of law.

12.3 Dispute Resolution. Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in Santa Barbara, California, before one arbitrator. The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. The award rendered thereon by the arbitrator shall be final and binding on the parties thereto, and judgment thereon may be entered in any court of competent jurisdiction. Nothing in this Section 12.3 shall prevent either party from applying to a court of competent jurisdiction for equitable or injunctive relief.

12.4 Notices. All notices required or permitted under this Agreement will be in writing and delivered in person, by confirmed facsimile transmission, by overnight delivery service, or by registered or certified mail, postage prepaid with return receipt requested, and in each instance will be deemed given upon receipt. All communications will be sent to the addresses set forth above or to such other address as may be specified by either party to the other party in accordance with this Section.

12.5 Waiver. The waiver of any breach or default of any provision of this Agreement will not constitute a waiver of any other right hereunder or of any subsequent breach or default.

12.6 Entire Agreement. This Agreement, including all Exhibits and Statements of Work, constitutes the entire and exclusive agreement of the parties regarding its subject matter and supersedes any and all prior or contemporaneous agreements, communications, and understandings (both written and oral) regarding such subject matter. In the event of a conflict between the provisions of this Agreement and the provisions of an Exhibit or Statement of Work, the provisions of the Exhibit or Statement of Work will govern and control. This Agreement may only be modified or any rights under it waived by a written document executed by both parties.

12.7 Severability. If any provision of this Agreement is held invalid or unenforceable by a court of competent jurisdiction, the remaining provisions of the Agreement will remain in full force and effect, and the provision affected will be construed so as to be enforceable to the maximum extent permissible by law.

12.8 Force Majeure. Neither party will be responsible for any failure or delay in its performance under this Agreement (except for the payment of money) due to causes beyond its reasonable control, including, but not limited to, labor disputes, strikes, lockouts, shortages of or inability to obtain labor, energy, raw materials or supplies, war, acts of terror, riot, acts of God or governmental action.

12.9 Counterparts. This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the Effective Date by their duly authorized representatives.

HEWLETT-PACKARD COMPANY

By: _____

Print Name: _____

Title: _____

Date: _____

CUSTOMER

By: _____

Print Name: _____

Title: _____

Date: _____

EXHIBIT A

SUBSCRIPTION AGREEMENT

This Subscription Agreement (“Subscription Agreement”) is attached as Exhibit A to that certain Master Services Agreement dated _____, 201_ (“Agreement”) by and between Hewlett-Packard Company, a Delaware corporation (“HP”) and [_____] a [_____] corporation (“Customer”). The terms contained in this Subscription Agreement, together with the terms contained in the Agreement, shall govern Customer’s use of the Licensed Software and Support Services. Capitalized terms used but not defined in this Subscription Agreement shall have the same meaning ascribed to them in the Agreement. In the event of a conflict between this Subscription Agreement and the Agreement, the terms in this Subscription Agreement shall take precedence with respect to Customer’s use of the Licensed Software.

1. General. Subject to the terms and conditions of this Agreement and payment of Subscription Fees, Customer shall have the right to use the Licensed Software and receive Support Services (as defined below) in relation to Licensed Software, during the Subscription Period (as defined below). HP offers three levels of Support Services and the subscribers are free to choose, and pay for, the level of Support Services that they wish to receive under this Agreement.

2. License Grant. HP grants Customer a non-exclusive, non-transferable, non-sublicenseable, limited license to install and use Licensed Software, during the Subscription Period, in object code version only, to run its internal business operations as specifically authorized by the License Key accompanying Licensed Software. As used in this Agreement, “**License Key**” means an authorization key that enables the user to access and use Licensed Software in a pre-determined manner on the number of cores that the user is licensed to install and use.

License Key is needed to use Licensed Software but the mere possession of the License Key does not constitute authorization to use Licensed Software. Customer agrees to use its best efforts to protect the License Key against theft, loss or misuse. If the License Key is lost or stolen, Customer shall (a) inform HP; and (b) purchase a new license for Licensed Software if it wants to continue use of the Licensed Software.

Third Party and Open Source Components. To the extent the Licensed Software includes any component of the HP Helion Eucalyptus software product Euca2ools that is subject to any third party license terms, including open source license terms, then those third party license terms or open source license terms shall govern with respect to the subject component; otherwise, the terms of this Agreement shall govern.

3. Backup Copies. Customer may make one backup copy of Licensed Software, provided its backup copy is not installed or used on any computer and further provided that all such copies shall bear the original and unmodified copyright, patent and other intellectual property markings that appear on or in Licensed Software. Customer may not transfer the rights to a backup copy.

4. Ownership. Customer acknowledges that Licensed Software and any copies that it is authorized by HP to make are the intellectual property of, and are owned by, HP and its licensors. The structure, sequence and organization of Licensed Software are the valuable trade secrets and confidential information of HP and its licensors. Licensed Software is protected by intellectual property laws, including without limitation by United States copyright law, international treaty provisions and applicable laws in the country in which it is used. Customer acknowledges that HP, or its licensors, retain the ownership of all patents, copyrights, trade secrets, trademarks and other intellectual property rights pertaining to Licensed Software. Customer will take no actions which adversely affect HP’s intellectual property rights in Licensed Software. This Agreement is a license and not an agreement for sale. No title to, or ownership of, Licensed Software, or any intellectual property rights subsisting therein, is transferred to Customer.

5. Restrictions. Licensed Software is licensed solely for internal use within Customer’s organization and any other use including for third parties is expressly prohibited. HP and its licensors reserve all rights not expressly granted to you in this Agreement. Without limiting the generality of the foregoing, Customer shall not nor shall it permit any other party to: (i) make copies of Licensed Software except as expressly set forth in this Agreement, or (ii) disassemble, decompile, reverse engineer, or translate any part of Licensed Software, or otherwise attempt to reconstruct or discover the source code of Licensed Software, except and only to the extent that such activity is expressly permitted by applicable law notwithstanding this limitation, or (iii) modify or create derivative works based upon Licensed Software, or (iv) externally distribute, sublicense, resell, encumber or otherwise transfer Licensed Software, or (v) rent, lease, lend, or use Licensed Software, or any part thereof, for timesharing or bureau use, or (vi) allow a third party to copy, access, or use Licensed Software (except as

expressly provided in this Agreement), or (vi) alter or remove any copyright, trademark or other proprietary notice which may appear on Licensed Software, or (vii) take any action that would cause Licensed Software to be placed in the public domain or become subject to an open source Subscription Agreement.

6. Limited Warranty. HP warrants that the original copy of Licensed Software will perform substantially in accordance with the accompanying Documentation for a period of three (3) months from the delivery of Licensed Software. HP does not warrant that functions contained in Licensed Software will meet Customer's requirements or that the operation of Licensed Software will be error-free or uninterrupted. As Customer's exclusive remedy for breach of HP's warranty, HP shall use reasonable efforts to provide maintenance, modifications or fixes in a timely manner, or at its option replace Licensed Software, provided, that the original copy of Licensed Software is returned. This limited warranty is void if failure of Licensed Software has resulted from accident, abuse, alteration or misapplication. Any replacement software will be warranted for the remainder of the original warranty period or thirty (30) days, whichever is longer. HP is not responsible for problems caused by changes in, or modifications to, the operating characteristics of any computer hardware or operating system for which Licensed Software or any Upgrade is procured, nor is HP responsible for problems which occur as a result of the use of Licensed Software in conjunction with software of third parties or with hardware, which does not meet HP's specific requirements.

7. Disclaimer of Warranties; Limitation of Liability. EXCEPT AS EXPRESSLY WARRANTED ABOVE IN SECTION 6, LICENSED SOFTWARE IS PROVIDED "AS IS," WITHOUT WARRANTY OR REPRESENTATION OF ANY KIND, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF NON-INFRINGEMENT, MERCHANTABILITY, AND FITNESS FOR A PARTICULAR PURPOSE. NEITHER HP NOR ITS LICENSORS REPRESENT OR WARRANT THAT LICENSED SOFTWARE WILL SATISFY CUSTOMER'S REQUIREMENTS OR THAT IT IS WITHOUT DEFECT OR ERROR OR THAT THE OPERATION THEREOF WILL BE UNINTERRUPTED OR ERROR FREE.

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW EVEN IF A REMEDY FAILS ITS ESSENTIAL PURPOSE, IN NO EVENT SHALL HP OR ITS LICENSORS BE LIABLE FOR ANY SPECIAL, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, OR ANY OTHER PECUNIARY LOSS) ARISING OUT OF THE USE OF OR INABILITY TO USE THE LICENSED SOFTWARE OR THE PROVISION OF OR FAILURE TO PROVIDE SUPPORT SERVICES, EVEN IF HP HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ANY CASE, HP'S ENTIRE LIABILITY TO CUSTOMER OR ANY OTHER PARTY FOR LOSS OR DAMAGE RESULTING FROM ANY CLAIMS, DEMANDS OR ACTIONS ARISING OUT OF THIS AGREEMENT SHALL NOT EXCEED THE SUBSCRIPTION FEES ACTUALLY PAID BY CUSTOMER TO HP FOR THE LICENSED SOFTWARE, NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. Because some states and jurisdictions do not allow the exclusion or limitation of liability, the above limitation may not apply to Customer. In such states and jurisdictions, HP's liability shall be limited to the greatest extent permitted by law.

CUSTOMER'S SOLE AND EXCLUSIVE REMEDY AND HP'S SOLE AND EXCLUSIVE LIABILITY ARE SET FORTH IN THIS AGREEMENT. This Agreement defines a mutually agreed-upon allocation of risk and forms an essential basis of the bargain between the parties.

8. Support Services. Subject to the payment of the applicable Subscription Fees, and during the Subscription Period, HP will provide (i) maintenance and upgrade services, and (ii) support services, described below (collectively, the "Support Services").

9. Maintenance and Upgrade Services.

9.1 As part of the maintenance and upgrade services, HP will provide Customer new versions, revisions and corrections of Licensed Software that are not separately marketed by HP. HP will provide one copy of each new version or revision of Licensed Software in machine readable form, together with any updated Documentation that may be available. Customer will not be entitled to receive new software modules or developments that HP separately markets. To clarify, the release status of Licensed Software is defined by version, revision and correction (individually and collectively, "Upgrades"). Each new version of Licensed Software will include significant improvements in functionality. A new revision of Licensed Software will include minor improvements in functionality and an accumulation of corrections. A correction of any version or revision will include only fixes necessary to cause Licensed Software to perform in accordance with this Agreement.

9.2 Except as otherwise expressly provided herein, this Agreement will govern any Upgrades to Licensed Software that may be provided to Customer as part of the Support Services, unless such Upgrades are expressly

provided under a separate Subscription Agreement. Customer may use such Upgrades only in conjunction with the then-existing Licensed Software licensed under this Agreement. Licensed Software and all Upgrades are licensed as a single product and such Upgrades may not be separated from Licensed Software to exceed the scope of the original license. Any other software that may be provided with Licensed Software that is associated with a separate end-user Subscription Agreement is licensed to Customer under the terms of that separate Subscription Agreement.

9.3 Subject to Customer’s application of all revisions and corrections in accordance with HP’s recommendations, HP will support each (i) version of Software for a minimum period of twelve (12) months after the first delivery of the next consecutive version; and (ii) revision of Software for a minimum period of six (6) months after the date of first delivery of the next consecutive revision. Support for other versions and revisions will be provided only upon the mutual agreement of the parties.

10. Support Services.

10.1 Support Services: As part of the support services, HP will provide the services described below:

- (a) Advice on how to use the Licensed Software
- (b) Installation and configuration
- (c) Problem diagnosis troubleshooting, workarounds and/or corrections
- (d) Customer portal for opening support cases and self solve through Eucalyptus knowledgebase.
- (e) Advice on Upgrades.

NOTE: Implementation and Upgrade services can be provided by HP consulting if desired.

10.2 Support Levels. HP will provide the above support services as per one of the two levels of support services set forth below:

- (a) Standard. Customer is entitled to web support and phone support during HP’s normal business days between the hours 9:00 A.M. and 5:00 P.M. Local Time.
- (b) Premium. Customer is entitled to web support and phone support on a 24-hour basis.

10.3 Response Time. In the event that Customer requires support services with respect to the Supported Software, HP shall prioritize problems/requests reported by Customer according to the severity levels and respond according to the support levels below:

SEVERITY LEVEL	STANDARD INITIAL RESPONSE TIMES	PREMIUM INITIAL RESPONSE TIMES
Urgent (Severity 1) - System down or an issue that severely impacts your use of the Eucalyptus Cloud software in a production environment. There is loss of production usage and/or data and there is no viable workaround. (Business is severely impacted.)	2 business hours	1 hour
High (Severity 2) - An issue that limits your use of the Eucalyptus Cloud software in a production environment with the software functioning at a reduced level. The production environment is severely impaired with a temporary workaround available. (Business is impacted.)	4 business hours	2 hours

SEVERITY LEVEL	STANDARD INITIAL RESPONSE TIMES	PREMIUM INITIAL RESPONSE TIMES
Normal (Severity 3) - A non-critical issue in a production or development environment where business continues to function or development work can continue. The issue is not causing a significant business impact in production or development. There is a workaround. (Business impact is moderate to low.)	1 business day	8 business hours
Low (Severity 4) - General usage question, documentation issues or product enhancement requests in a production or development environment. (Business is not impacted.)	2 business days	1 business day

11. Technical Account Management Services

11.1 Technical Account Manager (TAM) Support Subscription

The TAM Support Subscription provides direct linkage to an assigned support engineer who provides Customer with the following benefits:

- (a) Access to select HP technology and development plans, including beta testing and bug/feature escalation,
- (b) Weekly review calls,
- (c) Two (2) on-site technical review visits per year,
- (d) Up to four (4) support contacts to the TAM, and
- (e) Quarterly service performance metrics review.

11.2 TAM Service Coverage

Each TAM Support Subscription is limited to certain parameters (that is, a region, a Customer team and/or a product line) and is defined in the quote, order or purchase summary and, if not defined, the TAM parameters are established upon the initiation of the TAM Service:

Regions: North America, EMEA, Asia-Pacific

Customer Team: The Customer team supported by the TAM (for example, Customer's Development team, System Administration team, Support Team, etc.).

11.3 TAM Service Hours of Coverage

The TAM Service is offered during HP's standard business hours (9x5) based on the physical location of the TAM representative unless agreed to otherwise in writing.

11.4 Engagement of the TAM Representative Outside of Standard Business Hours.

If Customer has purchased Premium Software Subscriptions, Customer will receive 24x7 support for Crash issues through HP's 24x7 Support teams and not necessarily from Customer's assigned TAM representative. HP's 24x7 Support team is responsible for addressing issues, but will consult with Customer's TAM representative, as necessary to obtain advice and a better understanding of Customer's infrastructure, environment and specific needs. If Customer has purchased multiple TAM Service Subscriptions covering more than one geographical regions (e.g. Americas, EMEA, APAC), Customer will receive the benefit of extended TAM Service coverage hours.

12. Limitations & Commitments.

12.1 The following services will not be provided by HP under this Agreement:

(a) Consulting and other professional services beyond telephone support described in Section 10. By way of example and not limitation, questions which are specific to Customer's operating environment and questions regarding the operation of customizations are not included as Support Services under this Subscription Agreement.

(b) Services for the correction of problems caused by unauthorized modification of Licensed Software by Customer or any third party or the use of Licensed Software with third party products or in an operating environment other than as specified or approved by HP.

12.2 Customer agrees to:

(a) Appoint one (1) contact person who is sufficiently trained in the Software and inform HP in writing with the name and contact information for that person.

(b) Maintain access to all necessary equipment and competence for the handling and operation of the Software.

(c) Maintain and review a current version of the documentation for references purposes prior to placing a call for support.

(d) Install all recommended hardware and software for use in connection with fault diagnostics and maintenance service through telecommunications (modem) connected to the computer system in which the Software is used.

(e) Comply with the operational instructions provided by HP.

(f) Promptly notify HP following the discovery of any fault or problem with the Software, and upon HP's request, submit a listing of output and other data that HP may reasonably require in order to reproduce the problem and the operating conditions under which the fault occurred.

(g) Maintain records regarding the occurrence of faults and if possible, verify that the faults/problems are reproducible.

13. Export Restrictions. Customer agrees to comply with all export and re-export restrictions and regulations ("**Export Restrictions**") imposed by the United States or any other country in which Customer conducts business. Without limiting the generality of the foregoing, and regardless of any disclosure made by Customer to HP regarding an ultimate destination of Licensed Software, Customer represents and warrants that it understands that the U.S. law currently prohibits the export or re-export, directly or indirectly (including via remote access) of U.S. origin products and technology to certain proscribed countries (including Cuba, Iran, Sudan, North Korea and Syria and/or any other country that may become subject to an embargo by the United States), entities, organizations and individuals, without prior authorization from the U.S. Government. Customer will not commit any act or omission that will result in a breach of any such Export Restrictions. Customer's breach of this clause shall constitute cause for immediate termination of this Agreement.

14. Anti-Corruption Laws. Customer agrees that it is familiar with the provisions of the U.S. Foreign Corrupt Practices Act, the U.K. Bribery Act and other analogous anti-corruption legislation in other jurisdictions in which Customer conducts business or which otherwise apply to Customer (collectively, and with related regulations, the "Anti-Corruption Laws"), and that it shall not in connection with the transactions contemplated by this Agreement make any payment or transfer anything of value, offer, promise or give a financial or other advantage or request, agree to receive or accept a financial or other advantage either directly or indirectly: to any government official or government employee (including employees of a government corporation or public international organization) or to any political party or candidate for public office; or to any other person or entity with an intent to obtain or retain business or otherwise gain an improper business advantage. Customer

further agrees that it will not take any action which would cause HP to be in violation of any Anti-Corruption Laws. Customer will promptly notify HP if it becomes aware of any such violation and indemnify HP for any losses, damages, fines or penalties that HP may suffer or incur arising out of or incidental to any such violation. In case of breach of the above, HP may suspend or terminate the Agreement at any time without notice, liability, or indemnity.

This provision will survive termination of the Agreement for any reason.

15. High Risk Activities. Licensed Software is not designed, manufactured or intended for use or resale as on-line control equipment in hazardous environments requiring fail-safe performance, such as in the operation of nuclear facilities, aircraft navigation or communication systems, air traffic control, direct life support machines, or weapons systems, in which the failure of Licensed Software could lead directly to death, personal injury, or severe physical or environmental damage (“*High Risk Activities*”). HP specifically disclaims any express or implied warranty of fitness for High Risk Activities.

16. Miscellaneous.

16.1 If Customer is a unit or agency of the United States Government, the following applies: The Licensed Software is provided with RESTRICTED RIGHTS. Use, duplication or disclosure by the Government is subject to restrictions as set forth in Subparagraphs (a) through (d) of the Commercial Computer-Restricted Rights clause at FAR 52.227-19 when applicable, or in Subparagraph 252.227-7013 (c)(1)(ii) of the Rights in Technical Data and Computer Software at DFARS, and in similar clauses in the NASA FAR Supplement. Contractor/manufacturer is HP Systems, Inc.

16.2 This Agreement is in the English language only, and will only be provided in the English language, which language will be controlling in all respects, and all versions hereof in any other language will not be binding on the parties hereto. All communications and notices to be made or given pursuant to this Agreement must be in the English language.

16.3 No rule of strict construction shall apply against or in favor of either party in the construction and interpretation of this Agreement.

EXHIBIT B

Statement of Work # _____

This Statement of Work ("*Statement of Work*") is made and entered as of _____, 201_ (the "**Statement of Work Effective Date**") by and between Hewlett-Packard Company a Delaware corporation with offices at 6750 Navigator Way, Suite 200, Goleta, CA 93117 ("*HP*"), and [_____], a [_____] corporation with offices at _____ ("*Customer*").

1. Description of Services.

Project Name:

Project Description:

Duration of Project:

Project Schedule:

Description of HP and Customer Responsibilities:

Deliverables:

2. Fees.

3. Primary Contacts.

HP Contact:

Name: _____

Title: _____

Telephone Number: _____

Fax Number: _____

Email Address: _____

Customer Contact:

Name: _____

Title: _____

Telephone Number: _____

Fax Number: _____

Email Address: _____

EXHIBIT C

HP Customer Quote Form

The Quote Form provided to the Customer is hereby incorporated as Exhibit C of this Agreement.