



# END USER LICENSE AGREEMENT 128 TECHNOLOGY

3 October 2018  
v1.0

## End User License Agreement (EULA)

This Agreement sets forth the terms and conditions of your use of 128 Technology's software products (the "Software").

1. **License Grant.** 128 Technology grants to ConvergeOne, Inc., 3344 Highway 149, Eagan, MN 55121 ("Customer"), subject to the terms and conditions of this Agreement and the License Entitlement Document for the applicable Software located at [www.128technology.com/entitlement](http://www.128technology.com/entitlement) applicable as of the effective date of the Order Document (the "License Entitlement Document") and the payment of all applicable fees, a nonexclusive, nontransferable right to use the Software identified in the Ordering Document executed by 128 Technology and Customer for Customer's internal business purposes (which includes using the Software to provide services to its customers). The License Entitlement Document contains the specific usage parameters and terms for each Software product. Customer may copy the Software in object code form only for licensed use, archival and back-up purposes. Ownership of, and title to, the Software and any manuals, guides or any other printed material that 128 Technology provides to Customer for use with the Software ("Documentation"), and all copies thereof, is and will be held by 128 Technology and its licensors.
2. **Restrictions.** Except as expressly authorized in this Agreement, Customer may not rent, lease, sublicense, distribute, transfer, copy, reproduce, modify or time-share the Software or Documentation, nor permit publication or distribution of results of any benchmark tests run on the Software. The source code for the Software and other trade secrets embodied in the Software are not disclosed to Customer. Customer is not permitted (a) to decompile, disassemble, reverse compile, reverse assemble, reverse translate or otherwise reverse engineer the Software, (b) to use any similar means to discover the source code of the Software or to discover the trade secrets in the Software, or (c) to otherwise circumvent any technological measure that controls access to the Software. Customer agrees not to remove or alter any copyright notice or restrictive rights legend from the Software.
3. **Payment.**
  - a. If an authorized partner of 128 Technology collects the applicable fees from the Customer on behalf of 128 Technology, this Section 3 shall not apply; in such case, the payment terms in the agreement between the Customer and the partner shall apply.
  - b. Customer may license the Software at a discount of 30% off of 128 Technology's then-current list prices. Customer shall pay all amounts due for Software hereunder in U.S. dollars, within thirty (30) days from the date of receipt of 128 Technology's invoice (which will be provided via email), provided that if 128 Technology reasonably deems Customer's financial status unsatisfactory or Customer is in default of any obligation of Customer to 128 Technology, 128 Technology may (without prejudice to any other rights or remedies it may have) require payment in full prior to delivery. In the event of any undisputed overdue payments, 128 Technology may withhold future shipments or service and/or charge interest at a rate of 1.5% of the unpaid balance per month. Customer will notify 128 Technology of any disputes in writing (including a description of the basis for the dispute) within five (5) business days of receipt of the invoice. Absent a valid billing dispute, Customer shall not withhold or set off from any amounts due to 128 Technology. Each order shall be separately invoiced and paid for when due without regard to other orders. Prices do not include, and Customer shall be responsible for, any tax or other governmental charge or assessment on the license, sale or use of any Software provided to Customer hereunder (except for taxes on 128 Technology's income or revenue), unless Customer has furnished to 128 Technology an appropriate valid certificate of exemption issued by or acceptable to the tax authority in question. Travel and living expenses incurred by 128 Technology in connection with any professional services ordered by Customer must be pre-approved by Customer.

#### 4. Term and Termination; Expansions.

- a. This Agreement is effective upon the effective date of the Ordering Document and will remain in force until termination pursuant to the terms hereof ("Term"). The term of each Software subscription shall be set forth in the applicable Ordering Document, as further explained in the License Entitlement Document. Each subscription shall automatically renew for the same period as the original term, at the applicable pricing set forth in the then-current 128 Technology Price List (the "Price List"), unless either party notifies the other in writing of its desire to terminate the subscription at least ninety (90) days prior to the upcoming expiration date.
- b. In the event of an expansion upgrade to a current Software subscription, the current subscription will be terminated, and a new subscription will be created according to the Price List. A credit equal to the value of the remainder of the terminating subscription will be applied toward the upgraded subscription. The termination date of the current subscription and the start date of the new subscription will be the same.
- c. Either party may terminate this Agreement at any time upon thirty (30) days written notice to the other party in the event that the other party shall have breached any of its material obligations hereunder and shall not have cured such breach prior to the expiration of the 30-day period. Customer agrees that in the event of termination of this Agreement or the applicable Software subscription for any reason, Customer's license rights to the Software and the Documentation shall terminate, and Customer will delete or deinstall all copies of the Software and the Documentation that are in Customer's possession or under Customer's control. The provisions of Sections 2-5, 7, 8, 11 and 12 shall survive any termination or expiration of this Agreement.

#### 5. Confidentiality.

- a. **Confidential Information.** "Confidential Information" of a party means all information of that party (a "Discloser") relating to or disclosed to the other party (a "Recipient") by or on behalf of the Discloser during the Term which is or should be reasonably understood by the Recipient to be confidential or proprietary to the Discloser, including, but not limited to, the material provisions of this Agreement, the Software, technical processes and formulas, source codes and other software, product designs, sales, cost and other unpublished financial information, product and business plans, projections, and marketing data. Confidential Information does not include information that: (i) was known to the Recipient before receipt from Discloser; (ii) is obtained by the Recipient from any third person not owing any confidentiality obligation to the Discloser; (iii) is or becomes generally known in the trade through no act or omission of the Recipient; or (iv) is independently developed by the Recipient or Recipient's employees who have not had direct or indirect access to Discloser's Confidential Information. Recipient will bear the burden of establishing any of these exclusions. Only the specific information that meets the exclusions will be excluded, and not any other information that happens to appear in proximity to the excluded portions (for example, a portion of a document may be excluded without affecting the confidential nature of those portions that do not themselves qualify for exclusion).
- b. **Permitted Use.** Confidential Information of each party will be used by the other party solely for the purposes permitted by this Agreement. All Confidential Information will be received and held in confidence by the receiving party, subject to the provisions of this Agreement. Each party acknowledges that it will not obtain any rights of any sort in or to the Confidential Information of the other party as a result of such disclosure and that any such rights must be the subject of separate written agreement(s). Either party may only disclose the general nature, but not the specific financial terms, of this Agreement without the prior consent of the other party; provided each party may provide a copy of this Agreement to any finance provider in conjunction with a financing transaction, if such finance provider agrees to keep this Agreement confidential.

- c. Required Disclosures.** Nothing herein shall prevent either party from disclosing all or part of the Confidential Information of the other as necessary pursuant to the lawful requirement of a governmental agency or when disclosure is required by operation of law; provided that prior to any such disclosure, a Recipient shall use reasonable efforts to (i) promptly notify the Discloser in writing of such requirement to disclose, and (ii) cooperate fully with the Discloser in protecting against any such disclosure or obtaining a protective order. Recipient may comply with any such court order or other legal requirement, but any information so disclosed shall continue to be treated as Confidential Information hereunder.
- d. Equitable Relief.** Money damages will not be an adequate remedy if this Section 5 is breached and, therefore, each party shall, in addition to any other legal or equitable remedies, be entitled to an injunction or similar equitable relief against such breach or threatened breach without the necessity of posting any bond or surety.
- 6. Warranty.** 128 Technology warrants that the Software will perform substantially in accordance with the Documentation under normal use for a period of ninety (90) days from the date of order. In the event of a breach of this warranty, as 128 Technology's sole obligation and Customer's sole remedy, 128 Technology shall, at its option and expense, correct or replace the nonconforming Software or refund the prepaid, unused fees paid for the nonconforming Software. This warranty and 128 Technology's support obligations hereunder shall not apply to the extent the defect or non-conformance is due to: (a) alteration or misuse of the Software; (b) installation, maintenance or operation not in compliance with the Documentation; (c) use in conjunction with a product specified by 128 Technology as incompatible with the Software; (d) any error, act or omission by anyone other than 128 Technology or 128 Technology's agents, employees, and subcontractors; (e) failure by End Customer to be using the current release of the Software or the immediately prior release; or (f) where written notice of the defect has not been given to 128 Technology by Customer within the applicable warranty period. 128 TECHNOLOGY HEREBY EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES WITH RESPECT TO THE SOFTWARE, EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE AND NON-INFRINGEMENT. 128 TECHNOLOGY DOES NOT WARRANT THAT THE SOFTWARE WILL MEET CUSTOMER'S REQUIREMENTS OR THAT THE OPERATION OF THE SOFTWARE WILL BE UNINTERRUPTED OR ERROR-FREE.
- 7. Indemnification.**
- a. Infringement.** Subject to the provisions of Section 7(c), 128 Technology shall defend, indemnify and hold harmless Customer from and against (A) any claim, suit, or demand asserted by a third party that Customer's use of the Software in accordance with the terms of this Agreement constitutes an infringement of the intellectual property rights of a third party, (B) all resulting losses, damages, expenses or liabilities awarded by a court or included as part of a final settlement, and (C) all reasonable attorneys' fees (collectively "Losses"). 128 Technology shall have no liability or obligation to Customer under this Section 7(a) with respect to any infringement claim in the event and to the extent based upon: (i) use of the Software in an application or environment or on a platform or with devices for which the Software was not designed; (ii) modifications, alterations, combinations or enhancements of the Software not created by 128 Technology, (iii) any patent, copyright or other intellectual property right in which Customer or any affiliate has an interest, or (iv) failure of Customer to install any corrections or enhancements to the Software made available by 128 Technology.
- b. Additional Indemnity by 128 Technology.** In addition to its obligations under Section 7(a), if Software is held to constitute an infringement of any third party's intellectual property rights or if in 128 Technology's opinion, the Software is, or is likely to be held to constitute, such an infringement, 128 Technology will at its expense and option: (i) procure the right for Customer to continue using the Software; (ii) replace the Software with a non-infringing equivalent product conforming to the Software specifications; (iii) modify the Software to make it non-infringing while conforming to the Software specifications; or (iv) if options (i)-(iii) are not available terminate

Customer's license to the allegedly infringing Software and refund to Customer all prepaid, unused fees paid by Customer (unless Customer has received a refund from a 128 Technology partner or reseller). The foregoing Sections 7(a) and (b) state the entire liability 128 Technology in respect of any third party infringement claim.

- c. Procedure.** To receive the benefit of indemnification under this Section 7, the party seeking indemnification must promptly notify the indemnifying party in writing of a claim or suit and provide reasonable cooperation (at the indemnifying party's expense) and tender to the indemnifying party (and its insurer) full authority to defend or settle the claim or suit. Neither party has any obligation to indemnify the other party in connection with any settlement made without the indemnifying party's written consent. The indemnitee has the right to participate at its own expense in the claim or suit and in selecting counsel therefor.
- 8. Limitation of Liability.** EXCEPT FOR THE INDEMNIFICATION OBLIGATIONS IN SECTION 7(A)(B), 128 TECHNOLOGY'S LIABILITY FOR DAMAGES FOR ANY CAUSE WHATSOEVER, REGARDLESS OF THE FORM OF ANY CLAIM OR ACTION, SHALL NOT EXCEED AN ACCUMULATED AMOUNT EQUAL TO THE FEES PAID BY CUSTOMER FOR THE SOFTWARE INVOLVED IN THE CLAIM DURING THE TWELVE (12) MONTHS PRIOR TO THE CLAIM. 128 TECHNOLOGY SHALL NOT BE LIABLE FOR ANY LOSS OF PROFITS, LOSS OF USE, LOSS OF DATA, INTERRUPTION OF BUSINESS, NOR FOR INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES OF ANY KIND IN CONNECTION WITH THIS AGREEMENT.
- 9. Support Services.** If purchased by Licensee, 128 Technology will provide support services in accordance with the Support Services Plan for Customers, which is available upon request.
- 10. Export Laws.** Customer shall not export or re-export, directly or indirectly (including via remote access), the Software (or any portion thereof), documentation or other information or materials provided by 128 Technology hereunder, to any country for which the United States or any other relevant jurisdiction requires any export license or other governmental approval at the time of export without first obtaining such license or approval. It shall be Customer's responsibility to comply with all applicable laws, rules and regulations, and Customer shall reimburse 128 Technology for any damages, fines, penalties, assessments, liabilities, costs and expenses resulting from Customer's violation of this Section 10.
- 11. Audit.** 128 Technology reserves the right to audit Customer's use of the Software to ensure Customer's compliance with the terms of this Agreement. Such audits will be at 128 Technology's expense, will occur on reasonable advance notice and during normal business hours, and will not unreasonably interfere with Customer's business operations. Customer agree to provide all reasonable cooperation and assistance and access to relevant information in connection with any audit. Should an audit reveal that Customer has exceeded its entitlements, then the parties will work together to resolve the situation.
- 12. General.**
- a. Notices.** All communications under this Agreement shall be in writing and shall be deemed to have been duly given (i) upon personal delivery, (ii) upon deposit in the mail if mailed by certified mail, return receipt requested, postage prepaid, or (iii) upon deposit with a recognized courier with next-day delivery instructions.
- b. Severability.** In the event that any provision of this Agreement shall, in whole or in part, be determined to be invalid, unenforceable or void for any reason, such determination shall affect only the portion of such provision determined to be invalid, unenforceable or void, and shall not affect in any way the remainder of such provision or any other provision of this Agreement. The parties agree that they will negotiate in good faith or will permit a court or arbitrator to replace any provision of this Agreement so held invalid, unenforceable or illegal with a valid provision that is as similar as possible in substance to the invalid, unenforceable or illegal provision.

- c. **Waiver.** The waiver by a party of a breach or a default of any provision of this Agreement by the other party shall not be construed as a waiver of any succeeding breach of the same or any other provision, nor shall any delay or omission on the part of such party to exercise or avail itself of any right, power or privilege that it has, or may have hereunder, operate as a waiver of any right, power or privilege by such party.
- d. **Governing Law; Jurisdiction; Attorneys' Fees.** This Agreement and the transactions contemplated hereby shall be governed by and construed in accordance with the laws of the State of New York without taking into account its principles on conflicts of law. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods will not apply to this Agreement. In any such action, suit or proceeding, the successful or prevailing party shall be entitled to recover its reasonable attorneys' fees and other costs incurred in connection with that action, suit or proceeding, in addition to any other relief to which such party may be entitled.
- e. **Relationship of the Parties.** Nothing contained in this Agreement shall be deemed to constitute either party as the agent or representative of the other party, or both parties as joint venturers or partners for any purpose. Neither party shall have the authority to make any statements, representations or commitments or to take any actions which shall be binding on the other party, except as may be explicitly authorized in writing by such other party.
- f. **Entire Agreement; Amendment; Assignments.** This Agreement (and the License Entitlement Document) (i) constitutes the entire agreement of the parties hereto with respect to the subject matter hereof and supersede all prior understandings and agreements, whether written or oral, as to such subject matter; (ii) may be amended or modified only by a writing executed by an authorized officer of the party against whom enforcement is sought; (iii) may not be assigned by Customer without the written consent of 128 Technology; and (iv) shall be binding upon and shall inure to the benefit of the respective successors and permitted assigns of the parties hereto. Standard or pre-printed terms contained in Customer's purchase order shall be of no effect.
- g. **Force Majeure.** In no event shall either party have any liability to the other for any delayed performance or nonperformance by a party which results, in whole or in part, directly or indirectly, from any cause beyond the reasonable control of such party. Such causes shall include (but shall not be limited to) acts of God, wars, riots, civil disturbances, strikes, labor disputes, fires, storms, floods, earthquakes, natural disasters, inability to obtain or use raw or component materials or parts, labor, equipment, facilities, or transportation, and acts of any government or agency thereof.
- h. **Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, and all such counterparts shall constitute one and the same instrument.
- i. **Commitments.** 128 Technology has made no commitments or promises orally or in writing with respect to delivery of any future software features or functions. In relation to any future software features or functions, all presentations, RFP responses and/or product roadmap documents, information or discussions, either prior to or following the date herein, are for informational purposes only, and 128 Technology has no obligation to provide any future releases or upgrades or any features, enhancements or functions, unless specifically agreed to in writing by both parties. Customer acknowledges that no purchasing decisions are based upon any future software features or functions.
- j. **Laboratory, Evaluation or Beta Software.** In the event 128 Technology provides Customer with any laboratory, evaluation or beta Software in connection with this Agreement, Customer agrees that any such products will be used for testing or evaluation purposes only for the agreed upon period and not for production or other commercial purposes. All such products are provided as-is, with all faults, with no warranties or representations (express or implied) whatsoever. 128 TECHNOLOGY SHALL NOT BE LIABLE FOR ANY INDIRECT, SPECIAL, CONSEQUENTIAL,

INCIDENTAL, EXEMPLARY, DIRECT, OR PUNITIVE DAMAGES IN CONNECTION WITH THE USE OF SUCH PRODUCTS, WHETHER SUCH LIABILITY IS BASED IN CONTRACT, TORT (INCLUDING NEGLIGENCE), BREACH OF WARRANTY OR OTHERWISE.

128 ~~TECHNOLOGY~~; INC.

By: Susan Graham Johnston  
Print Name: Susan Graham Johnston  
Title: President  
Date: 10/19/2018

CONVERGEONE, INC.

By: Paul B Maier  
Print Name: Paul Maier  
Title: President, Services Organization  
Date: 10/3/2018