Berkeley Data Systems License and Service Agreement

<u>IMPORTANT</u>: READ THIS AGREEMENT CAREFULLY BEFORE CLICKING ON THE "ACCEPT" BUTTON BELOW.

This agreement (the "Agreement") is a legal agreement between you, either an individual or a single legal entity ("You" or "you"), and Berkeley Data Systems Inc. ("Berkeley Data Systems"). This Agreement governs your use of the Berkeley Data Systems Mozy Backup Client software distributed with this Agreement, including any updates that may be provided to you and any accompanying written documentation (the "Software") and the Berkeley Data Systems Mozy backup service ("Service").

By clicking "ACCEPT" you are indicating that you have read and understood, and assent to be bound by, the terms of this Agreement. If you are an individual working for a company, you represent and warrant that you have all necessary authority to bind your company to the terms and conditions of this Agreement.

If you do not agree to the terms of the Agreement, you are not granted any rights whatsoever in the Software or any right to receive the Service.

If you are not willing to be bound by these terms and conditions, you should not click "ACCEPT" and must return or destroy all copies of the Software promptly for a full refund.

FREE SERVICE; ADVERTISING EMAILS

You acknowledge and agree that Berkeley Data Systems may provide you with advertising and promotional material and other information from Berkeley Data Systems and on behalf of third parties via email. If you do not want to receive such material, you may elect not to do so, but you must immediately terminate your account and cease use of the Software and Service. This Agreement applies exclusively to Software and Service that are provided by Berkeley Data Systems without charge.

Please see the Berkeley Data Systems Privacy Policy [www.mozy.com/privacy.html], which is incorporated into this Agreement by reference.

ACCOUNTS, PASSWORDS, AND SECURITY

You must be a registered user to access the Service. You are responsible for keeping your password secure. You will be solely responsible and liable for any activity that occurs under your user name. If you lose your password or the encryption key for your account, you may not be able to access your Data.

ACCEPTABLE USE AND CONDUCT

You are solely responsible for your conduct and your data related to the Service. You agree to indemnify, defend, and hold harmless Berkeley Data Systems and its suppliers from any and all loss, cost, liability, and expense arising from or related to your data, your use of the Service, or your violation of these terms.

The Software and Service are made available to you only for your personal use, which use must be in compliance with all applicable laws, rules and regulations and must not infringe or violate third party rights. You may not make commercial use of the Software or service, including but not limited to selling or distributing the Software and/or Service to any third party.

Any unauthorized use of any Berkeley Data Systems computer system is a violation of this Agreement and certain federal and state laws. Such violations may subject the unauthorized user and his or her agents to civil and criminal penalties.

CONSENT TO COLLECT NON-PERSONAL INFORMATION; USE OF DATA

The Software and Service may collect certain non-personally identifiable information that resides on your computer, including, without limitation, statistics relating to how often backups are started and completed, performance metrics relating to the Software, and configuration settings. This information collected will be sent to Berkeley Data Systems and may be used by Berkeley Data Systems without restriction.

When you backup data via the Service, you agree that we and our service providers may copy and store such data as part of the Service.

CHANGES TO THE SERVICE AND TERMS AND CONDITIONS

Berkeley Data Systems reserves the right at any time to modify, suspend, or discontinue providing the Service or any part thereof in

its sole discretion with or without notice.

Berkeley Data Systems will use commercially reasonable efforts to notify you of modification, suspension, or discontinuance of the Service either by sending an email to the email address you provide with your registration or by a posting on Mozy.com website. However, in no event will Berkeley Data Systems be liable to you or to any third party for any modification, suspension or discontinuance of the Service with or without notice.

Berkeley Data Systems reserves the right at any time to modify this Agreement in its sole discretion, without liability to you. This Agreement, as amended, will be effective upon acceptance of registration for new users and effective for all existing users 15 days after the posting of any amended terms on the Mozy.com website. You agree to be bound by this Agreement, as modified. If you do not agree to any changes to this Agreement, you must terminate your account immediately.

Please review the most current version of this Agreement from time to time, located at Mozy.com/eula.html (or such successor URL as Berkeley Data Systems may provide), so that you will be apprised of any changes.

USE OF SOFTWARE

Subject to the terms and conditions of this Agreement, Berkeley Data Systems grants you a non-exclusive, non-transferable, non-sublicensable license to install and execute one (1) copy of the Software (in executable code form only) only on a single computer and only for the purpose of accessing and using the Service. Certain third party code may be provided with the Software. The third-party license terms accompanying such code, and not the terms of this Section, will govern your use of such code.

The Software and its structure, organization, source code, and documentation contain valuable trade secrets of Berkeley Data Systems and its licensors, and accordingly you agree not to (and agree not to allow third parties to) (1) sublicense, lease, rent, loan, transfer, or distribute the Software and/or Service or any derivative thereof to any third party, (2) modify, adapt, translate, or prepare derivative works from the Software or Service, (3) decompile, reverse engineer, disassemble or otherwise attempt to derive source code from the Software or Service, (4) extract portions of the Software's files for use in other applications, or (5) remove, obscure, or alter Berkeley Data Systems' or any third party's trademarks or copyright or other proprietary rights notices affixed to or contained within or accessed in conjunction with or through the Software or Service.

INTELLECTUAL PROPERTY

You acknowledge that Berkeley Data Systems or third parties own all right, title and interest in and to the Software and Service, portions thereof, or software or content provided through or in conjunction with the Software or Service, including without limitation all intellectual property rights. Except for the license granted in this Section, all rights in and to the Software and Service are reserved, and no implied licenses are granted by Berkeley Data Systems.

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TERM AND TERMINATION

This Agreement is effective until terminated.

You may terminate this Agreement at any time by destroying the Software and closing your account by following the instructions on the Mozy.com website.

This Agreement automatically terminates if you fail to comply with its terms and conditions. Berkeley Data Systems reserves the right to refuse or discontinue participation to any user at any time at its sole discretion.

You agree that, upon such termination, you will destroy and permanently erase all copies of the Software and that your access rights to the Service will immediately terminate.

The terms of the Sections entitled Prohibited Actions, Consent to Collect Non-Personal Information, Intellectual Property, Feedback, Disclaimer of Warranties, Limitation of Liability, and Miscellaneous will survive expiration or termination.

If this Agreement terminates, other than for your failure to comply, Berkeley Data Systems will use commercially reasonable efforts to make your Data available for you to download for a period of **three (3) days**. Berkeley Data Systems has no obligation to provide you with a copy of your Data and may remove and discard any Data.

DISCLAIMER OF WARRANTIES

THE SOFTWARE AND SERVICE AND ANY THIRD PARTY SOFTWARE AND SERVICES ARE PROVIDED "AS IS," WITH NO WARRANTIES WHATSOEVER. BERKELEY DATA SYSTEMS AND SUCH THIRD PARTIES EXPRESSLY DISCLAIM TO THE FULLEST EXTENT PERMITTED BY LAW ALL EXPRESS, IMPLIED, AND STATUTORY WARRANTIES, INCLUDING, WITHOUT LIMITATION, THE WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT OF PROPRIETARY RIGHTS AND ANY WARRANTIES REGARDING THE SECURITY, RELIABILITY, TIMELINESS, AND PERFORMANCE OF THE SOFTWARE OR SERVICE AND SUCH THIRD PARTY SOFTWARE OR SERVICES.

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SOME STATES OR OTHER JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES, SO THE ABOVE EXCLUSIONS MAY NOT APPLY TO YOU. YOU MAY ALSO HAVE OTHER RIGHTS THAT VARY FROM STATE TO STATE AND JURISDICTION TO JURISDICTION.

LIMITATION OF LIABILITY

UNDER NO CIRCUMSTANCES SHALL BERKELEY DATA SYSTEMS OR ITS SUPPLIERS BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, EXEMPLARY, OR PUNITIVE DAMAGES ARISING FROM OR RELATED TO THE SOFTWARE OR SERVICE, WHETHER SUCH CLAIM IS BASED ON WARRANTY, CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, (EVEN IF BERKELEY DATA SYSTEMS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES).

WITHOUT LIMITING THE FOREGOING, THE TOTAL AGGREGATE LIABILITY OF BERKELEY DATA SYSTEMS AND ITS SUPPLIERS ARISING FROM OR RELATED TO THIS AGREEMENT SHALL NOT EXCEED THE AMOUNT, IF ANY, PAID BY YOU TO BERKELEY DATA SYSTEMS FOR THE SOFTWARE OR SERVICES. FURTHERMORE, YOU AGREE TO USE THE SOFTWARE OR SERVICE EXCLUSIVELY FOR GOOD AND FOR AWESOME. IF THE SOFTWARE AND SERVICES ARE PROVIDED WITHOUT CHARGE, THEN BERKELEY DATA SYSTEMS AND ITS SUPPLIERS SHALL HAVE NO LIABILITY TO YOU WHATSOEVER.

THE FOREGOING LIMITATIONS OF LIABILITY SHALL APPLY WHETHER THE DAMAGES ARISE FROM USE OR MISUSE OF AND RELIANCE ON THE SOFTWARE OR SERVICE, FROM INABILITY TO USE THE SOFTWARE OR SERVICE, OR FROM THE INTERRUPTION, SUSPENSION, OR TERMINATION OF THE SOFTWARE OR SERVICE (INCLUDING SUCH DAMAGES INCURRED BY THIRD PARTIES). DO NOT TAUNT HAPPY FUN BALL. SUCH LIMITATION SHALL APPLY NOTWITHSTANDING A FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY AND TO THE FULLEST EXTENT PERMITTED BY LAW.

SOME STATES OR OTHER JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR INCIDENTAL, CONSEQUENTIAL, OR DIRECT DAMAGES, SO THE ABOVE LIMITATIONS AND EXCLUSIONS MAY NOT APPLY TO YOU.

THE SOFTWARE AND SERVICE ARE NOT INTENDED FOR USE IN CONNECTION WITH ANY NUCLEAR, AVIATION, MASS TRANSIT, OR MEDICAL APPLICATION OR ANY OTHER INHERENTLY DANGEROUS APPLICATION THAT COULD RESULT IN DEATH, PERSONAL INJURY, CATASTROPHIC DAMAGE, OR MASS DESTRUCTION, AND LICENSEE AGREES THAT LICENSOR WILL HAVE NO LIABILITY OF ANY NATURE AS A RESULT OF ANY SUCH USE OF THE SOFTWARE.

MISCELLANEOUS PROVISIONS

You acknowledge and agree that the Software which is the subject of this Agreement, may be controlled for export purposes. You agree to comply with all United States export laws and regulations. You assume sole responsibility for any required export approval and/or licenses and all related costs and for the violation of any United States export law or regulation. If you are located in a country subject to embargo by the United States government, you are not entitled to use the Software or Service.

This agreement will be governed by and construed in accordance with the laws of the State of Utah, without giving effect to any conflict of laws provisions that would require the application of the laws of any other jurisdiction. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement.

The failure of Berkeley Data Systems to exercise or enforce any right or provision of this Agreement does not constitute a waiver of such right or provision. If for any reason a court of competent jurisdiction finds any provision or portion of this Agreement to be unenforceable, the remainder of this Agreement will continue in full force and effect.

This Agreement, which incorporates the Berkeley Data Systems Privacy Policy [www.mozy.com/privacy.html], constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes and replaces all prior or contemporaneous understandings or agreements, written or oral, regarding such subject matter. Any waiver of any provision of this Agreement will be effective only if in writing and signed by Berkeley Data Systems.

All disputes arising out of this Agreement will be subject to the exclusive jurisdiction of the state and federal courts serving Salt Lake County, Utah, and the parties agree and submit to the personal and exclusive jurisdiction and venue of these courts, except that nothing will prohibit Berkeley Data Systems from instituting an action in any court of competent jurisdiction to obtain injunctive relief or protect or enforce its intellectual property rights.

You may not assign or transfer any of your rights or obligations under this Agreement to a third party without the prior written consent of Berkeley Data Systems. Berkeley Data Systems may freely assign this Agreement. Any attempted assignment or transfer in violation of the foregoing will be void from the beginning.

CONTACTING BERKELEY DATA SYSTEMS

Users with questions about this Agreement may contact Berkeley Data Systems via email: [eula@berkeleydata.net]