

Scale Computing: End User Software License Agreement (EULA)

1. Binding Agreement

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2.2. “Licensee” means the purchaser of the license under this Agreement.

2.3. “Licensee Computer” means the Scale computer hardware equipment and operating systems, which Scale has provided to Licensee or for which Licensee has procured the Software license.

2.4. “Licensors of Scale” means anyone who has licensed software or any form of intellectual property to Scale and that is supplied by Scale with the Software, as may be further specified in Scale documentation.

2.5. “Open Source Software” means any software, operating system, programming language, device, or program licensed under the terms of an open source license.

2.6. “Scale” means Scale Computing, Inc., a Delaware corporation.

2.7. “Software” means the object code for the computer programs and computer coded instructions, the specific Scale program modules, feature set(s) or feature(s), all for which Licensee has paid the required license fees, including all related specifications, documentation, technical information, and all Upgrades (defined in Section 3.3) to any of the foregoing provided by or made available by Scale to Licensee. The Software also includes any add-on components, web services and/or supplements that Scale or its authorized resellers may provide or make available to Licensee after the date Licensee obtains the initial copy of the Software to the extent that such items are not accompanied by a separate license agreement or terms of use.

2.8. “Effective Date” means the date of shipment of product or licenses, physical or virtual by Scale or its authorized reseller.

3. License

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3.1.2. Unless otherwise expressly provided in the documentation, Licensee shall use the Software solely as embedded in, for execution on, or (where the applicable documentation permits installation on non-Scale equipment) for communication with Scale equipment owned or leased by Licensee. Licensee's use of the Software shall be limited to use on a single hardware chassis and on a single central processing unit, as applicable; provided, however Customer may use the Software on the specified number of chassis or central processing units for which Licensee has paid Scale the required license fee for more than one. Licensee's use of the Software shall be limited to a usage capacity, number of users and period for operating with respect to each copy, as applicable and as set forth in this Agreement or in Scale's product catalog, user documentation, or web site. Licensee's use of the Software shall be limited by any other restrictions in Scale's product catalog, user documentation, or web site for the Software which are incorporated herein by this reference.

3.1.3. Licensee shall be solely responsible for payment of all taxes that may be assessed on the Software or its use, including personal property taxes, sales and use taxes, excise taxes, value-added taxes, consumption tax and withholding tax.

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3.2.2. Sell, license or distribute copies of the Software on a standalone basis or as part of any collection, product or service, or permit third parties to do so;

3.2.3. Rent, lease, provide commercial hosting services to third parties with, or lend the Software;

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3.2.5. Make error corrections to or otherwise modify or adapt the Software or create derivative works based upon the Software, or permit third parties to do the same; provided that the foregoing restriction shall not apply solely to the extent it is unenforceable under applicable law;

3.2.6. Reverse engineer, disassemble or decompile the Software or otherwise attempt to gain access to any source code, trade secret or confidential information related to the Software; provided that the foregoing restriction shall not apply solely to the extent it is unenforceable under applicable law; or

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3.7. Licensee Records

Licensee grants to Scale and its independent accountants the right to examine Licensee's books, records and accounts during Licensee's normal business hours to verify compliance with this Agreement. In the event such audit discloses noncompliance with this Agreement, Licensee shall promptly pay to Scale the appropriate license fees with interest at the highest rate allowed under the law and the audit expenses incurred by Scale. This right shall survive any termination or expiration of this Agreement.

3.8. Limited Warranty by Scale

3.8.1. Scale warrants to Licensee that for a period of thirty (30) days commencing from the date of original purchase by Licensee (“Warranty Period”) (i) the media on which the Software is furnished will be free of defects in materials and workmanship under normal use; and (ii) the Software substantially conforms to its published specifications. This

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3.8.3. Licensee is advised to use redundant and backup storage systems and to have a viable plan in place with said systems (“Disaster Recovery Plan”) for the potential loss, corruption, overwrite, misplacement and/or any other possible variance of a data loss scenario including but not limited to hardware errors or failures, Software errors or failures, Licensee, Licensee employee or designated operator errors or failures, and/or any other network or environmental factors on or around the Licensee Computer and Software. Further, due to the continual development of new techniques for intruding upon and attacking networks, Scale does not warrant that the Software or any equipment, system or network on which the Software is used will be free of vulnerability to intrusion, virus attack or hacker attacks. The Software is not designed or intended for use in hazardous environments requiring fail-safe performance, including without limitation, in the operation of nuclear facilities, aircraft navigation or communication systems, air traffic control, weapons systems, direct life-support machines, or any other application in which the failure of the Software could lead directly to death, personal injury, or severe physical or property damage (collectively, “High Risk Activities”). Scale expressly disclaims any express or implied warranty of fitness for High Risk Activities.

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3.10.2. SOME STATES OR OTHER JURISDICTIONS DO NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION MAY NOT APPLY TO A LICENSEE. A LICENSEE MAY ALSO HAVE OTHER LEGAL RIGHTS THAT VARY FROM STATE TO STATE OR JURISDICTION TO JURISDICTION.

3.11. Licensee's Exclusive Remedy

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The parties expressly acknowledge and agree that Scale has set its prices and entered into this Agreement in reliance upon limitation of liability specified herein, which allocates the risk between Scale and Licensee and forms the basis of the bargain between the parties.

3.12 Additional Functionality

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5. Indemnities

5.1. Indemnity by Licensee

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6. Term and Termination

6.1. Term

The License granted by this Agreement shall continue until such time as the Licensee decides to terminate the Agreement or fails to meet the Agreement terms; whichever may occur earlier. Right to use and operate some specific copies, modules, feature set(s) or feature(s) of the Software and hardware may be limited to the license period(s) as specified by Scale and will expire at the end of license period. Licensee may terminate this License at any time by destroying all copies of Software including any documentation. Licensee’s rights under this License will terminate immediately without notice from Scale if Licensee fails to comply with any provision of this License. Upon termination, Licensee must destroy all copies of Software in its possession or control.

6.2. Termination by Scale

Scale will have the right to terminate this Agreement if (a) Licensee fails to honor the restrictions on disclosure and use of Scale’s proprietary information provided under this Agreement, (b) Licensee infringes or participates in infringement of Scale’s Intellectual Property Rights, (c) Licensee fails to honor the limitations and restrictions on use of the Software or any part thereof as provided in this Agreement, (d) Licensee breaches or fails to perform any other material term or condition of this Agreement, (e) Licensee has not paid any or all Scale invoices when due, (f) Licensee ceases to be in business or (g) Licensee 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.

6.3. Termination by Licensee

Licensee will have the right to terminate this Agreement if Scale breaches or fails to perform any other material term or condition of this Agreement and Scale fails to remedy any such breach within thirty (30) days of notice from Licensee.

6.4. Effect of Termination of Agreement

If either party properly terminates this Agreement, Licensee shall immediately return to Scale or (at Scale’s request) destroy all copies of the Software and will certify to Scale in writing, over the signature of the President or a Vice

President (or similar position) of Licensee, that it has done so. All obligations relating to nonuse and nondisclosure of confidential information, indemnification, and the obligations of Licensee to respect Scale's Intellectual Property Rights shall survive termination of this Agreement for any reason. Licensee further agrees that in the event of termination, all fees or charges due for the remaining term of this Agreement shall immediately become due and payable. Upon termination of the license granted hereunder, Scale's obligations under this Agreement shall cease.

6.5. Survival

The rights and obligations of the parties contained in this Agreement shall survive the termination of this Agreement or of any individual Software license; notwithstanding the foregoing, Licensee's rights to use the Software shall terminate upon termination of this Agreement or as earlier stated above.

7. Miscellaneous

7.1. Restricted Rights

7.1.1. The data provided under this Agreement is "technical data" as that term is defined in 48 C.F.R. 27.401 and is a "commercial item" as that term is described in 48 C.F.R. 2.101. If acquired by or on behalf of a civilian agency, the U.S. Government acquires this commercial item technical data subject to the terms of this Agreement as specified in 48 C.F.R. 12.211 (Technical Data) of the Federal Acquisition Regulations ("FAR") and its successors. If acquired by or on behalf of any agency within the Department of Defense ("DOD"), the U.S. Government acquires this commercial item technical data subject to the terms of this Agreement as specified in 48 C.F.R. 227.71021 of the DOD FAR Supplement ("DFAR") and its successors.

7.1.2. Any use, duplication, or disclosure of the Software by the U.S government is subject to restrictions as set forth in this Agreement and as provided in DFARS 227.72021(a) and 227.72023(a) (1995), DFARS 252.227-7013(c)(1)(ii) (OCT 1988), FAR 12.212(a)(1995), FAR 52.22719, or FAR 52.22714 (ALT III), as applicable. For DOD agencies, the restrictions set forth in the "Technical Data Commercial Items" clause at DFARS 252.227-7015 (Nov 1995) shall also apply.

7.2. Export Restrictions

Licensee acknowledges that the Software licensed hereunder is subject to the export control laws and regulations of the U.S. and any amendments thereof. Licensee confirms that with respect to the Software, it will not export or reexport it, directly or indirectly, to any countries that are subject to U.S.A. export restrictions. Licensee further acknowledges that the Software may include technical data subject to export and reexport restrictions imposed by U.S. law. Both before and after termination of this Agreement for any reason, Licensee shall refrain from permitting all or part of the Software, including any embedded data, to be exported outside the United States of America, in any manner or by any means, without in each instance, if required, a validated license from the Office of Export Administration within the United States Department of Commerce and other appropriate governmental authorities of the United States. This requirement shall survive expiration or termination of this Agreement.

7.3. Notices

All notices and other communications required or permitted hereunder shall be in writing and be deemed given when delivered personally or sent by registered or certified mail, return receipt requested, to the official address of the other party or to such other place as the parties hereto from time to time may direct.

7.4. Relationship of Parties

The parties to this Agreement are independent contractors and this Agreement will not establish any relationship of partnership, joint venture, employment, franchise, or agency between the parties. Neither party will have the power to bind the other or incur obligations on the other's behalf without the other's prior written consent.

7.5. Force Majeure

Neither party hereto will be liable to the other for any failure or delay in performance hereunder due to circumstances beyond its reasonable control including, without limitation, Acts of God, accident, death, injury or illness of key personnel, acts, omissions and defaults of third parties and official, governmental and judicial action not the fault of the party failing or delaying in performance.

7.6. Assignment

Licensee shall not assign or otherwise transfer its rights under this Agreement, including the Software obtained pursuant to this Agreement, without the prior written consent of Scale. Any attempt to make such an assignment without Scale's consent shall be void. Scale may freely assign this Agreement.

7.7. No Waiver

No failure of either party hereto to prosecute its rights with respect to any single or continuing breach of this Agreement will act as a waiver of the right of that party to later exercise any right or enforce any remedy granted hereunder with respect to that same or any other breach of this Agreement by the other party hereto.

7.8. Choice of Law

This Agreement shall be governed by and construed in accordance with the laws of the State of California, USA, without giving effect to principles of conflict of laws. This Agreement shall be construed and enforced without regard to the United Nations Convention on the International Sale of Goods. Any legal action or proceeding arising under this Agreement shall be brought exclusively in state courts sitting in Santa Clara County or the federal courts located in the Northern District of California and the parties hereby consent to the personal jurisdiction and venue therein. Notwithstanding the foregoing, at either party's option, any dispute or claim arising out of or related to this Agreement shall be finally settled by binding arbitration in San Francisco, California under the American Arbitration Association International Arbitration Rules by one arbitrator appointed in accordance with said Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

7.9. Attorneys' Fees

If any legal action or other legal proceedings is brought for the enforcement of this Agreement, or if a dispute arises under this Agreement, the successful or prevailing party shall be entitled to recover reasonable attorney's fees and other costs incurred in that action or proceeding, in addition to any other relief to which it may be entitled.

7.10. Severability

If any part of this Agreement is adjudged by any court of competent jurisdiction to be invalid, that part shall be reformed to the minimum extent required to render it valid, and that judgment shall not affect or nullify the remainder of this Agreement, and the legality and enforceability of the other provisions of this Agreement shall remain in full force and effect.

7.11. Entire Agreement

This Agreement (and any agreements incorporated herein by reference, and exhibits and appendices attached) sets forth the entire agreement between the parties with respect to the subject matter hereof, and all other discussions, representations, proposals, offers, purchase order and any other prior or contemporaneous oral or written communications of any nature are entirely superseded hereby and extinguished by the acceptance hereof. To the extent the terms of any Scale policies or programs for support services conflict with the terms of this Agreement, the terms of this Agreement shall control.

7.12. Amendment

The parties agree that this Agreement shall be modified only by a written agreement duly executed by persons authorized to execute agreement on their behalf.

7.13 Language

The English language shall govern the meaning and interpretation of this Agreement.