**Scale Computing: End User Software License Agreement (EULA)**

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

2.6. “Location” means Licensee’s place of business where the Software will be operated.

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), for which Customer has paid the required license fees, including all related specifications, documentation, technical information, and all corrections, modifications, additions, improvements and
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3. License

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3.2.2. Sell, license or distribute copies of the Software on a stand-alone basis or as part of any collection, product or service where the primary value of the product or service is the Software, or permit third parties to do so;
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3.2.4. Permit third parties to distribute copies of the Software except as part of Licensee’s service. Licensee must include a valid copyright notice, as approved by Scale, on Licensee products and services that include copies of the Software;
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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; or
3.2.7. Remove, obscure or alter any notice of patent, copyright, trade secret, trademark, trade name, mask work or other proprietary right related to Software or documentation.

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For purposes of this Agreement, "Software" shall include (and the terms and conditions of this Agreement shall apply to) any upgrades, updates, bug fixes or modified versions (collectively, "Upgrades") or backup copies of the Software licensed or provided to Licensee by Scale or an authorized reseller for which Licensee has paid the applicable license fees.

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3.6. 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 non-compliance 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.

3.7. Limited Warranty by Scale

3.7.1. 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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3.9.2. SOME STATES 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. NO ACTION, REGARDLESS OF FORM, ARISING OUT OF OR PERTAINING TO THIS AGREEMENT MAY BE BROUGHT BY LICENSEE MORE THAN ONE (1) YEAR FROM THE DATE OF SUCH CAUSE OF ACTION ACCRUED.

3.10. LICENSEE’S EXCLUSIVE REMEDY

Licensee's sole and exclusive remedy and the entire liability of Scale under this Agreement shall be limited, at Scale or its service center's option to, subject to applicable law, repair, replacement, or refund of the Software if reported (or, upon request, returned with receipt) to Scale within the Warranty Period. Licensee shall receive the remedy elected by Scale without charge, except that Licensee is responsible for any expenses it may incur (e.g. shipping cost of the Software to Scale).

3.11. BASIS OF BARGAIN
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.

4. Indemnities

4.1. Indemnity by Licensee
Licensee agrees to defend, indemnify and hold harmless Scale from any liabilities, penalties, demands or claims finally awarded (including the costs, expenses and reasonable attorneys’ fees on account thereof) by any third party that is the result of any negligence on the part of the Licensee relating to the use, performance, quality, condition, service, maintenance or support of the Software in whole or in part.

4.2. Indemnity by Scale

4.2.1. Scale shall indemnify Licensee for any loss, damage, expense, or liability, including costs and reasonable attorneys’ fees finally awarded, in any action brought against Licensee to the extent that it is based on a claim that use of the Software provided by Scale pursuant to this Agreement infringes any U.S. patent and copyright. Scale’s indemnity obligations are conditioned on the following: (i) that Licensee notify Scale within thirty (30) days in writing of any such claim; (ii) that Scale is granted by Licensee in writing sole control of the defense of any such claim and of all negotiations for its settlement or compromise; (iii) that Licensee provide all reasonable cooperation to Scale to facilitate the settlement or defense of the claim; and (iv) that in the event the Software becomes, or in Scale’s sole opinion is likely to become, the subject of such a claim of infringement, then Licensee will permit Scale, at Scale’s sole discretion and expense, (A) to procure for Licensee the right to continue using the same under the terms of this Agreement, or (B) to replace or modify the same so that it becomes non infringing and substantially equivalent in function, or (C) upon failure of (A) and (B) above despite the reasonable efforts of Scale, to refund to Licensee the fees paid to Scale by Licensee hereunder, less a proportionate charge for the time the Software was under use by Licensee. THE OBLIGATION SET FORTH IN THIS SECTION IS SCALE’S EXCLUSIVE OBLIGATION WITH RESPECT TO INDEMNIFYING LICENSEE FOR ANY AND ALL CLAIMS, OBLIGATIONS, LIABILITIES ARISING UNDER THIS AGREEMENT.

4.2.2. Scale will defend any action brought against Licensee to the extent that it is based upon a claim that a Software furnished hereunder, and used within the scope of this Agreement, infringes a copyright or patent arising under the laws of any Covered Country or a United States trademark. “Covered Country” as used in this section means the United States of America, Canada, Mexico, and member states of the European Economic Union.

4.3. Exclusions

Notwithstanding the terms of Section 4.2, Scale shall have no liability for any
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occurred but for such combination, operation or use; (c) Licensee’s failure to use updated or
modified Software provided by Scale to avoid a claim; (d) Scale’s compliance with
any designs, specifications or plans provided by Licensee; or (e) Licensee’s use of the Software
other than in accordance with this Agreement or documentation.

5. Term and Termination

5.1. Term

The license granted by this Agreement shall continue until terminated or on expiry of 10 year
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limited to the license period(s) as specified by Scale and would 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.

5.2. Termination by Scale

Scale will have the right to terminate this Agreement if (i) Licensee fails to honor the
restrictions on disclosure and use of Scale's proprietary information provided under this
Agreement, (ii) Licensee infringes or participates in infringement of Scale's Intellectual
Property Rights, (iii) Licensee fails to honor the limitations and restrictions on use of the
Software or any part thereof as provided in this Agreement, (iv) Licensee breaches or fails to
perform any other material term or condition of this Agreement, (v) Licensee has not paid any or
all Scale invoices, (vi) Licensee ceases to be in business or (vii) 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.

5.3. Termination by Licensee

Licensee will have the right to terminate this Agreement if: (i) Scale fails to honor the
restrictions on disclosure and use of Licensee's confidential information provided under this
Agreement, or (ii) Scale breaches or fails to perform any other material term or condition
of this Agreement.

5.4. Procedure for Termination of Agreement

Either party, if it has a right of termination as provided above, may terminate this Agreement at
any time while the event or condition giving rise to that right of termination exists, by giving
the other written notice of the event or condition giving rise to the right of termination,
describing that event or condition in reasonable detail. Upon receipt of that notice, the other
party will have a period of thirty (30) days in which to cause that event or condition to be corrected or cured to the reasonable satisfaction of the party desiring termination. If the event or condition-giving rise to the right of termination is not so corrected or cured within that period, this Agreement shall terminate automatically as of the end of that period, without further act by any party.

5.5. 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 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 through its default, 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.

5.6. Survival

The rights and obligations of the parties contained in Sections 3, 4, 5, and 6 shall survive the termination of this Agreement or of any individual Software license.

6. Miscellaneous

6.1. Restricted Rights

6.1.1. 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. 227.7102-1 of the DOD FAR Supplement ("DFAR") and its successors.

6.1.2. 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 227.7202-1(a) and 227.7202-3(a) (1995), DFARS 252.227-7013(c)(1)(ii) (OCT 1988), FAR 12.212(a)(1995), FAR 52.227-19, or FAR 52.227-14 (ALT III), as applicable. For Department of Defense agencies, the restrictions set forth in the "Technical Data-Commercial Items" clause at DFARS 252.227-7015 (Nov 1995) shall also apply.

6.2. Export Restrictions
Licensee acknowledges that the Software licensed hereunder is subject to the export control laws and regulations of the U.S.A and any amendments thereof. Licensee confirms that with respect to the Software, it will not export or re-export 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 re-export restrictions imposed by U.S.A 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.

6.3. 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.

6.4. 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.

6.5. 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.

6.6. 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.

6.7. 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.
6.8. 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. 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. In each case this Agreement shall be construed and enforced without regard to the United Nations Convention on the International Sale of Goods.

6.9. 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 attorneys fees and other costs incurred in that action or proceeding, in addition to any other relief to which it may be entitled.

6.10. Severability

If any part of this Agreement is adjudged by any court of competent jurisdiction to be invalid, that judgment shall not effect 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.

6.11. 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.

6.12. 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.