

Scale Computing: End User Software License Agreement (EULA)

1. Binding Agreement

This Software License Agreement (“Agreement” or “EULA”) is a legal agreement between Scale Computing, Inc., a Delaware corporation with an office at 525 S. Meridian – Suite 3E, Indianapolis, IN 46225 (“Scale”) and the person or entity entering into these terms (“you” or “Licensee”). If you are entering into this Agreement on behalf of a company or other legal entity, then you represent that you have the authority to commit such entity to this Agreement, and the term “you” shall hereafter refer to such entity.

PLEASE READ THIS AGREEMENT CAREFULLY BEFORE DOWNLOADING, INSTALLING OR USING THE SOFTWARE. BY CLICKING “I ACCEPT”, DOWNLOADING, INSTALLING OR OTHERWISE USING THE SOFTWARE, YOU AGREE THAT YOU HAVE READ AND UNDERSTOOD, AND, AS A CONDITION TO YOUR USE OF THE SOFTWARE, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS AGREEMENT. IF YOU DO NOT AGREE TO BE BOUND BY THE TERMS OF THIS EULA, THEN DO NOT INSTALL, COPY OR USE THE SOFTWARE.

2. Definitions

2.1. “HC3” means Scale’s HC3 virtualization software.

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

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

2.4. “Order Form” means the order form, agreement or other ordering document between Licensee and Scale (or its authorized reseller) pursuant to which Licensee purchased the right to use the Software from Scale or its authorized reseller.

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

2.6. “Software” means the object code for the computer programs and computer coded instructions, the specific Scale program modules, feature set(s) or feature(s), including all related specifications, documentation, technical information, and all Upgrades (defined in Section 3.3) to any of the foregoing, in each case provided by or made available by Scale (or its authorized resellers) to Licensee. Software shall include HC3, add-on components, web services or supplements that Scale may provide or make available to Licensee, whether directly or via Scale’s authorized resellers, after the date Licensee obtains the initial copy of the Software (“Add-Ons”). For clarity, such Add-Ons may be subject to additional terms and conditions, which shall control in the event of any conflict between the terms of this Agreement and such additional terms and conditions, but only with respect to such Add-Ons.

3. License

3.1. License Grant

3.1.1. Upon Licensee’s full payment of the required license fees (as specified in the Order Form), Scale hereby grants to Licensee, and Licensee hereby accepts, a limited, nonexclusive, nontransferable, non-sublicensable license to: (i) install the number of licensed units of the Software onto equipment authorized by Scale, if and as indicated in the Order Form, and (ii) use the Software solely as embedded in, for execution on, or (where the applicable documentation permits installation on equipment not authorized by Scale) for communication with, Scale-authorized equipment owned or leased by Licensee in accordance with the applicable documentation, in each case subject to the terms and conditions set forth herein. Licensee’s use of the Software shall be limited to use on the specified number of chassis or central processing units specified on the Order Form (or if unspecified, then a single chassis and central processing unit).

3.2. General Restrictions

Except and solely to the extent such restriction is impermissible under applicable law, and other than as expressly set forth in this Agreement, Licensee will not, and will not assist or permit any third party to: (a) disassemble, reverse engineer, decompile, or otherwise attempt to derive the source code of the Software or any component thereof, (b) copy, reproduce, modify, alter or otherwise create any derivative works of the Software or any component thereof, (c) sell, lease, sublicense or otherwise transfer the Software to any third party, (d) use the Software to violate, misappropriate, or infringe the rights of any third party, (e) interfere with or circumvent any feature of the Software, including any security or access control mechanisms, (f) use the Software in any way that is not in accordance with the applicable documentation (including, for clarity, by installing or using the Software on any hardware that is not approved by Scale for use with the Software) or that violates applicable law, or (g) attempt to do any of the foregoing.

3.3. Upgrades and Additional Copies

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 shall be deemed to be Software, provided that Licensee has paid the fees, if any, for such copies or Upgrades. Notwithstanding the foregoing, Licensee may not use any additional copies of the Software provided by Scale or its authorized reseller other than for backup purposes only. Licensee may create a reasonable number of copies of any documentation or materials related to the Software solely for use in connection with Licensee's authorized use of the Software, provided, however, that Licensee shall promptly destroy all such copies upon termination of this Agreement.

3.4. Responsibility of Licensee

Licensee acknowledges that the Software incorporates or is based in part upon proprietary information of Scale and its third party licensors. Licensee shall not disclose or make available the Software, documentation, or any information or data embodied therein, to any person or entity other than employees of Licensee who have a need to know and that are bound by non-disclosure and non-use obligations at least as restrictive as those provided in this Section. Such employees shall be required to use the Software and documentation solely for the purposes set forth in this Agreement and shall not disclose or make available the Software, documentation, or any information or data embodied therein, to any person or entity other than those permitted by this Agreement. In all events the Licensee shall use at minimum the same care to maintain the confidentiality of the Scale proprietary information that it uses to maintain the confidentiality of its own information of equal importance.

3.5. Ownership

As between Scale and Licensee, Scale retains all right, title and interest in and to the Software, including any modifications, derivatives, and copies thereof, and any related documentations or materials, whether or not made by Scale. Scale reserves all rights in and to the foregoing, and except as expressly granted in this Agreement, Licensee receives no rights or licenses hereunder.

3.6. Maintenance and Support Services

Scale may provide Licensee with maintenance and support services related to the Software ("Support Services"). Such Support Services shall be provided pursuant to Scale's then-current standard terms for such Support Services. Unless otherwise indicated by Scale, all supplemental software code or documentation provided to Licensee as part of the Support Services, if any, will be deemed to be Software hereunder and use of such code or documentation be subject to the terms and conditions of this Agreement.

3.7 HC3 Platform

If Customer's subscription to HC3 includes the right to access Scale's online HC3 management platform, such access is provided under the HC3 Platform Terms available at <https://community.scalecomputing.com/s/article/Scale-Computing-HC3-Platform-Terms>. Licensee's rights to use the HC3 management platform does not extend beyond Customer's subscription to HC3.

3.8. 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 the results of such audit reveals that Licensee has failed to comply with the terms of this Agreement, Licensee shall promptly reimburse Scale for its reasonably incurred costs of conducting such audit, and Scale may terminate this Agreement immediately upon notice to Licensee. In the event that such failure includes Licensee's use of the Software that exceeds the scope of the rights granted hereunder, Licensee shall promptly pay to Scale the appropriate license fees for such excess use at Scale's then-current rates plus interest at the highest rate allowed under applicable law calculated from the date such non-compliance began. The terms of this Section shall survive any termination or expiration of this Agreement.

3.9. Limited Warranty by Scale

3.9.1. Scale warrants to Licensee that for a period of thirty (30) days commencing from the Shipment Date (“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.

3.9.2 Licensee’s sole and exclusive remedy and Scales sole and exclusive liability arising out of or related to a breach of warranty shall be limited, at Scale’s election, to: (i) repair of the defective media or Software, (ii) replacement of the defective media or Software, or (iii) refund of the license fees actually paid by Licensee and received by Scale for the affected Software, in each case if reported to Scale (and, if requested by Scale, returned and received by Scale) within the Warranty Period. For the avoidance of doubt, Licensee shall remain responsible for its own costs in connection with receipt of such remedies, including, by way of example, the cost of shipping the hardware on which the Software is installed to Scale for Scale.

3.9.3. EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH IN SECTION 3.9.1 ABOVE, THE SOFTWARE AND ANY DOCUMENTATION OR OTHER RELATED MATERIALS ARE PROVIDED ‘AS IS’ AND ‘AS AVAILABLE’. SCALE DISCLAIMS ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, RELATING TO THE SOFTWARE, DOCUMENTATION AND RELATED MATERIALS, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, QUIET ENJOYMENT, OR NON-INFRINGEMENT OR ANY WARRANTY ARISING OUT OF COURSE OF DEALING, USAGE, OR TRADE. SCALE DOES NOT WARRANT THAT THE SOFTWARE, DOCUMENTATION OR ANY RELATED MATERIALS OR ANY PORTION THEREOF WILL BE UNINTERRUPTED, SECURE, OR FREE OF ERRORS, VIRUSES, OR OTHER HARMFUL COMPONENTS, AND SCALE DOES NOT WARRANT THAT ANY OF THOSE ISSUES WILL BE CORRECTED, AND SCALE DOES NOT WARRANT THAT THE FUNCTIONS OR FEATURES CONTAINED WITHIN THE SOFTWARE OR THAT OPERATION OF THE SOFTWARE WILL BE SECURE, UNINTERRUPTED OR ERROR-FREE, OR THAT ALL DEFECTS THAT MAY EXIST IN THE SOFTWARE WILL BE CORRECTED, OR THAT THE SOFTWARE WILL BE COMPATIBLE WITH ANY SOFTWARE OR HARDWARE POSSESSED BY LICENSEE.

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THE LIMITATIONS, EXCLUSIONS AND DISCLAIMERS IN THIS SECTION 3.9.3 SHALL APPLY TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW. SCALE DOES NOT DISCLAIM ANY WARRANTY THAT SCALE IS PROHIBITED FROM DISCLAIMING UNDER APPLICABLE LAW.

3.9.4. Licensee agrees that 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”). Licensee acknowledges that the Licensee’s right to use the Software does not extend to use in connection with High Risk Activities, and Licensee hereby agrees to indemnify Scale from any and all liabilities, losses, harm or other costs (including reasonable attorney’s fees) incurred by Scale resulting from Licensee’s use of the Software in connection with High Risk Activities.

3.10. Limitations

Scale shall have no liability or obligation with regard to Scale’s breach of any warranty hereunder in the event the Software or any related product or equipment supplied by Scale: (a) has been altered, except by Scale, (b) has not been installed, operated, repaired, or maintained in accordance with instructions supplied by Scale, (c) has been subjected to abnormal physical or electrical stress, misuse negligence, virus or accident, or (d) is licensed for beta, trial, evaluation or demonstration basis for which Scale does not receive a payment or license fee.

3.11. LIMITATION ON LIABILITY

3.10.1. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL SCALE OR ITS RESELLERS BE LIABLE FOR ANY SPECIAL, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES WHATSOEVER (INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR LOSS OF PROFITS, LOSS OF DATA, CONFIDENTIAL OR OTHER INFORMATION, FOR BUSINESS INTERRUPTION OR LOSS OF USE, FOR PERSONAL INJURY, FOR LOSS OF PRIVACY, FOR FAILURE TO MEET ANY DUTY INCLUDING DUTY OF GOOD FAITH OR OF REASONABLE CARE, FOR NEGLIGENCE, OR FOR ANY OTHER PECUNIARY OR OTHER LOSS WHATSOEVER) ARISING OUT OF OR IN ANY WAY RELATED TO THE USE OF OR INABILITY TO USE THE SOFTWARE OR THE HARDWARE ON WHICH IT IS INSTALLED, EVEN IF SCALE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, NEITHER SCALE NOR ITS RESELLERS’ LIABILITY ARISING OUT OF OR RELATED TO THE SUBJECT MATTER OF THIS AGREEMENT SHALL EXCEED THE AMOUNTS ACTUALLY RECEIVED BY SCALE IN EXCHANGE FOR THE LICENSE GRANTED TO LICENSEE HEREUNDER DURING THE 12 MONTHS IMMEDIATELY PRECEDING THE EVENTS GIVING RISE TO THE CLAIM. WITHOUT LIMITING THE FOREGOING, 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 SUCH CAUSE OF ACTION AROSE.

3.12 Additional Functionality

Licensee acknowledges that the Software may contain the capability to self-report back to Scale any issues with the Software, the Licensee Computer and other relevant metrics (“Reported Data”). Licensee agrees that it shall not

interfere with the capability of the Software to collect Reported Data and transmit such Reported Data to Scale. In addition, Licensee acknowledges that in the event such capability is disabled or otherwise unavailable, Licensee may lose the ability to use certain features or functionality of the Software.

3.13. License Limitations

The availability of certain features depends on the type of license you purchase. Some features may not be enabled or supported for certain license types. Information regarding the availability of features by license type is available at the following support matrix: <https://community.scalecomputing.com/s/article/Scale-Computing-Software-Support-Matrix>. The version of the matrix that is in effect at the time of your purchase will govern the features available to you.

4. Third Party Software

The Software may include, or may be distributed on the same media or in the same download with third-party software, including Open Source Software (“Third Party Technology”). Use of such Third Party Technology may be governed by separate copyright notices and license provisions, including those listed at <https://www.scalecomputing.com/support/open-sources-licensing-agreements/>.

5. Indemnification

To the fullest extent permitted by law, Licensee will indemnify Scale and its affiliates from and against any claim, demand, action, proceeding, loss, liability, cost and expense (including court costs and reasonable fees of attorneys, accountants and other professionals) incurred or suffered by Scale and its affiliates arising out of or related to: (i) Licensee’s unauthorized use of the Software or (ii) Licensee’s breach of the terms of this Agreement. Scale reserves the right to assume the exclusive defense and control of any matter otherwise subject to indemnification by Licensee (without limiting Licensee’s obligations with respect to such matter), and in that case, Licensee agrees to reasonably assist Scale in connection with the defense of such matter.

6. Term and Termination

6.1. Term

This Agreement is effective beginning upon Licensee’s acceptance of this Agreement or when Licensee first downloads, installs or uses the Software, and, unless terminated earlier in accordance with its terms, shall continue for the subscription period indicated on the Order Form, or, if none is indicated, until terminated as specified herein. Licensee’s rights under this Agreement will terminate immediately without notice from Scale if Licensee fails to comply with any provision of this Agreement.

6.2. Termination by Scale

Scale will have the right to terminate this Agreement immediately upon notice if (a) Licensee breaches any term of this Agreement, or (b) 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 may terminate this Agreement: (i) at any time by destroying all copies of the Software including any documentation and other related materials, or (ii) in the event Scale breaches or fails to perform any other material term or condition of this Agreement and fails to remedy any such breach within thirty (30) days of receiving notice thereof from Licensee, by providing notice to Scale.

6.4. Effect of Termination of Agreement

Upon termination or expiration of this Agreement, Licensee shall immediately cease all use of the Software, the documentation or related materials, and return to Scale or (at Scale’s request) destroy all copies of the Software, documentation or related materials, and will certify to Scale in a writing signed by Licensee (or, if Licensee is an entity, an officer of Licensee) that Licensee has returned or destroyed all such copies. 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 or expiration of this Agreement for any reason. Licensee further agrees that in the event of such termination or expiration, all fees or charges due for the remaining term of this Agreement shall immediately become due and payable. Scale’s obligations under this Agreement shall cease upon termination or expiration thereof.

7. Miscellaneous

7.1. Restricted Rights

7.1.1. All Software and any accompanying documentation or related materials is deemed to be “commercial computer software” and “commercial computer software documentation,” respectively, pursuant to DFAR Section 227.7202 and FAR Section 12.212, as applicable. Any use, modification, reproduction release, performance, display or disclosure of the Software and accompanying documentation by the U.S. Government shall be governed solely by the terms of this Agreement, and shall be prohibited except to the extent expressly permitted hereunder.

7.2. Export Restrictions

Licensee acknowledges that the Software, documentation, or any related materials may be subject to export control laws and regulations, and that each of Scale and Licensee is responsible for their own compliance with such laws and regulations. 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

Waiver of any right or remedy under this Agreement or by law is only effective only if given in writing and shall not be deemed a waiver of any subsequent breach or default. Failure by either party to enforce any provisions of this Agreement shall not be deemed a waiver of future enforcement of that or any other provision.

7.8. Choice of Law and Jurisdiction

This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, USA, without giving effect to principles of conflict of laws, without regard to the United Nations Convention on the International Sale of Goods. The parties hereby irrevocably consent to the personal jurisdiction and venue of the state courts sitting in New Castle County or the federal courts located in the District of Delaware.

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 a court of competent jurisdiction holds any term of this Agreement invalid or unenforceable, such term will be reduced or otherwise modified by such court to the minimum extent necessary to make it valid and enforceable. If such term cannot be so modified, it will be severed and the remaining terms of this Agreement will be interpreted in such ways as to give maximum validity and enforceability to this Agreement.

7.11. Entire Agreement

This agreement constitutes the entire agreement between the parties and supersedes and all prior and contemporaneous written and oral communications regarding this transaction, and may not be altered, modified, or amended except by a written amendment duly executed by authorized representatives of each party hereto.

7.13 Language

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