



End User License Agreement

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3. Definitions. In this EULA, the following capitalized terms shall have the meaning set forth below:

3.1. “Agreement” shall have the meaning set forth in Section 10.7.

3.2. “Affiliate” of a Party means such Party’s parent corporation, an entity under the control of such Party’s parent corporation at any tier or an entity controlled by such Party at any tier. For these purposes, “control” shall mean the power to direct or cause the direction of the management and policies of the entity, whether through the ownership of more than 50% of the outstanding voting interests in such entity or otherwise.

3.3. “Commercial Software” means software that HGST intends to be used by businesses.



3.4. “Feature” means an activity or class of activities that can be undertaken by the Software.

3.5. “Party” means either Licensee or HGST and “Parties” means both Licensee and HGST.

3.6. “Software” has the meaning set forth in Section 2.2.

3.7. “Software Key” means a code or key that is supplied by HGST allowing for the use of Commercial Software, which may provide capacity, device or other usage restraints consistent with the applicable order. For the avoidance of doubt, the term “Software” includes the applicable “Software Key”.

3.8. “Third Party” means an individual or entity other than Licensee, Licensee's Affiliates, HGST and HGST's Affiliates.

3.9. “Territory” means the country in which Licensee received the Software, unless otherwise specified in a purchase order agreed to by HGST.

3.10. “Update” means an update to the Software that is supplied by HGST and that may incorporate (i) corrections of any substantial defects; (ii) fixes of any minor bugs; and/or (iii) at the sole discretion of HGST, minor enhancements to the Software; provided, however, that Updates shall not include Upgrades. Updates are generally identified by HGST by a change to the version number to the right of the first decimal point (e.g., version 3.1 to 3.2).

3.11. “Upgrade” means a new release of the Software that incorporates substantial changes or additions that (i) provide additional value and utility; (ii) may be priced and offered separately as optional additions to the Software; and/or (iii) are not generally made available to HGST's customers without a separate charge. Upgrades are generally identified by HGST by a change to the version number to the left of the first decimal point (e.g., version 3.2 to 4.0).

3.12. “User” means an individual able to use or gain access to any Software functionality.

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4.7. License Prohibitions. Notwithstanding anything to the contrary in this EULA, Licensee shall not, alone, through a User, an Affiliate or a Third Party (or allow a User, an Affiliate or a Third Party to):

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7.2. Invocation of Disabling Code. In addition to the invocation of disabling code when HGST has received Licensee's consent described in Section 7.1, HGST may, at its option, invoke disabling code in HGST's Software without receiving Licensee's consent (i) if in HGST's sole, reasonable discretion, HGST believes that such Software has been, is being or will be used in violation of laws; (ii) if HGST is required to do so, because of a court or regulatory order; (iii) if Licensee has not paid the applicable License Fee by the expiration of the Software trial period; or (iv) if Licensee has used the Software other than as authorized by Licensee's license. HGST shall have no liability to Licensee for any good faith invocation of any such disabling code.

8. Exclusive Remedies and Limitation of Liability.

8.1. Definitions. For purposes of the exclusive remedies and limitations of liability set forth in this Section 8, HGST shall be deemed to include its directors, officers, employees, agents, representatives, shareholders, subcontractors, licensors and suppliers; and "damages" shall be deemed to refer collectively to all injury, damage, loss or expense incurred.

8.2. Maximum Liability. Except as may otherwise be provided in the Agreement, HGST's maximum aggregate liability arising from or relating to this EULA or the use of the Software and Products shall not to exceed the total amount paid by Licensee to HGST for the applicable Software during the twelve (12) month period that immediately preceded the event that gave rise to the applicable claim.

8.3. Limitation of Liability. NOTWITHSTANDING ANY OTHER PROVISION OF THIS EULA BUT SUBJECT IN ALL RESPECTS TO THE AGREEMENT, TO THE MAXIMUM EXTENT PERMITTED BY LAW, HGST SHALL NOT BE LIABLE FOR INCIDENTAL, SPECIAL, EXEMPLARY, CONSEQUENTIAL OR OTHER INDIRECT DAMAGES, INCLUDING BUT NOT LIMITED TO THE COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, LOSS OF DATA, LOSS OR INTERRUPTION OF USE, LOST PROFITS, SAVINGS OR REVENUES OF ANY KIND, WHETHER OR NOT HGST HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THIS PROVISION SHALL APPLY EVEN IN THE EVENT OF THE FAILURE OF AN EXCLUSIVE REMEDY.



9. Term and Termination.

9.1. Term. The term of this EULA is while any Software is under Licensee's control or possession, unless terminated earlier (the "License Term").

9.2. Termination. HGST shall have the right to terminate this EULA (a) upon thirty (30) days' prior written notice to Licensee if Licensee has not cured any material breach of this EULA by the end of such thirty (30) day notice period; (b) if Licensee has not paid an invoice to HGST regarding such Software sixty (60) days after such invoice is due, at any time thereafter upon written notice to Licensee; (c) if the Software is found to infringe or misappropriate any Third Party's intellectual property or proprietary rights, or becomes subject to an injunction prohibiting its use, or HGST reasonably believes either of the foregoing conditions is likely to occur; or (d) as otherwise provided for in the Agreement. Upon termination of this EULA for any reason, (i) Licensee shall be responsible for payment for all purchase orders delivered to Licensee by HGST before the effective date of termination; and (ii) Licensee shall destroy all copies of the Software under Licensee's control or possession, and provide HGST with reasonably requested evidence of the destruction of copies of the Software.

9.3. Survival. The provisions of Sections 1, 2, 4.5, 4.6, 4.8, 4.9, 5, 6, 7, 8, 9.3, and 10 of this EULA shall survive any termination in accordance with their terms, in addition to any accrued obligations.

10. Miscellaneous.

10.1. Choice of Law; Jurisdiction. The Agreement shall be governed by the laws of the State of California, excluding (a) its conflicts of law rules that would result in the application of the law of any other jurisdiction; and (b) the United Nations Convention for the International Sale of Goods. The federal and state courts located in San Jose, California shall have exclusive jurisdiction with respect to any dispute arising under this Agreement.

10.2. Assignment. Neither Party may assign its rights and obligations hereunder without the prior written consent of the other Party. Notwithstanding the foregoing, either Party may assign this EULA to any Affiliate of the other or to an acquirer (by purchase, merger or otherwise) of all or substantially all of such Party's business or assets relating to this EULA, provided that (i) the assignee agrees in writing to be bound by the terms and conditions of this EULA, (ii) neither the assignor nor assignee are in default hereunder. Any attempted assignment other than as permitted shall be null and void.

10.3. Non-Waiver. No course of dealing or failure of either party to strictly enforce any term, right or condition of this Agreement shall be construed as a waiver of such term, right or condition. In the event of any breach or threatened breach of Section 4, Licensee agrees that HGST will suffer irreparable damage for which HGST will have no adequate remedy at law. Accordingly, in addition to any other remedy, HGST shall be entitled to injunctive and other equitable remedies to prevent or restrain such breach or threatened breach, without the necessity of proving actual damages or posting any bond.

10.4. Export Regulations. Licensee understands that HGST is subject to regulation by the U.S. government and its agencies, which prohibit export or diversion of certain technical products and information to certain countries and individuals. Licensee warrants to HGST that Licensee will comply in all respects with all export and re-export restrictions applicable to the technology and documentation provided hereunder.

10.5. Restricted Party. Licensee represents to HGST that Licensee is not a Restricted Party, which shall be deemed to include any person or entity: (1) located in or a national of Cuba, Iran, Libya, North Korea, Sudan, Syria, or any other countries that may, from time to time, become subject to U.S. export controls for anti-terrorism reasons or with which U.S. persons are generally prohibited from engaging in financial transactions; (2) on the U.S. Department of Commerce Denied Person's List, Entity List, or Unverified List; U.S. Department of the Treasury list of Specially Designated Nationals and



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10.7. Order of Precedence; Entire Agreement. To the extent of any conflict among this EULA, any additional terms in an agreement signed by Licensee and HGST, any HGST “click-accept” agreement, any terms on a purchase order and HGST’s terms and conditions of sale, the order of precedence shall be (a) an agreement signed by Licensee and HGST; (b) this EULA; (c) a “click-accept” agreement, including any agreement regarding the Features to be included as part of the Software; (d) HGST’s terms and conditions of sale; and (e) HGST’s purchase order acceptance (collectively, (a)-(e), after applying the order of precedence, the “Agreement”). The terms and conditions contained in the Agreement supersede all prior oral or written understandings between the Parties and shall constitute the entire agreement between the Parties with respect to the subject matter of the Agreement. This Agreement shall not be modified or amended except by a writing signed by Licensee and HGST.

10.8. Construction; Severability. The headings used in this Agreement are for reference purposes only and will not be deemed to limit, expand or in any way affect the interpretation of any term or provision hereof. If any provision or part hereof shall be held to be invalid or unenforceable for any reason, then the meaning of such provision or part hereof shall be construed so as to render it enforceable to the extent feasible. If no feasible interpretation would save such provision or part hereof, it shall be severed herefrom, but without in any way affecting the remainder of such provision or any other provision contained herein, all of which shall continue in full force and effect unless such severance effects such a material change as to render the Agreement unreasonable.