

MEMVERGE END USER LICENSE AGREEMENT FOR MEMVERGE MEMORY MACHINE BATCH SOFTWARE

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- 1.3 “**Servers**” means the servers on which the Software is installed and operated, and which meets any technical or compatibility requirements provided by MemVerge.
- 1.4 “**Software**” means the MemVerge Memory Machine Batch software.
- 1.5 “**Term**” means the period of time that Licensee is authorized to use the Software.
- 1.6 “**Workstations**” means the workstations on which the Software is installed and operated and which meets any technical or compatibility requirements provided by MemVerge.

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JURISDICTIONS DO NOT ALLOW THE LIMITATION OR EXCLUSION OF INCIDENTAL, CONSEQUENTIAL OR OTHER TYPES OF DAMAGES, SO SOME OF THE ABOVE LIMITATIONS MAY NOT APPLY TO LICENSEE.

5. Indemnification.

5.1 **MemVerge's Indemnification.** MemVerge shall defend, or at its option settle, any third party claim or action brought against Licensee that the Software infringes upon or misappropriates any United States copyright or trade secret of any third party or any patent of a third party issued under the laws of the United States as of the Effective Date, and shall pay any final judgments or settlements entered into; provided that: (i) Licensee promptly notifies MemVerge in writing of the claim; (ii) MemVerge shall have the sole control of the defense and all related settlement negotiations; and (iii) Licensee provides MemVerge with assistance, information and authority as reasonably requested. MemVerge shall have no liability hereunder if the actual or alleged infringement results from (a) Licensee's breach of this Agreement, (b) any modification, alteration or addition made to the Software or any use thereof that causes either to deviate from the Documentation, (c) Licensee's failure to use any corrections or modifications made available by MemVerge that would not result in any material loss of functionality, or (d) use of the Software in a manner or in connection with a product or data not contemplated by this Agreement.

5.2 **Remedies.** If the Software is held or likely to be held infringing, MemVerge shall have the option, at its own expense, to (i) modify the same such that it no longer infringes or misappropriates; (ii) obtain a license for Licensee to continue using the same; (iii) replace the same with functionally equivalent software; or (iv) if none of the foregoing is commercially practical, terminate this Agreement and refund a pro rata portion of license fees actually received by MemVerge from Licensee's license of the applicable Software as amortized over a 3 year period. THE REMEDIES SET FORTH HEREIN SHALL CONSTITUTE MEMVERGE'S SOLE LIABILITY AND LICENSEE'S EXCLUSIVE REMEDY FOR ANY CLAIM OF INFRINGEMENT OR MISAPPROPRIATION.

6. Termination.

6.1 **Term.** This Agreement will commence on the Effective Date and continue for the period of time Licensee is authorized to use the Software, unless otherwise terminated in accordance with this Section 6.

6.2 **Termination.** Either party may terminate this Agreement upon written notice if (i) a receiver is appointed for either party or its assets; (ii) either party makes a general assignment for the benefit of its creditors; (iii) either party commences or has commenced against it, proceedings under any bankruptcy, insolvency, or debtor's relief law, which proceedings are not dismissed within 60 days; (iv) either party is liquidated or dissolved, other than in a corporate reorganization in which the ongoing business of such liquidated or dissolved party shall be continued by substantially the same ownership and management as existed prior to such liquidation or dissolution; or (v) the non-terminating party commits a material breach of this Agreement that is not remedied within 30 days following receipt of written notice thereof from the non-breaching party.

6.3 **Effect of Termination.** Upon termination of this Agreement, Licensee shall have no further right to use the Software. Licensee shall, as instructed by MemVerge, within 14 days of the date of termination either return all copies of the Software in its possession, or destroy all copies of the Software in its possession and certify in writing to MemVerge that it has done so.

6.4 **Survival.** Sections 1 (Definitions), 2.2 (Restrictions), 2.3 (Reservation of Rights), 3 (Open Source Software), 4 (Disclaimer; Limitation of Liability), 6.3 (Effect of Termination), 6.4 (Survival), 7 (Confidentiality), and 8 (Miscellaneous), and all payment obligations of Licensee shall survive termination or expiration of this Agreement.

7. Confidentiality.

7.1 **Confidentiality Undertaking.** "Confidential Information" means the confidential and proprietary information of the disclosing party (the "Discloser") which is identified as confidential by the Discloser at the time of disclosure. In addition, MemVerge Confidential Information includes but is not limited to the Software

and Documentation, any responses to technical support requests, and any business information, technical data, or know-how relating to the Software, any services, or any associated technology or services, including without limitation all such information disclosed in written form. Confidential Information shall not include any information, documentation or data that: (i) was in the possession of the receiving party (the “**Recipient**”) at the time of disclosure as shown by the recipient’s files and records in existence prior to the time of disclosure, (ii) prior to or after the time of disclosure becomes publicly known, not as a result of any wrongful action or omission of Recipient; (iii) is developed independently by Recipient without use of or reference to the Discloser’s Confidential Information, or (iv) is properly acquired by Recipient from a third party having the right to disclose such information.

- 7.2 **Obligations.** Each party shall protect the confidentiality of the other party’s Confidential Information by exercising at least the same standard of care as it uses to protect its own confidential information and shall, in any event: (i) hold any Confidential Information of the other party in strict confidence; (ii) not disclose or reveal such Confidential Information to third parties; (iii) not use such Confidential Information for any purpose except as set forth in this Agreement; and (iv) take all such steps necessary to ensure compliance with the provisions of this Section 7 by its employees, agents, and subcontractors. Notwithstanding any of the foregoing, each party may disclose Confidential Information of the other party to the extent required to be disclosed pursuant to law or government regulation, provided that it gives the other party reasonable prior notice of any such disclosure and the opportunity to prevent such disclosure through available legal processes.
8. Consent to Collect Usage Data. Licensee acknowledges and agrees that MemVerge may collect certain usage data (the “**Usage Data**”) of the Licensee, including, without limitation, the applications running on Servers or Workstations that are using memory, the amount of memory that such applications are using and other memory usage behavior. MemVerge will not share the Usage Data with any third party.
9. Miscellaneous.
- 9.1 **Entire Agreement; Construction.** This Agreement constitutes the complete and exclusive agreement between the parties and supersedes any and all prior communications, representations and understandings, whether written or oral. This Agreement shall not be amended or modified except in writing by duly authorized representatives of the parties. Section headings are for convenience only and shall not affect interpretation of the relevant section. To the extent that a purchase order or like document contains terms that are different from or inconsistent with this Agreement such terms are hereby rejected and this Agreement shall control over any such different or inconsistent terms. All notices must be either sent registered or certified mail, return receipt requested, or served personally. This Agreement is in the English language only, which language shall be controlling in all respects, and all versions hereof in any other language shall not be binding on the parties hereto. All communications and notices to be made or given pursuant to this Agreement shall be in the English language. The parties agree that the United Nations Convention on the International Sale of Goods will not apply to this Agreement.
- 9.2 **No Third Party Beneficiaries.** Under no circumstances shall any third party be considered a third party beneficiary of Licensee’s rights or remedies under this Agreement or otherwise be entitled to any rights or remedies of Licensee under this Agreement.
- 9.3 **Export and Import Regulations.** Licensee acknowledges that the Software contains cryptographic features and is subject to United States and local country laws governing import, export, distribution and use. The Licensee is responsible for compliance by the Licensee and the end users with United States and local country laws and regulations and shall not export, use or transmit the Software (i) in violation of any export control laws of the United States or any other country, or (ii) to anyone on the United States Treasury Department’s list of Specially Designated Nationals or the U.S. Commerce Department’s Table of Deny Orders.
- 9.4 **Assignment.** This Agreement shall not be assigned or transferred, in whole or in part, without the prior written consent of the other party, which shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, MemVerge may without prior written consent (i) assign this Agreement in connection with the sale of all or substantially all of its stock or assets to which this Agreement relates, or (ii) transfer all or part of its rights and obligations to provide services under this Agreement. Any assignment or transfer made other than in

accordance with this Section is null and void. Subject to the foregoing, this Agreement will be binding upon, enforceable by, and inure to the benefit of the parties and their respective successors and assigns.

- 9.5 **Severability.** If any provision of this Agreement shall be held illegal or unenforceable by a court or tribunal of competent jurisdiction, the parties shall reform the provision to the minimum extent necessary to render it valid and enforceable in conformity with their intent as manifested herein. The remainder of the Agreement shall remain in full force and effect.
- 9.6 **Governing Law.** This Agreement shall be governed by the laws of the United States and the State of California, without reference to conflict of laws principles. Any dispute between the parties regarding this Agreement will be subject to the exclusive venue of the state and federal courts in the state of California in San Francisco, San Mateo and Santa Clara counties. The parties hereby consent to the exclusive jurisdiction and venue of such courts.
- 9.7 **U.S. Government Restricted Rights.** If the Software is accessed or used by any agency or other part of the U.S. Government, the U.S. Government acknowledges that (i) the Software and accompanying materials constitute “commercial computer software” and “commercial computer software documentation” under paragraphs 252.227.14 and 252.227.7202 of the DoD Supplement to the Federal Acquisition Regulations (“DFARS”) or any successor regulations, and the Government is acquiring only the usage rights specifically granted in this Agreement; (ii) the Software constitutes “restricted computer software” under paragraph 52.227-19 of the Federal Acquisition Regulations (“FAR”) or any successor regulations and the government’s usage rights are defined in this Agreement and the FAR.
- 9.8 **Force Majeure.** Neither party shall be liable to the other for delays or failures in performance resulting from causes beyond the reasonable control of that party, including, but not limited to, acts of God, labor disputes or disturbances, material shortages or rationing, riots, acts of war, governmental regulations, communication or utility failures, or casualties or epidemics.