MEMSQL HELIOS™
TERMS OF SERVICE
(as of 02/14/2020)

MEMSQL, INC. ("MEMSQL") AGREES TO GRANT ACCESS TO ITS HELIOS DATABASE SERVICE (THE "MANAGED SERVICE") AND PROVIDE SUPPORT AND/OR OTHER SERVICES ("SERVICES") TO YOUR BUSINESS OR ORGANIZATION ("CUSTOMER") ONLY IF (A) YOU REPRESENT AND WARRANT THAT YOU HAVE THE AUTHORITY TO LEGALLY BIND CUSTOMER AND (B) YOU ACCEPT AND AGREE ON BEHALF OF CUSTOMER TO BE BOUND BY ALL OF THE FOLLOWING TERMS OF SERVICE (THIS "AGREEMENT"), WHICH SHALL BE DEFINITIVELY EVIDENCED BY YOUR PLACING AN ORDER THROUGH AN ORDER DOCUMENT THAT INCORPORATES THESE GENERAL TERMS (AN "ORDER DOCUMENT") OR YOUR SIGNATURE ON A TANGIBLE COPY OF THIS AGREEMENT; ACCESS OR USE OF THE MANAGED SERVICE OR OTHER SERVICES, AND SHALL BE EFFECTIVE ON THE EARLIER OF THE DATE ON WHICH YOU ACCESS OR USE THE MANAGED SERVICE OR USE ANY OTHER SERVICES PROVIDED HEREUNDER OR THE DATE YOU SIGN THIS AGREEMENT (THE "EFFECTIVE DATE"). IF YOU DO NOT AGREE TO THESE TERMS AND CONDITIONS, DO NOT CHECK THE ACCEPTANCE BOX, AND DO NOT ACCESS OR USE THE MANAGED SERVICE OR ANY OTHER SERVICES.

THESE TERMS AND CONDITIONS CONSTITUTE A LEGAL AGREEMENT BETWEEN YOU AND MEMSQL. THIS AGREEMENT MAY ONLY BE SUPERSEDED OR AMENDED BY A WRITTEN AGREEMENT AGREED UPON BY BOTH PARTIES THAT EXPRESSLY PURPORTS TO SUPERSEDE OR AMEND THIS AGREEMENT IN PART OR IN WHOLE.

(THE FOLLOWING SECTIONS OF THIS AGREEMENT DO NOT APPLY TO YOUR USE OF THE ON-DEMAND SERVICE OR SUBSCRIPTION SERVICE FOR THE MANAGED SERVICE IF YOU ARE AN EXISTING MEMSQL CUSTOMER VIA A SIGNED ORDER DOCUMENT OR MASTER AGREEMENT (PURCHASED DIRECTLY FROM MEMSQL OR VIA AN AUTHORIZED MEMSQL RESELLER): Sections 3.4.1, 3.6, 6, 8, 9.2 and 10.)

PLEASE READ THE FOLLOWING TERMS AND CONDITIONS CAREFULLY BEFORE ACCESSING THE MANAGED SERVICE. FOLLOWING ANY TRIAL, YOU WILL BE RESPONSIBLE FOR PAYMENT OF THE THEN-PREVAILING ON-DEMAND FEES FOR FURTHER USE OF THE SERVICE.

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1. DEFINITIONS.

1.1.   "Trial" means a limited right to use the Managed Service for the sole purpose of testing and evaluating the Managed Service in accordance with the terms and conditions of this Agreement.

1.2.   "User" means an individual who is authorized by Customer to use the Managed Service under Customer's account. Users may include, without limitation, Customer's or its Affiliates' employees, consultants, contractors and agents.

1.3.   "Improvements" means new features, functionality, enhancements, upgrades, error corrections, and bug fixes to the Managed Service made generally available by MemSQL at no additional charge.

1.4.   "On-Demand Service" means the Managed Service when provisioned, accessed, used, or ordered by Customer other than during any Trial.

1.5.   "Order Document" means an order on the MemSQL form of provisioning document that is submitted by or on behalf of Customer, and executed by or on behalf of the parties referencing this Agreement and that specifies the products and services ordered by Customer, as well as the specific terms and conditions, for that particular transaction.

1.6.   "Unit" means an abstract measurement that represents the combination of compute, memory, and storage resources utilized by Customer's Helios database instance(s). One Unit corresponds to a single Leaf Node. Fees (if any) are calculated based upon: Price Per Unit multiplied by number of Unit/Hours of use of such Units.

2. PROVISION OF SERVICES; SUPPORT.

2.1.   Provision of Services. The Managed Service is designed to permit Customer to access and operate the MemSQL database management system. The Managed Service is offered a) on a no-charge Trial basis, b) as an On-Demand Service, and c) on an annual or

longer basis for a fixed, non-cancelable, subscription Term (the "Subscription Service") as set forth herein and in Order Documents.

2.2.   Trial Terms. During any free-of-charge Trial, your use of MemSQL Helios is ineligible for any type of MemSQL maintenance or technical support ("Support"), except as may be provided in MemSQL's sole discretion. MemSQL shall have no obligation to make available a generally available ("GA") version of the Managed Service, or to make such GA versions available to you, nor are you under any obligation to use, or continue your use of, the Managed Service.

2.3.   Access to Service and Documentation. Subject to these terms and conditions, MemSQL hereby grants to Customer a worldwide, non-exclusive, non-transferable, non-sublicensable and limited right and/or license, to access and use the Managed Service and the documentation available at http://docs.memsql.com/ ("Documentation") solely for Customer's business purposes, pursuant to, and on the basis expressly set forth herein and/or in the applicable Order Document (if any).

2.4.   General Restrictions. Customer shall not (a) make the Managed Service available to, or use any Managed Service for the benefit of, anyone other than Customer and its Affiliates; (b) rent, sublicense, embed, re-sell, assign, distribute, time share or similarly exploit the Managed Service; (c) reverse engineer, copy, modify, adapt, or otherwise attempt to compromise or gain unauthorized access to the Managed Service or its related systems or networks, or engage in any act designed to circumvent any restriction set forth in this Agreement or inherent in the Managed Service, including but not limited to restrictions related to Maximum Capacity; (d) access the Managed Service, the Documentation, or MemSQL's Confidential Information to build a competitive product or service, or to conduct any competitive analysis, publish or share with any third party, any results of any technical evaluation or benchmark tests performed on the Managed service, or disclose Software or Managed Service features, errors or bugs to any third party without MemSQL's prior written consent ("Benchmarking"); (e) alter or remove, or permit any third party to alter or remove, any proprietary trademark or copyright markings incorporated in, marked on, or affixed to the Managed Service; (f) allow User credentials to be shared or used by more than one individual User (except that User authorization credentials may be reassigned to new Users replacing individuals who no longer use the Managed Service for any purpose, whether by termination of employment or other change in job status or function); or (g) access or use the Managed Service: (i) to send or store infringing, obscene, threatening, or otherwise unlawful material, including material violative of third-party privacy rights; (ii) in violation of applicable laws; (iii) to send or store material knowingly or intentionally containing software viruses, worms, Trojan horses, or other harmful computer code, files, or scripts; or (iv) in a manner that interferes with or disrupts the integrity or performance of the Managed Service (or the data contained therein).

2.5.   Administration of Customer's Account. Customer acknowledges that it retains sole administrative control over to whom it grants access to Customer Data hosted in the Managed Service. Customer may specify one or more Users as administrators (each an "Administrator") to manage its account, and MemSQL is entitled to rely on communications from such Administrators when servicing Customer's account. Customer's Administrators may have the ability to access, monitor, use, and/or export Customer Data.

2.6.   Customer Credentials and Security Configuration. Customer will ensure that all Users keep passwords and/or login credentials for the Managed Service strictly confidential, and Customer will be solely responsible for any and all actions taken by its Users or by anyone using Customer's accounts and passwords for the Managed Service. MemSQL is not responsible for the proper configuration of security settings associated with Customer's use of the Managed Service.

2.7.   Compliance. Customer is responsible for use of the Managed Service by its Users and for their compliance with this Agreement and the relevant terms set forth in MemSQL's User Terms of Service ("Terms of Use"). Customer is solely responsible for the accuracy, quality, legality, reliability, and appropriateness of all Customer Data. Customer shall ensure that it is entitled to transfer the relevant Customer Data to MemSQL so that MemSQL and its service providers may lawfully use, process, and transfer the Customer Data in accordance with this Agreement on Customer's behalf. Customer shall promptly notify MemSQL if it becomes aware of any unauthorized use or access to Customer's account or the Managed Service.

2.8.   Suspension; Termination. MemSQL may request that Customer suspend the account of any User who: (a) violates this Agreement or the Terms of Use; or (b) is using the Managed Service in a manner that MemSQL reasonably believes may cause a security risk, a disruption to others' use of the Managed Service, or liability for MemSQL. If Customer fails to promptly suspend or terminate such User's account, MemSQL reserves the right to do so. MemSQL may suspend or terminate Customer's account or database instance(s) if Customer or any User attempts to access or tamper with any Software that MemSQL pre-loads on Customer's Managed Service database instance, including without limitation, the MemSQL Engine, operating system, Kubernetes Cluster, Historical Monitoring Agents and Prometheus Monitoring system.

2.9.   Customer's Application(s); Use of Third Party Services. Customer may install or enable its proprietary and/or third party applications for use with the Managed Service, including services that utilize the MemSQL API in connection with Customer's use of the Managed Service ("Third Party Services"). Any acquisition and use by Customer or its Users of such Third Party Services is solely the responsibility of Customer and the applicable third party provider. Customer acknowledges that providers of such Third Party Services may have access to Customer Data

in connection with the interoperation and support of such Third Party Services with the Managed Service. To the extent Customer authorizes the access or transmission of Customer Data through a Third Party Service, MemSQL shall not be responsible for any use, disclosure, modification or deletion of such Customer Data or for any act or omission on the part of such third party provider or its service.

2.10.	Support. Only the On-Demand Service and Subscription Service include the right to use the Managed Service and to receive support of Customer's use pursuant to the then-current terms and conditions set forth at [MemSQL Support Terms and Conditions](). Unless expressly stated in an Order Document, support of the Managed Service is provided at the Standard (f/k/a Premier) Support tier. The Support terms and conditions are subject to change at MemSQL's discretion; however, MemSQL will not materially reduce the level of Support during a Subscription Term for which Fees have been paid.

3.	FEES AND PAYMENT.

3.1.	Fees. Customer will pay MemSQL the fees for the Managed Service on the basis set forth herein and/or in an Order Document ("Fees").

3.2.	On-Demand Pricing; Subscription Pricing. Customer acknowledges that all Fees are on a per Unit basis and based on the then-current published On-Demand rates, or the rates stated in an Order Document for the On-Demand Service ("On-Demand Pricing") unless and/or to the extent Customer has purchased a Subscription for such Unit via an accepted Order Document with MemSQL. For Subscriptions, pricing for a Unit shall be on the basis set forth in the applicable Order Document ("Subscription Pricing") and the Order Document will set forth the purchased capacity (i.e., the number of concurrently provisioned Units) covered by the Subscription (the "Licensed Capacity"). Customer acknowledges and agrees that if it concurrently provisions Units in excess of the Licensed Capacity, such usage will be subject to additional Fees based on On-Demand Pricing.

3.3.	Important Pricing Terms.
        3.3.1.	Promotional pricing, if any, offered to customers is valid on a limited, one-time per-Customer basis and is not renewable beyond the original Licensed Capacity and/or promotional pricing period, except with MemSQL's consent.
        3.3.2.	Customer will owe the Fees based on Subscription Pricing for the duration of the Subscription Term, even if the Unit(s) are not used/in use, de-provisioned, or if this Agreement is terminated.
        3.3.3.	Units provisioned pursuant to a subscription are nontransferable, and all Fees paid in connection with such Unit(s) are nonrefundable.
        3.3.4.	Upon expiration or termination of the Subscription Term, the Subscription Pricing will expire and On-Demand Pricing will thereafter apply to the Unit(s) then being used.
        3.3.5.	Customer acknowledges that in addition to being subject to Subscription Fees, Customer Data may be subject to data transfer fees into and out of MemSQL Helios at the same data transfer cost, if any, charged by third parties to MemSQL.

3.4.	Payment Terms; Credit Card Authorization.
        3.4.1.	All invoiced Fees are due and payable within thirty (30) days after the date of invoice. Renewal Fees for any renewal Subscription Term will be due and payable within thirty (30) days of expiration of the then-current term.
        3.4.2.	Customer authorizes MemSQL to either charge the credit card account designated by Customer or issue an invoice for payment on a monthly basis, in arrears. For Fees based on Subscription Pricing, except as otherwise specifically set forth on an Order Document, MemSQL will invoice Customer at the commencement of the Subscription. In the event of any late payment of any invoiced Fees, Customer authorizes MemSQL to charge the credit card account designated by Customer for any late fees or interest which may accrue. If Fees are not paid when due, Customer must discontinue use of the Managed Service and MemSQL may suspend Customer's access to the Managed Service without liability to Customer until such amounts are paid in full. Customer agrees to pay all costs associated with collection, including legal fees. All Order Documents (including multi-year Subscriptions with annual payment schedules) are non-cancellable and all amounts paid are non-refundable, unless otherwise expressly set forth herein.

3.5.   Future Features and Functionality. Customer agrees that any purchases under this Agreement are not contingent on the delivery of any future feature or functionality or dependent on any oral or written public or private comments made by MemSQL regarding future features or functionality. MemSQL may release Improvements and other features and functionality in its sole discretion.

3.6.   Fees are exclusive of taxes. Customer will pay any sales, use, value added, surtax and personal property taxes, duties, fees and other governmental assessments or charges arising out of this Agreement and the transactions contemplated herein, excluding taxes based on MemSQL's net income.

4.   OWNERSHIP, DATA BACKUP & RETENTION; DATA PRIVACY & SECURITY.

4.1.   MemSQL retains all right, title, interest, ownership, and intellectual property rights, including patents, copyrights, trade secrets, and trademarks, in and to the Managed Service and reserves all rights not expressly granted to Customer hereunder.

4.2.   Customer retains all right, title, interest, ownership, and intellectual property rights in and to its electronic data and information submitted by or for Customer to the Managed Service ("Customer Data"). Customer grants to MemSQL a worldwide, limited-term license solely to host, copy, transmit and display Customer Data as reasonably necessary for MemSQL to support Customer's use of the Managed Service, to ensure the security and administrate the Managed Service in accordance with this Agreement or as otherwise outlined in https://www.memsql.com/privacy-notice. MemSQL will maintain reasonable administrative, physical, and technical safeguards, consistent with generally prevailing industry standards, for protection of the security, confidentiality and integrity of Customer Data, as described in the Documentation for the Managed Service. Those safeguards will include, but will not be limited to, measures for preventing access, use, modification or disclosure of Customer Data by MemSQL personnel, except as permitted herein. Notwithstanding the foregoing, Customer agrees that MemSQL may collect, use and disclose quantitative data and metadata derived from the use of the Managed Service (i) for its own internal, statistical analysis, (ii) to develop and improve the Managed Service and (iii) to create and distribute reports and other materials regarding use of the Software.   For clarity, any such data collected, used, and disclosed will be in anonymized aggregate form only and shall not identify Customer or its Users, or disclose any Customer Data.

4.3.   Sensitive Information. Customer agrees that, absent prior written agreement with MemSQL, it shall not use the Managed Service to store or process personal information subject to special regulatory or contractual handling requirements (e.g., Payment Card Industry Data Security Standards, the Gramm-Leach-Bliley Act, the Health Insurance Portability and Accountability Act, and any similar data protection laws) including without limitation: credit card information, credit card numbers and magnetic stripe information, social security numbers, driver's license numbers, passport numbers, government issued identification numbers, health-related information, biometric data, financial account information, personally identifiable information collected from children under the age of 13 or from online services directed toward children, and real time geo-location data which can identify an individual, or information deemed "sensitive" under applicable law (such as racial or ethnic origin, political opinions, or religious or philosophical beliefs) (collectively, "Sensitive Information").

4.4.   Backup/Archival Copies of Customer Data. MemSQL does not provide an archiving service for Helios. MemSQL agrees only that it will not intentionally delete any Customer Data from the Managed Service so long as Customer is in compliance with the terms of this Agreement, the applicable Order Document(s), and/or until the termination of Customer's applicable subscription. Unless Customer Data is extracted by Customer prior to de-provisioning any Unit, expiration of the applicable Subscription Term or termination of this Agreement, Customer will thereafter have no access to the Customer Data, and MemSQL may delete such data at any time. MemSQL expressly disclaims all other obligations with respect to storage of Customer Data.

5.   CONFIDENTIALITY.

5.1.   Definition of Confidential Information. "Confidential Information" means all information disclosed by a party ("Disclosing Party") to the other party ("Receiving Party"), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure. Customer's Confidential Information includes Customer Data; MemSQL Confidential Information includes the Software and Services; and Confidential Information of each party includes the terms and conditions of this Agreement and all Order Documents (including pricing), as well as business and marketing plans, technology and technical information, product plans and designs, and business processes disclosed by such party. However, Confidential Information does not include any information that (i) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party, (ii) was known to the Receiving Party prior to its

disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party, (iii) is received from a third party without breach of any obligation owed to the Disclosing Party, or (iv) was independently developed by the Receiving Party.

5.2.   The receiving party will use the same degree of care that it uses to protect the confidentiality of its own confidential information of like kind (but not less than reasonable care) to (i) not use any confidential information of the disclosing party for any purpose outside the scope of this agreement and (ii) except as otherwise authorized by the disclosing party in writing, limit access to confidential information of the disclosing party to those of its and its affiliates' employees and contractors who need that access for purposes consistent with this agreement and who have signed confidentiality agreements with the receiving party containing protections not materially less protective of the confidential information than those herein. Neither party will disclose the terms of this agreement or any Order Documents to any third-party other than its affiliates, legal counsel, and accountants without the other party's prior written consent, provided that a party that makes any such disclosure to its affiliate, legal counsel or accountants will remain responsible for such affiliate's, legal counsel's, or accountant's compliance with this "confidentiality" section.

5.3.   Compelled Disclosure. The receiving party may disclose confidential information of the disclosing party to the extent compelled by law to do so, provided the receiving party gives the disclosing party prior notice of the compelled disclosure (to the extent legally permitted) and reasonable assistance, at the disclosing party's cost, if the disclosing party wishes to contest the disclosure. If the receiving party is compelled by law to disclose the disclosing party's confidential information as part of a civil proceeding to which the disclosing party is a party, and the disclosing party is not contesting the disclosure, the disclosing party will reimburse the receiving party for its reasonable cost of complying and providing secure access to that confidential information.

6.   **REPRESENTATIONS AND WARRANTIES**.
6.1.   Mutual Representations and Warranties. Each Party represents and warrants to the other that: (i) it is a corporation lawfully incorporated and validly existing pursuant to the laws of its place of incorporation; (ii) it has all requisite power and authority, corporate or otherwise, to execute, deliver and perform its obligations under this Agreement; and (iii) this Agreement constitutes its legal, valid and binding obligations and may be enforced against it.

6.2.   Limited MemSQL Warranty; Remedies. Subject to the MemSQL Support Terms & Conditions (www.memsql.com/asseta/contracts/memsql-support-terms-and-conditions.pdf), MemSQL warrants that the Software, when used as permitted hereunder, will conform to the applicable Documentation, and that Services will be provided in a professional manner consistent with industry standards.

6.3.   Limitations; Remedy. MemSQL will have no warranty obligation under Section 6.2 for Customer's misuse or failure to use the Software or any Deliverable in accordance with its Documentation or this Agreement. Customer's sole and exclusive remedy, and MemSQL's sole and exclusive obligation, for breach of warranty will be (i) during the thirty (30) day period following initial Delivery of the Software under an Order Document, MemSQL's correction of the program errors that cause the breach of warranty, or if MemSQL cannot substantially correct such breach in a commercially reasonable manner, a refund of the fees paid for the nonconforming Software (ii) during the remainder of the relevant Subscription Term, MemSQL's delivery of Support with respect to any such program errors. In the event of a refund remedy, Customer's licenses and right to use the Software or receive Services will end. In the event of any noticed breach of warranty with respect to Services, MemSQL's sole and exclusive obligation shall be the re-performance of the deficient Services.

6.4   Disclaimer. THIS SECTION 6 IS A LIMITED WARRANTY AND, EXCEPT EXPRESSLY AS SET FORTH IN SECTION 6.2, THE SOFTWARE, INCLUDING WITHOUT LIMITATION THE THIRD-PARTY CODE, AND ALL SERVICES ARE PROVIDED "AS IS". MEMSQL MAKES NO OTHER WARRANTIES OR REPRESENTATIONS, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT.

7.   **CUSTOMER'S INTENDED USE**. THE SOFTWARE IS DESIGNED FOR GENERAL PURPOSE USE AND IS NOT INTENDED FOR USE IN OR WITH ANY NUCLEAR, AVIATION, MASS TRANSIT, MEDICAL, OR OTHER INHERENTLY DANGEROUS APPLICATIONS AND MEMSQL DISCLAIMS LIABILITY FOR ANY DAMAGES CAUSED BY ANY SUCH USE OF THE SOFTWARE. IT IS CUSTOMER'S RESPONSIBILITY TO TAKE ALL APPROPRIATE FAIL-SAFE, BACKUP, REDUNDANCY, AND OTHER MEASURES TO ENSURE THE SAFE USE OF ITS APPLICATIONS AND ARCHIVING OF CUSTOMER DATA.

8.   INDEMNIFICATION.

8.1   By MemSQL. MemSQL will defend against any action against Customer brought by a third party to the extent the action is based on a claim that the Software infringes a third party's patent, copyright or trademark (a "Claim") and indemnify Customer from the damages, liabilities, costs and expenses (including reasonable attorneys' fees) awarded against Customer or agreed in settlement by Customer resulting from such Claim. If your use of the Software is (or in MemSQL's opinion likely to be) enjoined, then MemSQL may, at its own expense and at its option: (i) substitute substantially similar functionality for the Software which renders it non-infringing; (ii) procure for Customer the right to continue to use the Software; or if (i) and (ii) are not commercially reasonable, terminate this Agreement and refund Customer any prepaid, unused (pro-rated) Fees for the duration of the then-current Subscription Term. The foregoing obligations of MemSQL will not apply: (a) if the Software is modified by any party other than MemSQL, but solely to the extent the alleged infringement is caused by such modification; (b) if the Software is used in combination with other products or processes not provided or authorized by MemSQL, but solely to the extent the alleged infringement is caused by such combination; (c) use of any version or release of Software other than the most current version or release made available to Customer by MemSQL, if its use would have avoided the infringement; (d) any unauthorized use of the Software.   THIS SECTION 8.1 SETS FORTH MEMSQL'S SOLE LIABILITY AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY WITH RESPECT TO ANY CLAIM OF INTELLECTUAL PROPERTY INFRINGEMENT.

8.2   By Customer. Customer will indemnify and hold MemSQL and its suppliers harmless against any claims, liabilities, costs, and expenses (including reasonable attorneys' fees) that MemSQL or its suppliers may incur as a result of a third-party claim arising from or related to Customer Data, or misuse or unauthorized use of the Software by Customer or any User.

8.3   Conditions. All defense and indemnity obligations under Sections 8.1 and 8.2 are conditioned on the indemnitee (a) giving the indemnitor written notice of the relevant claim within thirty (30) days after the indemnitee receives notice of the Claim (or sooner if required by applicable law); (b) reasonably cooperating with the indemnitor, at the indemnitor's expense, in the defense of the claim; and (c) giving the indemnitor sole control of the defense and any settlement negotiations. The indemnitee may participate in the defense at its expense.

9.   LIMITATION OF LIABILITY.

9.1.   NOTWITHSTANDING ANYTHING TO THE CONTRARY AND TO THE EXTENT PERMITTED BY LAW, EXCEPT FOR (1) PAYMENTS TO A THIRD PARTY ARISING FROM A PARTY'S OBLIGATIONS UNDER SECTION 8 (INDEMNIFICATION); (2) BREACH BY A PARTY OF SECTION 5 (CONFIDENTIALITY), AND (3) INFRINGEMENT BY A PARTY OF THE OTHER PARTY'S INTELLECTUAL PROPERTY RIGHTS (COLLECTIVELY EXCLUSIONS (1)-(3) ARE REFERRED TO AS THE "EXCLUDED CLAIMS"), NEITHER MEMSQL NOR CUSTOMER SHALL BE LIABLE TO THE OTHER OR ANY THIRD PARTY FOR LOST PROFITS (WHETHER DIRECT OR INDIRECT) OR LOSS OF DATA, COVER, SUBSTITUTE GOODS OR SERVICES, OR FOR INCIDENTAL, CONSEQUENTIAL, PUNITIVE, SPECIAL OR EXEMPLARY DAMAGES (INCLUDING DAMAGE TO BUSINESS, REPUTATION OR GOODWILL), OR INDIRECT DAMAGES OF ANY TYPE HOWEVER CAUSED, WHETHER BY BREACH OF WARRANTY, BREACH OF CONTRACT, IN TORT (INCLUDING NEGLIGENCE) OR ANY OTHER LEGAL OR EQUITABLE CAUSE OF ACTION EVEN IF SUCH PARTY HAS BEEN ADVISED OF SUCH DAMAGES IN ADVANCE OR IF SUCH DAMAGES WERE FORESEEABLE. THE FOREGOING EXCLUSIONS SHALL NOT APPLY TO:

9.2.   LIMITATIONS ON DIRECT DAMAGES. EXCEPT FOR ANY EXCLUDED CLAIMS AND ANY DAMAGES THAT CANNOT BE LIMITED UNDER APPLICABLE LAW, IN NO EVENT WILL EITHER PARTY'S TOTAL AGGREGATE LIABILITY ARISING FROM OR RELATED TO THIS AGREEMENT, UNDER ANY OTHER LEGAL THEORY, EXCEED AN AMOUNT EQUAL TO THE TOTAL AMOUNT OF FEES PAID OR PAYABLE BY CUSTOMER TO MEMSQL UNDER THIS AGREEMENT DURING THE TWELVE MONTHS PRECEDING THE CLAIM.

9.3.   NOTHING HEREIN SHALL BE INTENDED TO LIMIT A PARTY'S LIABILITY IN AN ACTION IN TORT (SEPARATE AND DISTINCT FROM A CAUSE OF ACTION FOR BREACH OF THIS AGREEMENT) FOR THE PARTY'S GROSS NEGLIGENCE OR WILFUL MISCONDUCT.

10. TERMINATION; SURVIVAL.

10.1. Customer may terminate this Agreement by discontinuing its use of the Managed Service and providing written notice to MemSQL. MemSQL may terminate this Agreement and Customer's right to use the Managed Service at any time if Customer fails to comply with any one or more terms of this Agreement, in which case Customer shall immediately discontinue any access or use of the Managed Service.

10.2. Upon any termination: (i) all rights and licenses granted to Customer herein will immediately terminate; and (ii) Customer must promptly discontinue access to the Managed Service. Sections 2.4, 3, 4, 5, 6, 8, 9.2 and 10 shall survive any termination hereof.

11. MISCELLANEOUS.

11.1. Choice of Law; Jurisdiction. Excluding conflict of laws rules, this Agreement shall be governed by and construed under: (a) the laws of the State of California, U.S. if you are located in North or South America, (b) the laws of Singapore if you are located in Asia or Australia, or (c) the laws of England and Wales if you located outside of North or South America, Asia, and Australia. All disputes arising out of or in relation to this Agreement shall be submitted to the exclusive jurisdiction of the courts of: (i) San Francisco, California when the laws of California apply, (ii) Singapore when the laws of Singapore apply, or (iii) London when the laws of England and Wales apply. Nothing in this section shall restrict MemSQL's right to bring an action (including for example a motion for injunctive relief) against you in the jurisdiction where your place of business is located. The United Nations Convention on Contracts for the International Sale of Goods and the Uniform Computer Information Transactions Act, as currently enacted by any jurisdiction or as may be codified or amended from time to time by any jurisdiction, do not apply to this Agreement.

11.2. Independent Contractors. The parties are independent contractors. No agency, partnership, franchise, joint venture, or employment relationship is intended or created by this Agreement. Neither party has the power or authority to create or assume any obligation, or make any representations or warranties, on behalf of the other party.

11.3. Export; Restricted Rights. The Managed Service, including technical data/documentation, may be subject to U.S. export control laws, and may be further subject to export or import regulations in other countries. Customer agrees to comply with all such regulations and acknowledges that it has the responsibility to obtain licenses to import and re-export the Managed Service (or otherwise provide access thereto) outside the USA. The Managed Service and documentation may not be accessed, downloaded, distributed, or otherwise exported or re-exported (i) into, or to a national or resident of, Cuba, Iran, North Korea, Sudan, Syria, the Crimea region of the Ukraine or any country to which the U.S. at any time has embargoed goods or trade restrictions; or (ii) to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Denied Persons, Denied Entities, and Unverified List. The Managed Service and related documentation are "Commercial Items" as that term is defined at 48 C.F.R. Section 2.101, consisting of "Commercial Computer Software" and "Commercial Computer Software Documentation," as such terms are used in 48 C.F.R. Section 12.212 or 48 C.F.R. Section 227.7202, as applicable.

11.4. Assignment. This Agreement will bind and inure to the benefit of each party's permitted successors and assigns. MemSQL may assign this Agreement to any affiliate or in connection with a merger, reorganization, acquisition, or other transfer of all or substantially all of MemSQL's assets or voting securities. Customer may not assign or transfer this Agreement, in whole or in part, without MemSQL's written consent except that Customer may assign its rights and obligations under this Agreement, in whole but not in part, without MemSQL's written consent in connection with any merger, consolidation, sale of all or substantially all of Customer's assets or voting stock, or any other similar transaction provided that: (a) the assignee is not a direct competitor of MemSQL; (b) Customer provides prompt written notice of such assignment to MemSQL; (c) the assignee is capable of fully performing Customer's obligations under this Agreement; and (d) the assignee agrees to be bound by the terms and conditions of this Agreement. Any attempt to transfer or assign this Agreement without such written consent will be null and void.

11.5. Publicity. MemSQL may, in conformity with Customer's trademark usage guidelines, use Customer's name and logo in MemSQL's sales and marketing materials, including in business presentations, Customer lists, and on websites. Neither party will issue a press release regarding this Agreement without the other party's prior written consent. Neither party will disclose the terms of this Agreement to any third party, except as required by law.

11.6. Notices. Notices to MemSQL must be in writing delivered by overnight courier service to 534 4th Street, San Francisco CA 94107, USA, attention Legal Department.

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11.7.   Force Majeure. If a party's performance hereunder is prevented, hindered, or delayed by causes outside of the reasonable control of the affected party, the affected party, upon giving prompt notice to the other party, will be excused from performance for the duration of the condition, provided that the affected party uses commercially reasonable efforts to mitigate the effects.

11.8.   Attorneys' Fees and Costs. The prevailing party in any action to enforce this Agreement will be entitled to recover its attorneys' fees and costs in connection with such action.

11.9.   Compliance with Law; Export. Each party will comply with all applicable laws, regulations, and orders of any governmental authority of competent jurisdiction in its performance under this Agreement, including but not limited to those applicable to data collection and the privacy and security of personal information, including trans-border data transfers and data breach notification requirements as required of each party by law. You acknowledge that the Software is subject to United States export control and economic sanctions laws, regulations, and requirements and to import laws, regulations, and requirements of certain foreign governments. You shall not, and shall not allow any third party to, export from the United States or allow the re-export or re-transfer of any part of the Software: (a) to any country subject to export control embargo or economic sanctions implemented by any agency of the U.S. Government; (b) to any person or entity on any of the U.S. Government's Lists of Parties of Concern (https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern); (c) to any known end-user or for any known end-use related to the proliferation of nuclear, chemical or biological weapons or missiles, without first obtaining any export license or other approval that may be required by any U.S. Government agency having jurisdiction with respect to the transaction; or (d) otherwise in violation of any export or import laws, regulations or requirements of any United States or foreign agency or authority.

11.10.   Government End-Users. The Software is commercial computer software. If the User or licensee of the Software is an agency, department, or other entity of the United States Government, the use, duplication, reproduction, release, modification, disclosure, or transfer of the software, or Documentation, including technical data and manuals, is restricted by a license agreement or by the terms of this Agreement in accordance with Federal Acquisition Regulation 12.212 for civilian purposes and Defense Federal Acquisition Regulation Supplement 227.7202 for military purposes. The Software was developed fully at private expense. All other use is prohibited.

11.11.   Supremacy; Modification. This Agreement will prevail over any written instrument submitted by Customer; the terms of any purchase order, acknowledgement, or similar document submitted by Customer to MemSQL will have no effect. If the express terms of an Order Document conflict with this Agreement, the terms on the Order Document will prevail, but only with respect to that Order Document. This Agreement cannot be varied or supplemented by course of dealing or by usage of trade.   All modifications or amendments to this Agreement must be in writing and signed by both parties, except that subsequent renewals and purchases of additional Licensed Capacity can be procured by payment against an issued invoice as set forth in Section 3 ("Fees and Payment") above.

11.12.   No Third Party Beneficiaries. This Agreement is not intended and shall not be construed to give any third party any interest or rights with respect to or in connection with any agreement or provision herein, except as expressly provided for in this Agreement.

11.13.   Entire Agreement; Severability; Waiver. This Agreement (inclusive of any Order Document) sets forth the complete and final agreement of the parties concerning the use of the Managed Service, and supersedes, replaces all prior agreements, written and oral, between them concerning the subject matter hereof. If a term of` this Agreement to be invalid or unenforceable, the remaining provisions will continue in full force and effect. A party's consent to, or waiver of, enforcement of this Agreement on one occasion will not be deemed a waiver of any other provision or such provision on any other occasion.