

MEMVERGE END USER LICENSE AGREEMENT

This MemVerge License Agreement (the “**Agreement**”) is a binding contract by and between MemVerge, Inc. (“**MemVerge**”), a Delaware corporation with a place of business at 1525 McCarthy Blvd., Suite 218, Milpitas, CA 95035, and the individual or entity who downloads, installs or otherwise uses the Software (“**Licensee**”). The effective date of the Agreement (the “**Effective Date**”) will be the date that the Licensee downloads, installs or otherwise first uses the Software.

PLEASE READ CAREFULLY: UNLESS YOU AS THE LICENSEE HAVE ANOTHER VALID AGREEMENT WITH MEMVERGE APPLICABLE TO THIS SOFTWARE, THE FOLLOWING TERMS WILL GOVERN THIS LICENSE. MEMVERGE PROVIDES THE SOFTWARE SOLELY ON THE TERMS AND CONDITIONS SET FORTH IN THIS AGREEMENT AND ON THE CONDITION THAT LICENSEE ACCEPTS AND COMPLIES WITH THEM. BY CLICKING "ACCEPT", LICENSEE (A) ACCEPTS THIS AGREEMENT AND AGREES THAT LICENSEE IS LEGALLY BOUND BY ITS TERMS; AND (B) REPRESENTS AND WARRANTS THAT: (I) IF AN INDIVIDUAL, LICENSEE IS 18 YEARS OF AGE OR OLDER/OF LEGAL AGE TO ENTER INTO A BINDING AGREEMENT; AND (II) LICENSEE HAS THE RIGHT, POWER, AND AUTHORITY TO ENTER INTO THIS AGREEMENT AND BIND LICENSEE TO ITS TERMS. IF LICENSEE DOES NOT AGREE TO THE TERMS OF THIS AGREEMENT, MEMVERGE WILL NOT AND DOES NOT **LICENSE** THE SOFTWARE TO LICENSEE AND YOU MUST NOT INSTALL THE SOFTWARE OR DOCUMENTATION. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT OR LICENSEE'S ACCEPTANCE OF THE TERMS AND CONDITIONS OF THIS AGREEMENT, NO **LICENSE** IS GRANTED (WHETHER EXPRESSLY, BY IMPLICATION, OR OTHERWISE) UNDER THIS AGREEMENT, AND THIS AGREEMENT EXPRESSLY EXCLUDES ANY RIGHT, CONCERNING ANY SOFTWARE THAT LICENSEE DID NOT ACQUIRE LAWFULLY OR THAT IS NOT A LEGITIMATE, AUTHORIZED COPY OF MEMVERGE'S SOFTWARE. ADDITIONAL TERMS, INCLUDING THOSE REGARDING LICENSE FEES, TERM AND MAX TERABYTES, HAVE BEEN AGREED TO BY THE PARTIES AND THOSE ADDITIONAL TERMS ARE A PART OF THIS LICENSE.

1. Definitions.

- 1.1 “**Documentation**” means the technical and functional documentation relating to the Software, as may be amended from time to time by MemVerge.
- 1.2 “**DRAM**” means dynamic random access memory.
- 1.3 “**Intellectual Property Rights**” means copyrights, patents, trademarks, service marks, design rights, trade secrets, and other intellectual property rights worldwide.
- 1.4 “**Max Terabytes**” means the total number of terabytes of system memory (including DRAM and PMEM) under management on a Server or Workstation for which Licensee is authorized to use the Software.
- 1.5 “**PMEM**” means persistent memory.
- 1.6 “**Servers**” means the servers on which the Software is installed and operated, and which meets any technical or compatibility requirements provided by MemVerge.
- 1.7 “**Software**” means the MemVerge software provides a software virtualization layer that integrates with existing applications to increase memory and data I/O speed and any Updates thereto.
- 1.8 “**Term**” means the period of time that Licensee is authorized to use the Software.
- 1.9 “**Updates**” means a subsequent release or version of the Software containing minor functional enhancements, extensions, error corrections or fixes, but does not include any release, option or future product which MemVerge licenses separately or for which MemVerge charges an additional fee. Updates are included as part of maintenance and support services. In the future some Updates may include enhancements made available

from third parties. If such third parties require additional license terms, Licensee would have to agree to those terms before utilizing the Update.

1.10 “**Workstations**” means the workstations on which the Software is installed and operated and which meets any technical or compatibility requirements provided by MemVerge.

2. License.

2.1 **Grant of License.** Subject to the terms and conditions of this Agreement, any additional terms agreed to and payment of the license fee charged for use of the Software, MemVerge hereby grants to Licensee a non-exclusive, non-transferable and non-sublicensable license during the Term (i) to use, to perform and display the Software, on Servers or Workstations with the Max Terabytes, in object code form only and for Licensee’s internal business purposes; and (ii) to make one copy of the Software in object code form only and solely for use in a non-production or testing environment and solely for Licensee’s internal business purposes. Licensee shall not copy the Software except to make a reasonable number of copies for the purposes of security back-up or disaster recovery. Whenever Licensee is permitted to copy or reproduce all or any part of the Software, Licensee shall reproduce all titles, trademark symbols, copyright symbols and legends, and other proprietary markings.

2.2 **Restrictions.** Licensee shall use the Software only on the Servers and Workstations unless otherwise stated in this Agreement. Licensee shall not transfer, sell, license, sublicense, outsource, rent or lease the Software or use the Software for service bureau or other third-party use. Licensee shall not make or permit the making of any modifications, additions or enhancements to the Software, or cause or permit the disassembly, decompilation or reverse engineering of the Software in whole or in part except where such restriction is prohibited by applicable law.

2.3 **Audit.** MemVerge and/or its designated agent may audit Licensee’s use of the Software, upon notice to Licensee, for purposes of ensuring compliance with this Agreement. Any such audit shall be conducted during regular business hours, not more than once per year (unless the audit reveals an underpayment in which case MemVerge and/or its designated agent may perform another audit within the same year) and shall not unreasonably interfere with Licensee’s business activities. If an audit reveals that Licensee has exceeded the scope of its license (i) Licensee shall pay for any such excess use together with interest thereon at a rate of 1.5% per month, or the highest rate allowed by law, whichever is less; and (ii) if Licensee has exceeded the scope of its license by 5% or more (e.g. Licensee’s use on Servers and Workstations exceeds the authorized Max Terabytes), Licensee shall pay the reasonable costs and expenses of such audit.

2.4 **Reservation of Rights.** Licensee acknowledges and accepts that, as between the parties, all right, title and interest in and to the Software and all Intellectual Property Rights associated with and in the Software shall at all times remain vested in MemVerge and its licensors, and Licensee shall acquire no rights, express or implied, in the Software, other than the license granted in this Agreement. Licensee shall not remove or alter any Intellectual Property Right or proprietary notice, title, trademark symbols, copyright symbols and legends and other proprietary marks on the Software or on any related material.

2.5 **Maintenance and Support.** Subject to Licensee’s payment of applicable license fees, MemVerge shall provide maintenance and support services for the Software according to the MemVerge Support Offerings which shall be included as part of the purchase of the Software.

3. Open Source Software. Licensee agrees that any software or materials which may be made available by MemVerge, or otherwise obtained or used by Licensee, subject to an open source license or other open source terms (“**Open Source Software**”) shall be and shall remain subject to the terms and conditions of the original providers and are not part of the Software. Licensee shall not use or combine the Open Source Software with the Software or other items in any manner that would subject the Software source code to be made available under open source terms and conditions.
4. Warranty.
 - 4.1 **Limited Warranty.** MemVerge warrants to Licensee that the Software and Open Source Software will operate in substantial conformance with the Documentation for a period of 90 days after receipt of the original Software. MemVerge’s entire liability and Licensee’s exclusive remedy under this warranty shall be replacement of the defective Software that does not meet MemVerge’s limited warranty and that is returned to MemVerge with a copy of Licensee’s receipt. Notwithstanding the foregoing, if MemVerge is unable to repair or replace defective Software during the 90-day warranty period, MemVerge may, at its sole option, terminate this Agreement and refund the amounts received from Licensee. This limited warranty is void if failure of the Software has resulted from accident, abuse, or misapplication. Any replacements will be warranted for the remainder of the original warranty period or 30 days, whichever is longer.
 - 4.2 **Disclaimer; Limitation of Liability.**
 - 4.2.1 EXCEPT AS EXPRESSLY SET FORTH IN SECTION 4.1 ABOVE, MEMVERGE MAKES NO WARRANTIES WHETHER EXPRESS OR IMPLIED AND, TO THE EXTENT PERMITTED BY APPLICABLE LAW, DISCLAIMS ANY AND ALL OTHER WARRANTIES WITH RESPECT TO ANY SOFTWARE, SERVICES OR PROFESSIONAL SERVICES, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT.
 - 4.2.2 EXCEPT FOR LICENSEE’S BREACH OF SECTION 2.1 AND/OR 2.2 AND FOR EITHER PARTY’S BREACH OF THE CONFIDENTIALITY OBLIGATIONS OF SECTION 6, (I) IN NO EVENT SHALL EITHER PARTY OR ITS SUPPLIERS BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES; LOSS OF USE, DATA, OR PROFITS; OR BUSINESS INTERRUPTION) HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY, WHETHER IN CONTRACT, STRICT LIABILITY, OR TORT (INCLUDING NEGLIGENCE OR OTHERWISE) ARISING IN ANY WAY OUT OF THE SERVICES, PROFESSIONAL SERVICES, OR THE SOFTWARE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGE; AND (II) MEMVERGE’S ENTIRE LIABILITY UNDER OR ARISING OUT OF THIS AGREEMENT SHALL NOT EXCEED THE TOTAL AMOUNT PAID TO MEMVERGE BY LICENSEE. SOME 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 (Audit), 2.4 (Reservation of Rights), 3 (Open Source Software), 4 (Disclaimer; Limitation of Liability), 5.3 (Effect of Termination), 5.4 (Survival), 6 (Confidentiality), and 7 (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. Miscellaneous.

- 8.1 **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.
- 8.2 **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.
- 8.3 **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.
- 8.4 **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.
- 8.5 **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.
- 8.6 **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.
- 8.7 **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.

8.8 **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.