

## EVALUATION AGREEMENT

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### 1. DEFINITIONS

- a. **“Derivative Work”** shall mean a new or modified work that is based on or derived from a preexisting work, including, without limitation, a work that, in the absence of a license, would infringe the copyright in such preexisting work or that uses trade secrets or other proprietary information with respect to such preexisting work.
- b. **“Materials”** shall mean any software (in object code or source code form) made available by Licensor to Licensee under the terms of this Agreement, any related materials and documentation therefor; and any modifications, error corrections, bug fixes, new releases or other updates thereto that may be provided hereunder by Licensor to Licensee.

### 2. RIGHTS IN MATERIALS

- a. **Grant of Rights.** Subject to the terms and conditions of this Agreement, Licensor hereby grants to Licensee a limited, non-exclusive, personal, nontransferable, nonsublicensable, royalty-free, revocable right to use, during the term of this Agreement and in accordance with the documentation made available by Licensor, a single copy of the Materials, solely in a non-commercial and non-production capacity for Licensee’s own internal testing and evaluation of the Materials. Licensor reserves all rights not expressly granted to Licensee in this Agreement. Except for the limited rights and licenses expressly granted under this Agreement, nothing in this Agreement grants, by implication, waiver, estoppel, or otherwise, to Licensee or any third party any intellectual property rights or other right, title, or interest in or to the Materials.
- b. **Use Restrictions.** Licensee shall not, without the prior written consent of Licensor: (i) copy all or any portion of the Materials; (ii) decompile, disassemble or otherwise reverse engineer (except to the extent expressly permitted by applicable law, notwithstanding a contractual obligation to the contrary) the Materials or any portion thereof, or determine or attempt to determine any source code, algorithms, methods or techniques embodied in the Materials or any portion thereof; (iii) modify, translate or create any Derivative Works based upon the Materials; (iv) distribute, disclose, market, rent, lease, assign, sublicense, pledge or otherwise transfer the Materials, in whole or in part, to any third party, including on or in connection with the internet or any time-sharing, service bureau, software as a service, cloud, or other technology or service; (v) remove or alter any copyright, trademark, trade name or other proprietary notices, legends, symbols or labels appearing on or in copies of the Materials; (vi) perform, or release the results of, benchmark tests, competitive analysis or other comparisons of the Materials with other software or

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Licensee is responsible and liable for all uses of the Materials resulting from access provided by Licensee, directly or indirectly, whether such access or use is permitted by or in violation of this Agreement. Licensee is solely responsible for taking appropriate measures to back up Licensee's systems and data and all other necessary measures to prevent any file or data loss.

### **4. SUPPORT**

Licensor is under no obligation to support, maintain or provide any other services relating to the Materials in any way, nor to provide any modification, error correction, bug fix, new release or other update (each an “**Update**”) to or for the Materials. In the event Licensor, in its sole discretion, supplies any Update to Licensee, such Update shall be deemed Materials hereunder and shall be subject to the terms and conditions of this Agreement.

### **5. PROPRIETARY RIGHTS**

As between Licensor and Licensee, Licensor retains all right, title and interest, including, without limitation, all patent rights, copyrights, trademarks and trade secrets, in and to the Materials and any portion thereof, including, without limitation, any copy or Derivative Work of the Materials or any portion thereof and any Update thereto. Licensee agrees to take any action reasonably requested by Licensor to evidence, maintain, enforce or defend the foregoing. Licensee shall not take any action to jeopardize, limit or interfere in any manner with Licensor's ownership of and rights with respect to the Materials, or any Derivative Work or Update. Licensee shall have only those rights in or to the Materials and any Derivative Work or Update granted to it pursuant to this Agreement.

### **6. PROPRIETARY INFORMATION**

**a. Proprietary Information.** Licensee acknowledges that, in the course of using the Materials and exercising its rights under this Agreement, it may obtain confidential information relating to the Materials and/or to Licensor (“**Proprietary Information**”). Such Proprietary Information shall, as between Licensee and Licensor, belong solely to Licensor and shall include, without limitation, the Materials (including any and all Derivative Works and Updates), trade secrets, know-how, inventions (whether or not patentable), techniques, processes, programs, ideas, algorithms, formulas, schematics, testing procedures, software design and architecture, computer code, internal documentation, design and functional specifications, product requirements, problem

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**b. Use and Disclosure Restrictions.** Licensee hereby acknowledges and agrees that the Materials constitute and contain valuable Proprietary Information and trade secrets of Licensor, and embody substantial creative efforts and confidential information, ideas and expressions. Licensee agrees (i) to protect Licensor's Proprietary Information from unauthorized dissemination and use; (ii) to use Licensor's Proprietary Information only in connection with the exercise of Licensee's rights hereunder; (iii) not to disclose any Proprietary Information, or any part or parts thereof, to any of its employees, agents or contractors except to those full-time employees of Licensee who (A) have a legitimate need to use the Materials in connection with Licensee's exercise of the rights hereunder, (B) are aware of the confidentiality obligations imposed by this Section 6 and (C) have entered into written confidentiality agreements with Licensee which require such employees to comply with confidentiality obligations no less restrictive than the requirements of this Section 6; (iv) not to disclose or otherwise provide to any third party, without the prior written consent of Licensor, any Proprietary Information or any data or other information produced, obtained or created by Licensee in connection with Licensee's evaluation of the Materials; and (v) to undertake whatever action is necessary (or authorize Licensor to do so in the name of Licensee) to prevent or remedy any breach of Licensee's confidentiality obligations herein set forth or any other unauthorized disclosure of any Proprietary Information by its current or former employees, agents or contractors.

**c. Exclusions.** The foregoing restrictions on disclosure and use shall not apply with respect to any Proprietary Information that: (i) was or becomes publicly known through no fault of Licensee; (ii) was known by Licensee before receipt from Licensor, as evidenced by Licensee's contemporaneous written records; (iii) becomes known to Licensee without confidential or proprietary restriction from a source other than Licensor that does not owe a duty of confidentiality to Licensor with respect to such Proprietary Information; or (iv) is independently developed by Licensee without the use of the Proprietary Information of Licensor. In addition, Licensee may use or disclose Proprietary Information to the extent Licensee is legally compelled to disclose such Proprietary Information, provided, however, that prior to any such compelled disclosure, Licensee shall, to the extent allowed by applicable law, cooperate fully with Licensor in protecting against any such disclosure and/or obtaining a protective order narrowing the scope of such disclosure and/or use of the Proprietary Information.

**d. Equitable Relief.** Licensee acknowledges and agrees that, due to the unique nature of Licensor's Proprietary Information, there can be no adequate remedy at law to compensate Licensor for the breach of any provision of this Section 6; that any such breach shall allow Licensee or third parties to compete unfairly with Licensor resulting in irreparable harm to Licensor that would be difficult to measure; and, therefore, that upon any such breach or threat thereof, Licensor shall be entitled to injunctive and other appropriate equitable relief (without the necessity of proving actual damages), in addition to whatever remedies it may have at law.

## **7. NO WARRANTY**

THE MATERIALS ARE PROVIDED "AS IS" AND LICENSOR DISCLAIMS ALL WARRANTIES AND REPRESENTATIONS, WHETHER EXPRESS OR IMPLIED, RELATING TO THE MATERIALS, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF DESIGN, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NONINFRINGEMENT OF THIRD PARTY RIGHTS, OR WARRANTIES ARISING FROM A COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE OR TRADE PRACTICE.

## 8. LIMITATION OF LIABILITY

TO THE EXTENT ALLOWED BY APPLICABLE LAW AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY OR LIMITATION OF LIABILITY: (a) IN NO EVENT SHALL LICENSOR OR ITS SUPPLIERS BE LIABLE FOR ANY DAMAGES FOR LOSS OF PROFITS, LOSS OF BUSINESS, LOSS OF USE OR DATA, OR INTERRUPTION OF BUSINESS, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY KIND OR OTHER ECONOMIC LOSS ARISING FROM OR RELATING TO THIS AGREEMENT, EVEN IF LICENSOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, HOWEVER CAUSED, AND (b) NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, LICENSOR'S ENTIRE LIABILITY ARISING FROM OR RELATING TO THIS AGREEMENT OR THE SUBJECT HEREOF, UNDER ANY LEGAL THEORY (WHETHER IN CONTRACT, TORT, INDEMNITY OR OTHERWISE), IF ANY, SHALL NOT EXCEED ONE HUNDRED DOLLARS (US\$100).

## 9. INDEMNIFICATION

Licensee agrees to indemnify, defend, and hold harmless Licensor and its officers, directors, employees, agents, affiliates, successors, and assigns, from and against any and all losses, damages, liabilities, or costs (including reasonable attorney's fees) resulting from any third-party claim, suit, action, or proceeding based on Licensee's (a) negligence or willful misconduct or (b) use of the Materials in a manner not authorized or contemplated by this Agreement. In the event Licensor seeks indemnification or defense from Licensee under this provision, Licensor shall promptly notify Licensee in writing of the claim(s) brought against Licensor for which Licensor seeks indemnification or defense. Licensor reserves the right, at its option and in its sole discretion, to assume full control of the defense of claims with legal counsel of Licensor's choice. Licensee may not enter into any third-party agreement, which would, in any manner whatsoever, affect Licensor's rights, constitute an admission of fault by Licensor or bind Licensor in any manner, without Licensor's prior consent.

## 10. TERM AND TERMINATION

**a. Term.** Unless otherwise terminated as specified under this Agreement, Licensee's rights with respect to the Materials will terminate on the later of (i) the date on which Licensor makes a version of all or a portion of the Materials available under commercial license terms or (ii) December 31, 2019.

**b. Termination.** Either party may terminate this Agreement upon five (5) days' prior written notice to the other party. In addition, Licensor may terminate this Agreement immediately in the event that Licensee breaches any of the provisions of this Agreement or takes any action in derogation of Licensor's rights in and to the Materials. Licensee shall notify Licensor within twenty-four (24) hours of Licensee's becoming aware of any breach (other than by Licensor) of the terms and conditions of this Agreement, including, without limitation, Sections 2 and 6.

**c. Effect of Termination.** Upon the expiration or termination of this Agreement, the rights granted to Licensee hereunder shall terminate. Within five (5) days after any termination or expiration of this Agreement, Licensee shall cease using and delete or destroy the Materials and all Proprietary Information. The provisions of Sections 2.b, 3, 5 - 9, 10.c and 11, shall survive the expiration or any termination of this Agreement. Termination of this Agreement by either party shall not act as a waiver of any breach of this Agreement and shall not act as a release of either party from any liability for breach of such party's obligations under this Agreement. Neither party shall be liable to the other for damages of any kind solely as a result of terminating this Agreement

in accordance with its terms, and termination of this Agreement by a party shall be without prejudice to any other right or remedy of such party under this Agreement or applicable law.

## **11. GENERAL PROVISIONS**

**a. Notices.** All notices, requests, consents, claims, demands, waiver, and other communications required or permitted hereunder shall be in writing, shall reference this Agreement and shall be deemed to be properly given: (a) when delivered personally; (b) when sent by email to Licensee and when sent by email, with written confirmation of receipt, to Licensor; (c) seven (7) days after having been sent by registered or certified mail, return receipt requested, postage prepaid; or (d) within two (2) business days after deposit with a private industry express courier, with written confirmation of receipt. Notices to Licensor shall be sent to the address set forth in the introductory paragraph to this Agreement. All Notices to Licensee shall be sent to the email address or other address provided to Licensor at the time of registration for access to the Materials. Notice may also be given to each party at such other address as may be designated by a party by giving written notice to the other party pursuant to this Section 11.a.

**b. Assignment.** This Agreement may not be assigned, in whole or part, whether voluntarily, involuntarily, by operation of law or otherwise, by Licensee without the prior written consent of Licensor. Licensor may freely assign this Agreement without restriction. Subject to the preceding sentences, the rights and liabilities of the parties hereto shall bind, and inure to the benefit of, their respective assignees and successors and is binding on the parties and their successors and assigns. Any attempted assignment other than in accordance with this Section 11.b shall be null and void.

**c. Governing Law, Jurisdiction and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of California, without reference to its conflicts of law provisions. Any dispute regarding this Agreement shall be subject to the exclusive jurisdiction of and venue in the federal and state courts within Los Angeles County, California. Licensee hereby consents to the personal and exclusive jurisdiction and venue of these courts. The parties hereby disclaim and exclude the application hereto of the United Nations Convention on Contracts for the International Sale of Goods.

**d. Arbitration.** EXCEPT FOR DISPUTES THAT QUALIFY FOR SMALL CLAIMS COURT, ALL DISPUTES ARISING OUT OF OR RELATED TO THIS AGREEMENT OR ANY ASPECT OF THE RELATIONSHIP BETWEEN YOU AND COMPANY, WHETHER BASED IN CONTRACT, TORT, STATUTE, FRAUD, MISREPRESENTATION OR ANY OTHER LEGAL THEORY, WILL BE RESOLVED THROUGH FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY AND YOU AGREE THAT COMPANY AND YOU ARE EACH WAIVING THE RIGHT TO TRIAL BY A JURY. SUCH DISPUTES INCLUDE, WITHOUT LIMITATION, DISPUTES ARISING OUT OF OR RELATING TO INTERPRETATION OR APPLICATION OF THIS ARBITRATION PROVISION, INCLUDING THE ENFORCEABILITY, REVOCABILITY OR VALIDITY OF THE ARBITRATION PROVISION OR ANY PORTION OF THE ARBITRATION PROVISION. ALL SUCH MATTERS SHALL BE DECIDED BY AN ARBITRATOR AND NOT BY A COURT OR JUDGE.

YOU AGREE THAT ANY ARBITRATION UNDER THIS AGREEMENT WILL TAKE PLACE ON AN INDIVIDUAL BASIS; CLASS ARBITRATIONS AND CLASS ACTIONS ARE NOT PERMITTED AND YOU ARE AGREEING TO GIVE UP THE ABILITY TO PARTICIPATE IN A CLASS ACTION.

The arbitration will be administered by the American Arbitration Association under its Consumer Arbitration Rules, as amended by this Agreement. The Consumer Arbitration Rules are available online at <https://www.adr.org/sites/default/files/Consumer%20Rules.pdf>. The arbitrator will conduct hearings, if any, by teleconference or videoconference, rather than by personal appearances, unless the arbitrator determines upon request by you or by us that an in-person hearing is appropriate. Any in-person appearances will be held at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances. If the parties are unable to agree on a location, such determination should be made by the AAA or by the arbitrator. The arbitrator's decision will follow the terms of this Agreement and will be final and binding. The arbitrator will have authority to award temporary, interim or permanent injunctive relief or relief providing for specific performance of this Agreement, but only to the extent necessary to provide relief warranted by the individual claim before the arbitrator. The award rendered by the arbitrator may be confirmed and enforced in any court having jurisdiction thereof. Notwithstanding any of the foregoing, nothing in this Agreement will preclude you from bringing issues to the attention of federal, state or local agencies and, if the law allows, they can seek relief against us for you.

**e. Attorneys' Fees.** If any legal action, including, without limitation, an action for arbitration or injunctive relief, is brought relating to this Agreement or the breach hereof, the prevailing party in any final judgment or arbitration award, or the non-dismissing party in the event of a dismissal without prejudice, shall be entitled to the full amount of all reasonable expenses, including all court costs, arbitration fees and actual attorneys' fees paid or incurred in good faith.

**f. Export Regulation.**

The Materials may be subject to US export control laws, including the Export Control Reform Act and its associated regulations. Licensee shall not, directly or indirectly, export, re-export, or release the Materials to, or make the Materials accessible from, any jurisdiction or country to which export, re-export, or release is prohibited by law, rule, or regulation. Licensee shall comply with all applicable federal laws, regulations, and rules, and complete all required undertakings (including obtaining any necessary export license or other governmental approval), prior to exporting, re-exporting, releasing, or otherwise making the Materials available outside the US.

**g. Waiver.** The waiver by either party of a breach of or a default under any provision of this Agreement, shall be in writing and shall not be construed as a waiver of any subsequent breach of or default under the same or any other provision of this Agreement, nor shall any delay or omission on the part of either party to exercise or avail itself of any right or remedy that it has or may have hereunder operate as a waiver of any right or remedy.

**h. Severability.** If the application of any provision of this Agreement to any particular facts or circumstances shall be held to be invalid or unenforceable by an arbitration panel or a court of competent jurisdiction, then (i) the validity and enforceability of such provision as applied to any other particular facts or circumstances and the validity of other provisions of this Agreement shall not in any way be affected or impaired thereby and (ii) such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and reformed without further action by the parties to the extent necessary to make such provision valid and enforceable.

**i. Relationship of the Parties.** Nothing contained in this Agreement shall be deemed or construed as creating a joint venture, partnership, agency, employment or fiduciary relationship between the parties. Neither party nor its agents have any authority of any kind to bind the other party in any respect whatsoever, and the relationship of the parties is, and at all times shall continue to be, that of independent contractors.

**j. Restricted Rights.** If Licensee is an agency or instrumentality of the United States Government, the Materials are “commercial computer software” and “commercial computer software documentation,” and, pursuant to FAR 12.212 or DFARS 227.7202, and their successors, as applicable, use reproduction and disclosure of the Materials are governed by the terms of this Agreement.

**k. Entire Agreement.** This Agreement, constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior or contemporaneous representations, discussions, proposals, negotiations, conditions, agreements and communications, whether oral or written, between the parties relating to the subject matter of this Agreement and all past courses of dealing or industry custom. No amendment or modification of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized signatory of Licensor and Licensee.