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TERMS AND CONDITIONS

1. Definitions

- 1.1. “Software” means the software program(s) (and any related documentation, instructions, exhibits and reference materials provided to Licensee) as well as Updates (as defined below) listed in the ordering documentation herein (“Order Schedule”).

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10. Indemnity. You agree to indemnify, defend, and hold harmless Berkeley Lab, its licensors (if any), the U.S. Government, the Software developers, the Software sponsors, and their agents, officers, and employees, against any and all claims, suits, losses, damage, costs, fees, and expenses arising out of or in connection with this Agreement. You shall pay all costs incurred by Berkeley Lab in enforcing this provision, including reasonable attorneys' fees.
11. Term and Termination. The Agreement shall remain in full force and effect for the period outlined in the Order Schedule ("Term") unless terminated by Berkeley Lab in accordance with this Agreement. If You breach any term of this Agreement, and fail to cure such breach within thirty (30) days of the date of written notice, this Agreement shall immediately terminate. Upon such termination, You shall immediately: cease using the Software; return to Berkeley Lab or destroy, all copies of the Software; and provide Berkeley Lab with written certification of Your compliance with the foregoing. Termination shall not relieve You from Your obligations arising prior to such termination, including but not limited to the responsibility to pay previously accrued fees. Notwithstanding any provision to the contrary, Sections 3 through 16 shall survive termination of this Agreement.
12. Export Controls. You shall observe all applicable United States and foreign laws and regulations (if any) with respect to the export, re-export, diversion or transfer of the Software and related technical data and direct products thereof, including, without limitation, the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations. Failure to obtain any required export control license may result in criminal liability under U.S. laws.
13. Audit. You shall maintain all necessary records to ensure compliance with this Agreement, including but not limited to, finance and accounting records as would be required by generally accepted accounting principles herein, and to retain such records for at least three (3) years after the expiration or termination of this Agreement. During the Term of this Agreement and for three (3) years thereafter, Berkeley Lab shall have the right, upon ten (10) days prior written notice, to audit You to ensure compliance with this Agreement, during normal business hours. Berkeley Lab may not request an audit more than once a calendar year unless an audit reveals an under reporting of fees due to Berkeley Lab, in which case, Berkeley

Lab may not request an audit more than once per calendar quarter. If any audit reveals a shortfall, You shall promptly pay to Berkeley Lab such shortfall. If any audit reveals an overpayment, then You shall credit such overpayment against its next payment or fees to Berkeley Lab. If any audit reveals that fees due Berkeley Lab are more than five percent (5%) of amounts remitted to Berkeley Lab, You shall reimburse Berkeley Lab for its audit expenses for such audit.

14. Notices. All notices and demands under this Agreement will be in writing and will be delivered by personal service, express courier, or United States mail, to the respective addresses as set forth in this Agreement. Either party may change the addresses set forth above by written notice to the other party. Notice will be effective on receipt therein.
15. Use of Name. In accordance with California Education Code Section 92000, You shall not use in advertising, publicity or other promotional activities any name, trade name, trademark, or other designation of the University of California, nor use "Ernest Orlando Lawrence Berkeley National Laboratory" or "Department of Energy" (including any contraction, abbreviation, or simulation of any of the foregoing) without Berkeley Lab's prior written consent.
16. GENERAL. The relationship created by this Agreement is one of independent contractors, and not partners or joint ventures. This Agreement, together with any Order Schedule and made a part hereof, constitute the complete and exclusive agreement between Berkeley Lab and You with respect to its subject matter, and supersede all prior oral or written understandings, communications or agreements. If any provision of the main body of the Agreement conflicts with a provision of any Order Schedule, then the terms of the Order Schedule will prevail. This Agreement shall automatically terminate without an obligation to provide any notice if You commence bankruptcy, reorganization, receivership or insolvency proceedings (including without limitation bankruptcy protection under Chapter 7 and 11 of the

U.S. Bankruptcy Code), or any other proceeding under any U.S. Federal, state or other law for the relief of debtors. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The rights and remedies of the parties under this Agreement are cumulative and not exclusive of any rights or remedies to which the parties are entitled by law. The exercise by either party of any right or remedy under this Agreement or under applicable law will not preclude such party from exercising any other right or remedy under this Agreement or to which such party is entitled by law. This Agreement has been written in the English language. You waive any rights You may have under the law of Your country to have this Agreement written in the language of that country. Your rights and obligations under this Agreement shall not be assignable without the prior written consent of Berkeley Lab and any attempt to assign them without that consent will be void. This Agreement shall be governed by the laws of the State of California, excluding its rules governing conflicts of laws. If any action arises out of or relating to this Agreement, You hereby consent to the exclusive jurisdiction of the state courts located in the City and County of Alameda, California, or if applicable, the federal courts located in the Northern District of California. No provision in either party's purchase orders or in any other business forms employed by either party shall supersede the terms of this Agreement, and no modification or amendment of this Agreement is binding, unless in writing signed by a duly authorized representative of each party. This Agreement is binding upon and shall inure to the benefit of Berkeley Lab, its successors and assigns. The waiver by either party of any breach of this Agreement by the other party will not waive subsequent defaults by such party of the same or a different kind. If any provision of this Agreement is held to be unenforceable for any reason, such provision shall be reformed only to the extent necessary to make it enforceable, and such decision shall not affect the enforceability of such provision under other circumstances, or of the remaining provision hereof.



ORDER SCHEDULE
Software: DIVA/Device Editor v. 1.0, 2.0, v. 3.1

This Order Schedule is hereby incorporated and made part of the End Use License Agreement as follows:

1. Term: *Perpetual*.
2. You are acquiring a license for the Software on the following conditions:

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<input checked="" type="checkbox"/> Creation of derivative works	You may create derivative works of the Software.

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