



Lawrence Berkeley National Laboratory

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## TERMS AND CONDITIONS

### 1. Definitions

“Software” means one instantiation or instance of 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 attached ordering document (“Order Schedule”).

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9. Limitation of Liability. IN NO EVENT WILL BERKELEY LAB OR ITS LICENSORS (IF ANY), THE UNITED STATES, THE UNITED STATES DEPARTMENT OF ENERGY, OR THEIR EMPLOYEES BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR PUNITIVE DAMAGES OF ANY KIND OR NATURE, INCLUDING BUT NOT LIMITED TO LOSS OF PROFITS OR LOSS OF DATA, FOR ANY REASON WHATSOEVER, WHETHER SUCH LIABILITY IS ASSERTED ON THE BASIS OF CONTRACT, TORT (INCLUDING NEGLIGENCE OR STRICT LIABILITY), OR OTHERWISE, EVEN IF BERKELEY LAB HAS BEEN WARNED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGES. IN NO EVENT WILL BERKELEY LAB'S LIABILITY FOR DAMAGES ARISING FROM OR IN CONNECTION WITH THIS AGREEMENT EXCEED THE AMOUNT PAID BY YOU FOR THE SOFTWARE AT ISSUE. THE PARTIES ACKNOWLEDGE THAT ANY FEES AS DUE UNDER THIS AGREEMENT ARE REFLECTIVE OF THE ALLOCATION OF RISK HEREUNDER.
10. Indemnity. You will 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 will pay all costs incurred by

Berkeley Lab in enforcing this provision, including reasonable attorneys' fees.

11. **Term and Termination.** The Agreement will 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 will immediately terminate. Upon such termination, You will 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 will 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 will survive termination of this Agreement.

12. **Export Controls.** You will observe all applicable United States and foreign (if any) export control laws and regulations, including, without limitation, the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations, with respect to the export, re-export, diversion, or transfer of the software, related technical information, and direct products thereof. Export of the software, related technical information, and direct products thereof from the United States may require some form of export control license or other authority from the U.S. Government. Failure to obtain any required export control license may result in civil and criminal liability under U.S. laws and regulations.

13. **Audit.** You will 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 will 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 will promptly pay to Berkeley Lab such shortfall. If any audit reveals an overpayment, then You will 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 will 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 will 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 will 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 will 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 will 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 will 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 will 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 will 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 will be reformed only to the extent necessary to make it enforceable, and such decision will not affect the enforceability of such provision under other circumstances, or of the remaining provision hereof.



## ACADEMIC/NONPROFIT USE ORDER SCHEDULE

This Academic/Nonprofit Use Order Schedule is hereby incorporated and made part of the Agreement as follows:

1. **Software:** means the selected source code, executable code, or both as selected and listed as Software at the Berkeley Marketplace, currently <https://marketplace.lbl.gov> plus any derivative works therein (if permitted below) plus any associated documentation, if provided.
2. **Term:** Ten (10) years from the date that You click the “I ACCEPT” button (the “Effective Date”).
3. You are acquiring a non-exclusive license for the Software on the following conditions:

License Grant/Conditions <i>(select all as applicable)</i>	Additional Conditions
<input checked="" type="checkbox"/> Academic/Nonprofit Use rights	You will use the Software for research purposes only. You must be an accredited academic institution or nonprofit. On the basis of the two previous sentences, You do not need to pay license fees, royalties, or other form of compensation or consideration.
<input checked="" type="checkbox"/> Non-Commercial Use rights	You will use the Software for non-commercial purposes only. On this basis, You do not need to pay license fees, royalties, or other form of compensation or consideration apply.
<input checked="" type="checkbox"/> Internal Use rights	The Software and any derivative works, if permitted, will be used solely by You and limited to use only within Your information technology infrastructure (i.e., Your hardware, software, and networks under Your control).
<input checked="" type="checkbox"/> Creation of derivative works	You may create derivative works of the Software.

4. **Total Fees:** The fees due are as listed for the selected Software at the Berkeley Marketplace currently <https://marketplace.lbl.gov>. Upon payment therein, unlimited instantiations or instances of the Software are permitted under this Order Schedule. Failure to timely pay such Fees when due will immediately terminate this Agreement.
5. **Order of Precedence:** In the event of a conflict between the terms and conditions of the Agreement and the terms of this Order Schedule, the terms of this Order Schedule will prevail.

***BY DOWNLOADING, INSTALLING, OR USING THE SOFTWARE, AND/OR CLICKING THE “I ACCEPT” BUTTON, YOU ARE INDICATING YOUR ACCEPTANCE OF THE TERMS AND CONDITIONS HEREIN.***