Master Software Agreement

MEMSQL, INC. ("MEMSQL") AGREES TO LICENSE AND/OR GRANT ACCESS TO CERTAIN OF ITS SOFTWARE AND PROVIDE SUPPORT & MAINTENANCE OR OTHER 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 TERMS AND CONDITIONS IN THIS SOFTWARE SUBSCRIPTION AGREEMENT (THIS “AGREEMENT”), WHICH SHALL BE DEFINITIVELY EVIDENCED BY ANY ONE OF THE FOLLOWING MEANS: YOUR CLICKING THE “DOWNLOAD, “ACCEPTANCE” OR “CONTINUE” BUTTON, AS APPLICABLE; 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; OR YOUR INSTALLATION, ACCESS OR USE OF THE SOFTWARE OR THE SERVICES, AND SHALL BE EFFECTIVE ON THE EARLIER OF THE DATE ON WHICH YOU DOWNLOAD, ACCESS, COPY OR INSTALL ANY SOFTWARE OR USE ANY SERVICES (INCLUDING ANY UPDATES OR UPGRADES) PROVIDED HEREUNDER OR 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 DOWNLOAD, ACCESS, COPY, INSTALL OR USE THE SOFTWARE OR THE SERVICES.

Free Tier Users: If you receive free of charge access to the Software via a “Free Tier” download, the terms and conditions herein are not applicable, and all access and use is subject to https://www.memsql.com/assets/contracts/memsql-free-tier-softwarelicense-11-06-18.pdf.

UNLESS OTHERWISE SET FORTH HEREIN, THIS AGREEMENT MAY ONLY BE SUPERSEDED OR AMENDED BY A WRITTEN AGREEMENT AGREED UPON BY BOTH PARTIES THAT EXPRESSLY PURPORTS TO SUPERSEDE OR AMEND THIS AGREEMENT IN PART OR IN WHOLE.

1. ORDERS, DELIVERY; SUBSCRIPTION TERMS.

This Agreement is a master agreement under which Customer may license certain MemSQL proprietary downloadable enterprise software as well as software updates, upgrades, bug fixes, or modified versions thereof from MemSQL ("Enterprise Software") and receive Support (as defined below) and professional services requested by Customer in respect of such Software. This Agreement shall be implemented through one or more order forms (each, an “Order”) that set forth the Enterprise Software to be licensed by Customer and the term of such Order (the “Subscription Term”). Each Order and SOW shall set forth the Fees for such Enterprise Software or professional services, and certain other terms applicable to such Enterprise Software and professional services. Absent the execution of an Order, this Agreement does not, in and of itself, represent a commitment by Customer to order, receive or pay for any products or services of MemSQL. To become effective, an Order, and any modifications or amendments thereto, must be signed by an authorized representative of each party. This Agreement sets forth the terms and conditions applicable to all such Orders. Any Order executed under this Agreement will be a part of this Agreement as if fully included within its body. Customer is solely responsible for installing Software on Customer’s own computer equipment or hosted environment. The Enterprise Software includes a license for the associated technical documentation located at http://docs.memsql.com/ (“Documentation”). In some instances, Customer’s purchasing relationship exists solely between Customer and an authorized reseller of MemSQL’s Software and Services (a “Reseller”), in which case Sections 5.1-5.3 (Fees and Payment) will be inapplicable to such Order(s), and the Reseller shall be responsible for submitting Orders and the appropriate payment method therewith to MemSQL.

2. SUPPORT.

Support. MemSQL will use commercially reasonable efforts to provide Support to Customer in accordance with MemSQL’s then-current terms and conditions set forth at MemSQL Support Terms and Conditions (www.memsql.com/assets/contracts/memsqlsupport-terms-and-conditions.pdf) at the support tier stated in the applicable Order. “Support” means the support services, including any updates, upgrades, patches, enhancements and bug fixes for the Software that may be provided to Customer by MemSQL pursuant to the terms of this Agreement. 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.

MemSQL, Inc. 20200806
3. LICENSE GRANTS; RESTRICTIONS AND PROPRIETARY RIGHTS.

Customer’s license and access rights and benefits, and MemSQL’s obligations to Customer will vary, depending on the product and the type of license MemSQL is granting. If you purchased a license to MemSQL Software, your license will be subject to certain use and/or capacity restrictions, as identified on the applicable Order Document.

3.1. Enterprise Software License. In consideration of the Fees paid hereunder and subject to the terms of this Agreement and the applicable Order, MemSQL grants Customer a world-wide, non-exclusive, non-transferable, non-sublicenseable, and limited license during the applicable Subscription Term, to install, download, and use the Enterprise Software up to the maximum capacity (“Licensed Capacity”) solely for Customer’s internal business purposes only (expressly excluding Customer’s commercial uses), and subject to the usage rules, specified in the applicable Order Document, and to use Documentation solely for Customer’s internal use in connection with operation of the Enterprise Software.

3.2. Early Access/Beta Software. From time to time, Customer may be given access to pre-release or “beta” versions of the Software for the limited purposes of non-production testing and evaluation of such Software. Customer acknowledges that MemSQL shall have no obligation to release a generally available version of such Software or to provide support or warranty for such versions of the Software for any production or non-evaluation use.

3.3 NO OBLIGATIONS. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT OR IN ANY ORDER DOCUMENT, MEMSQL WILL HAVE NO WARRANTY, INDEMNITY, SUPPORT, OR SERVICE LEVEL, OBLIGATIONS WITH RESPECT TO ANY ENTERPRISE TRIAL, “BETA,” “PRE-RELEASE,” OR OTHER NO-CHARGE SOFTWARE (INCLUDING TOOLS AND UTILITIES) LICENSES.

3.4 General Restrictions. Customer acknowledges that the Software, and its structure, organization, and source code, constitute MemSQL’s and its suppliers’ valuable trade secrets, and that usage of the Software is subject to the following restrictions:

3.4.1 Restrictions. Customer agrees not to, and not to authorize any third party to: (a) allow access or use of the Software by anyone other than its employees and Contractors of Customer that Customer has permitted or authorized to access and use of the Software on Customer’s behalf (“Users”); (b) distribute, embed, sell, rent, transfer, lease, lend, sublicense, loan, assign, pledge, grant a security interest in, or otherwise make the Software accessible or available to any third party; (c) except to the limited extent expressly provided in Section 3.4.2, use the Software in any service-bureau, timesharing, outsourcing or similar arrangement; or (d) disassemble, decompile, reverse engineer or otherwise attempt to derive the structure, sequence or organization of source code or APIs, except as permitted by applicable law to achieve interoperability if MemSQL does not offer the means to do so when requested by Customer; (e) remove or alter product identification, copyright, trademark or other proprietary markings contained in or on the Software; (f) modify, adapt, recast, transform or otherwise prepare a derivative work of the Software or portion thereof; (g) conduct any competitive analysis, publish or share with any third party any results of any technical evaluation or benchmark tests performed on the Software, or disclose Software features, errors or bugs to a third party without MemSQL’s prior written consent (“Benchmarking”); or (h) engage in any act designed to circumvent any restriction set forth in this Agreement, in the Software, or in an Order, including but not limited to restrictions related to Licensed Capacity.

3.4.2 Licenses; Users. Customer may permit its independent contractors and consultants acting on behalf of Customer as its IT provider (“Contractors”) to serve as Users. Customer will remain responsible for compliance by each of its Users (including but not limited to any Contractor Users) with all of the terms and conditions of this Agreement, and any use of the Software by any Contractors must be for the sole benefit of Customer.

3.5 Ownership; Reservation of Rights. This is an agreement for use of MemSQL Software and not an agreement for sale. Customer acknowledges that it is obtaining only a limited right to use the Software on a licensed basis, and that irrespective of any use of the words “purchase”, “sale” or like terms hereunder no ownership rights are being conveyed to Customer. Customer agrees that MemSQL or its suppliers retain all right, title and interest (including all patent, copyright, trade secret and other
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intellectual property rights) in and to the MemSQL Enterprise Software, including but not limited to the technology, and methodologies, including, without limitation, products, software tools, architecture, algorithms, class libraries, objects and Documentation existing as of the Effective Date or arising hereafter. Nothing in this Section 3.6 shall be deemed as granting MemSQL ownership of Customer Data or in any way impacting Customer’s ownership of Customer Data.

3.6 Third Party Code. The Software may contain or be provided with components which are licensed from third parties, including components subject to the terms and conditions of “open source” software licenses (“Open Source Software”). Open Source Software may be identified in the Software, Documentation, or in a list of the Open Source Software provided to you upon your written request. To the extent required by the license that accompanies the Open Source Software, the terms of such license will apply in lieu of the terms of this Agreement with respect to such Open Source Software, including, without limitation, any provisions governing access to source code, modification, or reverse engineering.

3.7 IP Ownership. The Parties agree that neither of party shall gain, by virtue of this Agreement, any rights of ownership or any other interest, right or title of copyrights, patents, trade secrets, trademarks, or any other intellectual property rights owned by the other Party. Any and all new works developed in the course of performing obligations pursuant to this Agreement and all new inventions, innovations or ideas developed by a Party in the course of performance of its activities under this Agreement, will belong to that Party who develops the same. Notwithstanding anything to the contrary in this Section, the Parties understand and agree that any and all proprietary materials developed by a Party prior to this Agreement and any modifications, enhancements, improvements or inventions made to such proprietary materials shall be owned by that Party, regardless of which Party prepared or developed such modifications, enhancements, improvements or inventions.

4. OBLIGATIONS OF CUSTOMER AND MEMSQL.

Customer shall retain all of its rights, title, and interest in and to its intellectual property rights in Customer Data. Customer grants to MemSQL a non-exclusive, 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 Software, to ensure the security of and to administrate the Software, and to deliver services in accordance with this Agreement or as otherwise outlined in https://www.memsql.com/privacynotice.

Protection of Customer Data. We 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. 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 by this Agreement. “Customer Data” means business information or other data loaded by or for Customer and/or processed by the Software.

Personal data. The parties acknowledge that, in the ordinary course of providing the services, MemSQL shall not process personal data (as defined in the EU General Data Protection Regulation (Regulation 2016/679)) on behalf of Customer. In the event that the Customer requires MemSQL to process personal data on its behalf, it shall notify MemSQL and the parties shall execute such terms as necessary under applicable law.

5. FEES AND PAYMENT.

5.1. Fees. Customer will pay MemSQL the fees for the Licenses and Professional Services as set forth in the applicable Order (“Fees”). Customer acknowledges and agrees that if Customer’s use of the Software exceeds the Licensed Capacity set forth on the applicable Orders or otherwise requires the payment of additional fees (per the terms of this Agreement), Customer shall be invoiced for such usage and Customer agrees to pay the additional fees in accordance with this Section 5. Notwithstanding the terms of Section 5.4 below (Reconciliation), Customer acknowledges and agrees that it is obligated to ensure that its Software usage does not exceed the Licensed Capacity and to promptly notify MemSQL of any such excess usage no more than thirty (30) days from the last day of the calendar month during which such excess usage occurred.

5.2. Payment Terms. Except as otherwise specifically set forth on an Order Document, all undisputed fees are due and payable within thirty (30) days after the date of invoice. Renewal Fees for any renewal Subscription Term (if purchased
by Customer) will be due and payable within thirty (30) days of expiration of the then-current term. If Fees are not paid when due, or in the event of other breach of this Agreement, Customer shall discontinue use of the Software and MemSQL may suspend its performance, including its delivery of technical support of the Software or Professional Services without further notice and without penalty. All Orders (including multi-year Subscriptions with annual payment schedules) are non-cancellable and all amounts paid are nonrefundable, unless otherwise expressly set forth herein. Any invoiced amount not received by the due date will accrue late interest at the rate of 1.5% of the outstanding balance per month, or the maximum rate permitted by applicable law, whichever is lower.

5.3. Taxes. 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. Customer will make all payments free and clear of, and without reduction for, any withholding taxes. MemSQL will invoice Customer for the applicable sales and use taxes unless Customer provides MemSQL with evidence that it is exempt from such taxes or that it makes direct tax payments to the government. Evidence of exemption may be in the form of an exemption certificate, direct payment permit number, or location of Customer’s data centers.

5.4. Reconciliation. At MemSQL’s request from time to time, not exceeding once per quarter, Customer will provide MemSQL with a report detailing its use of the Software, including its non-production and/or production use and using the self-monitoring capabilities of the Software or other means, and MemSQL may inspect Customer’s records related to such report not more frequently than annually to ensure payment of Fees. Any on-site review will be conducted during regular business hours at Customer’s offices. The parties will use reasonable good faith efforts to promptly resolve any discrepancies between licensed usage and actual usage.

5.5. Professional Services. MemSQL shall provide the number of person-days of professional consulting or training services (“Professional Services”) purchased in the applicable Order Document or SOW. The parties acknowledge that the scope of the Professional Services provided hereunder consists solely of either or both of: (a) assistance with Software installation, deployment, and usage; and (b) training in use of the Software. Customer shall have a non-exclusive license right to use any MemSQL Software (including any documentation, code, software, tools, training materials or other work product) provided or made available in connection with the Software or as part of the Professional Services solely in connection with your permitted use of the Software, subject to all the same terms and conditions as apply to your Software license (including Section 3.4 (General Restrictions)). The Professional Services shall be provided as stated on the Order Document or SOW. Fees for Professional Services are exclusive of MemSQL’s preapproved T&E costs incurred in rendering such services and are subject to reimbursement by Customer.

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/assets/contracts/memsql-support-term-and-conditions.pdf), MemSQL warrants that the Software, when used as permitted hereunder and subject to the Support terms, will conform to the applicable Documentation and that Professional Services will be provided in a professional manner consistent with industry standards.

6.3. Limitations; Remedy. MemSQL will have no warranty obligation under Section 7.2 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, 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 Support and Professional Services will end. In the event of any noticed breach of warranty with respect to Professional Services, MemSQL’s sole and exclusive obligation shall be the re-performance of the deficient Support and Professional Services.
6.4. Disclaimer. THIS SECTION 7 IS A LIMITED WARRANTY AND, EXCEPT EXPRESSLY AS SET FORTH IN SECTION 7.2, THE SOFTWARE, INCLUDING WITHOUT LIMITATION THE THIRD-PARTY CODE, SUPPORT, AND ALL PROFESSIONAL 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 NONINFRINGEMENT.

7. INDEMNIFICATION.

7.1. 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.

7.2. 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.

7.3. 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.

8. LIMITATION OF LIABILITY.

8.1. 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) 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:

8.2. 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.

8.3. NOTHING HEREIN SHALL BE INTENDED TO LIMIT A PARTY’S LIABILITY IN AN ACTION IN TORT.
9. CONFIDENTIALITY.

9.1. 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 Professional Services; and Confidential Information of each party includes the terms and conditions of this Agreement and all Orders (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.

9.2. 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 Orders 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.

9.3. 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.

10. TERMINATION.

10.1. Term. The term ("Term") of this Agreement will commence on the Effective Date and continue until all Subscriptions, license terms and Orders expire, unless earlier terminated in accordance with this Section 11.

10.2. Termination for Cause. In the event of a material breach of this Agreement (excluding any breaches for which an exclusive remedy is expressly provided), the non-breaching party may terminate this Agreement if such breach is not cured within thirty (30) days after written notice thereof (except that for a breach of Section 3.4 ("General Restrictions"), there will be no cure period). For clarity, material breach of this Agreement includes, but is not limited to, failure to timely pay amounts due hereunder, exceeding the scope of any License granted hereunder (including the Licensed Capacity), violating the License restrictions, and failing to protect the other party’s Confidential Information.

10.3. Effect of Termination. Upon the termination of this Agreement: (a) all licenses will terminate; (b) Customer will immediately discontinue all use of the affected Software, erase all full and partial copies of the Software and (subject to this Section 11.3) all other tangible embodiments of MemSQL Confidential Information in Customer’s possession or control, and promptly certify the same to MemSQL; (c) MemSQL may immediately cease providing the services; (d) (subject to this Section 11.3), MemSQL will return or delete all tangible embodiments of Customer Confidential Information in MemSQL’s possession or control; and Sections 3.4 ("General Restrictions"), 3.5 ("Ownership; Reservation of Rights"), 5 ("Fees and Payment"), 7.3 ("Limitations"), 7.4 ("Disclaimer"), 8 ("Indemnification"), 9 ("Limitation of Liability"), 10 ("Confidential Information"), 11.3 ("Effect of Termination"), and 12 ("Miscellaneous") will survive. If a party’s file retention policies or a
valid legal order provides for backup or archival copies of files to be retained, such party will notify the other party of such policy or order, protect the other party’s Confidential Information as required hereunder, and permanently erase, delete, or destroy such Confidential Information as soon as permissible under such policy or order.

11. MISCELLANEOUS.

11.1. 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.

11.2. 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.

11.3. Governing Law; Jurisdiction and Venue. 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. Except as set forth herein, the parties’ rights and remedies are cumulative. The parties agree that injunctive relief (without bond) is an appropriate remedy for threatened breaches of Sections 3, 8, or 10, which will constitute immediate, irreparable harm.

11.4. 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.

11.5. Severability; Waiver; Construction. If a court of competent jurisdiction adjudges any provision of this Agreement to be invalid or unenforceable, the remaining provisions of this Agreement, if capable of substantial performance, will continue in full force and effect without being impaired or invalidated in any way. The parties agree to replace any invalid provision with a valid provision that most closely approximates the intent and economic effect of the invalid provision. All waivers must be in writing. 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. In this Agreement, the word “including” means “including but not limited to.” No presumption will operate in favor of or against any party as a result of its role in drafting this Agreement.

11.6. Subcontractors. MemSQL may use the services of subcontractors in connection with its performance of this Agreement, provided that MemSQL remains solely responsible for (i) compliance of any such subcontractor with the terms of this Agreement and (ii) the overall performance of MemSQL as required under this Agreement.

11.7. Use of Aggregate Data. Customer agrees that MemSQL may collect, use and disclose quantitative data and metadata derived from the use of the Software (i) for its own internal, statistical analysis, (ii) to develop and improve the Software and (iii) to create and distribute reports and other materials regarding use of the Software. For clarity, any such data...
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collected, used, and disclosed will be in anonymized aggregate form only and shall not identify Customer or its Users, include any Customer or User Confidential Information, or disclose any Customer Data.

11.8. 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.

11.9. 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.

11.10. Notice. Any notice, consent, or waiver hereunder must be in writing, addressed to the attention of “Legal Department” at the address set forth above, and delivered by personal delivery, reputable rapid courier, or certified/registered mail, return receipt requested, and will be deemed given upon personal delivery, one (1) day after deposit with an overnight domestic courier, two (2) days after deposit with an international courier, or five (5) days after deposit in the certified or registered mail. A party may specify a new address by providing notice to the other party in accordance with this Section.

11.11. 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 reexport 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.

11.12. 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.

11.13. 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 5 (“Fees”) above.

11.14. 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.

11.15. Entire Agreement. This Agreement (inclusive of Exhibits) in its original English text, sets forth the complete, exclusive, and final agreement of the parties concerning the subject matter hereof, supersedes, replaces, and merges all prior and contemporaneous agreements, communications, and understandings, both written and oral, between them concerning the subject matter hereof. This Agreement may be executed in counterparts.