



Deltapath Product Beta Testing Program - Terms and Conditions

May 2020

1. Licensee Obligations.
 - 1.1. Evaluation Team. Licensee may change the members of the Evaluation Team, provided Licensee promptly notifies Deltapath of any changes. Licensee agrees that Deltapath may contact any person who is (or at one time was) on the Evaluation Team in order to receive feedback regarding the Products, and Licensee agrees to direct such persons to cooperate with Deltapath's reasonable requests for such information.
 - 1.2. Evaluation and Reporting.
 - 1.2.1. Licensee is solely responsible for installing the Products, and for determining whether the Products are suitable, secure, and reliable for its evaluation purposes.
 - 1.2.2. Licensee will use diligent efforts to notify Deltapath of any errors or deficiencies in the Products, suggestions for improvements, compatibility problems, and the other information regarding the Products (collectively, "Feedback"). Licensee acknowledges that Deltapath may or may not incorporate Feedback into the general release version of the Products at Deltapath's sole discretion.
 - 1.3. Indemnity. Licensee shall indemnify and hold harmless Deltapath from and against any and all costs, damages, losses, liability or expenses (including reasonable attorneys' fees) arising from Licensee's use of the Products (including without limitation any actions arising from acts or omissions of Licensee's employees or agents) or any failure by Licensee to comply with the terms of this Agreement.
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Licensee shall not (and shall not allow any third party to):

 - 3.1. decompile, disassemble, or otherwise reverse engineer the Products or attempt to reconstruct or discover any source code, underlying ideas, algorithms, file formats or programming interfaces of the Products by any means whatsoever (except and only to the extent that applicable law prohibits or restricts reverse engineering restrictions, and in such case Licensee shall notify Deltapath in advance of its intent to reverse engineer);
 - 3.2. distribute, sell, sublicense, rent, lease or use the Products (or any portion thereof) for any purpose, including without limitation time sharing, hosting, service provider;
 - 3.3. remove any product identification, proprietary, copyright or other notices contained in or on the Products;
 - 3.4. modify any part of the Products or create a derivative work of any part of the Products;
 - 3.5. publicly disseminate performance information or analysis (including, without limitation, benchmarks) from any source relating to the Products; or
 - 3.6. separate any software included in the Products from the Products themselves, or use any software included with the products separately from the Products.

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 - 4.2.3. any Feedback; and
 - 4.2.4. any changes or improvements to the Products resulting from Feedback.
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5. **Termination.**

At such time as this Agreement is no longer in effect for any Products, this Agreement shall terminate in its entirety.

 - 5.1. **Expiration.** This Agreement is effective as of the Effective Date and with respect to each Product expires on the earliest of (a) the date specified above for the Product, (b) the end of Deltapath's beta period for the Product (as determined by Deltapath in its sole discretion, or (c) the general commercial availability of the Product.
 - 5.2. **Termination.** Deltapath may terminate this Agreement with respect to any or all Products on 15 days' notice to Licensee without cause, and may terminate this Agreement immediately upon notice upon any breach by Licensee.

Licensee may terminate this Agreement with respect to any Product upon notice (and shall immediately thereafter undertake the obligations of Section 5.3).
 - 5.3. **Effect of Termination or Expiration.** Upon any termination or expiration of this Agreement, Licensee shall immediately (a) cease any and all use of any Products, and to the extent that any Products included software that was not embedded on hardware, destroy all copies of such software whether partial or complete and so certify to Deltapath in writing; and b) return all Products and copies of Confidential Information, catalogs, literature and other Deltapath materials in its possession or control, or at Deltapath's option and written request, destroy such materials and so certify to Deltapath in writing. Termination is not an exclusive remedy and the exercise by either party of any remedy under this Agreement will be without prejudice to any other remedies it may have under this Agreement, by law, or otherwise.

- 5.4. Survival. This Section 5.4 and Sections 1.1, 1.3, 3, 4, 5.3, 6, 7, 8, and 9 shall survive any termination or expiration of this Agreement.
6. **Warranty Disclaimer.**
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- 7.1. NEITHER PARTY SHALL BE LIABLE FOR ANY LOSS OF USE, LOST DATA, FAILURE OF SECURITY MECHANISMS, INTERRUPTION OF BUSINESS, OR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND (INCLUDING LOST PROFITS), REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, EVEN IF INFORMED OF THE POSSIBILITY OF SUCH DAMAGES IN ADVANCE. THIS SECTION 7.1 SHALL NOT APPLY TO LICENSEE WITH RESPECT TO ANY CLAIM ARISING UNDER THE SECTIONS TITLED "LICENSE RESTRICTIONS" OR "CONFIDENTIAL INFORMATION".
- 7.2. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, DELTAPATH'S ENTIRE LIABILITY TO LICENSEE UNDER THIS AGREEMENT SHALL NOT EXCEED \$1,000.
- 7.3. The parties agree that the limitations specified in this Section 7 will survive and apply even if any limited remedy specified in this Agreement is found to have failed of its essential purpose.
8. **Confidential Information.**
Licensee agrees that all code, inventions, know-how, business, technical and financial information it obtains (or, in the case of Feedback, creates) regarding the Products constitute the confidential property of Deltapath ("Confidential Information"). Licensee will hold in confidence and not use or disclose any Confidential Information except as expressly permitted in this Agreement. Licensee's nondisclosure obligation shall not apply to information which Licensee can document: (i) is or has become public knowledge through no fault of Licensee; or (ii) is required to be disclosed pursuant to a regulation, law or court order (but only to the minimum extent required to comply with such regulation or order and with advance notice to Deltapath). Licensee acknowledges that disclosure of Confidential Information would cause substantial harm to Deltapath that could not be remedied by the payment of damages alone, and therefore that upon any such disclosure by Licensee, Deltapath shall be entitled to seek appropriate equitable relief.

9. General.
- 9.1. Export Compliance. Licensee acknowledges that the Products may contain encryption technology that is subject to export restrictions by the United States government and import restrictions by certain foreign governments. Licensee shall not, and shall not allow any third-party to, remove or export from the United States or allow the export or re-export of any part of the Products or any direct product thereof: (i) into (or to a national or resident of) any country to which the U.S. has embargoed goods; (ii) to anyone on the U.S. Commerce Department's Table of Denial Orders or U.S. Treasury Department's list of Specially Designated Nationals; (iii) to any country to which such export or re-export is restricted or prohibited, or as to which the United States government or any agency thereof requires an export license or other governmental approval at the time of export or re-export without first obtaining such license or approval; or (iv) otherwise in violation of any export or import restrictions, laws or regulations of any United States or foreign agency or authority. Licensee agrees to the foregoing and warrants that it is not located in, under the control of, or a national or resident of any such prohibited country or on any such prohibited party list. The Products are restricted from being used for the design or development of nuclear, chemical, or biological weapons or missile technology without the prior permission of the United States government.
- 9.2. Compliance Audit Rights. Upon Deltapath's written request, Licensee shall furnish Deltapath with a signed certification certifying that the Products are being used pursuant to the terms of this Agreement including any copy and user limitations. With prior reasonable notice, Deltapath may audit the Products in use by Licensee provided such audit is during regular business hours.
- 9.3. Government End-Users. The Products provided under this Agreement contain commercial computer software programs developed solely at private expense. As defined in U.S. Federal Acquisition Regulations (FAR) section 2.101 and U.S. Defense Federal Acquisition Regulations (DFAR) sections 252.227-7014(a)(1) and 252.227-7014(a)(5) (or otherwise as applicable to Licensee), the software portion of Products licensed in this Agreement are deemed to be "commercial items" and "commercial computer software" and "commercial computer software documentation." Consistent with FAR section 12.212 and DFAR section 227.7202, (or such other similar provisions as may be applicable to Licensee), any use, modification, reproduction, release, performance, display, or disclosure of such commercial software or commercial software documentation by the U.S. government (or any agency or contractor thereof) shall be governed solely by the terms of this Agreement and shall be prohibited except to the extent expressly permitted by the terms of this Agreement.
- 9.4. Other. This Agreement shall be governed by and construed under the laws of the State of California without regard to the conflict of laws provisions thereof. Any suit or proceeding relating to this Agreement shall be commenced exclusively in the Superior Court of San Francisco County and/or the United States District Court for the Northern District of California, and each party irrevocably submits to the exclusive jurisdiction and venue of such courts. The United Nations Convention on Contracts for the International Sale of Goods is specifically disclaimed. The parties are independent contractors and no employment, agency, or joint venture is created hereunder. All notices, requests and other communications under this Agreement must be in writing, and must be mailed by registered or certified mail, postage prepaid and return receipt requested, or delivered by hand to the party to whom such notice is required or permitted to be given. Headings and titles are for convenience only, and are not intended to be of operative effect or modify the terms of this Agreement. This Agreement may not be assigned by Licensee or amended without the prior written consent of both parties. Any purported assignment or amendment in violation of the foregoing shall be void. If any provision of this Agreement is held by a court of competent jurisdiction to be unenforceable for any reason, the remaining provisions hereof shall be unaffected and remain in full force and effect. This Agreement is the final, complete and exclusive agreement between the parties relating to the subject matter hereof, and supersedes all prior or contemporaneous understandings and agreements relating to such subject matter, whether oral or written.