

## End-User License Agreement for EnSoft SimDiff Software

**LEGALLY BINDING AGREEMENT.** This End-User License Agreement ("EULA") is a legal agreement between you ("You") as defined below and EnSoft Corp. ("EnSoft") with its primary address at 3006 Northridge Parkway, Ames, IA 50014, for EnSoft SimDiff software (the "Software"), as defined below. BY INSTALLING, COPYING, DOWNLOADING, ACCESSING OR OTHERWISE USING THE SOFTWARE, YOU AGREE TO BE BOUND BY THE TERMS OF THIS EULA. IF YOU DO NOT AGREE, DO NOT INSTALL, COPY, ACCESS, OR USE THE SOFTWARE. If you agree to these terms on behalf of an organization or entity, you hereby represent to EnSoft that you are authorized to accept these terms on its behalf.

**IMPORTANT NOTICE.** This EULA shall prevail over your standard terms and conditions (if any) attached to, enclosed with, or referred to in, the purchase order or confirmation of order.

**RECITALS.** EnSoft provides the Software, which is not a replacement for the knowledge, skills and judgment of users. Therefore, in consideration of the mutual covenants, terms, and conditions set forth below, including those on the Receipt (as defined below), which are incorporated into this EULA by reference, the adequacy of which consideration is hereby accepted and acknowledged, the parties agree as set forth below.

### DEFINITIONS

**"Computer"** shall mean a single physical computing device on which a licensed user may access the Software according to the terms of this agreement and the guidelines for the license type described below.

**"Documentation"** shall mean the online videos and other online instructions related to the Software.

**"Effective Date"** shall mean the date when EnSoft granted you the License in the Software.

**"License Server"** as used herein shall mean an application which manages network floating, named user and node locked licenses for the Software and permits the legal authorized use of the Software.

**"Network Floating License"** as used herein shall mean a software license which is shared by multiple Users on a network, as permitted by the specific license type.

**"OSE"** shall mean an Operating System Environment which is all or part of an operating system instance, or all or part of a virtual (or otherwise emulated) operating system instance which enables separate machine identity (primary OSE name or similar unique identifier) or separate administrative rights.

**"Receipt"** shall mean a printed or electronic document stating the kind of license purchased by you.

**"Server"** shall mean a Computer on which the operating system executing the Software is a server-level operating system.

**"Software"** shall mean the machine-readable object code of the EnSoft SimDiff software product that you install, copy, download, access, operate or otherwise use pursuant to the terms and conditions of this EULA, along with any associated media.

**"Term"** shall mean the length of time during which the License remains in effect.

**"User"** shall mean an individual operator of the Software, prior to or during operation.

**"Workgroup Client"** as used herein shall mean a user or machine who is authorized to use a copy of the Software managed by a Workgroup Floating License.

**"Workgroup User"** as used herein shall mean a user of the Software who is authorized to use a copy of the Software managed by a Workgroup Floating License Server.

**"Workstation"** shall mean a Computer on which the operating system executing the Software is a desktop operating system.

**"You", "Your"** and the non-capitalized versions thereof shall mean an individual who licenses the Software for personal use, or an individual who licenses the Software on behalf of an organization or entity, or the organization or entity who licenses the software.

## 1. LICENSE

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1.2 Scope of License. The scope of the License is defined and its cost determined by the following criteria as stated in your Receipt:

- a. Term (perpetual or subscription)
- b. Plan (Team, Professional or Basic)

1.3 Types of License. Except as otherwise expressly provided in this agreement, you may install and use the Software according to the guidelines for your license type as described below.

**Named-User:** Tied to one user for use on no more than three (3) OSEs, virtual or physical. Only the user for whom the license is granted may access and/or use the Software. Any use of a single license for this Software by multiple users is not permitted. The sole mechanism by which additional users may operate the Software shall be through the legal issuance of additional licenses.

**Node-Locked:** You may install and use one copy of the Software on a single physical Workstation. The Software may not be installed, accessed, displayed, run, shared or used concurrently on or from different Computers, including a Workstation or other device, unless a separate license has been purchased for each such instance of use. You may make one copy of the Software for each of archival, backup, and testing purposes.

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1.5 Presentation Software. The Software may be used in conjunction with presentation applications such as WebEx or Adobe Connect to allow multiple observers to collaboratively view the information displayed by the Software, so long as you comply with the scope of the License regarding operation of the Software.

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**4. AUDIT AND LICENSE TRACKING.** You agree that EnSoft or a duly qualified agent of EnSoft may enter your premises to conduct an audit of your compliance with the terms and conditions of this EULA. The cost of such audit will be borne by EnSoft unless you have failed to pay fees in excess of the greater of 10% of the license fees paid by you to EnSoft for the Software or \$10,000, in which case you will reimburse EnSoft for the reasonable costs of the audit. Furthermore, you agree that EnSoft may utilize functionality of the Software to identify the OSEs on which the Software is loaded and to limit or restrict use of the Software to those OSEs or replacement OSEs. If the functionality of the Software allows for such data to be transmitted to EnSoft electronically, then you consent to such transmission. If the functionality of the Software does not exist or does not allow for such data to be transmitted to EnSoft electronically, then you agree to provide to EnSoft no later than the 5th business day of each calendar quarter a list of each OSE, using a unique identifier such as serial number or MAC address, on which you have loaded the Software.

**5. CONSENT TO USE OF DATA.** You agree that EnSoft may collect and use technical information gathered as part of the product support services provided to you, if any, related to the Software. Such data will not be transmitted to EnSoft without your prior knowledge. EnSoft may use this information solely to improve EnSoft products or to provide customized services or technologies to you and will not disclose this information in a form that personally identifies you.

**6. EXPORT RESTRICTIONS.** You acknowledge that the Software is subject to U.S. export jurisdiction. You agree to comply with all applicable international and national laws that apply to the Software, including the U.S. Export Administration Regulations, as well as end-user, end-use, and destination restrictions issued by U.S. and other governments.

**7. SEPARATION OF COMPONENTS.** The Software is licensed as a single product. Its component parts may not be separated for use on more than one OSE.

## **8. TERMINATION AND EXPIRATION; SURVIVAL OF CERTAIN PROVISIONS**

8.1 Term. Unless terminated by EnSoft or you as provided in Sections 8.2, your License will remain in effect for the Term set down in the Receipt. Certain provisions of this EULA, as provided in Section 8.3, will survive the termination or expiration of your License.

8.2 Termination. EnSoft or you may terminate this EULA for the other's material breach by written notice, effective in 30 days unless the other party first cures such breach.

8.3 Effects of Termination and Expiration. Upon termination or expiration of your License, you shall cease all operation and use of the Software and delete, destroy, or return all copies of it. The following provisions of this EULA will survive termination or expiration of your License to the Software: (a) any obligation by you to pay fees incurred before termination or expiration; (b) Sections 2 (Reservation of Rights and Ownership), 3 (Limitations on Use), 4 (Audit and License Tracking), 9 (Disclaimer of Warranties), 10 (Exclusion of Incidental, Consequential and Certain Other Damages), 11 (Limitation of Liability and Remedies) and 16 (Feedback); and (c) any other provision of this EULA that must survive to fulfill its essential purpose.

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**10. EXCLUSION OF INCIDENTAL, CONSEQUENTIAL AND CERTAIN OTHER DAMAGES.** TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL ENSOFT BE LIABLE FOR ANY SPECIAL, INCIDENTAL, PUNITIVE, INDIRECT, OR CONSEQUENTIAL DAMAGES WHATSOEVER (INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR LOSS OF PROFITS OR CONFIDENTIAL OR OTHER INFORMATION, FOR BUSINESS INTERRUPTION, FOR PERSONAL INJURY, FOR LOSS OF PRIVACY, FOR FAILURE TO MEET ANY DUTY OF GOOD FAITH OR OF REASONABLE CARE, FOR NEGLIGENCE, AND FOR ANY OTHER PECUNIARY OR OTHER LOSS WHATSOEVER) ARISING OUT OF OR IN ANY WAY RELATED TO THE USE OF OR INABILITY TO USE THE SOFTWARE, THE PROVISION OF OR FAILURE TO PROVIDE SUPPORT OR OTHER SERVICES, INFORMATION, SOFTWARE, AND RELATED CONTENT THROUGH THE SOFTWARE, OR OTHERWISE UNDER OR IN CONNECTION WITH ANY PROVISION OF THIS EULA, EVEN IN THE EVENT OF THE FAULT, TORT (INCLUDING NEGLIGENCE), MISREPRESENTATION, STRICT LIABILITY, BREACH OF CONTRACT OR BREACH OF WARRANTY

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**11. LIMITATION OF LIABILITY AND REMEDIES.** NOTWITHSTANDING ANY DAMAGES THAT YOU MIGHT INCUR FOR ANY REASON WHATSOEVER (INCLUDING, WITHOUT LIMITATION, ALL DAMAGES REFERENCED HEREIN AND ALL DIRECT OR GENERAL DAMAGES IN CONTRACT OR ANYTHING ELSE), THE ENTIRE LIABILITY OF ENSOFT UNDER ANY PROVISION OF THIS EULA AND YOUR EXCLUSIVE REMEDY HEREUNDER (EXCEPT FOR ANY REMEDY OF REPAIR OR REPLACEMENT ELECTED BY ENSOFT) SHALL BE LIMITED TO THE GREATER OF THE ACTUAL DAMAGES YOU INCUR IN REASONABLE RELIANCE ON THE SOFTWARE, WHICH MAY NOT EXCEED THE AMOUNT ACTUALLY PAID BY YOU FOR THE SOFTWARE, OR US\$5.00. THE FOREGOING LIMITATIONS, EXCLUSIONS AND DISCLAIMERS (INCLUDING SECTIONS 9 AND 10) SHALL APPLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EVEN IF ANY REMEDY FAILS ITS ESSENTIAL PURPOSE.

## **12. CHOICE OF LAW, JURISDICTION AND DISPUTES**

**12.1 Choice of Law and Jurisdiction.** You agree that this EULA will be governed solely by the internal laws of the State of Iowa, without reference to: (a) any conflicts of law principle that would apply the substantive laws of another jurisdiction to the parties' rights or duties; (b) the 1980 United Nations Convention on Contracts for the International Sale of Goods; or (c) other international laws. EnSoft and you consent to the sole and exclusive jurisdiction of the United States District Court for the Southern District of Iowa as to any claim or proceeding over which it may have jurisdiction, or of the state courts of the Fifth Judicial District of Iowa (District 5C in Polk County, Iowa) as to all other claims or proceedings.

**12.2 Injunctive Relief.** Without prejudice to any other rights or remedies that EnSoft may have, you acknowledge and agree that damages alone would not be an adequate remedy for any breach by you of Section 1, Section 2 and/or Section 3 of this EULA. Accordingly, EnSoft shall be entitled to seek an injunction or other equitable relief for any threatened or actual breach of those clauses.

**13. ENTIRE AGREEMENT; SEVERABILITY.** This EULA (including the Receipt and any addendum or amendment to this EULA which is included with the Software) is the entire agreement between you and EnSoft relating to the Software and the support services (if any) and it supersedes all prior or contemporaneous oral or written communications, proposals and representations with respect to the Software or any other subject matter covered by this EULA. This EULA shall prevail over your standard terms and conditions (if any) attached to, enclosed with, or referred to in, the purchase order or confirmation of order. If any provision of this EULA is held to be void, invalid, unenforceable or illegal, the other provisions shall continue in full force and effect.

**14. ADDITIONAL SOFTWARE/SERVICES.** This EULA applies to updates, supplements, add-on components, or Internet-based services components, of the Software that EnSoft may provide to you or make available to you after the date you obtain your initial copy of the Software, unless we provide other terms along with the update, supplement, add-on component, or Internet-based services component. EnSoft reserves the right to discontinue any Internet-based services provided to you or made available to you through the use of the Software.

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**18. AMENDMENT.** EnSoft may amend this EULA when the Software is updated. The update of the Software will constitute notice of any amendments, which will be included in the new EULA accompanying the updated Software. By installing, copying, downloading, accessing, operating or otherwise using the updated version of the Software, you agree to be bound by the terms of the amended EULA. If you do not agree to the terms of the amended EULA that may accompany an upgraded version of the Software, then you may continue to operate the current version of the Software under the original EULA until the expiration or termination of your License. This EULA may not be amended in any other way except through a written agreement by authorized representatives of EnSoft and you.