

## MODULAR MINING SYSTEMS END USER LICENSE AGREEMENT

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**NOTICE TO USER:** This End User License Agreement (“**EULA**”) is a legal agreement between you, either an individual or a single entity (“**End User**”), and Modular Mining Systems, Inc. (“**Modular**”) for the Modular Mining Systems software Program identified above, which includes computer software and may include associated media, printed materials, online or electronic documentation, and Internet-based services. An amendment or addendum to this EULA may accompany the Program. BY INSTALLING, COPYING, OR OTHERWISE USING THE PROGRAM, END USER AGREES TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS EULA. If End User does not agree with such terms and conditions, End User: (a) shall not install or use the Program; (b) shall delete the Program or any portion thereof, where installed; and (c) if in conjunction with this Agreement, End User received a disk, CD-ROM, or other media containing the Program or documentation related to the Program, End User shall return these materials to Modular.

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### SECTION 1. DEFINITIONS

“**Application Specific**” refers to the Program which is limited to use in conjunction with Modular’s software products and shall not be modified for use with any third party application.

“**Intellectual Property**” means all patents, patent rights, copyrights, rights of publicity, trademark, trade dress and service mark rights, goodwill, trade secret rights and any other proprietary or intellectual property right, as may now exist or hereafter come into existence worldwide, and all applications therefore and registrations, renewals and extensions thereof, recognized under any state, country, or territory’s laws, or international treaty.

“**Open-source Materials**” means Third Party Materials supplied under open-source software license agreements, including any modifications to such software made by Modular.

“**Program**” means the object-code, Application Specific version of the software program, including Program documentation and any Program Updates acquired from Modular.

“**Source-code**” means human-readable program statements written in a high-level or assembly language, as opposed to object-code, which is derived from source-code and is designed to be machine-readable.

“**Third Party Materials**” means software licensed by Modular to End User which is specifically labelled as being provided by and/or owned other than by Modular, including Open-source Materials.

“**Update**” means a broadly available improvement or fix to a specific problem in a Modular software Program and includes without limitation, subsequent versions, modifications, revisions, enhancements, adaptations, translations, updates, supplements and add-on components.

### SECTION 2. GRANT OF LICENSE

Provided that End User complies with all the terms and conditions of this EULA, Modular grants to End User a non-exclusive, non-transferable (without right of sublicense or assignment), limited, and revocable license to use the Program: (a) solely in machine-readable, object-code form; (b) for End User’s internal business purposes; and (c) at the specific End User site location where the Program is first installed. License shall only be valid where End User has fully paid all applicable fees. **THE PROGRAM UNDER THIS EULA IS LICENSED, NOT SOLD. ALL RIGHTS RESERVED.**

### SECTION 3. RESTRICTIONS ON USE

- (1) End User shall not duplicate the Program except for a single copy in machine-readable form as part of a normal system backup, and one archival copy of Program, solely for archival and disaster recovery purposes. All copies shall remain the exclusive property of Modular and shall be subject to the terms of this EULA. End User shall have no other right to copy the Program, in whole or in part. All copies shall include all Modular's copyright and other Intellectual Property and proprietary notices, and include notices and legends embedded in the Program and affixed to its medium and container, as received from Modular. End User shall maintain a record of the location of Program copies, including where merged with other software.
- (2) End User shall not make Program available in any form to any third party without Modular's prior express written consent.
- (3) End User shall not provide processing services, commercial time-sharing, subscription services, rental or sharing arrangements, or otherwise use or provide the Program to a third party on a service-bureau basis
- (4) End User shall not reverse-engineer, unless required by law for interoperability, disassemble or decompile, or in any way derive any Source-code from the Program.
- (5) End User shall be licensed to use the Program solely in conjunction with Modular's software products.
- (6) End User shall take appropriate action to protect the confidentiality of the Program and ensure that any person or entity permitted access to the Program does not disclose or use the Program except as licensed by this EULA.
- (7) End User shall not modify the Program, write or develop any derivative work, software, or any other software program based on the Program.
- (8) End User shall not remove or modify any Program markings or any notice of Modular proprietary rights.
- (9) End User shall not perform benchmark tests on the Program without Modular's prior express written consent.

#### **SECTION 4. OWNERSHIP RIGHTS**

End User acknowledges that the license granted under this EULA shall only provide the End User with a right of limited use. End User further acknowledges that Modular owns all right, title, and interest in the Program and End User will not contest those rights or engage in any conduct contrary to those rights. Modular shall retain full ownership of all Intellectual Property rights in the Program. Any copy, modification, revision, enhancement, adaptation, translation, or derivative work of or created from the Program, or documentation relating thereto, shall belong exclusively to Modular as shall all Intellectual Property rights therein.

#### **SECTION 5. SOURCE CODE AND UPDATES**

- (1) End User understands that the Program may include Source-code provided by Modular, said Source-code shall be governed by the terms of this EULA. **ALL SOURCE CODE IS LICENSED, NOT SOLD. ALL RIGHTS RESERVED.**
- (2) Modular may, in its sole discretion, provide further Program Updates to End User hereunder. The terms and conditions of this EULA (except the limited warranty in section 7) shall apply to any

subsequent Program Update unless other terms of use are provided by Modular with such Update.

## **SECTION 6. OPEN SOURCE MATERIALS**

End User understands that the Program may contain Open Source or third party Materials, and as such said Materials may be governed by open source and third party software license agreements. Modular makes no claim of ownership of Open Source or third party Materials, and said Materials are supplied solely in accordance with the applicable license agreement. Accordingly, End User is bound by all terms, conditions and restrictions contained in any and all applicable open source software license agreements. Notwithstanding, the provisions under section 9 (Limitation of Liability) apply to all Third Party Materials including Open Source Materials.

## **SECTION 7. LIMITED WARRANTY**

- (1) Modular warrants to End User, that for a period of ninety (90) days from receipt of Program, the Program will substantially comply with the functional specifications set forth in Modular's documentation. Modular does not warrant that the Program will: (a) meet End User's requirements; (b) operate in combination with other software (including without limitation, unsupported platforms, operating systems, or databases); (c) that operation of Program will be uninterrupted or error-free; or (d) that Modular will correct all Program errors. Modular's entire liability and End User's sole and exclusive remedy for breach of this limited warranty shall be, in Modular's sole discretion: (i) correction of the defect, or replacement of non-conforming Program with conforming Program; or (ii) a refund of the price paid to Modular for the non-conforming Program or portion thereof. End User must notify Modular in writing of any nonconformity within the limited warranty period. The limited warranty shall be void if Program has been: (1) altered or modified by any party other than Modular; (2) subjected to accident, abuse, misuse, abnormal or negligent use; or (3) used, adjusted or installed other than in accordance with Modular's instructions.
- (2) THIS LIMITED WARRANTY IS THE ONLY WARRANTY MADE BY MODULAR. EXCEPT FOR THE LIMITED WARRANTY STATED HEREIN, AND TO THE MAXIMUM EXTENT PERMITTED BY LAW, MODULAR DISCLAIMS ANY OTHER WARRANTIES AND CONDITIONS, WHETHER EXPRESS, IMPLIED OR STATUTORY, WITH RESPECT TO THE PROGRAM AND RELATED INFORMATION. MODULAR SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT.

## **SECTION 8. INDEMNIFICATION**

End User shall indemnify, defend and hold Modular and its directors, officers, agents, employees, members, subsidiaries, and affiliates harmless from and against any claim, action, proceeding, liability, loss, damage, cost, or expense (including without limitation, attorneys' fees), for any claims of Intellectual Property infringement made by any third party where: (a) End User alters the Program or uses said Program outside the scope of use identified in Modular documentation; (b) the claim is based upon the combination or operation of the Program with any other program, products or services not provided by Modular; (c) the claim is based upon specifications provided by End User for the development of custom programming; (d) the claim is based upon services performed on the Program, or modifications or derivative works of the Program by a party other than Modular; or (e) the claim is otherwise based on a violation by End User of this EULA.

## **SECTION 9. LIMITATION OF LIABILITY**

- (1) MODULAR'S TOTAL LIABILITY AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR ANY CLAIM OF ANY TYPE WHATSOEVER ARISING UNDER THIS AGREEMENT SHALL BE LIMITED TO PROVEN DIRECT DAMAGES CAUSED BY MODULAR IN AN AMOUNT NOT TO

EXCEED THE PRICE PAID BY END USER TO MODULAR FOR THE PROGRAM GIVING RISE TO THE CLAIM.

- (2) IN NO EVENT SHALL MODULAR BE LIABLE FOR INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, PUNITIVE, OR CONSEQUENTIAL DAMAGES (INCLUDING WITHOUT LIMITATION, DAMAGES FOR LOSS OF PROFITS, LOSS OF DATA, LOSS OF DATA USE OR BUSINESS INTERRUPTION) WHETHER AN ACTION IN CONTRACT, TORT, OR BASED ON ANY OTHER LEGAL THEORY, EVEN WHERE MODULAR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE RESULTING FROM ANY LIMITED REMEDY AND TO THE MAXIMUM EXTENT PERMITTED BY LAW.

#### **SECTION 10. TERM & TERMINATION**

- (1) This EULA and the license granted hereunder shall remain in effect unless terminated as provided herein for breach of this EULA. The exercise of Modular's right to termination shall not prejudice any other available remedy whether legal, equitable, or otherwise.
- (2) Where End User breaches any covenant, obligation, representation, or warranty under this Agreement, it being agreed that all breaches shall be deemed material, Modular may in its sole discretion: (a) immediately terminate this EULA upon giving notice to End User; (b) terminate this EULA where End User fails to cure said breach within a period of time defined by Modular; and/or (c) suspend, lock, or otherwise disable operation of the Program.
- (3) Upon termination of this EULA, End User shall immediately discontinue use of the Program and shall, at Modular's option, promptly return to Modular, or certify destruction of, any and all copies of the Program and related information, and deliver to Modular a written certification that End User has complied with this section.
- (4) The following provisions shall survive termination of this Agreement: section 4 (Ownership Rights); section 8 (Indemnification); section 9 (Limitation of Liability); and any other obligation which is intended to survive termination of this EULA.

#### **SECTION 11. VERIFICATION**

Modular shall have the right to audit, at End User's expense, all of End User's supporting records, detail and information, and to verify End User's use of the Program in order to satisfy Modular that End User is in compliance with the terms and conditions of this EULA. End User shall immediately pay any applicable adjustments to the license fee revealed by the audit.

#### **SECTION 12. IMPORT/EXPORT LAWS**

End User shall comply with the import and export laws and regulations of the United States and all other applicable customs, import and export laws and regulations to ensure that the Program, or any portion thereof, is exported, directly or indirectly, in violation of said laws. End User shall not ship, transfer, or export the Program to any country, or use the Program in any manner prohibited by the United States Export Administration Act or any export laws, restrictions, or regulations of any other applicable country or jurisdiction. End User shall arrange for import documentation and any documentation or permits related to the import of Program as required by applicable law. End User agrees to indemnify, defend and hold Modular harmless from any breach of End User's obligations under this section 12.

#### **SECTION 13. MISCELLANEOUS**

- (1) **NEW AGREEMENT VERSIONS.** Modular reserves the right to modify this EULA at any time by providing a revised EULA to End User, or by publishing the revised EULA on Modular's website. The revised EULA shall become effective within thirty (30) days of such publication or provision to End User. End User's express acceptance of the revised EULA, or End User's continued use of

the Program after expiration of the thirty (30) day notice period, shall constitute acceptance of the revised EULA.

- (2) **ENTIRE AGREEMENT.** This Agreement encompasses the entire understanding between the Parties with respect to the subject matter of this EULA, and supersedes all prior or contemporaneous agreements or statements regarding the subject matter hereof. There are no representations, warranties, covenants, agreements, collateral understandings, oral or otherwise, expressed or implied, affecting this instrument not expressly set forth or provided for herein.
- (3) **WAIVER.** All waivers under this EULA must be made in writing to be effective. No delay on the part of either Party in exercising any of their respective rights under or the failure to exercise the same, nor the acquiescence in or waiver of a breach of any term, covenant or condition of this EULA shall be deemed or construed to operate as a waiver of such rights or acquiescence thereto except in the specific instance for which given.
- (4) **AMENDMENT.** Except as provided in section 13(1), none of the terms, conditions or provisions of this EULA shall be deemed modified or altered by any act, course of conduct, or knowledge of either Party, their respective agents, servants or employees. The terms of this EULA may not be amended, changed, waived, varied or modified except by a statement in writing signed by duly authorized representatives of the Parties expressly assenting to the amendment.
- (5) **SEVERANCE.** The invalidity or unenforceability of any provision of this EULA pursuant to any applicable statute, law or regulation shall not affect the validity or enforceability of the remaining provisions hereof. However, this EULA shall be construed as if not containing the provision held invalid or unenforceable in the jurisdiction in which so held, and remaining provisions shall remain in full force and effect.
- (6) **COMMUNICATIONS.** All notices, requests and other communications provided for in writing in this EULA shall be deemed to have been duly given: (i) on the date of delivery when delivered in person, including by courier service; (ii) upon receipt if delivered by mail, including by certified mail, return receipt, or postage prepaid; or (iii) upon receipt where sent by electronic or facsimile transmission. Any notice received at the addressee's location on any business day after 5:00 p.m. (addressee's local time) shall be deemed to have been received at 9:00 a.m. (addressee's local time) on the next business day. Either Party to this EULA may notify the other Party of any changes to its address or any of the other details specified in this paragraph, provided that such notification shall only be effective on the date specified in such notice or five (5) business days after the notice is given, whichever is later. Rejection, refusal to accept, or the inability to deliver due to a changed address for which no notice was given shall result in deemed receipt of said notice as of the date of rejection, refusal or inability to deliver.
- (7) **HEADINGS.** Paragraph headings used herein are for the convenience of the Parties only. They do not form a part of this EULA and shall not be deemed or construed in any way to define or limit the meaning of such paragraphs.
- (8) **SINGULAR INCLUDES PLURAL.** In this EULA, unless there is something in a subject matter or context inconsistent therewith, the singular shall include the plural and the plural shall include the singular.
- (9) **ASSIGNMENT.** Neither this EULA nor any interest in this EULA may be assigned by End User without the prior express written consent of Modular. End User may not assign, pledge, mortgage, sell to a third party, or otherwise dispose of all or a portion of this EULA or the license granted hereunder.
- (10) **LIMITATION OF ACTIONS.** End User may not bring any action, suit, claim or other legal proceeding against Modular arising out of, or related to this EULA or the subject matter hereof more than one (1) year after the occurrence of the event which gave rise to said action.

- (11) **LEGAL COSTS.** The Parties endeavor to resolve disputes under this EULA by mutual consultation. Where legal action is pursued to enforce any provision of this EULA, the prevailing Party shall be entitled to recover all associated fees, including reasonable attorney fees, and costs.
- (12) **GOVERNING LAW.** This Agreement shall be governed by the laws of the state of Arizona and the United States, without regard to conflict of laws principles, as set forth in section 13(13) below. The rights and obligations of the Parties to this Agreement shall not be governed by the provisions of the United Nations Convention on Contracts for the International Sale of Goods (1980), but instead shall be governing by the laws of the State of Arizona and the United States, as set forth in section 13(13) below.
- (13) **JURISDICTION.** The Parties irrevocably and unconditionally agree that the exclusive place of jurisdiction for any action relating to this EULA shall be in the courts of the United States of America sitting in the district of Arizona. If such courts do not have jurisdiction over the subject matter thereof, exclusive jurisdiction shall be in the courts of the State of Arizona sitting in the County of Pima or Maricopa. Each Party irrevocably and unconditionally waives any objection it may have to the venue of any action brought in such courts or to the convenience of such forum. Final judgment in any action shall be conclusive and may be enforced in other jurisdictions by suit on the judgment, a certified or true copy of which shall be conclusive evidence of the fact and the amount of any indebtedness or liability of any Party therein described.
- (14) **LANGUAGE.** To the extent that this document or any subsequent agreements arising out of this EULA are translated into another language, the English version of said documents shall be the sole authoritative version.