End-User Software License - Protein Metrics

THIS END USER SOFTWARE LICENSE AGREEMENT ("AGREEMENT") GOVERNS YOUR USE OF PROTEIN METRICS SOFTWARE PRODUCTS, INCLUDING BYOS®, PREVIEW™, BYONIC™, BYOLOGIC®, BYOMAP™, INTACT MASS™, SUPERNOVO™ OR OTHER PROPRIETARY SOFTWARE PRODUCT(S) THAT REQUIRES A VALID LICENSE KEY FROM PROTEIN METRICS™ INC. ("PROTEIN METRICS").

PROTEIN METRICS IS WILLING TO LICENSE THE SOFTWARE IDENTIFIED BELOW TO YOU ONLY UPON THE CONDITION THAT YOU ACCEPT ALL OF THE TERMS OF THIS AGREEMENT. PLEASE READ THE AGREEMENT CAREFULLY. IF YOU DO NOT AGREE TO ANY OF THE TERMS OF THIS AGREEMENT, YOU MUST NOT USE THE SOFTWARE. BY USING THE SOFTWARE YOU ACKNOWLEDGE THAT YOU HAVE READ THE TERMS OF THIS AGREEMENT AND AGREE TO THEM.

This Agreement was last updated on December 18, 2019. It is effective between you and us as of the date you accept this Agreement ("Effective Date").

1. Definitions. In this Agreement, the following terms have the following meanings:
    a. "Computer" means a physical or virtual computer device that accepts information in digital or similar form and manipulates it for a specific result based on a sequence of instructions. A single Computer, based on an integrated circuit central processing unit (CPU), may have up to eight (8) physical cores. (Please contact Protein Metrics at info@proteinmetrics.com (mail to:info@proteinmetrics.com) for information on licenses for larger numbers of physical cores.)
    b. "License Key" means the key that we may issue or that you may purchase from us for use of Byos, Preview, Byonic, Byologic, Byomap, Intact Mass, Supernovo or any other proprietary software that requires software activation by us.
    c. "Party" means either you or us, and "Parties" means both you and us.
    d. "Software" means any software we grant you the license to use under the terms of Section 2, and any components and documentation distributed therewith.
    e. "We," "us," and similar terms mean Protein Metrics.
    f. "You," "Your," and similar terms mean you individually and the corporation, university, non-profit, or other legal entity for which you are accepting this Agreement.
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    a. Protein Metrics Software Products, include BYOS, PREVIEW, BYONIC, BYOLOGIC, BYOMAP, INTACT MASS, SUPERNOVO, or any other proprietary software that requires software activation by Protein Metrics. Conditioned on your agreement with and adherence to the terms of this Agreement and your purchase of valid License Keys, we hereby grant you a non-exclusive, non-transferable, non-sublicensable license to install, execute and use one copy of Protein Metrics' Software Products (such as BYOS, PREVIEW, BYONIC, BYOLOGIC, BYOMAP, INTACT MASS, SUPERNOVO), solely for your internal business, academic uses, and internal research, on your own data, and on no more than the number of Computers for which you have purchased License Keys at any one time, for use by no more than one user at any one time. Additionally, you must use the licensed Software only in a manner and for the purposes for which the Software was designed.
    b. You may make a copy of the licensed Software and any accompanying documentation for backup and archival purposes only. All copies of the Software and any related documentation, in whole or in part, will contain Protein Metrics' restrictive and proprietary notices in the form and content as they appear on or in the original, and all such copies will remain our property.
3. Intellectual Property.

a. Acknowledgments. You acknowledge that the Software is a proprietary product of Protein Metrics and is protected by United States and foreign copyright laws and international copyright treaties, as well as other intellectual property laws and treaties. You further acknowledge that PROTEIN METRICS, BYOS, PREVIEW, BYONIC, BYOLOGIC, BYOMAP, INTACT MASS, and SUPERNOVO are trademarks that belong to Protein Metrics. Solely for convenience, these marks may be used in this Agreement with or without the "™" or "®" symbol.

b. Reservation of Rights. Subject to the limited rights expressly granted hereunder, Protein Metrics reserves all rights, title and interest in and to the Software, including all related intellectual property rights. No rights are granted to you hereunder other than as expressly set forth herein.

4. Restrictions.

a. Restrictions on Your Use. You may not use, reproduce, transmit, modify, distribute, adapt or translate the Software or any License Key, in whole or in part, except as otherwise permitted by this Agreement. You may not reverse engineer, decompile, disassemble, or create derivative works based on the Software. You may not alter, remove or cover copyright or proprietary notices in or on the Software, or storage media or use the Software or any License Key in any unlawful manner whatsoever. You may not use the Software or any License Key in any manner whatsoever with the result that access to the Software or any License Key may be obtained through the Internet including, without limitation, any web page.

b. Restrictions on Use by Third Parties. You may not use the Software on behalf of third parties, or offer, rent, lease, license, transfer, distribute, share, assign, sell or otherwise provide access to the Software or any License Key to third parties, in whole or in part, on a temporary or permanent basis, including on a time-share, for-hire, or similar basis, unless we have granted you our express written permission to do so. To discuss alternative licensing arrangements, please contact info@proteinmetrics.com.

5. Third-Party Software.

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6. Support. The terms and conditions governing your eligibility for technical support for and updates to the Software are set out in the Support Agreement, which is hereby incorporated herein by reference.

7. Warranties.

a. Each Party represents and warrants that it, and the entity on whose behalf it enters this Agreement, if any, has the legal power and authority to enter into this Agreement. You further represent that you are not otherwise prohibited from using or receiving the Software. EXCEPT AS EXPRESSLY INDICATED IN THIS SECTION 7, THE SOFTWARE IS PROVIDED AS-IS WITHOUT ANY REPRESENTATIONS, WARRANTIES OR GUARANTEES OF ANY KIND, WHETHER EXPRESS OR IMPLIED. WE DO NOT WARRANT THAT THE SOFTWARE WILL PERFORM WITHOUT ERROR OR THAT IT WILL RUN WITHOUT IMMATERIAL INTERRUPTION. PROTEIN METRICS PROVIDES NO WARRANTY REGARDING, AND WILL HAVE NO RESPONSIBILITY FOR, ANY CLAIM ARISING OUT OF: (a) A MODIFICATION OF THE SOFTWARE MADE BY ANYONE OTHER THAN PROTEIN METRICS, UNLESS WE APPROVE SUCH MODIFICATION IN WRITING, OR (b) USE OF THE SOFTWARE IN COMBINATION WITH ANY OPERATING SYSTEM NOT AUTHORIZED IN THE DOCUMENTATION OR WITH HARDWARE OR SOFTWARE SPECIFICALLY FORBIDDEN BY THE DOCUMENTATION. WE SPECIFICALLY DISCLAIM ANY REPRESENTATION, WARRANTY OR GUARANTEE OF NONINFRINGEMENT,

MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. BY USING THE SOFTWARE, YOU ASSUME THE ENTIRE RISK OF THE RESULTS AND PERFORMANCE OF THE SOFTWARE.

8. LIMITATION OF LIABILITY.

    a. IN NO EVENT SHALL WE OR OUR LICENSORS BE LIABLE FOR ANY LOST REVENUE, PROFIT OR DATA, OR FOR SPECIAL, INDIRECT, CONSEQUENTIAL, INCIDENTAL OR PUNITIVE DAMAGES, NO MATTER HOW CAUSED AND REGARDLESS OF THE THEORY OF LIABILITY, ARISING OUT OF OR RELATED TO THE USE, MISUSE, MALFUNCTION OF OR INABILITY TO USE THE SOFTWARE, EVEN IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. In no event will our liability to you, whether in contract, tort (including negligence), or otherwise, exceed the amount actually paid by you to us for the then current Term in consideration for the Software licensed under this Agreement, and you shall bring no action for any claim relating to or arising out of this Agreement more than one (1) year after the accrual of any claim. The foregoing limitations will apply even if the foregoing warranty fails of its essential purpose. Some jurisdictions do not allow the exclusion of incidental or consequential damage so some of the terms above may not be applicable to you.

    b. THESE SECTIONS 7 AND 8 STATE THE SOLE AND EXCLUSIVE REMEDIES AVAILABLE TO YOU, AND OUR SOLE AND EXCLUSIVE LIABILITY, FOR ANY BREACH OF WARRANTY CLAIM AND ANY CLAIM REGARDING THE PERFORMANCE OR NONPERFORMACNE OF THE LICENSED SOFTWARE.

9. Indemnity. You will be solely responsible for, and will indemnify, defend and hold us harmless from all damages, liabilities, charges and expenses (including reasonable attorneys' fees) from all claims, lawsuits, or other proceedings arising out of or relating to:

    a. Your use of the Software in a manner not permitted by this Agreement, not permitted by Protein Metrics, or not in conformance with Protein Metrics' then current written documentation and requirements, including maintaining the Software by updating it with its most current Software and/or maintenance release;

    b. any acts or omissions by you, your employees, agents or any person or entity who has access to the Software through you; or

    c. an infringement of any right resulting in any way from the use of the Software with other software or materials that we have not approved or licensed to you.

10. Termination. This Agreement is effective until terminated. You may terminate this Agreement at any time by destroying all copies of the Software. This Agreement will terminate immediately without notice from us if you fail to comply with any provision of this Agreement. Either Party may terminate the Agreement immediately should any Software become, or in either Party's reasonable opinion be likely to become, the subject of a claim of infringement of any intellectual property right. Upon any termination, you must cease all use of the Software and destroy all copies of the Software in your possession or under your control. Sections 1, 3, 4, 8, 9, 10 11, and 12 shall survive any termination, and no termination shall affect any causes of action or sums accrued before such termination.

11. Export Regulations. All Software and technical data delivered under this Agreement are subject to U.S. export control laws and may be subject to export or import regulations in other countries. You agree to comply strictly with all such laws and regulations and acknowledge that you have the responsibility to obtain such licenses to export, re-export, or import as may be required after delivery to you.

12. Miscellaneous.

    a. Governing Law and Venue. This Agreement and performance hereunder will be governed by and construed in accordance with the laws of the State of California and controlling U.S. federal law, without giving effect to its conflict of law provisions. You agree to submit to the exclusive jurisdiction of the courts of the County of San Mateo, California.

b. Dispute Resolution. In the event of a dispute, claim or controversy between the Parties relating to the Software or this Agreement, the Parties shall first negotiate in good faith to arrive at an agreed resolution. If the Parties are unable to resolve the dispute, claim or controversy, the matter will be settled by independent arbitration involving a neutral arbitrator in San Mateo County, California. The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. The Parties understand there is no judge or jury in in an arbitration proceeding and the decision of the arbitrator shall be binding on both Parties and may be entered into any court having jurisdiction. SUBJECT TO THE FOREGOING, EACH PARTY HEREBY WAIVES ANY RIGHT IT MAY HAVE TO A JURY TRIAL IN CONNECTION WITH ANY ACTION OR LITIGATION IN ANY WAY ARISING OUT OF OR RELATING TO THIS AGREEMENT.

c. Severability and Unenforceability. If any provision of this Agreement is held by a court of competent jurisdiction to be illegal, contrary to policy or otherwise unenforceable, such provision shall be deemed modified so as to most nearly accomplish the Parties' intent to the fullest extent permitted by applicable law. If the unenforceable provision cannot be rendered enforceable through such deemed modification, then, so long as the fundamental terms of the Parties' bargain remain binding, the unenforceable provision shall be deemed struck and the remainder of this Agreement shall remain in force.

d. Integration. This Agreement, together with the Invoice Terms and Conditions and the Support Agreement, is the entire agreement between you and us relating to its subject matter. It supersedes all prior or contemporaneous oral or written communications, proposals, representations and warranties and prevails over any conflicting or additional terms of any quote, order, acknowledgment, or other communication between the Parties relating to its subject matter during the term of this Agreement. No modification or waiver of any provision of this Agreement will be binding, unless in writing and signed by an authorized representative of each Party.

e. Restricted Rights. The Software is a "commercial item" comprised of "commercial computer software" and "commercial computer software documentation," as those terms are defined in 48 C.F.R. § 2.101 and 48 C.F.R. § 227.7202, and any use, duplication, or disclosure by the United States federal government is subject to the restrictions applicable to commercial computer software, commercial computer software documentation and commercial items generally in 48 C.F.R. § 12.212 and 48 C.F.R. § 227.7202, as applicable. For purposes of use, duplication, or disclosure by the United States federal government, the "Contractor" and author of the Software is Protein Metrics.

f. Assignment. You may not assign or transfer this Agreement without our express, prior, written consent, except that you may assign this Agreement without our consent in the context of a merger or sale of all or substantially all of your assets to the surviving entity of such merger of the acquirer of such assets, and shall within ten business days of closing such a deal provide written notice to Protein Metrics of your company's disposition. Subject to the first sentence of this subsection, this Agreement shall be binding upon and will inure to the benefit of the Parties, their successors and permitted assigns.

g. Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties, and no third party has any rights hereunder.

h. Relationship of the Parties. This Agreement does not establish any relationship between the Parties except that of independent contractor. This Agreement does not create a partnership, franchise, joint venture, agency, fiduciary or employment relationship between the Parties.

i. Notice. All notices required or permitted to be given under this Agreement shall be deemed duly given (i) immediately, if by personal delivery, (ii) one business day after sending, if by electronic mail, or (iii) five business days after sending, if by certified mail. Notices to us shall be sent to P.O. Box 414, San Carlos, CA 94070 USA or legal@proteinmetrics.com. Notices to you shall be sent to the contact information you provided in connection with your registration for or purchase of a license to the Software. Each Party may from time to time update its addresses

by sending notice to the other Party, and neither Party shall bear any liability for the other Party's failure to notify it of its updated addresses.

j. Headings. The article, section, and subsection headings contained in this Agreement are for reference purposes only, and shall not affect in any way the meaning or interpretation of this Agreement.