

PathScale Software Support Agreement

1. Definitions: For purposes of this Software Support Agreement (the “Agreement”), the following capitalized words and phrases shall have the following meanings:
 - 1.1. Annual Support Fee: The fee payable by the Customer to PathScale for the software support covered by this Agreement:
 - a) for the Initial Support Period, the amount quoted from PathScale Subscription Pricing Agreement and accepted by the Customer; and
 - b) for each subsequent twelve (12) month renewal period after the Initial Support Period, the standard fee then charged by PathScale.
 - 1.2. Confidential Information: All information (including, without limitation, the PathScale Documentation) provided by PathScale with respect to PathScale, whether or not protected by any Proprietary Right; provided, that Confidential Information shall not include any sales brochures or other literature provided generally by PathScale to prospective Customers.
 - 1.3. Customer: The party purchasing software support from PathScale under this Agreement.
 - 1.4. Effective Date: The date that PathScale signs and accepts this Agreement.
 - 1.5. Event of Default: The occurrence of any one or more of the following events:
 - a) a breach of default by the Customer in the payment or performance of any of the Customer's obligations under this Agreement;
 - b) the insolvency (however evidenced) of the Customer, an assignment for the benefit of creditors by the Customer, or the filing of any petition or the commencement of any proceeding by or against the Customer under any bankruptcy or insolvency laws or any laws relating to the relief of debtors, readjustment or indebtedness, reorganizations, compositions, or extensions (and, in the case of an involuntary petition or proceeding, the failure to cause the same to be dismissed or otherwise terminated within sixty (60) days of the filing or commencement thereof); or
 - c) the dissolution, termination of business existence, business failure, suspension of the transaction of the usual business, or appointment of a receiver of or for the Customer.
 - 1.6. Improvement: any enhancement or modification to the Software Product (together with any revisions to its documentation) which is distributed generally by PathScale at no additional charge to PathScale's other software support customers for such Software Product.
 - 1.7. Initial Support Period: The period of time commencing as of the Effective Date of this Agreement and continuing for twelve (12) months following the Installation Date.
 - 1.8. Installation Date: The first day of the month subsequent to the installation of the PathScale software at Customer's location.
 - 1.9. PathScale Documentation: PathScale documentation provided by PathScale.



1.10. Proprietary Right: Any patent, copyright, trademark, trade secret, or other proprietary right granted or recognized under the laws of the United States or of the State of Delaware.

1.11. Software: The PathScale Compiler Suite software products licensed to Customer under this Agreement, including documentation, error corrections, bug fixes, patches, extensions, enhancements, modifications and updates provided under this Agreement.

2. License Grant: As specified in the PathScale Software License Terms and Conditions Agreement.

3. Payment Terms

3.1. Initial Support Period. The PathScale Annual Support Fee for the Initial Support Period shall be payable in full upon the Installation Date.

3.2. Subsequent Annual Support Renewal Periods. For each subsequent twelve (12) month period, following the Installation Date, the Customer agrees to pay to PathScale the then current PathScale Annual Support Fee, as invoiced, on or before the first (1st) day of the twelve (12) month renewal period.

3.3. Non-Refundable. All Annual Support Fees are non-refundable.

3.4. Taxes. The Customer agrees to pay all federal, state, and local taxes (including, without limitation, sales and use taxes, privilege and excise taxes, and all other taxes of any kind or nature, exclusive only of taxes based on PathScale's income) related to or arising out of this Agreement, however such taxes may be designated, levied, or based, and whether on any of the fees set forth in this Agreement, the Products, the Services, or any other performance whatsoever under this Agreement.

4. Description of Software Support

4.1. Updates. During the Support Period PathScale will make available to Customer, subject to applicable media distribution charges, all extensions, enhancements, modifications, updates, error corrections, bug fixes and patches to the Software that PathScale makes generally available to its other licensees on similar terms. PathScale is not obligated to make available to Customer the aforementioned modifications and updates for Licensed Software Products for which Customer has not purchased annual support.

4.2. Technical Support. PathScale will, during the Subscription period or License term, provide technical support for the Software by:

a) providing email support 9:00 A.M. to 5:00 P.M. Pacific time Monday through Friday;

b) acknowledging customer support queries when received and responding by the next business day in the form of any known "workarounds", if possible estimates of time to fix, and or request for additional information on the problem submitted;

c) making available an Internet based query capability for customers to ask product questions, submit problems and access known problem "workarounds"; and

d) making available the ability to request temporary fixes in cases where waiting for the next release would severely impair the Customer's ability to use the product according to specifications.

4.3. Additional Support:

- a)** PathScale developed enhancements to PathScale will be made available on a periodic basis. When practical, minor enhancements and product fixes will be made accessible via e-mail. Major enhancements and product fixes will be downloadable from pathscale.com to the Customer.
- b)** Some fixes or updates will be specified as mandatory. The Customer is required to implement all mandatory updates within ninety (90) days of their availability. Failure to implement a mandatory update may result in PathScale's inability to support the old version of the product.
- c)** Any system integration efforts or prerequisite software installation requirements (such as a specific operating system version) that are needed to utilize PathScale enhancements or to bring the Customer up to the "latest" product release level are the Customer's responsibility. With reasonable notification PathScale can provide technical resources to implement these changes. All such work will be billable to the Customer at the then prevailing PathScale hourly rates.
- d)** Access. Web based issue tracking and e-mail access is provided to the PathScale technical staff for PathScale software support.
- e)** Problem Diagnosis. PathScale will provide diagnosis for problems occurring with PathScale. If the problem is determined to result from software not supplied by PathScale, the problem diagnosis effort is billable to the Customer at PathScale's standard hourly rates at the time the problem diagnosis effort was performed.
- f)** Software "FIXES". Software fixes will be provided for PathScale developed and PathScale customized components of PathScale. When a problem is determined to result from a third party software product (i.e., Windows 2000, Windows 2003, Windows XP, etc.), PathScale will facilitate the problem resolution process and bring third party supplier technical resources to bear as appropriate. The timely creation of any required fix is the responsibility of the third party software developer.
- g)** PathScale Support Hours. Support hours for the PathScale technical staff are 8:00 am to 5:00 pm, (Pacific Time as seasonally adjusted) Monday through Friday excluding holidays.

4.4. Support Limitations. PathScale's obligation to provide software support services for Customer is subject to the following conditions:

- a)** Annual Support Fees. Annual support fees must be paid by the Customer on a timely basis in accordance with the provisions of this Agreement;
- b)** Current Revision Only. The only supported version will be the most recent version issued by PathScale;
- c)** Proper use of the Software: The version of PathScale being supported must be used by the Customer in accordance with the terms and conditions of this Agreement and the applicable software license; and
- d)** Information Requests: The Customer shall have provided PathScale with all information reasonably requested by PathScale from time to time in connection with PathScale's performance of software support services for PathScale; the processor on which PathScale is being used, any operating system and other system software associated with the processor, and all other software upon which PathScale relies or with which PathScale is interdependent, shall be operating properly.

4.5. Additional Fees: If PathScale provides software support services to the Customer for PathScale under circumstances where one or more of the conditions set forth above have not been satisfied, then



the Customer agrees to pay to PathScale, within ten (10) days of PathScale's invoice date and at PathScale's then-current hourly rates, an additional fee for such services based on the services provided.

5. Other Support Benefits. The following value-added benefits are included with your Annual Support Fees:
 - 5.1. PathScale will conduct an annual account review, at your request, to identify the features of PathScale that will best benefit your organization.
 - 5.2. PathScale periodically sponsors value-add usage webinars for PathScale customers.
6. Limitation of Warranties. PATHSCALE MAKES AND CUSTOMER RECEIVES FROM PATHSCALE NO EXPRESSED OR IMPLIED WARRANTIES OF ANY KIND WITH RESPECT TO THE Software Support Services . PATHSCALE HEREBY EXCLUDES ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE Software Support SERVICES.
7. Limitation of Losses and Damages. IN NO EVENT SHALL PATHSCALE BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, OR PUNITIVE LOSSES OR DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOST PROFITS OR LOST DATA) AS THE RESULT OF ANY BREACH OR DEFAULT BY PATHSCALE UNDER THIS AGREEMENT, EVEN IF PATHSCALE HAS BEEN ADVISED OR MADE AWARE OF THE POSSIBILITY OF ANY SUCH LOSSES OR DAMAGES AND REGARDLESS OF WHETHER THE CLAIM IS BASED ON CONTRACT, TORT, STRICT LIABILITY, OR OTHER THEORY OF LIABILITY.
8. Allocation of Risks. The fees set forth in this Agreement reflect the allocation of risks between PathScale and the Customer, as set forth in this Article and elsewhere in this Agreement. The Customer represents to PathScale that the Customer (a) has read and understands the allocation of risk provisions, and (b) acknowledges and understands that the provisions limit the liability of PathScale. The Customer further acknowledges and agrees that such allocation of risks and limitation of PathScale's liability are a material part of the consideration being given by the Customer to PathScale in exchange for PathScale's obligations under this Agreement and PathScale's acceptance of the amount of the fees charged for Software Support Services as set forth in this Agreement.
9. Termination
 - 9.1. Event of Default. Upon the occurrence of an Event of Default, PathScale shall at PathScale's option, be entitled to terminate this Agreement by giving the Customer written notice thereof at any time thereafter.
 - 9.2. Termination by the Customer. The Customer shall have the right at any time, to terminate this Agreement by giving PathScale written notice thereof; however, termination of this Agreement by Customer will not entitle Customer to the refund of any annual service fees previously paid by Customer.
 - 9.3. Customer's Liability Following Termination. No termination of the Agreement, whether by PathScale or the Customer, shall relieve the Customer from liability for any existing breach or default by the Customer in the payment or performance of any of the Customer's obligations under this Agreement nor shall the same limit PathScale's rights or remedies therefore.
10. General Provisions
 - 10.1. Waiver. No Waiver by PathScale or the Customer of any breach or default by the other of any of the other's obligations under this Agreement shall be deemed to be a waiver of any other breach or default of the same or any other nature. No failure by PathScale or the Customer on any one or more occasions to

exercise any right or remedy provided in this Agreement shall preclude the exercise of such right or remedy on any other occasion.

- 10.2.** Severability. Each term, condition, and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law. If there is any conflict between any term, condition, or provision of this Agreement and any statute, law, ordinance, order, rule or regulation, the latter shall prevail; provided that any such conflicting term, condition, or provision shall be curtailed and limited only to the extent necessary to bring it within the legal requirements and the remainder of this Agreement shall not be affected thereby.
- 10.3.** Binding Effect. This Agreement shall be binding on and for the benefit of PathScale and the Customer and their respective legal representatives, successors, and assigns; provided that the Customer shall not be entitled to assign, sublicense, delegate, or otherwise transfer any of the Customer's rights or obligations under this Agreement without the prior written consent of PathScale. PathScale agrees not to withhold PathScale's consent unreasonably to a proposed transfer of all of the Customer's rights and obligations under this Agreement to a third party that will be the successor to the Customer's business by virtue of either
- a) a statutory merger, consolidation, or share exchange, or
 - b) a sale of all or substantially all of the assets of the Customer, so long as the Customer requests PathScale's consent prior to the proposed transfer.
- 10.4.** Entire Agreement. Any oral or written statements, understandings, correspondence, purchase orders, or agreements previously made by PathScale and the Customer with respect to the subject matter of this Agreement are merged into this Agreement, which alone fully and completely expresses the respective obligations of PathScale and the Customer. This Agreement is entered into by the Customer after opportunity for investigation, and the Customer represents that the Customer is not relying upon any statements, understandings, correspondence, purchase orders, or agreements not embodied or explicitly referenced in this Agreement and made by PathScale or on PathScale's behalf.
- 10.5.** Amendment. This Agreement may not be amended, in whole or in part, except by an instrument in writing signed by both PathScale and the Customer.
- 10.6.** Governing Law; Jurisdiction. This Agreement and all rights, remedies, and obligations under this Agreement, including matters of construction, validity, and performance, shall be governed exclusively by the laws of the State of Delaware. This Agreement shall be enforceable, at PathScale's option, in any jurisdiction; provided, that the Customer specifically consents to, and agrees that the Customer is subject to, the jurisdiction of the state and federal courts of the State of Delaware with respect to any actions for enforcement of or breach of this Agreement.
- 10.7.** Notices. Any demand, notice, or other communication required or permitted under this Agreement shall be in writing and shall be either
- a) hand-delivered to the addressee,
 - b) faxed to a telephone number specified by the addressee in a previous notice, or
 - c) deposited in the mail (first class, registered, or certified) or delivered to a private express company, postage or freight prepaid, addressed to PathScale at the PathScale address and to the Customer at the Customer's address specified on the first page of this Agreement. Each party may



change such party's fax number or address from time to time by giving the other party notice of the change.

- 10.8.** Counterparts. This Agreement may be executed in one or more counterpart copies, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
- 10.9.** Headings. The article and section headings used in this Agreement are for convenience and reference only, and the words contained therein shall not be held to explain, modify, amplify, or aid in the interpretation, construction, or meaning of any of the provisions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their authorized representatives effective as of the Effective Date.

PathScale, Inc.

(Customer Name)

By:

By:

Name:

Name:

Title:

Title:

Date:

Date: