

QLOGIC PATHSCALE COMPILER SUITE SOFTWARE SUBSCRIPTION AND LICENSE AGREEMENT FOR PRODUCTS SOLD THROUGH RESELLERS

THIS QLOGIC PATHSCALE COMPILER SUITE SOFTWARE SUBSCRIPTION AND LICENSE AGREEMENT FOR PRODUCTS SOLD THROUGH RESELLERS (THE “AGREEMENT”) IS BETWEEN QLOGIC CORPORATION AND ITS SUBSIDIARIES (“QLOGIC”) AND ANY PURCHASER OR USER OF THE QLOGIC PATHSCALE COMPILER SUITE SERVICES AND SOFTWARE (“CUSTOMER”) AND THE APPLICABLE RESELLER (“RESELLER”). THIS AGREEMENT GOVERNS CUSTOMER’S USE AND QLOGIC’S SUPPLY OF SERVICES AND SOFTWARE THROUGH RESELLER DURING THE APPLICABLE SUBSCRIPTION PERIOD OR LICENSE TERM. QLOGIC IS WILLING TO SUPPLY THESE SERVICES AND SOFTWARE ONLY ON THE CONDITION THAT CUSTOMER ACCEPTS ALL OF THE TERMS IN THIS AGREEMENT.

PLEASE READ THIS AGREEMENT CAREFULLY BEFORE DOWNLOADING, PURCHASING OR USING SERVICES OR SOFTWARE SUPPLIED BY QLOGIC THROUGH RESELLER. BY DOWNLOADING, USING OR PURCHASING THESE SERVICES OR SOFTWARE, CUSTOMER SIGNIFIES ITS ASSENT TO THIS AGREEMENT. IF YOU ARE ACTING ON BEHALF OF AN ENTITY, THEN YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO ENTER INTO THIS AGREEMENT ON BEHALF OF THAT ENTITY. IF CUSTOMER DOES NOT ACCEPT THE TERMS OF THIS AGREEMENT, THEN IT MUST NOT USE ANY QLOGIC PATHSCALE COMPILER SUITE SERVICES OR SOFTWARE.

1) Effective Date.

The Effective Date of this Agreement is the earlier of the date that Customer accepts this Agreement or the date that Customer uses Services (as defined in Section 4 below) or Software (as defined in Section 5 below) provided by QLogic through Reseller.

2) Evaluation Period.

Reseller may choose to provide Software and Services to Customer for an initial Evaluation Period (thirty (30) days, unless otherwise specified), during which no fees are payable by Customer to Reseller. Upon expiration of this Evaluation Period if Customer continues to use QLogic’s Software or Services Customer signifies its acceptance of a one (1) year for-fee extension of the Subscription Period at Reseller’s then-current prices. Customer may elect to pay for a longer extension period if it is then-currently available.

3) Term.

(a) Subscription Period. Except as may be specified in Customer’s valid, preexisting Evaluation or Subscription agreements, if Customer is licensing the Software on a subscription basis, the “Subscription Period” begins on the Effective Date and continues for an initial term of one (1) year. Thereafter, the Subscription Period will automatically renew for successive one (1) year terms at Reseller’s then-current prices (Customer may elect to pay for a longer extension period if it is then-currently available), unless either party provides written notice of non-renewal at least sixty (60) days prior to the end of the current term.

(b) License Term. Except as may be specified in Customer’s valid, preexisting Evaluation or

License agreements, if Customer is licensing the Software on a license basis, the “License Term” begins on the Effective Date for the term specified in Customer’s accepted order.

(c) Early Termination. The Subscription Period and License Term can be terminated early (a) by either (i) Customer or (ii) QLogic or Reseller, if the other party materially breaches the Agreement and does not cure the breach within thirty (30) days of written notice of the material breach; (b) by Reseller or QLogic if Customer is late in paying any fees; or (c) immediately if Customer uses the Software in an unauthorized manner.

4) “Services” means the warranty, update, and technical support services for the Software (as defined below) provided by QLogic either directly to Customer or to Customer through Reseller under this Agreement. During the Subscription Period or during any portion of the License Term for which Customer has purchased support services from QLogic or through Reseller, QLogic will provide the Services either directly to Customer or to Customer through Reseller, conditioned upon compliance with the following: (i) the Services are used to benefit only Customer (and not to benefit any third party or in connection with services provided by Customer to a third party, unless otherwise agreed to by QLogic in a separate, written agreement or as set forth in Section 5(c) below), and (ii) Customer complies with all the terms and conditions of this Agreement (including timely payment of all fees). QLogic and Reseller reserve the right to suspend any Services if Customer is late in paying any fees.

(a) Warranty. QLogic warrants to Customer for a period of ninety (90) days after delivery of the Software to Customer that the Software will perform in all material respects in accordance with QLogic’s published specifications for the Software. As Customer’s sole and exclusive remedy and QLogic’s entire liability for any breach of this warranty, QLogic will use reasonable efforts to correct any Software that fails to meet this warranty by use of a workaround, temporary fix or permanent fix.

(b) Updates. For “Subscription Software Products” (which currently include the QLogic PathScale Compiler Suite, the QLogic PathScale C/C++ Compiler, and the QLogic PathScale FORTRAN 77/90/95 Compiler), and for “Licensed Software Products” (which currently include QLogic PathScale Compiler Suite – Perpetual RTU License) for which Customer has purchased annual support, QLogic will, during the Subscription Period or License Term, 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 QLogic makes generally available to its other licensees on similar terms. QLogic 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.

(c) Technical Support. QLogic will, during the Subscription Period or License Term, provide technical support for the Software by: (i) providing email support 7:00 A.M. to 6:30 P.M. Pacific time Monday through Friday; (ii) acknowledging customer support queries when received and responding by the next business day in the form of “workarounds”, estimate of time to fix, or request for additional information on the problem submitted; (iii) making available an Internet query capability for customers to ask product questions, submit problems and access known problem “workarounds”; and (iv) 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.

(d) Customer Obligations. QLogic has no obligation to provide Services for problems in the Software to the extent caused by: (a) software or hardware not provided by QLogic; (b) modifications that Customer or others make to the Software; (c) unauthorized or improper use of the Software; (d) earlier versions of the Software that are not currently supported by QLogic; or (e) use of the software

on operating systems not supported by QLogic. QLogic reserves the right to charge Customer at QLogic's then-current rates for any services provided by QLogic to address the above problems. QLogic shall be free to use, without any obligation to Customer, any suggestions, feedback and related information provided by Customer concerning the Software.

5) "Software" means the QLogic 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. During the Subscription Period, Customer may install and run the Software on any number of Customer's computers as Customer sees fit. During the License Term, Customer may install and run the Software on Customer's computers subject to the limitations of the type of license purchased by Customer (e.g., per-user, per-server, site license, etc). Both during the Subscription Period and during the License Term, Customer's use of the Software is conditioned upon compliance with the following: (i) Customer uses the Software only for Customer's own internal use (and not on behalf of third parties or to provide support services to third parties, unless otherwise agreed to by QLogic in a separate, written agreement or as set forth in Section 5(c) below), (ii) Customer preserves and reproduces all copyright notices and other proprietary rights notices associated with the Software, and (iii) Customer complies with all the terms and conditions of this Agreement (including timely payment of all fees).

(a) Open Source Software. The Software may include on a common distribution medium certain independent code ("Open Source Code") that is licensed under the GNU General Public License or other open source licenses, and Open Source Code is licensed to Customer in accordance with the applicable open source license. Notwithstanding anything to the contrary, to the extent that any of the terms and conditions of this Agreement conflict with any such open source license, the conflicting terms and conditions shall not apply to the corresponding Open Source Code.

(b) QLogic Proprietary Software. The Software also includes on the distribution medium QLogic proprietary code ("QLogic Code") that is not governed by any open source license. OPEN SOURCE LICENSE TERMS DO NOT APPLY TO QLOGIC CODE. Customer may not transfer, sublicense or distribute QLogic Code to any third party. Except as expressly authorized in this Agreement, Customer may not copy or modify QLogic Code. In order to protect QLogic's trade secrets contained in QLogic Code, Customer agrees not to disassemble, decompile or reverse engineer QLogic Code.

(c) QLogic Run Time Restrictions. Portions of the Software may be run-time libraries in object code form ("Run Time Libraries" as described in the attached Schedule A). The Run Time Libraries must be linked with the Customer's code in order to execute the Customer's code. During the Subscription Period or License Term, QLogic grants to Customer a nonexclusive, non-royalty bearing, worldwide, object code license to (a) statically link Run Time Libraries with Customer's code and distribute such statically linked libraries as part of the executable version of the Customer's code, or (b) distribute Run Time Libraries with the Customer's code solely for the purpose of dynamically linking such libraries with the Customer's code at a later time (after distribution); provided that any distribution of any Run Time Library is subject to the following conditions: (i) the Run Time Libraries are for linking only with the Customer's code, (ii) Customer must include a notice in the Customer's code and in the corresponding documentation stating that "Portions of this program include material copyrighted by QLogic Corporation 2005-2007," and (iii) the entity receiving the Run Time Library must be bound by terms and conditions which are at least as protective of QLogic's rights as this Agreement. Customer acknowledges that portions of the Run Time Libraries are copyrighted by QLogic and other parties, the terms of which are provided with the Software. Any

modifications or enhancements made by Customer to QLogic Proprietary Software contained in the Run Time Libraries shall be the exclusive property of QLogic; Customer hereby irrevocably transfers and assigns to QLogic all right, title and interest that Customer may have in such modifications or enhancements. QLogic has no obligation to provide Services for modified Software or on any system or to any entity that does not have a valid subscription or support agreement.

(d) No Trademark Rights. The Software also contains QLogic's trademarks. This Agreement does not give Customer any rights to distribute software under QLogic's trademarks or otherwise use QLogic's trademarks.

(e) Reservation. QLogic and its licensors reserve all rights and licenses in and to the Software not expressly granted to Customer under this Agreement or under the applicable open source licenses.

(f) Government Rights. Any use, duplication, or disclosure of the Software by the U.S government is subject to restrictions as set forth in this Agreement and the applicable open source licenses and as provided in DFARS 227.7202-1(a) and 227.7202-3(a) (1995), DFARS 252.227-7013(c)(1)(ii) (OCT 1988), FAR 12.212(a) (1995), FAR 52.227-19, or FAR 52.227-14 (ALT III), as applicable.

6) Source Code Access.

(a) Open Source Code. To the extent required by applicable open source licenses and when requested by Customer in accordance with QLogic's then-current procedures, QLogic shall provide to Customer copies of the source code for Open Source Code components. Such source code provides only a subset of the functions and capabilities available in the complete Software and Customer may or may not be able to compile, execute or use the source code in Customer's environment. Such source code shall be governed by the applicable open source license and not by this Agreement. The source code is provided "AS IS" and without warranty. QLogic has no obligation to provide any of the Services (including, without limitation, any warranty or support services) except for the binary version of the Software originally provided by QLogic. All reported Customer problems must be reproducible in the original binary version of the Software.

(b) QLogic Code. Customer has no rights to source code for QLogic Code under this Agreement.

7) Additional Use Limitations.

Customer acknowledges that the QLogic Code and Services include the valuable proprietary information of QLogic and are provided on the condition that they not be used for any purpose other than Customer's internal use in accordance with this Agreement, and Customer agrees not to use the same for any other purpose. Without limiting the foregoing, Customer agrees that it will not use nor assist any agent, affiliate or third party to use any QLogic Code, or any information, material or know-how obtained through use of the Services, to supply products or services that compete with the products or services offered by QLogic.

8) Pricing.

QLogic provides the Services and the QLogic Code through Reseller for the fees specified in the applicable Reseller fee schedule. Pricing is usage-based and may depend on the number of users of the

Software, the number of compile systems and run-time systems running the Software, and the number of features selected. If Customer is authorized to exceed Customer's prepaid usage by submission of a new purchase order by Customer and acceptance of such purchase order by QLogic, Customer shall pay for any additional usage above and beyond the prepaid usage. Where derivative works and modifications are permitted, pricing is based on usage of derivative works and modifications (even if made by Customer or others) in addition to usage of the Software as originally provided by QLogic through Reseller.

9) Payment Terms.

Payment terms shall be established by the applicable Reseller.

10) Subscription Manager.

The Software includes a management function for tracking and controlling usage ("Subscription Manager"), which is intended to assist Customer in abiding by the limits of its prepaid usage. In the event Customer disables the Subscription Manager, or it otherwise becomes inoperable for any reason, Customer shall remain obligated to pay the applicable fees for its actual usage. Customer acknowledges that the Subscription Manager may automatically disable the Software at the end of the Subscription Period or License Term or otherwise prevent unauthorized use. QLogic shall not be liable for damages of any kind as a result of the Subscription Manager disabling the Software.

11) Audit.

QLogic reserves the right to audit Customer's use of the Software to ensure compliance with this Agreement. Any such audit will be conducted during regular business hours and will not unreasonably interfere with Customer's business activities. If an audit reveals an underpayment of fees, Customer will promptly pay Reseller for the underpaid fees. If the underpayment exceeds five percent (5%) of the fees paid for the relevant time period, Reseller will pay QLogic's reasonable costs of conducting the audit. Notwithstanding anything to the contrary in this Section 11, Reseller will have responsibility for making payment of any amounts due to QLogic.

12) Termination.

QLogic through Reseller may choose to provide the Customer an option to purchase a perpetual right to use the QLogic Code, which permits the Customer to continue to use the then current version of QLogic Code beyond the end of the Subscription Period. However unless the Customer continues to pay to extend the Subscription Period, neither QLogic nor Reseller have any obligation to provide further Services or Updates after the Subscription Period. In all other cases, upon expiration of the Subscription Period or License Term or earlier termination of this Agreement for any reason, the Customer will immediately cease all use of the applicable Software and de-install and remove all online copies made by Customer. Offline copies of the Software made in the course of Customer's regular backup procedures need not be destroyed, but Customer agrees not to restore, reinstall or otherwise use the Software from those backup copies. The Customer is not required to delete and may continue to use and distribute the Run Time Libraries, provided that the Customer complies with any obligations related to the Run Time Libraries. Sections 7, 11, 14-18 and the restrictions contained in Section 5 shall survive expiration of the Subscription Period or License Term or termination of this Agreement.

13) Non-Infringement Indemnity.

QLogic will defend Customer against any suit brought against Customer by a third party to the extent the suit alleges that the Run Time Libraries (in the form provided by QLogic and not in combination with any other data, software or hardware and excluding any Open Source Code), infringe any copyright or U.S. patent or incorporates any misappropriated trade secrets of the third party, and QLogic will indemnify and hold harmless Customer from and against any damages, costs and reasonable expenses payable to the third party as a result of the suit; provided that Customer (i) gives QLogic prompt written notice of any such claim or proceeding; (ii) provides QLogic with the authority, information and assistance that QLogic deems reasonably necessary for the defense and settlement of the claim or proceeding; and (iii) grants QLogic authority and control of the defense or settlement of such claim or proceeding. THE FOREGOING IS CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR ANY CLAIM OF INTELLECTUAL PROPERTY RIGHTS INFRINGEMENT. IN NO EVENT WILL QLOGIC'S LIABILITY UNDER THIS SECTION 13 EXCEED TWO HUNDRED AND FIFTY THOUSAND DOLLARS (\$250,000)

14) Disclaimer of Warranty.

EXCEPT AS PROVIDED IN SECTION 4(a) AND 13 ABOVE, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE SOFTWARE AND THE SERVICES ARE PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. QLOGIC DOES NOT WARRANT THAT THE SOFTWARE WILL MEET CUSTOMER'S REQUIREMENTS OR THAT OPERATION OF THE SOFTWARE WILL BE UNINTERRUPTED OR ERROR-FREE.

15) Limitations of Liability.

WITH THE EXCEPTION OF CAUSES OF ACTION ASSOCIATED WITH SECTION 13 ABOVE, IN NO EVENT WILL QLOGIC'S TOTAL CUMULATIVE LIABILITY TO CUSTOMER FROM ALL CAUSES OF ACTION AND UNDER ALL THEORIES OF LIABILITY EXCEED THE FEES RECEIVED BY RESELLER FROM CUSTOMER UNDER THIS AGREEMENT DURING THE TWELVE MONTHS PRECEDING THE FIRST ACCRUAL OF ANY SUCH CAUSE OF ACTION. REGARDLESS WHETHER ANY REMEDY SET FORTH HEREIN FAILS OF ITS ESSENTIAL PURPOSE OR OTHERWISE, IN NO EVENT WILL QLOGIC BE LIABLE TO CUSTOMER OR ANY THIRD PARTY FOR ANY SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES (INCLUDING LOSS OF USE, DATA, BUSINESS OR PROFITS) OR FOR THE COST OF COVER IN CONNECTION WITH THIS AGREEMENT OR THE SOFTWARE OR SERVICES, WHETHER SUCH LIABILITY ARISES FROM ANY CLAIM BASED UPON CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, AND WHETHER OR NOT QLOGIC HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.

Customer agrees that the limitations of liability and disclaimers set forth herein will apply regardless of whether Customer has accepted the Software or any Service. Customer agrees that QLogic and Reseller have set their prices and entered into this Agreement in reliance upon the disclaimers of liability set forth herein, that the same reflect an allocation of risk between the parties (including the risk that a contract remedy may fail of its essential purpose and cause consequential loss), and that the same form an essential basis of the bargain between the parties.

16) Non-Transferable.

Customer may not assign or otherwise transfer this Agreement or any Services or QLogic Code, by operation of law or otherwise, without QLogic's express prior written consent. Any dissolution, merger, consolidation or other reorganization of Customer, the sale or other transfer of all or substantially all of the assets or properties of Customer, or the sale or other transfer of a controlling interest in Customer, constitutes an assignment for all purposes of this Section 16. Any attempt to assign this Agreement, without such consent, will be null and of no effect. Subject to the foregoing, this Agreement will bind and inure to the benefit of each party's successors and permitted assigns.

17) Entire Agreement.

This Agreement constitutes the complete and exclusive understanding and agreement between the parties regarding QLogic's supply through Reseller and Customer's use of the Software and Services, and supersedes all prior or contemporaneous agreements or understandings, written or oral, relating to this subject matter. Subscription Periods, License Terms and pricing may be specified in ancillary documents, such as accepted purchase orders or Reseller's then-current price list, and these quantities are deemed to be a part of this Agreement. Any waiver, modification or amendment of any provision of this Agreement will be effective only if in writing and signed by duly authorized representatives of both parties.

18) General.

(18.1) This Agreement will be governed by the laws of the State of California, without regard to or application of choice of law rules or principles. (18.2) If a court of competent jurisdiction finds any provision of this Agreement invalid or unenforceable, that provision of the Agreement will be enforced to the maximum extent permissible and the other provisions of this Agreement will remain in full force and effect. (18.3) The failure by either party to enforce any provision of this Agreement will not constitute a waiver of future enforcement of that or any other provision. (18.4) All notices under this Agreement will be in writing or electronic form, and delivered by facsimile transmission, by courier or overnight delivery services, by certified mail, or by email or similar electronic transmission, and in each instance will be deemed given upon the later of receipt or five days after transmission. Customer will provide Reseller with accurate and complete billing information and will keep such information current at all times. (18.5) No party will be responsible for any failure or delay in its performance under this Agreement (except for any payment obligations) due to causes beyond its reasonable control, including, but not limited to, labor disputes, strikes, lockouts, shortages of or inability to obtain labor, energy, raw materials or supplies, war, terrorism, riot, acts of God or governmental action. (18.6) The parties to this Agreement are independent contractors and this Agreement will not establish any relationship of partnership, joint venture, employment, franchise, or agency between the parties. (18.7) Customer agrees to comply fully with all relevant export laws and regulations of the United States of America. Regardless of any disclosure made by Customer to Reseller or QLogic of an ultimate destination of the Software, Customer represents, warrants and agrees that it will not, directly or indirectly, export, re-export or transmit the Software or any part thereof to any country in which such export, re-export or transmission is restricted by any applicable U.S. regulation or statute, without the prior written consent of both QLogic and, if required, of the Bureau of Export Administration of the U.S. Department of Commerce, or such other governmental entity as may have jurisdiction over such export or transmission. (18.8) Customer acknowledges and agrees that unauthorized use of the Software could cause QLogic irreparable harm that could not be compensated by monetary damages. Accordingly, Customer agrees that QLogic will be entitled to

seek injunctive and preliminary relief to remedy any actual or threatened unauthorized use of the Software. The Software is protected by United States copyright law and international treaty. Unauthorized reproduction or distribution is subject to civil and criminal penalties.

19) Additional Provisions.

Notwithstanding anything to the contrary in Sections 8 or 9, payment obligations to QLogic for Software and Services provided under this Agreement will be governed by that certain Reseller Agreement (the "Reseller Agreement"), dated March 31, 2006, by and between QLogic and Cray Inc. ("Cray").

Schedule A

Run-Time Libraries

- libmv.so.1
- libmpath.so.1
- libpsrt.so.1
- libpathfortran.so.1