

# OPEN SCALABLE FILE SYSTEMS, INC.

## MEMBERSHIP AGREEMENT

This Membership Agreement (the “Agreement”) constitutes a binding agreement between Open Scalable File Systems, Inc., a California nonprofit mutual benefit corporation (“OpenSFS”) and the undersigned member executing the signature page of this Agreement (“Member”), hereinafter referred to individually as “Party”, and collectively as “Parties”. This Agreement is effective as of the date on which it is signed by the last of the Parties (the “Effective Date”). All capitalized words not defined herein are defined in the Bylaws of OpenSFS, as such may be amended from time to time (the “Bylaws”). The current version of the Bylaws can be found at [www.opensfs.org](http://www.opensfs.org).

### 1. Compliance and Obligations

- 1.1 Bylaws: Member agrees to abide by the terms of the Bylaws. Member acknowledges that Member has received and reviewed the Bylaws and understands that certain of Member’s obligations under the Bylaws will survive the termination of Member’s membership in OpenSFS (the “Surviving Provisions”), including terms relating to Maintenance and Modification of Releases (Article 14), Intellectual Property (Article 16) and Confidentiality (Article 17), and any relevant successor provisions thereto.
- 1.2 Intellectual Property: Without limiting the generality of the foregoing, the provisions of the Bylaws relating to intellectual property and Member’s obligations relating thereto are attached hereto as **Exhibit A** and incorporated herein by reference, and Member hereby (i) affirmatively makes the patent license grant set forth in Section 16.4.A, (ii) covenants to make the copyright license grant set forth in Section 16.2 upon any Contribution, and (iii) agrees to abide by the covenant not to assert and the other covenants set forth therein.
- 1.3 Policies and Procedures: Member agrees to abide by the terms of the Policies and Procedures of OpenSFS (the “Policies”), as they appear at [www.opensfs.org](http://www.opensfs.org) as of the Effective Date or as amended thereafter by the Board of Directors of OpenSFS.
- 1.4 Dues: Member agrees to make timely payment of its annual dues. Member shall pay its initial dues upon or promptly following the execution of this Agreement, and in any event no later than five (5) business days after the Effective Date.
- 1.5 Contribution Agreement: Member has received and reviewed OpenSFS’ form of Contribution Agreement and, upon any Contribution by Member to OpenSFS, agrees to execute and deliver, and to abide by the terms of, the Contribution Agreement, as the same may be amended from time to time.
- 1.6 Compliance: In the event of Member’s failure to comply with Member’s obligations set forth herein or Member’s obligations in the Contribution Agreement, Member’s membership in OpenSFS may be terminated as provided in the Bylaws.

**2. Term and Termination**

This Agreement shall continue in effect until such time as Member's membership in OpenSFS is terminated by Member or by OpenSFS in accordance with the Bylaws. Notwithstanding such termination, Member shall continue to be bound by the Surviving Provisions.

**3. Notices**

Except to the extent otherwise explicitly required or permitted by the Bylaws or the Policies, all notices under this Agreement shall be in writing and shall be delivered personally (by reputable international courier) or sent by U.S. mail or electronic communication. Notices to OpenSFS shall be sent to OpenSFS at its address of record as provided on the OpenSFS website [www.opensfs.org](http://www.opensfs.org). Notices to Member shall be sent to Member at Member's address as it appears in the official membership records of OpenSFS. All notices shall be deemed given at the time defined in Section 5015 of the Corporations Code.

**4. Consent to Electronic Communications**

(a) Consent. By signing this Agreement, the undersigned Member consents and agrees with OpenSFS to receive communications from OpenSFS (which may include, without limitation, notices of member meetings, written ballots, annual reports and any other materials) by electronic transmission, including by facsimile or email transmission to the facsimile number or email address of Member on record with OpenSFS (which shall initially be the facsimile number and email address of the lead person indicated by Member on Member's Membership Application and set forth below in this Agreement), by posting such communication on a designated message board or network, together with facsimile or email notice to Member of such posting, or by other electronic means. Member acknowledges and agrees that delivery by OpenSFS of such electronic communication shall constitute delivery for all purposes, with the same force and effect as though Member had received a written communication in tangible form. The foregoing consent shall apply to all communications, and OpenSFS may, but shall not be required to, convey any communication to Member by electronic means.

(b) Authenticity. Member also agrees that OpenSFS may rely on the authenticity of all communications and writings (including without limitation written ballots of Member or proxies of Member) sent by Member or its representatives to OpenSFS by electronic transmission from any of Member's electronic addresses for any and all purposes.

(c) Right to Receive Record. Member understands and agrees that a record of any electronic transmission that OpenSFS sends to Member will be provided or made available to Member by Open SFS in paper or other non-electronic form within a reasonable time only upon the written request of Member sent to OpenSFS in writing by mail to OpenSFS's address set forth below in this Section.

(d) Process for Withdrawal of Consent. Member acknowledges and agrees that Member's consent to receive communications by electronic transmission as provided

above in this Section (the “Consent”) shall remain in full force and effect until Member withdraws the Consent as follows. Member may withdraw or revoke its Consent by delivering to Open SFS, at its principal executive office (to the attention of OpenSFS’s Secretary), tangible written notice (in non-electronic form) of such withdrawal or revocation of Member’s Consent (which written notice must, include the complete contact name and physical address to which subsequent notices, ballots, materials and other communications to Member should be delivered by OpenSFS) and such withdrawal and revocation of Member’s Consent shall not take effect until thirty (30) days after OpenSFS has actually received such written notice of withdrawal from Member complying with these provisions.

(e) Consent to Holding of Meetings. In addition, Member consents to the holding of regular and special meetings of Members by electronic communication or transmission, provided that if Member withdraws this consent upon thirty (30) days’ prior written notice to OpenSFS, such meetings shall be held at a physical location.

**5. Assignment**

OpenSFS may assign its rights or obligations under this Agreement to the surviving entity in a merger, consolidation or conversion of OpenSFS or in connection with a transfer or sale of all or substantially all of the business or assets of OpenSFS. The rights and obligations of Member under this Agreement may not be assigned, except in connection with an assignment of Member’s membership in OpenSFS, to the extent permitted and subject to the terms and conditions set forth in the Bylaws. For an assignment to be effective the acquiring or surviving entity must meet the then-required qualifications for the membership being assigned and must agree in writing to be bound by the terms of OpenSFS’ then-current form of Membership Agreement.

**6. General Provisions**

This Agreement shall be construed under and governed by the laws of the State of California, USA, without reference to its conflict-of-laws principles. This Agreement, together with the referenced Bylaws, Policies, and any other documents entered into between Member and OpenSFS, sets forth the entire understanding of OpenSFS and Member relative to the subject matter hereof, and supersedes all prior agreements and understandings relating hereto, unless otherwise stated in this Agreement. No modifications or additions to or deletions from this Agreement shall be binding unless accepted in writing by authorized representatives of OpenSFS and Member, and the waiver of any breach or default will not constitute a waiver of any other right hereunder or any subsequent breach or default. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but collectively shall constitute one and the same instrument. In the case of any conflict between the terms of this Agreement and the terms of the Bylaws and the Policies, the Bylaws and Policies shall supersede the terms of this Agreement.

**In witness whereof**, the parties have executed this Agreement as of the respective dates set forth below.

**Member**

**Open Scalable File Systems, Inc.**

\_\_\_\_\_  
(Entity Legal Name)

By: \_\_\_\_\_  
(Signature)

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_  
(Signature)

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**Exhibit A**

**Article 16 of Bylaws**

## **ARTICLE 16. INTELLECTUAL PROPERTY**

**16.1** Copyright Ownership of the OpenSFS Alliance Release. Except as may be separately agreed, copyright ownership of an OpenSFS Alliance Release (or portion thereof) contributed by a Participant remains with the Participant that contributed such OpenSFS Alliance Release (or portion thereof) but only to the extent of the Contribution made by such Participant, which shall not extend to any copyright ownership rights of the Corporation or any other Participant that may have contributed works used in the OpenSFS Alliance Release (or portion thereof). No rights of joint authorship or joint ownership of copyrights in any OpenSFS Alliance Release (or portion thereof) shall be created solely by virtue of a Participant's act of contributing works that are included within such OpenSFS Alliance Release (or portion thereof). As the creator of the compilation that shall comprise the whole of any OpenSFS Alliance Release that has Contributions from more than one Participant, the Corporation shall own all compilation copyrights in each OpenSFS Alliance Release (or portion thereof), provided such rights in the compilation shall only be as to the whole and not to the components contained in such whole that were contributed by the Participants.

**16.2** Copyright License from Contributors. Each Participant that makes a Contribution intended to be used as part of an OpenSFS Alliance Release shall accompany such Contribution with a written or electronic form that specifies the items being contributed, and shall be deemed to have made such Contribution under a license that grants the Corporation a perpetual, worldwide, non-exclusive, no-charge, royalty-free, irrevocable copyright license to reproduce, prepare derivative works of, publicly display, publicly perform, sublicense and distribute such Contribution and derivative works thereof, including in both source code and object code formats. Each Participant agrees that its Contributions to an OpenSFS Alliance Release shall be on terms permitting the Corporation to publish and license the OpenSFS Alliance Release under open source license(s) approved by the Board.

### **16.3 Trademarks.**

A. Selection. Each Participant agrees not to assert against any other Participant, the Corporation or licensee, any trademark, trade name, or similar rights it may have now or hereafter in the names "Open Scalable File Systems" or "OpenSFS" when used to identify or refer to an OpenSFS Alliance Release. Subject to legal requirements and the legal rights of other parties, the Corporation may develop, own, and register trademarks ("Trademarks") relating to its activities or to an OpenSFS Alliance Release.

B. Use of the Trademarks. Each Participant agrees to not use as a trademark "Open Scalable File Systems" or "OpenSFS" or any Trademarks that have been registered by the Corporation unless such use is either subject to the terms and conditions of a license agreement with the Corporation or otherwise permitted by law.

### **16.4 Patents.**

A. Patent License from Participants. Except where a Participant has withdrawn from participation in an OpenSFS Alliance Release as described in Section 16.4.C.(ii) below, each Participant grants to the Corporation a perpetual (except as stated below),

worldwide, non-exclusive, sublicensable, no-charge, royalty-free and irrevocable license under its Licensed Patents (as defined below), solely within the Field of Use (as defined below), to make, have made, use, offer for sale, sell and import Licensed Products (as defined below) and to practice the methods inherent in the Contribution solely in the Field of Use.

As used in this Section 16.4: (i) “Licensed Patents” means, with respect to each Contribution or any OpenSFS Alliance Release, those Patents in existence, pending or filed by the Participant at any time prior to the termination of such Participant’s membership or participation in the Corporation, any claim of which is encompassed by the methods, practices, inventions or products described or practiced by one using the Contribution or the OpenSFS Alliance Release (or a portion thereof); (ii) “Field of Use” means the technology and methods necessary to implement the assertions, protocols, bindings, profiles and other methods described, referenced or relied upon by the Contribution or the OpenSFS Alliance Release; and (iii) “Licensed Products” means any software, product, article, toolkit, equipment, system, unit or component part which employs or is produced by the practice of an invention claimed in the Licensed Patents and which if made, used or sold in the absence of the license(s) granted in this Section 16.4, would infringe, contribute to, or induce the infringement of, at least one of the Licensed Patents.

B. Covenant Not to Assert. Each Participant, on behalf of itself and each of its Affiliates who are such at any time during such Participant’s membership or participation in the Corporation (each Participant and each such Affiliate being referred to herein individually as “Party” and collectively as “Parties”) irrevocably covenants that it will not enforce or seek to enforce any of its Covered Patent Rights (as defined below) against any implementation of any OpenSFS Alliance Release (i) to which the Party contributes, (ii) in the development of which the Party participates, or (iii) which is created or released while the Party is a Participant in the Corporation.

As used in this Section 16.4: “Covered Patent Rights” means a Party’s (i) Licensed Patents, if any; (ii) Patents of such Party in existence, pending or filed by such Party at any time prior to the termination of such Party’s membership or participation in the Corporation, any claim of which is encompassed by the methods, practices, inventions or products described or practiced by one using any OpenSFS Alliance Release (or a portion thereof), and (iii) right, title and interest in and to the Patents described in (i) and (ii) and the causes of action to sue for infringement and other enforcement rights thereof. Covered Patent Rights do not include:

(i) any Patents that are infringed as a consequence of further modification of the OpenSFS Alliance Release (or any portion thereof) as licensed and downloaded from the Corporation; or

(ii) any Patents which are infringed only by:

(a) enabling technologies that may be necessary to make or use any product or portion thereof that implements an OpenSFS Alliance Release, but are not themselves expressly included in an OpenSFS Alliance Release (e.g., semiconductor manufacturing technology, compiler

technology, object-oriented technology, basic operating system technology, and the like); or

(b) the implementation of technology not developed under the auspices of the Corporation or contributed to the Corporation, which is merely incorporated by reference into an OpenSFS Alliance Release.

The foregoing covenant in this Section 16.4.B is not an assurance or representation by any Party either (i) that any of such Party's issued Patents cover an OpenSFS Alliance Release or are enforceable, or (ii) that an OpenSFS Alliance Release would not infringe Patents or other intellectual property rights of any third party.

Notwithstanding the commitment above, the Parties' covenants shall not apply, and each Party makes no assurance, covenant or commitment not to assert or enforce any or all of its Covered Patent Rights against any individual, corporation or other entity that asserts, threatens or seeks at any time to enforce its own or another party's Patents or patent rights against any OpenSFS Alliance Release.

Each Party further agrees that all transfers, whether by the Party or a subsequent transferor, of any right to assert any of its Covered Patent Rights will be subject to the transferee's agreement not to assert such Covered Patent Rights as provided in this Section 16.4.

The Parties' covenant not to assert shall not require disclosure of the Parties' Patents in any portion of an OpenSFS Alliance Release (except as set forth herein in order to comply with the exception to the non-assert).

C. Defensive Assertion and Exception. Notwithstanding the provisions of Section 16.4.B, a Party (an "Asserting Party") may assert ab initio any Covered Patent Right:

(i) against any person or entity (or any of such person's or entity's Affiliates) who is not in compliance with the requirements of Section 16.4.B or who otherwise asserts a Patent against an OpenSFS Alliance Release that is made, has been made, used, imported, sold, offered for sale or provided by a Party or that is in any product, technology or service of a Party, or

(ii) otherwise against any person or entity with respect to an OpenSFS Alliance Release, but only if the Asserting Party objects at the Proposal Meeting to the approval of a Proposal for such OpenSFS Alliance Release, discloses in writing such Asserting Party's Covered Patent Rights that cover any aspect of the OpenSFS Alliance Release, and, if requested by the Board, terminates its membership or participation in the Corporation within thirty (30) days after the Proposal Meeting; *provided, however*, that the foregoing exception and objection in this subparagraph (ii) is unavailable with respect to the Asserting Party's Covered Patent Rights (x) in the Asserting Party's own Contributions, or (y) with respect to which the Asserting Party



had Actual Knowledge (as defined below), at any time during the development of such OpenSFS Alliance Release, that such Covered Patent Rights were, or were likely to be, embodied in or infringed by such OpenSFS Alliance Release (or portion thereof), unless the Asserting Party disclosed such fact to the Corporation promptly following the Asserting Party's becoming aware of such existing or likely embodiment or infringement.

D. Each Party further agrees that, in the event a party other than Parties asserts a Patent(s) against a person or entity with respect to an OpenSFS Alliance Release, and such Party has the right to grant a release of liability for past infringement of such Patents to the extent such liability arose out of the use of an OpenSFS Alliance Release or the right to grant a license under such Patent(s) with no requirement of payment or other consideration other than to such Party's Affiliates or employees, then such Party will grant, to the extent of its right to do so, such person or entity such release and a worldwide, irrevocable, non-exclusive, non-transferable, royalty-free and fully paid up license only under such asserted Patent(s) as to which such Party holds such rights and only with respect to such person or entity making, having made, using, importing, selling, leasing, offering to sell or lease, license or otherwise distributing such OpenSFS Alliance Release to the extent necessary to dispose of such assertion.

**16.5** Representation by Participants. Except as otherwise disclosed in writing at the time a Contribution is made, each Participant represents that it will not make a Contribution to an OpenSFS Alliance Release that its contributing Representative knows, with Actual Knowledge, includes unlicensed third party intellectual property rights. This representation is not based on and does not require a patent search. "Actual Knowledge" means actual knowledge of the individual Representative(s).

**16.6** Non-Member Participants. All Non-Member Participants shall be required to agree, as a condition precedent to making a Contribution, to be bound by the obligations contained in Sections 16.2, 16.3, 16.4 and 16.5, and shall enjoy the benefits thereof.