

AMENDED AND RESTATED
BYLAWS
OF
OPEN SCALABLE FILE SYSTEMS, INC.
A CALIFORNIA NONPROFIT MUTUAL BENEFIT CORPORATION

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ARTICLE 1. NAME AND PRINCIPAL OFFICE

1.1 Name. The name of this corporation is Open Scalable File Systems, Inc. (the “Corporation”).

1.2 Principal Office. The principal office for the transaction of business of the Corporation shall be at such location as the Board may determine.

ARTICLE 2. CERTAIN DEFINITIONS AND CONSTRUCTION

2.1 Certain Definitions. The following terms used in these Bylaws shall have the meanings set forth below:

“**Adopter Agreement**” means the Corporation’s form of agreement entered into with Adopters, as the same may be amended from time to time.

“**Affiliate**” means an entity that directly or indirectly Controls, is Controlled by, or is under common Control with another entity, so long as such Control exists. “Control” means beneficial ownership of more than fifty percent (50%) of the voting power or equity in an entity, or the contractual right to manage the business affairs of an entity.

“**Alliance Participant**” means a Promoter, Adopter or Supporter.

“**Board of Directors**” or “**Board**” means the Board of Directors of the Corporation.

“**Bylaws**” means these Amended and Restated Bylaws, as amended from time to time.

“**Contribution**” means software code, documentation or other submission that is in writing or electronic media submitted for inclusion in an OpenSFS Stack.

“**Contribution Agreement**” means the Corporation’s form of contribution agreement or contributor agreement entered into with a Contributor, as the same may be amended from time to time.

“**Contributor**” means a person who makes a Contribution.

“**Corporations Code**” means the Corporations Code of the State of California, as amended.

“**Internal Revenue Code**” means the Internal Revenue Code of 1986, as amended.

“**Maintainer**” has the meaning set forth in Article 11.

“**Membership Agreement**” means the Corporation’s form of membership agreement entered into with Members, as the same may be amended from time to time.

“**Non-Member Participant**” means any Adopter, Supporter, non-Member Contributor, consultant and any other non-Member participant designated by the Board from time to time.

“OpenSFS Stack” means all the software (including source, object and libraries), bug database(s), tools, test scripts, test results, release notes, mail list contents, and all related documentation for development, compilation or release approved by the Board from time to time, including all updates, upgrades, improvements, releases and versions thereof.

“Participant” means a Member or a Non-Member Participant, and **“Participants”** means all Members and Non-Member Participants collectively.

“Patents” means United States and foreign patents and applications therefor and all reissues, divisions, divisionals, re-examinations, renewals, extensions, provisionals, continuations and continuations-in-part thereof.

The word **“person”** shall have the meaning set forth in Section 5065 of the Corporations Code.

“Representative” means a director, officer, employee, independent contractor, agent or other legal representative of a person.

“Supporter Agreement” means the Corporation’s form of agreement entered into with Supporters, as the same may be amended from time to time.

“Working Group” has the meaning set forth in Section 10.1.

The words **“writing,” “written,” “in writing”** and similar terms shall be understood within the meaning of a “writing” as defined in Section 8 of the Corporations Code.

2.2 Construction. The terms “include,” “including” and words of similar import shall be understood to mean the inclusion of the referenced items without limitation. References to the Corporations Code, the Internal Revenue Code or any other law or regulation shall apply to any successor or replacement statute or regulation and the corresponding provisions thereof.

ARTICLE 3. PURPOSES

3.1 General Purposes. The purpose of the Corporation is to engage in any lawful act or activity, other than credit union business, for which a corporation may be organized under the California Nonprofit Mutual Benefit Corporation Law. The Corporation is organized and shall be operated for one or more of the purposes permitted by Section 501(c)(6) of the Internal Revenue Code, including the making of distributions to other organizations that qualify as exempt organizations under Section 501(c)(6) of the Internal Revenue Code.

3.2 Specific Purposes. The specific purposes for which the Corporation is formed are to provide a mechanism to support communities of software developers of interoperable scalable high performance computer (“HPC”) open source file systems to be run on the Linux operating system. The Corporation may also combine and channel resources of the community to incentivize the development, testing, and productization of improvements to the state of the art and technology base of HPC Linux-based scalable file systems and promote the adoption of these technologies by a broader set of international HPC users and institutions.

In furtherance of the foregoing purposes, the Corporation intends to: (A) provide multiple mechanisms to increase collaboration and community support of open scalable file systems, (B) promote the free exchange of information pertaining to the development, support, use of and best practices related to open scalable file systems, (C) organize open scalable file system release planning and ongoing support, (D) develop software for training and use in the manufacture of or use in provision of products and applications, (E) establish, charter, approve or support Working Groups, and (F) engage in education and outreach activities relating to the foregoing.

ARTICLE 4. MEMBERSHIP; ADOPTERS; SUPPORTERS

4.1 Members.

A. The Corporation shall have members (“Members”) who shall be “members” as that term is defined in Section 5056 of the Corporations Code. Members shall have all of the rights of members of a California nonprofit mutual benefit corporation, which are provided in the Corporations Code and these Bylaws, except to the extent such rights may be lawfully limited by provisions in the Corporation’s Articles of Incorporation or Bylaws and are so limited. Members shall constitute the membership of the Corporation within the meaning of the Corporations Code and these Bylaws.

B. There shall be one (1) class of Members, which shall be called “Promoters” and all references to a “Member” or to “Members” in these Bylaws shall refer solely to the Promoters. Certain rights of the Promoters are set forth below:

(1) Promoters. In addition to all other rights of a Member under the Corporations Code, each Promoter shall be eligible to vote on all matters brought before the Members at any regular or special meeting of Members. Each Promoter is entitled: (a) to designate one (1) Representative to the Board as a Director, as set forth in Section 6.3; and (b) to designate, for consideration by the Board, Representatives to chair or co-chair one or more Working Groups and Representatives to be a Maintainer of an OpenSFS Stack (or part thereof). Representatives of Promoters shall be eligible to participate in all Working Groups and to vote therein.

(2) Actions Requiring Supermajority Vote of Members. The following actions shall require the affirmative vote or consent of at least two-thirds (2/3) of the Promoters, voting as a separate class:

(a) Amendments to the Corporation’s Articles of Incorporation or Bylaws;

(b) Any increase in the amount of dues payable by Promoters in an amount greater than 10% annually;

(c) Any change in the formula for determining the number of authorized Directors of the Corporation;

- (d) Any change in the right, power or ability of a Promoter to designate one (1) person as a Director and member of the Board;
- (e) Authorization of any new class of members;
- (f) Any exchange, reclassification, or cancellation of the memberships of the Promoters as a class;
- (g) The dissolution, liquidation or winding up of the Corporation;
- (h) A merger, consolidation or a sale or other disposition of all or substantially all of the Corporation's assets;
- (i) Any conversion of the Corporation into a different form of entity (such as a limited liability company); and
- (j) Any changes to this Section 4.1.

C. Whenever these Bylaws refer to a vote of the Members, such reference shall mean the vote of the relevant class or classes (if any) of Members eligible to vote on a matter as specified in this Section 4.1.

4.2 Adopters. The Corporation shall have Non-Member Participants called "Adopters". Adopters shall not have any voting rights as a Member and shall not be "Members" of the Corporation as defined in Section 5056 of the Corporations Code. Adopters shall, however, have the right to vote with respect to an OpenSFS Stack under Article 12. Adopters shall be entitled to designate, for consideration by the Board, Representatives to chair or co-chair one or more Working Groups and Representatives to be a Maintainer of an OpenSFS Stack (or part thereof). Subject to the provisions of Article 10, Representatives of Adopters shall be eligible to participate in all Working Groups and to vote therein.

4.3 Supporters. The Corporation shall have Non-Member Participants called "Supporters". Supporters shall not have any voting rights as a Member and shall not be "Members" of the Corporation as defined in Section 5056 of the Corporations Code. Supporters shall, however, have the right to vote with respect to an OpenSFS Stack under Article 12. Subject to the provisions of Article 10, Representatives of Supporters shall be eligible to participate in all Working Groups, but shall not be eligible to vote therein.

4.4 Participation by Non-Members. The Board, in its discretion, may allow Non-Member Participants to participate in the activities of the Corporation. By way of example but not limitation, the Board may allow participation by Adopters, Supporters, non-Member Contributors, consultants and other non-Member parties to participate in Working Groups and to contribute work to the OpenSFS Stacks, under the terms and conditions of a separate agreement as determined and approved by the Board. Non-Member Participants shall not, by virtue of such status, be deemed "members" of the Corporation as defined in Section 5056 of the Corporations Code, nor shall they have any of the rights of members that are provided by the Corporations

Code. Non-Member Participants shall have only the rights expressly granted by these Bylaws or by the Board, subject to change or elimination by the Board at any time.

4.5 Qualifications of Members and Non-Member Participants.

A. A person seeking to become a Member or to participate as a Non-Member Participant must request and obtain the approval of the Board or the Board-designated committee or Officer. Approval shall be based on whether the person meets the qualifications set forth in this Article 4 and in any Board-approved policies and procedures then in place.

B. Subject to such approval, membership as a Member or participation as a Non-Member Participant will be available to an individual or a for-profit or nonprofit corporation, organization or entity or a government entity that has a bona fide intent to support the specific purpose of the Corporation and that is engaged in the use, manufacture, sale, or distribution of HPC computers, scalable file systems, computer parts or components, peripherals, software, or related products or services or that is engaged in research relating thereto.

C. Each Participant agrees:

(i) if the Participant is a Member, to execute, enter into, and adhere to, the Corporation's Membership Agreement signed by such Member and the Corporation, as it may be amended from time to time; or, if the Participant is a Non-Member Participant, to execute, enter into, and adhere to, the Corporation's Adopter Agreement, Supporter Agreement or other agreement relating to such Non-Member Participant's participation in the Corporation, as the case may be, as it may be amended from time to time;

(ii) to adhere to the Corporation's Articles of Incorporation and these Bylaws as amended from time to time in accordance with the terms of the Articles of Incorporation or these Bylaws, as applicable, and in accordance with applicable law;

(iii) to pay dues and assessments established by the Board (subject, in the case of Promoters, to Section 4.1.B(2)(b)); and

(iv) to comply with policies and procedures duly adopted by the Board.

4.6 Dues.

A. The annual dues payable to the Corporation by Members, Adopters and Supporters shall be established and may be changed from time to time by the Board (subject to any required approval of the Promoters as provided in Section 4.1 hereof). The Board, by a two-thirds (2/3) majority vote of all Directors then in office may reduce or waive the initial amount of dues payable by any person joining the Corporation as an Adopter or a Supporter, subject to such terms and conditions as determined by the Board. Unless earlier terminated as permitted by these Bylaws, (i) a Promoter's term of membership, (ii) an Adopter's term as an Adopter, and (iii) a Supporter's term as a Supporter, shall each continue for a period of one year, and must be renewed by payment of dues for the next year on an annual basis at the time and at the annual dues rate then in effect. The failure by a Promoter, Adopter or Supporter to pay the applicable

annual dues in full when due shall cause the Promoter's membership in the Corporation, such Adopter's status as an Adopter or such Supporter's status as a Supporter to terminate, subject to Section 15.1 hereof.

B. Notwithstanding the foregoing, the Board, by a two-thirds (2/3) majority vote of all Directors then in office may reduce or waive both the initial amount of dues and the annual amount of dues of any person (a "Peering Participant") joining the Corporation as an Adopter or a Supporter, provided that such person: (i) is a non-profit legal entity engaged in activities substantially similar to or complimentary to the activities of the Corporation, and (ii) affords the Corporation reciprocal membership or participation rights in such organization at a reduced cost or at no cost to the Corporation. Unless earlier terminated as permitted by these Bylaws, a Peering Participant's term as an Adopter or Supporter shall continue for a period of time as agreed upon between the Corporation and the Peering Participant. The failure by a Peering Participant to maintain non-profit status or to afford the Corporation reciprocal membership or participation rights, or to comply with such other conditions set forth in a written agreement between the Corporation and the Peering Participant, shall cause the Peering Participant's status as an Adopter or Supporter to terminate. Except as otherwise set forth in a written agreement between the Corporation and a Peering Participant, a Peering Participant shall be treated for all purposes as a Participant hereunder.

4.7 Transferability.

A. Member Interests. Neither membership in the Corporation as a Promoter nor any membership rights of a Promoter may be assigned or transferred to any other party, unless approved in advance in writing by the Board; except that, notwithstanding the foregoing, the rights, interest and status of a Promoter may be assigned and transferred without the approval of the Board (i) to the surviving entity into which the Promoter is merged, consolidated or converted in a statutory merger, consolidation or conversion, (ii) to the purchaser of all or substantially all of the assets of such Promoter, or (iii) in the case of a Promoter that is a managing contractor of a national laboratory or similar governmental entity, to a new managing contractor of such laboratory or entity; but in each case only if such surviving entity, purchaser or managing contractor (x) meets the then-applicable qualifications to be a Promoter and (y) agrees in writing with the Corporation to be bound by the terms of the Corporation's then-current Membership Agreement.

B. Non-Member Participant Interests. The rights, interest and status of a Non-Member Participant may not be transferred, unless approved in advance in writing by the Board.

ARTICLE 5. MEETING OF MEMBERS

5.1 Place of Meetings. Meetings of Members may held at places and times within or without the State of California as determined by the Board and reflecting the global nature of the Corporation's Members and to encourage participation as determined by the Board. Meetings may be held in person or by any combination of audio or video teleconferencing techniques or other electronic communication or transmission to the fullest extent permitted by the Corporations Code.

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5.2 Regular Meetings. There will be an annual meeting of the Members each year to elect the Community Representative Director, for the purpose of conducting such election, and to transact any other proper business which may be brought before the meeting.

5.3 Special Meetings. Special meetings of the Members for any lawful purpose may be called by the Board, by any three (3) Directors, by the Chairman of the Board, by the President or by written request of 5% or more of the Members.

5.4 Notice of Meetings.

A. Unless otherwise provided by these Bylaws or provisions of law, written notice stating the place, date and time of a meeting of Members and, in the case of a special meeting of Members, the purpose or purposes for which the meeting is called, shall be given not less than ten (10) nor more than ninety (90) days before the date of the meeting to each Member who, on the record date for notice of the meeting (as determined in accordance with Section 7611 of the Corporations Code), is entitled to vote thereat; *provided, however*, that if notice is given by mail, and the notice is not mailed by first-class, registered, or certified mail, that notice shall be given not less than twenty (20) days before the meeting. Notwithstanding the foregoing, upon request in writing to the Corporation addressed to the attention of the Chairman of the Board, President, Vice-President, or Secretary by any person (other than the Board) entitled to call a special meeting of Members, notice shall be given to the Members entitled to vote that a meeting will be held at a time fixed by the Board, which shall be not less than thirty-five (35) nor more than ninety (90) days after the receipt of the request, and such notice shall be given within twenty (20) days after receipt of the request. Notice shall be deemed given as of the time written notice (or facsimile, telegram or other electronic mail message) is deemed given as set forth in Section 5015 of the Corporations Code.

B. The notice of any meeting of Members at which the Community Representative Director is to be elected by the Members shall state the names of all those individuals who are nominees or candidates for election to the Board as the Community Representative Director at the time notice is given.

C. Whenever any notice of a meeting of Members is required to be given to any Member under provisions of these Bylaws or the Corporations Code, a waiver of notice or consent to the holding of the meeting or an approval of the minutes thereof in writing signed by the Member, whether before or after the time of the meeting, shall be equivalent to the giving of such notice to such Member.

5.5 Quorum for Meetings. Members holding a majority of the voting power held by all Members eligible to vote on the business to be transacted, present in the person of a duly authorized Representative or present by proxy, shall constitute a quorum for meetings of the Members.

5.6 Membership Action. Every act or decision done or made by a majority of the Members present in person or by proxy at a duly held meeting at which a quorum is present is the act of the Members, unless the Corporation's Articles of Incorporation, these Bylaws or

provisions of applicable law require a greater proportion of the Members or a different method of calculation.

5.7 Voting Procedure. Each Member of a class eligible to vote on a matter submitted to a vote by the Members shall have one (1) vote on such matter. Voting on all matters at a meeting shall be by a show of hands if held in person, or by voice ballot if held by audio or video teleconferencing, or by electronic communication or transmission or by written or electronic ballot as provided in Section 5.8.

5.8 Action by Written Consent. Any action required or permitted to be taken by the Members may be taken without a meeting, if all Members shall individually or collectively consent in writing to the action. The written consent or consents shall be filed with the minutes of the proceedings of the Members. The action by written consent shall have the same force and effect as the unanimous vote of the Members. Any reference in these Bylaws to the calling of a “meeting” of Members to take any action shall be deemed to include and to permit the taking of such action by written consent as set forth in this Section 5.8.

5.9 Action by Written or Electronic Ballot. Except as otherwise provided under these Bylaws or provisions of law, any action which may be taken at any regular or special meeting of Members may be taken without a meeting if the Corporation distributes a written or electronic ballot to each Member in accordance with Section 7513 and 7514 of the Corporations Code.

The ballot shall:

- A. Set forth the proposed action;
- B. Provide an opportunity to specify approval or disapproval of each matter or group of related matters;
- C. State the percentage of approvals necessary to meet the quorum requirements and pass the matters submitted; and
- D. Specify the date by which the ballot must be received by the Corporation in order to be counted. The date set shall afford Members a reasonable time within which to return the ballots to the Corporation; and

Ballots shall be mailed or delivered in the manner required for giving notice of meetings of the Members as specified in these Bylaws.

Any reference in these Bylaws to the calling of a “meeting” of Members to take any action shall be deemed to include and to permit the taking of such action by written or electronic ballot as set forth in this Section 5.9.

5.10 Conduct of Meetings.

A. Meetings of Members shall be presided over by the Chairman of the Board or, in the Chairman’s absence, by the Chief Executive Officer or, in the Chief Executive

Officer's absence, by another individual serving on the Board or, in the absence of all of these persons, by the person appointed to serve as secretary of the meeting, or if none has been so appointed prior to the meeting then by an individual elected to serve as secretary of the meeting by approval of the Members at the beginning of the meeting.

B. Meetings shall be conducted to allow for active, fair and open participation by all Members attending the meeting. Subject to reasonable limitations on the time and duration of meetings, all Members shall have the right to express opinions on any matter discussed at the meeting, whether or not the opinions differ from those of the majority. Where a decision is called for, it shall be determined by vote, and each Member eligible to vote on such matter at such meeting who attends such meeting in person or by proxy shall have the reasonable opportunity to vote on the matters presented for the vote of the Members at such meeting.

C. In the absence of a quorum, any meeting of Members may be adjourned by the vote of a majority of the votes represented at the meeting either in person or by proxy, but no other business may be transacted except as provided in Section 7512(c) of the Corporations Code. When a meeting of Members is adjourned to another time or place, except as required by the Corporations Code, notice need not be given of the adjourned meeting if the time and place thereof (or the means of electronic transmission or electronic communication, if any, by which Members may participate) are announced at the meeting at which the adjournment is taken. No meeting may be adjourned for more than forty-five (45) days. At the adjourned meeting the Corporation may transact any business which might have been transacted at the original meeting. If after the adjournment a new record date is fixed for notice or voting, a notice of the adjourned meeting shall be given to each Member who, on the record date for notice of the meeting, is entitled to vote at the meeting.

5.11 Proxies. Every Member shall have the right to vote either in person or by one (1) or more agents authorized by a proxy validly executed by the Member. A proxy may be executed by written authorization signed, or by electronic transmission authorized, by the Member, giving the proxy holder(s) the power to vote on behalf of the Member. A proxy shall be deemed signed if the Member's name or other authorization is placed on the proxy (whether by manual signature, typewriting, telegraphic or electronic transmission or otherwise) by the Member. Subject to the time limitations set forth in the following sentence, a validly executed proxy shall continue in full force and effect unless revoked by the person executing it, prior to the vote pursuant thereto, by a writing delivered to the Corporation stating that the proxy is revoked or by a subsequent proxy executed by, or attendance at the meeting and voting in person by, the person executing the proxy. No proxy shall be valid after the expiration of eleven (11) months from the date of such a proxy, unless otherwise provided in the proxy, except that the maximum term of any proxy shall be three (3) years from the date of execution.

5.12 Annual Report; Transaction or Indemnification Statements. To the extent required by the Corporations Code, the Corporation shall prepare an annual report as required by Section 8321 of the Corporations Code not later than one hundred twenty (120) days after the close of the Corporation's fiscal year (or by such earlier or later date as is required by Section 8321 of the Corporations Code), and shall notify each Member yearly of the Member's right to receive such

financial report. If applicable, the Corporation shall also prepare and deliver to each Member the transaction or indemnification statements required by Section 8322 of the Corporations Code, or shall include such information in the annual report.

ARTICLE 6. BOARD

6.1 Powers of the Board. Subject to the provisions of the Corporations Code and any limitations in these Bylaws relating to action required to be taken or approved by the Members, the Corporation's activities and affairs shall be managed by, and all corporate powers shall be exercised by or under the direction of, its Board.

6.2 Number of Directors. Subject to Section 6.5.D, the number of seats on the Board shall be equal to the number of Promoters plus one (1) additional seat for the Community Representative Director, as provided by Section 6.3 below.

6.3 Designation/Election and Term of Directors.

A. Promoter Directors. Each Promoter is entitled to designate one (1) individual Representative meeting the qualifications for a Promoter Director set forth in Section 6.4 below to serve as a Director on the Board (a "Promoter Director") and to remove such Promoter Director at any time for any reason. A Promoter Director need not be elected to office but instead shall be designated by the applicable Promoter as provided herein and shall continue in office as a Director on the Board until a replacement has been designated by the Promoter who designated such Promoter Director to be a Director or until the Promoter Director's earlier death, resignation or removal.

B. Community Representative Director. In addition, the Members, voting together as a single class, shall be eligible to elect one (1) individual as a Director who meets the qualifications of a Community Representative Director in Section 6.4 below who is not a Promoter Director (called a "Community Representative Director"), in accordance with the procedures set forth below.

(i) As soon as reasonably practicable after the end of a calendar year (and in no event later than January 15), the Corporation shall notify the Adopters and Supporters of the procedures for nominating candidates to fill the Community Representative Director seat. Each Adopter and Supporter shall have the right to nominate one (1) candidate who meets the qualifications for a Community Representative Director set forth in Section 6.4 below for election as the Community Representative Director by giving written notice of such nomination in the manner and within the timeframe (which shall not be less than ten (10) days nor longer than thirty (30) days) specified by the Corporation in its notice (the "Community Representative Director Nomination").

(ii) Within thirty (30) days after the Community Representative Director Nomination has been completed, the Corporation shall cause a meeting of Members to be held at which the Community Representative Director may be elected from among the candidates nominated by the Community Representative Director Nomination who meet the qualifications in Section 6.4. Nothing shall obligate any Member to vote for, or obligate the

Members to elect, any nominee nominated via the Community Representative Director Nomination. The Community Representative Director seat shall be filled only by the nominee, if any, receiving the affirmative vote of a simple majority of the Members participating in the meeting of Members (without cumulative or plurality voting). If no nominee for a Community Representative Director seat receives such majority vote, such seat shall remain vacant until such time as a subsequent nominee is so elected.

(iii) The Community Representative Director's term shall begin on the date of such election and (unless earlier terminated by death, resignation or removal from office) shall end on the earlier of (x) the date of the meeting of Members held to elect such Community Representative Director's successor, or (y) March 15 of the year immediately following the calendar year in which such Community Representative Director was elected, at which time such Community Representative Director shall automatically cease to be a Director.

C. Each Promoter Director and Community Representative Director shall have one (1) vote at each meeting of the Board, and, unless otherwise specified in these Bylaws, each reference to a "Director" shall apply to both a Promoter Director and a Community Representative Director.

6.4 Qualifications of Directors. An individual serving as a Promoter Director must be and remain a Representative of the Promoter who designates such individual as a Promoter Director. No Promoter may have more than one (1) Representative serving as Director. An individual serving as the Community Representative Director (A) may not be a Representative of any Promoter; (B) may be a Representative of a Supporter or Adopter and (C) must have meaningful experience in the development, marketing, implementation and/or use of software substantially similar to, or with comparable functionality to, software of the type comprising an OpenSFS Stack.

6.5 Vacancies, Resignations, Removals.

A. Vacancies of the Directors on the Board shall exist whenever a Director is removed or resigns or his or her tenure otherwise terminates.

B. Any Director may resign effective upon giving written notice to the Secretary of the Corporation or the Board, unless the notice specifies a later time for the effectiveness of such resignation.

C. Any Director may be removed by the Board if, without a leave of absence approved by the Chairman, such Director either (i) fails to attend four (4) consecutive duly noticed meetings of the Board each held at a time when such Director was a Director or (ii) misses (other than due to illness or bona fide exigency) more than twenty-five percent (25%) of the duly noticed meetings of the Board held during a twelve (12) month period during which at all times such Director has been a Director (provided that not fewer than four (4) such meetings are held in such twelve (12) month period).

D. If two (2) or more Promoters that have Representatives serving as Promoter Directors become Affiliates, the Promoter who holds beneficial ownership of more

than fifty percent (50%) of the voting power of the other Affiliated Promoter(s) shall, within thirty (30) days after such Promoters become Affiliates, designate which of such Promoter Directors will remain on the Board as a Promoter Director and the other Promoter Director's tenure on the Board shall automatically terminate upon such designation, and during such thirty (30) day period only one of such two Promoter Directors may act as a Director. The number of authorized members of the Board shall automatically be reduced to reflect the termination of the relevant Promoter's right to designate a Promoter Director.

E. The Board may declare vacant the office of a Director who has been declared of unsound mind by a final order of court, or convicted of a felony.

F. Except as provided in Section 6.5.D above, a Promoter Director may be removed without cause at any time by, and only by, the Promoter that designated such Promoter Director, in which case such Promoter shall immediately be entitled to designate a replacement Promoter Director to fill the vacancy on the Board caused by such removal.

6.6 Filling Vacancies on the Board. A vacancy in the Board seat of a Promoter Director shall be filled by, and only by, an individual designated by the Promoter who designated the Promoter Director whose resignation or removal created the vacancy. If such Promoter has ceased to exist, has become an Affiliate of another Promoter who, under Section 6.5.D hereof has the right to designate the Promoter Director of an Affiliate that remains on the Board as provided in Section 6.5.D above, or has failed to continue to be a Promoter, then a vacancy in that Promoter Director Board seat shall not exist. A vacancy on the Board seat of a Community Representative Director may be filled only by the vote of the Members obtained at a meeting of Members held as provided in Section 6.3.B hereof.

6.7 No Compensation. Directors shall serve (in their capacity as Directors) without compensation from the Corporation, but Directors shall be entitled to reasonable expense reimbursement for expenses incurred in attending Board meetings.

6.8 Board Committees. The Board may, by resolution adopted by a majority of Directors then in office, provided that a quorum is present, create one (1) or more committees, each consisting of two (2) or more Directors, to serve at the pleasure of the Board. The Board may appoint one (1) or more Directors as alternate members of such committee, who may replace any absent member at any meeting of the committee. The specific activities, procedures and authority of the committee will be as authorized by the Board. Within the limits of the authority granted to the committee by the Board, the committee may exercise all the authority of the Board, except with respect to (a) any matters reserved to the Members or the full Board as set forth in Section 7212 of the Corporations Code or (b) any matters that, under the Articles of Incorporation or these Bylaws, requires the approval of more than a majority of the Directors then in office.

6.9 Advisory Boards. The Board may, by resolution adopted by a majority of Directors then in office, provided that a quorum is present, create one (1) or more advisory boards, to serve at the pleasure of the Board. An advisory board may include Representatives of any Participant, industry leaders, civil servants or any other individuals deemed appropriate by the Board. Members of advisory boards may be invited from time to time to participate in Board

meetings and discussions in a non-voting capacity, but shall not be considered directors for purposes of California law and shall not have authority to bind the Corporation or take any action on behalf of the Corporation. The specific activities, procedures and authority of the advisory boards will be as authorized by the Board. Members of advisory boards shall serve without compensation from the Corporation, unless otherwise approved by the Board.

ARTICLE 7. BOARD MEETINGS

7.1 Place of Meetings. The meetings of the Board shall be held at places and times set by the Board.

7.2 Regular Meetings. There will be an Annual Meeting of the Board and such other regular meetings as the Board may establish.

7.3 Special Meetings. Special meetings of the Board may be called by the Chairman of the Board, the President or by any three (3) Directors.

7.4 Notice of Meetings. Regular meetings of the Board may be held without notice if the time and place of the meetings are fixed by the Board. Special meetings of the Board shall be held upon four (4) days' notice by first-class mail or forty-eight (48) hours' notice delivered personally, by telephone (including a voice messaging system) or by electronic transmission by the Corporation. A notice, or waiver of notice, need not specify the purpose of any regular or special meeting of the Board. Notice of a meeting need not be given to a Director who provided a waiver of notice or consent to holding the meeting or an approval of the minutes thereof in writing, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to that Director.

7.5 Quorum for Meetings; Adjournment. A quorum shall consist of a majority of the number of Directors actually serving as a Director (if a Promoter eligible to designate a Director has not done so, that vacancy will not be considered in determining a quorum); however, in no event shall a quorum be less than one-fifth (1/5) of the number of Directors then authorized or less than two (2) (unless only a single Director is authorized, in which case the quorum is one). A majority of the Directors present, whether or not a quorum is present, may adjourn any meeting to another time and place. If the meeting is adjourned for more than 24 hours, notice of an adjournment to another time or place shall be given prior to the time of the adjourned meeting to the Directors who were not present at the time of the adjournment.

7.6 Board Action. Every motion, act or decision passed, done or made by the affirmative vote of a majority of Directors in attendance at a meeting, is the motion, act or decision of the Board, unless another section of these Bylaws (such as Section 7.7 below) or provisions of law require a greater or different voting percentage or different rules for approval of a matter by the Board.

7.7 Actions Requiring Supermajority Board Vote. The approval of the Board with, and including, the affirmative vote of two-thirds (2/3) of all Directors then in office shall be required to:

- A. establish or materially change the charter of a Working Group;
- B. approve a proposed OpenSFS Stack, or any revision or substantial part thereof, for consideration for approval by the Alliance Participants;
- C. terminate the membership of a Member in accordance with Article 15;
- D. materially change: (i) the purpose of the Corporation (Article 3), (ii) the provisions relating to the Board (Article 6 and Article 7), (c) the termination and withdrawal provisions (Article 15), (d) the intellectual property provisions (Article 16), (iii) the confidentiality provisions (Article 17), (f) the freedom of action provisions (Article 19), and/or (iv) the provisions of Sections 21.1, 21.2, 21.3, 21.4, 21.5, 21.6 and/or 21.9 of these Bylaws;
- E. file or consent to the filing of any petition, either voluntary or involuntary, to take advantage of any applicable insolvency, bankruptcy, liquidation or reorganization statute, or make an assignment for the benefit of creditors; or merge or consolidate with or into another entity; or directly or indirectly sell all or substantially all of the assets of the Corporation;
- F. increase the amount of dues payable by Promoters in an amount greater than 10% annually;
- G. make any change in the formula for determining the number of authorized Directors of the Corporation;
- H. make any change in the right, power or ability of a Promoter to designate one (1) person as a Director and member of the Board;
- I. create or authorize any class or series of members who are “Members” as defined in Section 5056 of the Corporations Code;
- J. make, approve or effect any exchange, reclassification or cancellation of the memberships of the Promoters as a class of Members;
- K. approve or effect the dissolution, liquidation or winding up of the Corporation; or
- L. amend this Section 7.7.

7.8 Conduct of Meetings. The Board shall be presided over by the Chairman of the Board or, in the Chairman’s absence, by a Director selected by a majority of the Board present at the meeting. The Secretary of the Corporation shall act as secretary of all meetings of the Board, provided that, in the Secretary’s absence, the presiding officer shall appoint another person to act as secretary of the meeting. Meetings shall be governed by such procedures as may be approved from time to time by the Board, insofar as such rules are not inconsistent with or in conflict with these Bylaws or with provisions of law.

7.9 Meetings by Telephone, Video Conference or Electronic Transmission. Directors may participate in a regular or special meeting through use of conference telephone, videoconference, or other electronic communication or transmission, or in person, so long as all people participating in such meeting can hear one another or can communicate with all other participants concurrently. Participation in a meeting pursuant to this Section 7.9 constitutes presence at such meeting for all purposes, including the existence of a quorum and voting.

7.10 Board Action without a Meeting. Any action that the Board is required or permitted to take may be taken without a meeting if all of the Directors consent in writing or by electronic transmission to that action. Such action by written consent shall have the same force and effect as any other validly approved action of the Board. All consents shall be filed with the minutes of the proceedings of the Board.

ARTICLE 8. OFFICERS

The Board may appoint officers at any time. The officers of the Corporation may include a Chief Executive Officer, President, Vice-President, Chairman of the Board, Secretary, Chief Financial Officer, Treasurer, and any other officer as determined by the Board (“Officers”). Any number of offices may be held by the same person unless prohibited by the Corporation’s status under Section 501(c)(6) of the Internal Revenue Code. Each Officer shall be elected, and any vacancy in any office may be filled, by a simple majority vote of the Board. The Officers shall serve at the pleasure of the Board, and shall serve without compensation unless otherwise approved by the Board.

If no individual has been elected as the Chief Executive Officer, the President, or if there is no President the Chairman of the Board, is the general manager and chief executive officer of the Corporation. If there is no chief financial officer, the Treasurer is the chief financial officer of the Corporation.

The Chief Executive Officer shall be responsible for the general supervision, direction and control of the activities and personnel of the Corporation. The Chairman of the Board, and if the Chairman of the Board is absent the Chief Executive Officer, shall preside at all meetings of the Members, except as set forth in Section 5.10.A. The Chairman of the Board shall preside at all meetings of the Board, except as set forth in Section 7.8. The Chief Financial Officer shall be responsible for the books and accounts of the Corporation, including monitoring payment of dues by the Members and investment of Corporation funds in interest bearing accounts. The Officers shall have such other powers and duties as determined by the Board from time to time.

ARTICLE 9. EXECUTIVE COMMITTEE

The Corporation may form an executive committee (the “Executive Committee”) which may consist of the President, Treasurer, Secretary, Chairman of the Board, or such other individuals as determined by the Board. The Board may delegate the management of the day-to-day activities of the Corporation to the Executive Committee, including overseeing the Corporation’s finances, public relations, organization of community meetings and such other duties and responsibilities as determined by the Board from time to time, provided that such activities and powers shall be carried out under the direction of the Board as required by Section

7210 of the Corporations Code. For the avoidance of doubt, the Executive Committee may not amend (or authorize amendment of) the Articles of Incorporation or the Bylaws of the Corporation or take any action which under applicable law or these Bylaws is reserved to or may only be taken by the Board or a Board Committee or may only be taken with the approval of the Members. Members of the Executive Committee serve at the pleasure of the Board. The final determination as to the composition, duties, policies, procedures, and size of the Executive Committee will be made by the Board.

ARTICLE 10. WORKING GROUPS

10.1 Working Groups. The Corporation may establish, charter, approve or support one or more working groups (“Working Groups”) to lead development of OpenSFS Stacks and to carry out such other activities with such charters and duties as may from time to time be determined by the Board.

10.2 Meetings and Actions of Working Groups. Meetings, responsibilities and actions of the Working Groups shall be governed by, noticed, held and taken in accordance with policies and procedures established by the Working Groups, as approved or ratified by the Board. Representatives of Promoters and Adopters in a Working Group shall be eligible to vote at meetings of, and for the taking of actions by, the Working Group.

10.3 Composition of Working Groups. The Board shall select the chair or co-chairs of a Working Group from among Representatives of Promoters and Adopters designated for consideration by the Board to chair or co-chair the Working Group. Such chair or co-chairs shall serve for a one (1) year term. Representatives of Promoters, Adopters and Supporters shall be eligible to participate in all Working Groups. The Board may authorize participation of other Participants in a Working Group according to Section 4.4 herein.

ARTICLE 11. MAINTAINERS

The Corporation may designate, approve, or support individuals or organizations as maintainers with respect to an identified OpenSFS Stack (or part thereof) (“Maintainers”). Maintainers shall serve in accordance with the policies and procedures adopted by the Board, and, where feasible, adhere to the practices and procedures of the licensees for which such OpenSFS Stack may be or is targeted. Maintainers shall have the responsibilities, expertise and capabilities suitable for the operating environment of the applicable software stack and purposes of the particular OpenSFS Stack.

ARTICLE 12. APPROVAL OF OPENSFS STACK

12.1 Approval and Notice of the Proposal. If the Board, by the requisite vote in accordance with Section 7.7, determines that a proposal put forward by an Alliance Participant for an OpenSFS Stack (or part thereof) (“Proposal”) is consistent with the purposes, the licensing, the patent and the documentation policies of the Corporation and for consideration for approval by the Alliance Participants as an approved OpenSFS Stack, the Corporation will notify each Alliance Participant of the Proposal under consideration for approval, along with notice of a

meeting of the Alliance Participants, which may take place in person or by electronic transmission or communication, to vote on approval of the Proposal (“Proposal Meeting”).

12.2 Timing of Proposal Meeting. The Proposal Meeting shall be at least ten (10) days after the date notice of the meeting and the Proposal as approved by the Board is given to the Alliance Participants.

12.3 Conduct of Proposal Meeting. The Board may designate an individual to preside over the Proposal Meeting, who may be an Alliance Participant or a Representative of an Alliance Participant, a member of a Working Group or other individual familiar with the Proposal and related issues, or such other individual determined by the Board. In the absence of such designation, the Proposal Meeting shall be presided over by the Chairman of the Board or, in the Chairman’s absence, by the Chief Executive Officer or, in the Chief Executive Officer’s absence, by another individual serving on the Board or, in the absence of all of these persons, by the person appointed by the Board to serve as secretary of the meeting, or if none has been so appointed prior to the meeting then by an individual elected to serve as secretary of the meeting by approval of the Alliance Participants at the beginning of the meeting

12.4 Changes to the Proposal. Prior to and during the Proposal Meeting, any Alliance Participant may propose a change or modify, remove from, or add to the Proposal, provided such change is promptly made known to all Alliance Participants. Upon any such proposed change being made known prior to the Proposal Meeting, the Board will vote to amend or not to amend the Proposal and reschedule, or not, the Proposal process. Upon any such proposed change being made known during the Proposal Meeting, the Proposal Meeting may nevertheless vote to amend or not to amend the Proposal, provided however, that the Proposal, if amended, shall be subject to subsequent approval or ratification by the Board in accordance with Section 7.7.

12.5 Approval. The Proposal is approved as an OpenSFS Stack (or part thereof) when approved at the Proposal Meeting by a majority of the Alliance Participants in attendance in person or by proxy, or by voting by written or electronic transmission. By the same method (i.e., by a vote of a majority of the Alliance Participants in attendance in person or by proxy, or by voting by written or electronic transmission) the Alliance Participants may delegate any part of their approval authority to a designated Working Group.

12.6 Continued Work. In the event the Proposal is not approved at a Proposal Meeting, the Alliance Participants shall be free to continue work on the Proposal and resubmit the Proposal for approval.

ARTICLE 13. PUBLICATION

13.1 Publication of an OpenSFS Stack. The Board will use reasonable efforts to ensure that each OpenSFS Stack will be published in a timely manner following approval, and will not be subject to trade secret or confidential treatment. The publication of an OpenSFS Stack by the Board or by a designated Working Group delegated approval authority as described in Section 12.5, above, shall, where feasible, adhere to the schedules, processes and release procedures for the environment in which such stack is targeted to be included and operate correctly. All publications shall include:

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A. Measures necessary to ensure that any person obtaining access to an OpenSFS Stack has agreed to accept it under the terms of the open source license(s) approved by the Board, and

B. Appropriate disclaimers intended to prevent any third party from claiming that any rights are granted by implication or estoppel because of such publication.

13.2 Publication of Draft Documents. “Draft Documents” include any written information provided by a Participant for the purpose of creating, specializing, guiding, commenting on, revising, updating, modifying, or adding any information that is to be considered for approval as an OpenSFS Stack. With permission from the Board, a Member may publish or distribute any portion of a Draft Document, provided that all publications shall include the notices and disclaimers required for publication of an OpenSFS Stack. This paragraph will not restrict the right of the Participants to release software and data generated that is not specifically identified as an OpenSFS Stack.

ARTICLE 14. MAINTENANCE OF AND MODIFICATION TO OPENSFS STACKS

14.1 Updates. By a majority vote, the Board or its designated Working Group may at any time update an OpenSFS Stack for the purpose of making error corrections or updates (e.g., an object storage system change, additional driver, or operating system release synchronization) that do not substantially alter or augment the functionality or capabilities of an OpenSFS Stack. The Board or Working Group may publish such Updates subject to the terms of Article 13.

14.2 Modification. Once an OpenSFS Stack has been approved, published and released, any additions or alterations (but not updates) that substantially augment (e.g., a new transport, or operating system) the functionality and capability of such OpenSFS Stack shall follow the procedures for approval of a Proposal in Article 12.

ARTICLE 15. TERMINATION AND WITHDRAWAL

15.1 Termination of Membership. The membership of a Member shall terminate automatically upon (A) a failure of a Member to pay the required dues within forty-five (45) days of the due date unless such Member cures such failure to pay within fifteen (15) days after the date on which such Member receives from the Corporation written notice of such Member’s failure to timely pay such dues, or (B) upon termination of the Member’s Membership Agreement. The Board, by a two-thirds (2/3) majority vote of all Directors then in office may also terminate a Member’s membership for failure to perform the duties of membership, including failure, in a material respect, to abide by the terms of the Articles of Incorporation, Bylaws, the policies and procedures adopted by the Board for Members or such Member’s Membership Agreement or Contribution Agreement. Such termination is contingent on the Member being given written notice of the reasons for termination at least fifteen (15) days before such termination and being given the right (which shall be specified in such notice) to appeal such termination, orally or in writing, to the Board or a committee of Directors appointed by the Board, such appeal to be heard and determined not less than five (5) days prior to the effective date of termination, unless waived by the affected Member. The decision of the Board or committee shall be rendered in writing and shall be final. A Member may terminate its own

membership at any time upon written notice to the Board. If a Promoter's membership is terminated involuntarily for any reason, then such involuntarily terminated Promoter shall be entitled to a pro rata refund (the "Refund") of dues previously paid by such Promoter to the Corporation based on the number of days remaining of the then-current membership term for which the Promoter has paid or advanced dues. The Refund shall be equal to the lesser of: (X) the pro rata remainder of the Promoter's dues previously paid to the Corporation for the Promoter's then-current annual membership period, based on the ratio of the actual number of days remaining to the total number of days in such annual membership period; or (Y) (1) the dollar amount of the Corporation's funds not then allocated to outstanding contracts and commitments or budgeted contracts and commitments specified in the Corporation's budget previously approved by the Board, as reflected on the books of the Corporation, divided by (2) the number of Promoters of the Corporation at the time of the Promoter's involuntary termination (including the Promoter being terminated). If inadequate funds are available for a lump sum payment of the Refund upon termination and/or if such payment would be prohibited by applicable laws relating to distributions, solvency or preferences, the Corporation may pay such Refund to the terminated Promoter in installments over time; provided that the Corporation shall endeavor in good faith to make such payments in the amounts and as soon as the Corporation may reasonably do so without jeopardizing the Corporation's existing contractual obligations and as permitted by law. If a Member's membership is terminated voluntarily by such Member for any reason, then such voluntarily terminating Member shall not be entitled to a refund or return of any dues previously paid by such Member to the Corporation.

15.2 Termination of Adopter. An Adopter's term as Adopter shall terminate automatically upon (A) a failure of an Adopter to pay the required dues within forty-five (45) days of the due date or (B) upon termination of the Adopter's Adopter Agreement. The Board may also terminate an Adopter's participation as an Adopter for failure to perform the duties of an Adopter, including failure, in a material respect, to abide by the terms of the Articles of Incorporation, Bylaws, the policies and procedures adopted by the Board for Adopters or such Adopter's Adopter Agreement or Contribution Agreement. An Adopter may terminate its own participation as an Adopter at any time upon written notice to the Secretary of the Corporation. Upon termination of an Adopter's participation as an Adopter for any reason, the Adopter shall not be entitled to a refund or return of any dues previously paid by such Adopter to the Corporation.

15.3 Termination of Supporter. A Supporter's term as Supporter shall terminate automatically upon (A) a failure of a Supporter to pay the required dues within forty-five (45) days of the due date or (B) upon termination of the Supporter's Supporter Agreement. The Board may also terminate a Supporter's participation as a Supporter for failure to perform the duties of a Supporter, including failure, in a material respect, to abide by the terms of the Articles of Incorporation, Bylaws, the policies and procedures adopted by the Board for Supporters or such Supporter's Supporter Agreement or Contribution Agreement. A Supporter may terminate its own participation as a Supporter at any time upon written notice to the Secretary of the Corporation. Upon termination of a Supporter's participation as a Supporter for any reason, the Supporter shall not be entitled to a refund or return of any dues previously paid by such Supporter to the Corporation.

15.4 Effect of Termination. If a Member's membership is terminated for any reason or an Adopter's or Supporter's participation is terminated for any reason:

A. Articles 17 and 19 shall survive and continue to be binding on a terminated Participant with respect to OpenSFS Stacks approved prior to the date of termination. Articles 14 and 16 shall survive with respect to (i) OpenSFS Stacks approved prior to the date of termination, and (ii) the Participant's Contribution but only as used in OpenSFS Stacks for which such Contribution was accepted prior to the date of termination and for approved succeeding stacks (e.g., updates of such stacks) for backwards compatibility purposes only (not, for example, for new uses).

B. The terminated Participant shall, within ten (10) days following its termination, destroy all copies of Confidential Information in its possession and certify such destruction to the Board, provided that the Participant may retain one (1) copy of such Confidential Information solely for archival purposes, subject to the provisions of Article 17.

ARTICLE 16. INTELLECTUAL PROPERTY

16.1 Copyright Ownership of the OpenSFS Stack. Except as may be separately agreed, copyright ownership of an OpenSFS Stack (or portion thereof) contributed by a Participant remains with the Participant that contributed such OpenSFS Stack (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 Stack (or portion thereof). No rights of joint authorship or joint ownership of copyrights in any OpenSFS Stack (or portion thereof) shall be created solely by virtue of a Participant's act of contributing works that are included within such OpenSFS Stack (or portion thereof). As the creator of the compilation that shall comprise the whole of any OpenSFS Stack that has Contributions from more than one Participant, the Corporation shall own all compilation copyrights in each OpenSFS Stack (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 Stack 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 Stack shall be on terms permitting the Corporation to publish and license the OpenSFS Stack 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 Stack. 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 Stack.

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 Stack 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 Stack, 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 Stack (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 Stack; 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 Stack (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 Stack (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 Stack (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 Stack, but are not themselves expressly included in an OpenSFS Stack (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 Stack.

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 Stack or are enforceable, or (ii) that an OpenSFS Stack 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 Stack.

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 Stack (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 Stack

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 Stack, but only if the Asserting Party objects at the Proposal Meeting to the approval of a Proposal for such OpenSFS Stack, discloses in writing such Asserting Party's Covered Patent Rights that cover any aspect of the OpenSFS Stack, 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 Stack, that such Covered Patent Rights were, or were likely to be, embodied in or infringed by such OpenSFS Stack (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 Stack, 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 Stack 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 Stack 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 Stack 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.

ARTICLE 17. CONFIDENTIALITY

17.1 Maintenance of Confidentiality. The Board may deem the content of its deliberations (including the content of a Contribution and the deliberations of a Working Group) and the Corporation's business plans to be "Confidential Information". To be protected as

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provided in these Bylaws, Confidential Information, if embodied in tangible form must be marked with a restrictive legend, or if disclosed orally, must be identified as confidential at the time of disclosure. Each Participant agrees not to disclose the Confidential Information and agrees to maintain the confidentiality of the Confidential Information with at least the same degree of care as it maintains its own similar confidential information, for a period of three (3) years from the date of disclosure of such Confidential Information. Notwithstanding the foregoing, any Participant that is a United States governmental entity contractor may disclose any Confidential Information to such governmental entity that is required to be disclosed pursuant to its contract with the governmental entity.

17.2 Exclusions. Confidential Information does not include any information that is: publicly available other than by breach of a duty of confidentiality; rightfully received from a third party without any obligation of confidentiality; rightfully known to the receiving party without any limitation on disclosure prior to or after its receipt from the disclosing party (including a Participant's own code, documentation and/or other information provided to the Corporation); disclosed as required by law; or included in an OpenSFS Stack adopted and approved for release by the Board.

17.3 Residuals. Participants shall be free to use the residuals of Confidential Information for any purpose including use in the development, manufacture, marketing and maintenance of products and services, subject only to the obligations herein with respect to maintaining the confidentiality of such Confidential Information. The term "residuals" means that Confidential Information in non-tangible form, which may be retained in the memories of individuals who have had rightful access to such Confidential Information. It is understood that receipt of Confidential Information shall not create any obligation in any way limiting or restricting the assignment or reassignment of any employees within an organization. Nothing in this paragraph shall be construed to grant a patent license or other intellectual property license, express or implied.

ARTICLE 18. ANTITRUST

Each Participant acknowledges that they are committed to fostering competition in the development of new products and services and that the Corporation's activities are intended to promote such competition. They further acknowledge that some of them may compete with one another in various lines of business and that it is therefore imperative that they and their Representatives act in a manner that does not violate any applicable antitrust laws and regulations. Without limiting the generality of the foregoing, Participants acknowledge that they shall not discuss issues relating to product costs, product pricing, methods or channels of product distribution, any division of markets, or allocation of customers or any other topic that would be prohibited by applicable antitrust laws. Accordingly, each Participant hereby assumes responsibility to provide appropriate legal counsel to its Representatives regarding the importance of limiting their discussions to subjects that relate to the purposes of the Corporation, whether or not such discussions take place during formal meetings, informal gatherings, or otherwise. Each Participant consents to the Corporation giving notice of Participant's participation in the Corporation, to the extent necessary for the Corporation to invoke the

protection of the National Cooperative Research and Production Act of 1993. The Corporation may, but is not obligated to, invoke such protection.

ARTICLE 19. FREEDOM OF ACTION

Neither participation in the Corporation nor the Corporation's approval or release of an OpenSFS Stack shall require any Participant to use or implement an OpenSFS Stack, to preclude it from developing or employing additional, competing, or alternative products, or to foreclose taking a different course of action should it so desire. No provision of these Bylaws or a Membership Agreement, Adopter Agreement or Supporter Agreement shall be interpreted to prevent any Participant from engaging in any other activities or business ventures, independently or with others, whether or not competitive with the activities contemplated herein or those of any other and regardless of the effect thereof on the Corporation.

ARTICLE 20. DISSOLUTION

The Corporation shall be dissolved, its assets shall be disposed of, and its affairs wound up upon approval of the Board, by a two-thirds (2/3) majority vote of all Directors then in office, and the approval of two-thirds (2/3) of the Promoters, or as otherwise permitted by law. In the event that the Corporation is dissolved or wound up at any time, whether by voluntary or involuntary dissolution, all of the remaining properties, monies, and assets of the Corporation after provision has been made for its known debts and liabilities as provided by law, shall be distributed, in accordance with the requirements of Section 501(c)(6) of the Internal Revenue Code, to the Members, calculated on a pro rata basis among all Members, based upon their respective membership classes, if any, and the amount of annual dues then in effect for each membership class.

ARTICLE 21. MISCELLANEOUS

21.1 NO OTHER WARRANTY. EXCEPT AS PROVIDED IN SECTION 16.5, ALL PARTICIPANTS ACKNOWLEDGE AND AGREE THAT ALL INFORMATION PROVIDED AS PART OF THE OPENSFS STACK DEVELOPMENT PROCESS AND THE OPENSFS STACK IS PROVIDED "AS IS" WITH NO WARRANTIES WHATSOEVER, WHETHER EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, AND THE PARTICIPANTS AND THE CORPORATION EXPRESSLY DISCLAIM ANY WARRANTY OF MERCHANTABILITY, NONINFRINGEMENT, FITNESS FOR ANY PARTICULAR PURPOSE, OR ANY WARRANTY ARISING OUT OF ANY PROPOSAL, SPECIFICATION, OR SAMPLE. ANY PARTICIPATION AGREEMENTS OR SIMILAR MEANS OF PARTICIPATION FOR NON-MEMBERS SHALL PROVIDE FOR SUCH DISCLAIMER OF WARRANTY EXTENDING TO ALL OTHER PARTICIPANTS.

21.2 LIMITATION OF LIABILITY. IN NO EVENT WILL PARTICIPANTS OR THE CORPORATION BE LIABLE TO EACH OTHER, OR TO ANY THIRD PARTY FOR THE COST OF PROCURING SUBSTITUTE GOODS OR SERVICES, LOST PROFITS, LOSS OF USE, LOSS OF DATA OR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, OR SPECIAL DAMAGES, WHETHER UNDER CONTRACT, TORT, WARRANTY, OR OTHERWISE, ARISING IN ANY WAY OUT OF THIS OR ANY OTHER RELATED

AGREEMENT, WHETHER OR NOT SUCH PARTY HAD ADVANCE NOTICE OF THE POSSIBILITY OF SUCH DAMAGES. ANY PARTICIPATION AGREEMENTS OR SIMILAR MEANS OF PARTICIPATION FOR NON-MEMBERS SHALL PROVIDE FOR SUCH LIMITATION OF LIABILITY EXTENDING TO ALL OTHER PARTICIPANTS.

21.3 No Other Licenses. Except for the rights expressly provided in these Bylaws, no person grants or receives, by implication, estoppel, or otherwise, any rights under any patents or other intellectual property rights.

21.4 No Liability for Debts of Corporation. No Director, Officer or any of the Participants shall be personally liable for the debts, liabilities, or other obligations of the Corporation.

21.5 Waiver of Personal Liability. The liability of Directors of this Corporation for monetary damages shall be waived and limited to the fullest extent permissible under California law.

21.6 Indemnification. The Corporation shall indemnify Directors from any liability based upon, arising from or relating to the Director's authorized activities on behalf of the Corporation, to the fullest extent permissible under California law.

21.7 Insurance for Corporate Agents. Except as may be otherwise provided under provisions of law, the Corporation may purchase and maintain insurance on behalf of any agent of the Corporation (including Directors, Officers, employees or other agents of the Corporation) against liabilities asserted against or incurred by the agent in such capacity or arising out of the agent's status as such, whether or not the Corporation would have the power to indemnify the agent against such liability under these Bylaws or provisions of law. In furtherance of the foregoing, the Board shall cause the Corporation to purchase and maintain D&O and E&O insurance for the benefit of Directors and Officer, provided such insurance is available upon commercially reasonable terms and premium as determined by the Board in its sole discretion.

21.8 Fiscal Year. The Corporation's fiscal year shall be the calendar year or as otherwise determined by the Board.

21.9 Amendment. Except as otherwise provided by law or in these Bylaws, including Section 4.1(B) and Section 7.7 hereof, these Bylaws may be amended upon the affirmative vote of a majority of the Board.

21.10 Law of California. These Bylaws and all amendments hereto shall be governed by the laws of the State of California; and in the event of litigation or other disputes, venue shall be in the city and county where the Corporation has its principal place of business.