

ToolsGroup®  
Software License and Maintenance Agreement  
Terms and Conditions

*NOTE: If Licensor is an entity other than ToolsGroup, certain special terms apply.  
See Section 9.17 below.*

1 DEFINITIONS. As used in this Agreement, the following capitalized terms have the following respective meanings:

1.1 “Affiliate” means, with respect to any Person, any other Person that Controls, is Controlled by, or is under common Control with, such first Person.

1.2 “Agreement” means this Software License and Maintenance Agreement, including the Signature Page, these Terms and any other document referenced or incorporated herein or therein.

1.3 “Applicable Policies” means the policies of Licensor (and, if different, ToolsGroup) referenced in the Schedule to the Signature Page, including without limitation these Terms.

1.4 “Business Day” means, with respect to a given location, a day that is not a Saturday, a Sunday or other day on which banks are required or authorized to be closed in such location. Except as otherwise specified, the relevant location for a Business Day is the principal office of Licensor.

1.5 “Category” means a group of one or more product lines or business activities for which Licensee has a planning organization with respect to a Region.

1.6 “Confidential Information” means any and all information disclosed by a party hereto (“Discloser”) to any of the other party and its Affiliates (“Recipient”) which is proprietary to Discloser, whether or not reduced to writing or other tangible medium, and whether or not protected or protectable by patent, trade secrecy or copyright, including the terms of this Agreement, technical information and other information relating to intellectual property, business and marketing plans, financial matters, products, services, processes, methods, specifications, designs, costs, sources of supply, pricing, sales, profits, personnel and business relationships. Confidential Information shall not include information which: (a) becomes generally known to the public through no fault of Recipient; (b) was known to Recipient prior to its (or any of its Affiliates’) relationship with Discloser, as evidenced by Recipient’s written records; (c) is furnished to Recipient by a third party who is lawfully in possession of, and who lawfully conveys, such information; or (d) is subsequently developed by Recipient without the use of Confidential Information, as established by Recipient’s written records. In the case of Licensor (and, if different, ToolsGroup) as Discloser, Confidential Information shall include the Software, whether in object-code or source-code form, and the Documentation.

1.7 “Control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting stock or similar rights, the holding of office, by contract, or otherwise.

1.8 “Documentation” means any user documentation, on any media, provided by Licensor or ToolsGroup for use with the Software, including the Applicable Policies and ToolsGroup’s on-line help files, standard manuals, program listings, data models, flow charts, logic diagrams, input and output forms, functional specifications, instructions, as in effect from time to time, and complete or partial copies of the foregoing.

1.9 “Error” means a failure of the Software (unmodified and as updated by the most recent Release or Update issued by ToolsGroup at the relevant time) to perform substantially as specified in the Documentation and which can be reproduced by Licensee and Licensor.

1.10 “Initial Term” means the initial term, if any, specified on the Signature Page.

1.11 “Installation” means an installation of the Software operating in conjunction with a dedicated operational database managing a Category with respect to a Region or a part thereof (as specified on the Signature Page) and interfacing a single system of reference (legacy, ERP or SCP suite).

1.12 “License” has the meaning given in Section 2.2 below.

1.13 “Licensee” means the entity identified as such in the Signature Page.

1.14 “Licensee’s Data” means the data stored or processed by or on behalf of Licensee in the course of Using the Software hereunder.

1.15 “Licensor” means the entity identified as such in the Signature Page, which, if not ToolsGroup, is a master licensee of ToolsGroup authorized to grant a sub-license hereunder.

1.16 “Maintenance Term” has the meaning provided in Section 3.1 below.

1.17 “Perpetual License” means the License hereunder, if no specific Initial Term and subscription fees are specified on the Signature Page.

1.18 “Person” means a natural person, corporation or other entity.

1.19 “Qualified Individual” means an individual appointed by Licensee to serve as the primary contact between Licensee and Licensor for all technical support issues, who shall be knowledgeable in the Use and application of the Software and familiar with the Support Plan. One Qualified Individual may cover multiple Installations.

1.20 “Read-Only User” means a User whose Use of the Software is limited to read-only access to the output of such Software.

1.21 “Region” means a geographical area for which Licensee has a planning organization for manufacturing or distribution of one or more Categories, as specified on the Signature Page.

1.22 “Release” means a set of the Software which, in addition to possible corrections of detected shortcomings, includes functional enhancements and may also include architectural and technical changes to comply with changes in Third-Party Software or information-technology architectures.

1.23 “Signature Page” means the Signature Page signed by Licensee and Licensor that incorporates these Terms in the Agreement.

1.24 “Software” means the ToolsGroup® software described on the Signature Page, as updated from time to time by Releases and Updates in accordance with the Documentation and the Applicable Policies, including any extensions thereto (e.g., customization).

1.25 “Subscription License” means the License hereunder, if a specific Initial Term and subscription fees are specified on the Signature Page.

1.26 “Subscription Period” means the Initial Term or any subsequent renewal period under Section 2.1 below.

1.27 “Support Plan” means the Maintenance and Technical Support Plan referred to in the Schedule to the Signature Page.

1.28 “Term” has the meaning given in Section 2.1 below.

1.29 “Third-Party Software” means any and all third-party computer programs required for the Software to operate.

1.30 “ToolsGroup” means ToolsGroup B.V., a Dutch corporation, and its Affiliates.

1.31 “Update” means a set of the Software provided by Licensor (or, if different, ToolsGroup) for general application to its supported customers in which detected shortcomings are being remedied (including Error corrections, patches, fixes and updates).

1.32 “Use” means the loading, execution, employment, utilization, storage or display of the Software by Licensee as permitted by this Agreement and contemplated by the Documentation.

1.33 “User” means an individual who is: (a) authorized by Licensee or on Licensee’s behalf to use the Software in accordance with this Agreement; and (b) Licensee’s or Licensee’s Affiliate’s (i) employee or (ii) independent contractor who has agreed in writing to be bound by obligations with respect to the License, the Software and other Confidential Information of Licensor and ToolsGroup that are at least as stringent as Licensee’s obligations hereunder.

Within the numerical limits of the configuration set forth in the Schedule to the Signature Page, Licensee may remove and replace Users.

1.34 “Year” means: (a) for a Subscription License, a twelve- (12-) month period commencing on the date of this Agreement or an anniversary thereof; or (b) for a Perpetual License a calendar year.

## 2. LICENSE.

2.1 Term. As used herein, “Term” means:

(a) *Subscription License*. If the License is a Subscription License, a period, unless and until earlier this Agreement is terminated in accordance with these Terms, comprising: (i) the Initial Term; and (ii) automatic consecutive renewal periods of one (1) Year thereafter unless (A) either party gives the other notice of non-renewal at least ninety (90) days before the relevant renewal date or (B) Licenser notifies Licensee that such renewal is cancelled due to Licensee’s (I) failure to pay the applicable Subscription Fee at least thirty (30) days prior to such renewal date or (II) continuing breach of this Agreement; or

(b) *Perpetual License*. If the License is a Perpetual License, a period commencing on the date hereof and continuing unless and until this Agreement is terminated in accordance with these Terms, in which case the License and, if then continuing, the Maintenance Term shall immediately terminate.

2.2 License to Use the Software. Subject to the provisions of this Agreement and to full payment of the license fee specified herein, Licenser hereby grants to Licensee during the Term a fully paid, non-exclusive and non-transferable license (the “License”) to (a) Use the Software as set forth herein with respect to the business of Licensee; (b) use the Documentation in connection with Use of the Software; and (c) copy the Software solely for backup or archival purposes; *provided* that all titles, trademark and copyright notices and other propriety markings are reproduced; and *provided further* that Licensee Uses the Software only in the configuration and within the scope provided herein or authorized in writing in advance by Licenser. Any act or omission of a User which, if committed by Licensee, would constitute a breach of this Agreement, shall be deemed a breach by Licensee.

2.3 License Fees. In consideration of the License, Licensee shall pay the following consideration:

(a) *Subscription License*. If the License is a Subscription License, Licensee shall pay the Subscription Fee set forth on the Signature Page for the Initial Term. For each subsequent Subscription Period, Subscription Fees shall increase to the lower of: (a) Licenser’s published list price, if any; (b) one hundred ten percent (110%) of the Subscription Fee for the immediately preceding Subscription Period; or (c) such fee as the parties may agree in writing at least one hundred twenty (120) days prior to the beginning of such Subscription Period. Subscription Fees hereunder shall be subject to increase at any time, in the reasonable discretion of Licenser, in connection with any increase in the scope of Use by Licensee not previously

accepted in writing by Licensor. Licensor shall have no obligation to accept late or partial payments of Subscription Fees. Subscription Fees shall be payable before the commencement of the relevant Subscription Period; or

(b) *Perpetual License.* If the License is a Perpetual License, Licensee shall pay the license fee set forth on the Signature Page in accordance with the payment terms set forth therein or, if no such payment terms are specified, on the date of this Agreement.

2.4 Intellectual Property Rights. Licensee acknowledges that ownership of and title in and to all intellectual property rights, including patent, trademark, service mark, copyright and trade secret rights, in the Software and Documentation are and shall remain in Licensor and its licensors. Except for the License, Licensee shall not hereby acquire any right in the Software or Documentation, including without limitation future Releases and Updates, as the case may be. Licensee shall not remove any proprietary, copyright, trademark or service mark legend from the Software or the Documentation.

2.5 Delivery of Software. Licensor shall provide to Licensee one (1) machine-readable copy of the Software, along with one machine-readable copy of the Documentation. Licensee may reproduce the Documentation by printing the online files for its own internal use.

2.6 Third-Party Software. Licensee acknowledges that the Software must be Used with a Third-Party Software platform. Licensee shall be solely responsible for ensuring that it has licensed and installed all necessary Third-Party Software. Licensor (and, if different, ToolsGroup) makes no representations or warranties and shall have no responsibility regarding Third-Party Software.

2.7 License Restrictions. Licensee shall not do, or permit to be done, any of the following:

(a) sublicense or other attempt to transfer or assign any portion of the Software or Documentation;

(b) decompile, disassemble or reverse-engineer any portion of the Software, except to the extent that applicable law specifically requires such action by Licensee to be permitted;

(c) modify, or create any derivative work from, the Software, the Documentation or any Confidential Information of Licensor (or, if different, ToolsGroup);

(d) use Software for any purpose other than Licensee's internal business operations (including without limitation the provision of processing services to third parties that are not divisions of Licensee, whether pursuant to any commercial timesharing, rental, sharing or "service bureau" arrangement or otherwise);

(e) permit access to or use of Software by Persons other than Users without ToolsGroup's prior written consent;

(f) use Software beyond the scope (Installations, Users, Categories, Regions or Software Configuration) specified in the Signature Page; or

(g) remove or modify any program markings or any notice of Licensor's or its licensors' proprietary rights.

2.8 Qualified Individual. Licensee shall ensure that at least one of the Users at all times is a Qualified Individual. The number of Qualified Individuals at any given time may not exceed the maximum, if any, set forth on the Signature Page. The initial Qualified Individuals are designated on the Signature Page. Licensee shall notify Licensor of any new or replacement Qualified Individuals.

2.9 Audit. During the Term and for a period of three (3) years thereafter, Licensee shall permit Licensor, upon reasonable notice and during Licensee's business hours, to audit Licensee's use of the Software. Licensee shall cooperate with Licensor's audit and provide reasonable assistance and access to information. Any such audit shall not unreasonably interfere with Licensee's normal business operations. If, as a result of such audit, it is determined that there has been an overpayment or underpayment of fees (license fees and, consequently, support fees), then (i) the parties shall promptly rectify such overpayment or underpayment by repaying the amount thereof, together with interest thereon at the prime rate published in *The Wall Street Journal*, from the time such payment was originally due to the time it is paid; and (ii) in the case of an underpayment of exceeding than five percent (5%) over a Year, Licensee shall reimburse Licensor for its reasonable fees and expenses in connection with such audit. During the Maintenance Term, Licensor shall use reasonable efforts to conduct its audits through remote access to Installations in lieu of in-person, on-site reviews.

### 3 PRODUCT MAINTENANCE AND TECHNICAL SUPPORT SERVICES; SECURITY.

3.1 Maintenance Term. The term during which Licensee shall be entitled to product maintenance and technical support services under this Section 3 (the "Maintenance Term") shall be as follows:

(a) *Subscription License*. If the License is a Subscription License, the Maintenance Term shall be coterminous with the Term; or

(b) *Perpetual License*. If the License is a Perpetual License, the Maintenance Term shall commence on the date of delivery of the Software to Licensee and continue through the end of such Year and thereafter automatically renew for consecutive periods of one (1) Year unless Licensee has notified Licensor in writing, at least ninety (90) days prior to the relevant renewal date, of its intention not to renew; *provided* that Licensee has paid the fee for the relevant Year under Section 3.2. The Maintenance Term shall immediately terminate in the event of the early termination of the License under Section 8.

3.2 Fee for Maintenance and Technical Support. (a) *Subscription License.* If the License is a Subscription License, no additional fees shall be payable hereunder for product maintenance and technical support services.

(b) *Perpetual License.* If the License is a Perpetual License, Licensee shall pay a fee for product maintenance and technical support services for each Year of the Maintenance Term. Such fee for the first Year is set forth on the Signature Page. For each subsequent Year, such fee shall be the lower of: (a) Licensor's published list price, if any; (b) one hundred ten percent (110%) of the fee for the immediately preceding Year; or (c) such fee as the parties may agree in writing at least one hundred twenty (120) days prior to the beginning of such Year. If the first (1<sup>st</sup>) Year is shorter than a full calendar year, the fee for such Year shall be annualized for purposes of calculating the fee for the following Year. All fees hereunder shall be subject to increase in the reasonable discretion of Licensor in connection with any increase in the scope of the License. The fee for each renewal Year must be paid in full prior to the commencement of such Year.

3.3 Lapse of Maintenance Term (Perpetual Licenses Only). Upon the termination or non-renewal of the Maintenance Term for a Perpetual License, services under this Section 3 shall terminate; *provided* that the License shall not be affected thereby unless it is independently terminated under Section 8 below. Thereafter, upon the request of Licensee, Licensor may renew the Maintenance Term, subject to payment of (a) the fees that would have been applied under Section 3.2 for the period of lapse plus (b) the fee applicable under Section 3.2 for the then current Year.

3.4 Maintenance Services (Releases and Updates). During the Maintenance Term, Licensor shall provide Licensee with each new Release and Update, together with the related Documentation, as it is issued to ToolsGroup's licensees generally.

3.5 Technical Support Services. During the Maintenance Term, upon receipt of a report from a Qualified Individual of a presumed Error preventing the Use of the Software as permitted hereby, Licensor shall use reasonable efforts to resolve the Error in accordance with the Support Plan, subject to Section 3.10 below.

3.6 Delegation of Technical Support Services. Licensor may in its sole discretion delegate the performance of some or all technical support services under Section 3.5 to third parties; *provided* that Licensor shall remain responsible hereunder for such performance.

3.7 Limitations to Technical Support. Licensor (and, if different, ToolsGroup) shall have no obligation under this Section 3 to support Software if: (a) altered, damaged or modified or incorporated with or into other software; (b) not the then current Release or, if such Release was issued within the immediately preceding twelve (12) months, the immediately prior Release; (c) the Error results from Licensee's negligence, abuse or misapplication, use not contemplated by the Documentation, or other causes beyond the reasonable control of Licensor (or, if different, ToolsGroup); or (d) installed on any computer hardware not specified in writing by ToolsGroup. Licensor (and, if different, ToolsGroup) shall have no liability for any changes to hardware required for Use of Software due to correction of Errors, Update or Release.

3.8 Other Services. All services not referred to in this Section 3 shall be charged separately at Licensor's then current standard rates and terms.

3.9 Security. At all times during the Term, Licensor shall comply with the ISO/IEC 27001:2013 Information Security Management Standards and maintain its certification as to such compliance. Upon written request, Licensor shall furnish evidence of such certification to Customer.

3.10 Licensor's Use of Licensee's Data for Technical Support. (a) Consent. Licensee: (i) consents to the use of Licensee's Data, including downloading from Licensee's environment onto its secure servers by Licensor (or, if different, ToolsGroup) or its subcontractor, solely for, and for such periods, as may be required for purposes of resolving presumed Errors under section 3.5; (ii) acknowledges that Licensor may provide the technical support from locations, and through use of subcontractors, worldwide; (iii) shall be solely responsible for providing any notices and obtaining any consents required for the processing of Licensee's Data for purposes of such technical support; and (v) shall have sole responsibility for the accuracy, quality, integrity, legality, reliability, appropriateness and ownership of Licensee's Data.

(b) Personal Data. (i) Certain Definitions. As used herein:

(A) "GDPR" means Regulation (EU) 2016/679 (General Data Protection Regulation) or any successor regulation; and

(B) "Personal Data" means any data that constitutes "personal data" as defined in the GDPR or that is protected under similar laws in other jurisdictions where Licensee will use the Software.

(ii) General. Licensee hereby warrants to Licensor that Licensee's Data shall not include any Personal Data, except to the extent that the following may be deemed to constitute Personal Data under applicable law: (A) User Data stored or generated in connection with the use of Usage Metrics (as defined in clause (iii) below); (B) names of companies or other entities that include personal names; and (C) names of Users. In the case of inclusion of Personal Data in Licensee's Data, Licensee would be considered the "data controller", and Licensor, when providing technical support, would be considered a "data processor", under the GDPR and similar laws in other jurisdictions. Licensee shall be solely responsible for ensuring that there is a lawful basis for the processing of Personal Data hereunder (see, e.g., GDPR Art. 6).

(iii) Usage Metrics Feature. The Software includes a feature that, when activated by Licensee, enables Licensee to monitor each User's usage of the Software ("Usage Metrics"). Usage Metrics uses User-specific numerical identifiers, which, along with the information linked to them (collectively, "User Data"), may constitute Personal Data. In order to avoid liability under applicable privacy laws, including without limitation the GDPR



where applicable, Licensee shall meet all requirements of such laws in its treatment of User Data as if such User Data were Personal Data.

(iv) Controller-Processor Agreement under GDPR. Licensee shall inform Licenser whenever the processing of Personal Data hereunder is subject to the GDPR, in which case the following provisions shall constitute the agreement between controller and processor required by Article 28(3) of the GDPR (the “Controller-Processor Agreement”):

(A) Documented Instructions. Licenser shall process Personal Data only (I) on behalf of Licensee and in accordance with explicit written instructions issued by Licensee and accepted by Licenser or (II) as required by EU or EU member-state law, in which case Licenser shall inform Licensee in advance unless prohibited by such law for important reasons of public interest.

(B) Security. Licenser shall have taken measures for the security of processing required by Article 32 of the GDPR, for which purpose Licensee hereby confirms that the standard set forth in Section 4.6 above is satisfactory.

(C) Confidentiality. Licenser shall ensure that its employees and other persons authorized by Licenser to process Personal Data have committed themselves to keep the Personal Data confidential or are subject to a statutory obligation of confidentiality.

(D) Sub-Processors. Licensee hereby consents to the processing of Personal Data by subcontractors of Licenser (“Sub-Processors”). Licenser shall inform Licensee of any addition or replacement of Sub-Processors, in which case Licensee shall have the opportunity to raise objections against such change. Licenser shall ensure that Sub-Processors agree in writing to be bound by the obligations of a processor under the Controller-Processor Agreement with respect to the Personal Data. Where a Sub-Processor fails to fulfil its data protection obligations, Licenser shall be fully liable to Licensee for the performance of that Sub-Processor’s obligations.

(E) Data Subjects’ Rights. Licenser shall, at Licensee’s written request and expense, and to the extent possible, assist Licensee in responding to requests of data subjects (*i.e.*, Users) in the exercise of their rights with respect to Personal Data under Chapter III of the GDPR (*e.g.*, access, portability, correction and erasure).

(F) Information; Audit. Licenser will make available to Licensee information reasonably required by Licensee to demonstrate Licenser’s compliance with the Controller-Processor Agreement. Licensee or its independent auditor may audit Licenser’s compliance with the Controller-Processor Agreement; *provided* that such audits are performed at Licensee’s sole expense, upon reasonable advance notice to Licenser, at intervals of at least twelve (12) months, during Licenser’s ordinary business hours and with the least possible disruption to Licenser’s business.

(G) Further Assistance. Licenser shall assist Licensee at Licensee’s written request and expense in ensuring Licensee’s compliance with Articles 32 to 36

of the GDPR, taking into account the nature of processing and the information available to Licensors.

(H) Return of Personal Data. At Licensee's request, Licensors shall delete or return all Personal Data to Licensee and delete existing copies thereof, unless EU or EU member-state law requires Licensors to store such Personal Data.

(v) Indemnification. Licensee shall indemnify, defend and hold harmless Licensors, its Affiliates and their respective officers, directors, employees, agents and stockholders from and against all Claims (as defined in Article 6) arising out of or relating to any breach or inaccuracy of Licensee's obligations or representations in this Section 3.10.

4 TAX. All amounts payable by Licensee hereunder shall be exclusive of any federal, state or local sales, value added, use, property, excise, service, withholding or other taxes, fees, duties or other amounts, however designated, now or hereafter levied ("Taxes"). Licensee shall be responsible for all Taxes except for taxes on net income of Licensors.

## 5 WARRANTY; DISCLAIMERS; LIMITATION OF LIABILITY.

5.1 Warranty. Licensors warrants that: (a) during the Maintenance Term, the Software shall perform substantially as described in the Documentation when Used as contemplated hereby; and (b) when delivered by Licensors, the Software (and each subsequent Release) shall not contain any computer code intentionally designed to (i) disrupt, disable, harm or otherwise impede in any manner the proper operation of a computer program or computer system, or (ii) damage or destroy any data files residing on a computer system (except as required for the normal operation of the Software). During the Maintenance Term, Licensors shall correct, modify, replace or take other remedial steps with respect to any failure of the Software to perform as so warranted; *provided* that (x) the Software is being correctly used on properly operating equipment and software meeting specifications and (y) the Software has not been modified or altered by anyone other than Licensors (or, if different, ToolsGroup) or its agents and has not been abused or misapplied. Such corrections or repairs shall be Licensee's sole remedy hereunder.

LICENSORS (AND, IF DIFFERENT, TOOLSGROUP) DOES NOT WARRANT THAT THE SOFTWARE WILL BE FREE OF BUGS OR ERRORS OR PERFORM WITHOUT INTERRUPTION. TO THE EXTENT NOT PROHIBITED BY LAW, THE FOREGOING WARRANTY IS EXCLUSIVE AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ARE HEREBY DISCLAIMED, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT.

5.2 Limitation of Liability. (a) IN NO EVENT SHALL LICENSORS BE LIABLE IN CONNECTION WITH ANY MATTER ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE PERFORMANCE, BREACH OR DELAY IN PERFORMANCE HEREUNDER, OR THE TERMINATION HEREOF FOR:

(I) ANY LOSS OF PROFITS, LOSS OF USE, BUSINESS INTERRUPTION, LOSS OF DATA, COST OF COVER OR INDIRECT, SPECIAL, PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY KIND; OR

(II) THE FOLLOWING MONETARY LIMITS:

(AA) IF THE LICENSE IS A SUBSCRIPTION LICENSE, ANY AMOUNT EXCEEDING IN THE AGGREGATE OF THE SUBSCRIPTION FEES RECEIVED BY LICENSOR HEREUNDER IN RESPECT OF THE THEN CURRENT YEAR; OR

(BB) IF THE LICENSE IS A PERPETUAL LICENSE, ANY AMOUNT EXCEEDING IN THE AGGREGATE OF (X) THE FEES RECEIVED BY LICENSOR HEREUNDER IN RESPECT OF THE LICENSE GRANTED HEREUNDER, REDUCED BY TWO PERCENT (2%) FOR EACH COMPLETE MONTH OF USE HEREUNDER, IF THE LOSS OR DAMAGE IS NOT RELATED TO TECHNICAL SUPPORT, OR (Y) THE MAINTENANCE FEES RECEIVED BY LICENSOR HEREUNDER FOR THE THEN CURRENT ANNUAL MAINTENANCE TERM, IF THE LOSS OR DAMAGE IS RELATED TO TECHNICAL SUPPORT.

THE FOREGOING LIMITATIONS SHALL NOT APPLY TO LIABILITY (I) CAUSED BY LICENSOR'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, (II) DEATH OR PERSONAL INJURY CAUSED BY LICENSOR'S NEGLIGENCE, OR (III) UNDER ARTICLE 6 HEREOF.

(b) IF LICENSOR IS NOT TOOLSGROUP, IN NO EVENT SHALL TOOLSGROUP HAVE ANY LIABILITY OF ANY NATURE WHATSOEVER ARISING OUT OF OR RELATING TO THIS AGREEMENT.

5.3 Additional Disclaimer in Case of Trial Use of Software. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, INCLUDING WITHOUT LIMITATION SECTION 5.1 ABOVE, DURING ANY PILOT PERIOD, IF SPECIFIED IN THE SIGNATURE PAGE, THE SOFTWARE AND DOCUMENTATION MAY BE USED FOR TRIAL PURPOSES ONLY AND SHALL BE PROVIDED "AS IS", WITH NO WARRANTIES OF ANY KIND.

## 6 INDEMNIFICATION FOR INFRINGEMENT.

6.1 Indemnification. Licensor shall indemnify, defend and hold harmless Licensee, its Affiliates and their respective officers, directors, employees, agents and stockholders (each an "Indemnitee") from and against all damages, costs, liabilities and expenses (including without limitation reasonable attorneys' fees) arising out of any claim or action by a third party not an Affiliate of an Indemnitee (a "Claim") arising out of or resulting from infringement of the third-party claimant's intellectual property rights by the Software, except to the extent such Claim could have been avoided but for: (i) modification of Software not done or authorized by Licensor; (ii) use of a superseded Release of the Software if Licensor has made available to

Licensee a current Release of the Software which would have prevented or eliminated the claimed infringement; (iii) Licensor's compliance with or use of specifications, instructions, technology or information provided by any Indemnitee; (iv) use of Software in combination with products or services not supplied or approved by Licensor; or (v) any act or omission of an Indemnitee not in compliance with this Agreement.

6.2 Remedy for Infringement or Misappropriation. In the event any aspect of the Software or its Use becomes, or in Licensor's opinion is likely to become, the subject of a Claim, Licensor may, at its sole option and expense, mitigate its other obligations under this Section 6 by doing one or more of the following: (a) procuring for Licensee the right to continue use of Software; (b) modifying the Software or replace the infringing part thereof with other non-infringing Software having substantially the same or better capabilities; or (c) if Licensor is unable to carry out the remedies described in the foregoing clauses (a) and (b) on commercially reasonable terms, terminating this Agreement upon at least thirty (30) days' advance notice to Licensee, refunding to Licensee the Refundable Amount. For purposes hereof, the "Refundable Amount" means: (x) in the case of a Subscription License, the Subscription Fees actually paid by Licensee for the remaining portion of the then current Subscription Period; or (y) in the case of a Perpetual License, both (A) the license fee paid hereunder, reduced by two percent (2%) for each complete month of Use hereunder and (B) any prepaid fees for maintenance and technical support services for the remaining portion of the Maintenance Term.

6.3 Procedure. An Indemnitee seeking indemnification hereunder shall promptly notify Licensor of the Claim; *provided* that the failure so to notify shall not excuse Licensor from its obligations under this Section 6 except to the extent Licensor's ability to defend the Claim has been prejudiced thereby. Licensor (or, if different, ToolsGroup) shall have the right to control the defense of, and to settle or compromise, all Claims; *provided* that Licensor (and, if different, ToolsGroup) may not settle or compromise a Claim without the written consent of Licensee, not to be unreasonably withheld, if such settlement or compromise would (a) require Licensee to part with any right, make any admission of liability, or make any payment not indemnified under this Section 6 or (b) subject Licensee to any injunction. Subject to the foregoing, Licensee shall have the right, at its option and expense, but not the obligation, to retain counsel to represent its interests in defending any such claim or lawsuit.

6.4 Exclusive Remedy. THIS ARTICLE 6 STATES THE SOLE REMEDY AND THE ENTIRE LIABILITY OF LICENSOR HEREUNDER FOR INTELLECTUAL PROPERTY INFRINGEMENT.

## 7 CONFIDENTIALITY; NON-SOLICITATION.

7.1 Confidentiality. Each party ("Recipient") shall use Confidential Information of the other party ("Discloser") to which it becomes privy, and give access to such Confidential Information to its employees, agents and Affiliates, only to perform its obligations and exercise its rights hereunder. Recipient shall, and shall cause such employees, agents and Affiliates to, maintain such Confidential Information in the strictest confidence. All Confidential Information is, and shall remain, the property of Discloser. Notwithstanding the foregoing, Recipient may disclose Confidential Information as required by governmental authority or court of competent

jurisdiction; *provided* that Recipient has (x) made reasonable efforts to obtain confidential treatment of such disclosure and (y) given reasonable advance notice of such disclosure to Discloser, to the extent legally permissible. Upon the expiration or termination of this Agreement, Recipient shall promptly return to Discloser or, at Discloser's request, destroy any and all copies of Confidential Information in its possession or control and delete any Confidential Information stored in its electronic media; *provided* that (i) Recipient shall not be required to delete electronic back-up files created and retained in accordance Recipient's back-up procedures and not accessed or restored to general accessibility and (ii) Recipient's legal counsel may retain copies of the Confidential Information which shall be used solely as archival copies for the purpose of defending any claim that Recipient breached its obligations hereunder with respect to such Confidential Information. Notwithstanding the return or deletion of the Confidential Information, Recipient will continue to be bound by such Recipient's obligations hereunder with respect to such Confidential Information.

7.2 Non-Solicitation. During the Term and for twelve (12) months thereafter, each party hereto shall, and shall cause its Affiliates to, refrain from soliciting, offering work to, employing, or contracting with, directly or indirectly, any Personnel of the other party; *provided* that this section will not apply to Personnel who independently respond to indirect solicitations (such as general newspaper advertisements, employment agency referrals and internet postings) not targeting such Personnel. As used herein, "Personnel" of a party includes any individual that such party or its Affiliate has employed or engaged at any time during the Term as an employee or independent contractor and with whom the other party hereto or its Affiliate has come into contact in connection with this Agreement. If Licensor is not ToolsGroup, Licensor's Personnel shall also include employees and contractors of ToolsGroup and its Affiliates.

## 8 TERMINATION.

8.1 Termination. In addition to the termination rights specified elsewhere in this Agreement, this Agreement may be terminated:

(a) by Licensor upon notice of at least ten (10) Business Days, in the event of Licensee's failure to pay in full any Subscription Fee or license fee when due hereunder and to remedy such non-payment before the effective date of termination specified in such notice;

(b) by either party upon at least thirty (30) days' advance notice to the other, if the non-terminating party has breached a material term of this Agreement described in such notice and failed to remedy such breach before the effective date of termination specified in such notice. By way of example but not limitation, a breach of any of the following shall be deemed material: (i) the limitations set forth on the Signature Page on Categories, Regions, Scope of Use, number and location of Installations or number of Users; (ii) any payment obligation not covered by subsection (a) above; and (iii) Section 7.1 (Confidentiality); or

(c) by either party upon notice to the other if the non-terminating party (i) ceases to conduct its business in the ordinary course; (ii) becomes insolvent; (iii) makes an assignment for the benefit of creditors; (iv) petitions, applies for, or suffers (with or without its consent) the appointment of a custodian, receiver, trustee in bankruptcy or similar officer for all

or any substantial part of its business or assets; or (v) avails itself of or becomes subject to any proceeding relating to bankruptcy, insolvency, reorganization, receivership, arrangement, adjustment of debts, dissolution or liquidation, which proceeding, if involuntary, is not dismissed within sixty (60) days of commencement thereof.

8.2 Effects of Termination. Upon termination or expiration of this Agreement for any reason, Licensee shall immediately: (a) cease all Use of Software and Documentation; (b) discontinue any use of the name, logo, trademarks, service marks or slogans of Licensor (and, if different, ToolsGroup); (c) fully comply with the requirements of Section 7.1 above, including without limitation the return to Licensor or destruction, and deletion from storage media, of all Software and Documentation; and (d) within thirty (30) days, furnish Licensor with a certificate signed by an executive officer of Licensee verifying that Licensee has complied with this Section. In the event of any termination hereunder (other than an unlawful termination by ToolsGroup), Licensee shall not be entitled to any refund of any portion of any monies that have been paid to Licensor. The expiration or termination hereof shall not affect any indebtedness or liability then accrued hereunder or in connection herewith.

## 9 GENERAL.

9.1 Legal Compliance. Licensee shall at all times comply with applicable law. Without limitation of the foregoing, Licensee shall not use, or allow the transfer, transmission, export, or re-export of any Software or Documentation, or any portion thereof, in violation of any export control laws and regulations of The Netherlands, the United States or any other jurisdiction. Licensee shall comply with all such laws and regulations (including “deemed export” and “deemed re-export” regulations).

9.2 Force Majeure. Except with respect to payment obligations, a party shall not be in breach of this Agreement to the extent that its performance hereunder is prevented or delayed by circumstances beyond its reasonable control, including but not limited to strikes, lockouts, labor disputes, fire, flood, war, epidemic, hurricane or other extreme weather, or governmental action; *provided* that such party gives prompt notice to the other party of such cause and takes such steps as are reasonably necessary to relieve the effect of such cause as rapidly as possible.

9.3 Relationship of the Parties. The parties are independent contractors to each other and neither shall have the authority to bind the other. Nothing in this Agreement shall be deemed to create a fiduciary, partnership, agency or joint-venture relationship between the parties. Licensee acknowledges that Licensor’s business partners, including any third-party firms retained by Licensee to provide computer consulting services, are independent of Licensor and are not Licensor’s agents. Licensor is not liable for nor bound by any acts of any such business partner, unless the business partner is providing services as Licensor’s subcontractor under this Agreement.

9.4 Injunctive Relief. Licensee acknowledges that a breach of this Agreement adversely affecting Licensor’s (or, if different, ToolsGroup’s) intellectual property rights in the Software or Documentation would cause irreparable injury to Licensor (and, if different, ToolsGroup) for which monetary damages would not be an adequate remedy and Licensor (or, if

different, ToolsGroup) shall be entitled to equitable relief in addition to any remedies it may have hereunder or at law.

9.5 Marketing. In consideration for the rights granted to Licensee hereunder and the associated pricing: (a) upon ToolsGroup's reasonable request, (i) Licensee shall work with ToolsGroup's marketing department to prepare and issue a mutually acceptable (A) press release announcing Licensee's entry into this Agreement and (B) within a reasonable period after "go live", Licensee/ToolsGroup success story (video or written); (b) Licensee shall act as a reference for prospective ToolsGroup Licensees and industry analysts; and (c) ToolsGroup may use Licensee's logo, subject to Licensee's guidelines for design and usage, to display on its website, in presentations and proposals to prospective Licensees, and for other similar media and uses.

9.6 Notices. Any notice required or permitted under this Agreement from one party to the other shall be in writing and addressed to the receiving party's address, to the attention of the contact person, set forth on the Signature Page, or to such updated address and contact person as such party may designate by notice hereunder. Notices shall be deemed given (a) ten (10) Business Days after being sent by certified or registered mail with return receipt, (b) three (3) Business Days after being sent by reputable express courier service with tracking capability, or (c) upon successful transmission by email with confirmation of receipt. Without limitation of the foregoing, Licensee shall promptly notify Licensor if it disputes any charges hereunder or becomes subject to insolvency or other similar legal proceedings. .

9.7 Anti-Corruption. Licensee hereby acknowledges that it has not received or been offered any illegal or improper bribe, kickback, payment, gift, or thing of value from any of Licensor's employees or agents in connection with this Agreement. If Licensee learns of any violation of the foregoing restriction, Licensee will promptly notify Licensor thereof.

9.8 Assignment. (a) *General*. Except as otherwise provided in this Section 9.8, Licensee may not assign this Agreement, in whole or in part, without Licensor's (and, if different, ToolsGroup's) prior written consent. A change of Control of Licensee shall be deemed an assignment for purposes hereof.

(b) *Service Providers*. Licensor (and, if different, ToolsGroup) shall not unreasonably withhold its consent to the assignment hereof by Licensee, in whole or in part, to a third-party professional service provider ("Service Provider") in connection with the outsourcing of Licensee's internal business support function to which the Software relates, solely for the limited purpose of Use of the Software authorized hereunder and for the sole benefit of Licensee, subject to all of the terms and conditions set forth in this Agreement; *provided* that Licensee shall remain jointly and severally liable with Service Provider for all of Licensee's obligations hereunder. By way of example and not limitation, Licensor (and, if different, ToolsGroup) may withhold its consent to such assignment based upon its determination, in its reasonable discretion, that Service Provider: (i) engages, directly or indirectly through any of its Affiliates or clients, in competition with ToolsGroup or its software products; (ii) lacks adequate creditworthiness; or (iii) has a history of litigiousness.

(c) Affiliates. Licensee may assign this Agreement to its Affiliate; *provided* that Licensee shall remain jointly and severally liable with such Affiliate for all of its obligations hereunder.

9.9 Third-Party Beneficiaries. Licensor's content licensors (including ToolsGroup, if different from Licensor) shall have the benefit of Licensor's rights and protections hereunder. There are no other third-party beneficiaries under this Agreement.

9.10 Governing Law; Disputes. This Agreement is governed by the laws of the jurisdiction indicated, and any dispute arising out of or relating to this Agreement shall be subject to the exclusive jurisdiction of the courts, indicated in the table below:

<i>If Licensor is:</i>	<i>The laws of:</i>	<i>Courts:</i>
ToolsGroup B.V.	The Netherlands	Amsterdam
ToolsGroup, Inc.	Massachusetts, USA	State or federal courts sitting in Boston, Massachusetts, USA
Other	the jurisdiction of Licensor's incorporation	the city of Licensor's principal address specified on the Signature Page

Except for actions for non-payment or breach of Licensor's proprietary rights, no action, regardless of form, arising out of or relating to this Agreement may be brought by either party more than two (2) years after the cause of action has accrued.

9.11 Entire Agreement. This Agreement sets forth the entire agreement, and supersedes all prior or contemporaneous understandings or representations, written or oral, between the parties regarding the subject matter hereof. This Agreement shall not be modified, conditioned or supplemented by any standard terms, provisions or conditions or any purchase order, acknowledgment or other business document which Licensee may use in connection herewith, regardless of any failure by Licensor to object to such terms, provisions or conditions. In the event of any conflict or inconsistency among the following documents, the order of precedence shall be: (1) the Signature Page; (2) these Terms; (3) the Applicable Policies; and (4) the Documentation.

9.12 Severability. If any provision of this Agreement shall to any extent be held invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and such invalid or unenforceable provision shall be reformed so that it is valid and enforceable to the fullest extent permitted by law.

9.13 Amendments. This Agreement may not be amended except by a written instrument signed by Licensor and Licensee. Notwithstanding the foregoing, Licensor (or, if different, ToolsGroup) may in its discretion make amendments to the Applicable Policies; *provided* that any such change that would materially reduce the level of protection or service



provided to Licensee shall not be binding upon Licensee during the then current Subscription Period (if the License is a Subscription License) or Maintenance Term (if the License is a Perpetual License).

9.14 Waiver. A waiver by a party hereto of the performance or breach of any provision of this Agreement must be in writing and shall not constitute a waiver of any subsequent performance or breach of the same or any other provision hereof.

9.15 Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

9.16 Survival. The provisions of Sections 1, 2.9, 3.10, 4, 5.2, 6, 7, 8.2, 9.4, 9.5-9.14 and 9.17 shall survive the expiration or termination of this Agreement.

9.17 Certain Terms Applicable If Licensors Is Not ToolsGroup. If Licensors is not ToolsGroup, then, notwithstanding any other provision in this Agreement, the following terms shall apply:

(a) *Authority of Licensors to Grant License*. Licensors represents and warrants to Licensee that Licensors is authorized, pursuant to a license or value-added reseller agreement with ToolsGroup, to grant the License and provide the services contemplated hereby. Licensee may request confirmation of the foregoing from ToolsGroup at any time.

(b) *Relationship with ToolsGroup*. Licensors is not an agent of ToolsGroup and cannot bind or act on behalf of ToolsGroup. Licensee acknowledges that this Agreement shall not create any contractual relationship between Licensee and ToolsGroup and Licensee shall look solely to Licensors for any request, service, claim or remedy hereunder.

(c) *Amendment*. Licensors's agreement with ToolsGroup requires that this Agreement be in a form satisfactory to ToolsGroup. Licensors hereby represents to Licensee that it has obtained ToolsGroup's approval for the form of this Agreement. Any amendment of this Agreement shall be subject to ToolsGroup's prior written approval.

(d) *Assignment to ToolsGroup*. In the event of the expiration or termination for any reason of the agreement between ToolsGroup and Licensors pursuant to which Licensors is authorized to grant the License hereunder, Licensors shall be deemed to have assigned this Agreement in whole to ToolsGroup or to a third-party reseller designated in writing by ToolsGroup to Licensee, which shall thereafter be Licensors hereunder; *provided* that (i) Licensee shall not be charged for any amount paid to Licensors when due hereunder prior to such assignment and (ii) ToolsGroup shall not assume any obligation of Licensors accrued hereunder prior to such assignment.