

# Software License and Support Agreement

1. **SCOPE.** This Software License and Support Agreement (“Agreement”) is a legal agreement between you (either an individual or an entity (“Licensee”)) and TestOptimal, a Minnesota Limited Liability Company. By downloading or unsealing Licensor’s software and/or documentation (“Products”), Licensee is agreeing to be bound by the terms of this Agreement. In the event of a conflict between the terms of this Agreement and any ordering document, the terms of this Agreement will govern and control. If Licensee is evaluating Licensor software, only the provisions of Section 20 below will govern such use.

2. **GRANT.** Licensor grants to Licensee a non-exclusive, nontransferable license (the “License”) to use this Product within the territory specified by Licensee’s business address listed in the ordering document for the Product in the following manner:

- (a) If Licensee has purchased a Named User Node Lock-Down License, Licensee may install and run one instance of the Product on one computer for the named user for whom Licensee has purchased the license. An instance of the Product is defined as running the Product on one computer on one port number.
- (b) If Licensee has purchased a Shared Single-Node Lock-Down License, Licensee may install and run one instance of the Product on a designated computer to be used by users for whom Licensee has purchased the license. An instance of the Product is defined as running the Product on one computer on one port number.
- (c) If Licensee has purchased a Named User Float License, Licensee may install the Product on one or multiple computers to be used by the named user for whom Licensee has purchased the license and has agreed to limit to one instance of the installation at any given time to be used by the named user. An instance of the Product is defined as running the Product on one computer on one port number. Named User Float License will require the purchase and installation of a SvrMgr.
- (d) If Licensee has purchased a Concurrent Users License (Runtime Edition, Dashboard and SvrMgr), Licensee may install one instance of the Product on one computer on the network (server) to be used concurrently by up to the authorized number of users for whom Licensee has purchased the license(s).
- (e) Licensee acknowledges that the computer on which the Product is installed must have internet connection (either direct or through proxy server) to allow the Product to communicate with <http://testoptimal.com/> for license key validation.

3. **TERM.** This Agreement shall be effective on the date first accessed by Licensee.

4. **TERMINATION.** Licensor may immediately terminate this Agreement without further obligation or liability: (a) with respect to a License, if Licensee fails to pay the licensee fee due for the License hereunder and continues to be delinquent for a period of thirty (30) days after the last day on which payment is due, (b) if a petition alleging insolvency is filed by or against Licensee and not stayed within 60 days, or a receiver is appointed for any part of Licensee’s business, or its assets are assigned for the benefit of creditors; or (c) if Licensee commits any material breach of this Agreement and fails to remedy such breach within thirty (30) days after written notice by Licensor of such breach. The termination of this Agreement shall not affect: (i) the obligation of either party pursuant to any License which has not been terminated, and which shall therefore remain in effect in accordance with its terms; or (ii) the survival of the representations and warranties contained herein. Within 60 days of the termination of any License, Licensee shall return to Licensor the terminated Product and all related documentation, and copies thereof. Licensee shall promptly certify in writing to Licensor that all copies of the Product have been removed from each computer upon which the Product was installed, and that any copies not returned have been destroyed.

5. **TITLE AND PROPRIETARY INFORMATION.**

5.1 **TITLE AND COPYRIGHT.** Licensor represents and warrants that it has the full rights to license the Product to Licensee and to perform its obligations under this Agreement. All title and copyrights and other industrial, intellectual and marketing rights in and to the Product, including but not limited to all modifications thereto made by or for any person, are owned by Licensor and/or its affiliates and licensors, and are protected by both United States copyright law and applicable international copyright treaties. Licensee agrees not to claim or assert title to or ownership of the Product. Except as expressly set forth herein, Licensee may copy the Product only for backup or archival purposes, and for no other purpose. Licensee will not remove or alter any copyright or proprietary notice from copies of the Product, and copies made by or for Licensee shall bear all copyright, trade secret, trademark and any other intellectual property right notices on the original copies.

5.2 **RESTRICTIONS.** Licensee acknowledges and agrees that the Product contains valuable trade secrets of Licensor and/or its affiliates and licensors, and that this Agreement establishes a confidential relationship between the parties with respect to this information. Subject to applicable law, Licensee agrees (a) not to decompile, disassemble, reverse engineer or otherwise attempt to derive the Product source code from object code except to the extent expressly permitted by applicable law or treaty despite this limitation; (b) not to sell, rent, lease, license, sublicense, display, modify, time share, outsource or otherwise transfer the Product to, or permit the use of the Product by, any third party; and (c) to preserve the confidential nature of the proprietary and trade secret information by retaining and using the Product in trust and confidence, solely for its internal use, and using the degree of care and protection that Licensee would use for its own information of similar importance, but in no event less than a reasonable degree of care and protection, to prevent the unauthorized use, copying, publication or dissemination of the Product and Licensor’s confidential information learned from Licensee’s use of the Product. Licensee will not export or re-export the Product without both the written consent of Licensor and the appropriate U.S. and/ or foreign government license(s) or license exception(s). Licensor shall have the right to seek injunctive relief against any actual or threatened violation of these restrictions, in addition to any other available remedies. Additional restrictions may apply to certain files, programs or data supplied by third parties and embedded in the Product; consult the Product installation instructions or release notes for details. Licensee agrees to promptly report to Licensor any violations of these provisions by Licensee’s employees, consultants or agents of which Licensee is aware.

6. **SUPPORT, MAINTENANCE AND ENHANCEMENTS (“Support”).** Licensee is entitled to the Support services defined below for an annual Support fee.

6.1 **ELECTRONIC SERVICES.** To the extent that electronic services are available, Licensee may electronically access, at no charge, Support services which will be available twenty four (24) hours a day, seven (7) days per week. Such electronic services may include, but are not limited to: user forums, Product documentation, hints and tips; Product maintenance and demonstration code.

**6.2 SUPPORT.** Support shall be applicable only to the Product licensed or sold under this Agreement for which Support fees have been paid in addition to the license fee. In the United States and Canada, Support is provided from 8:00 AM through 6:00 PM CST Monday through Friday, excluding United States federal holidays. Support shall consist of:

(a) Supplying the electronic support to Licensee in order to help Licensee locate and, on its own, correct problems with the Product.

Licensee shall: (i) make reasonable effort to provide the information requested by Licensor; (ii) ensure any confidential information is removed from any correspondence sent to Licensor. Licensor shall: (i) make reasonable effort to supply code corrections to Licensee to correct Product malfunctions in order to bring the Product into substantial conformity with the published operating specifications for the most current version of the Product unless Licensee's unauthorized modifications prohibit or hamper such corrections or cause the malfunction; or (ii) supply code corrections to correct insubstantial problems at the next general release of the Product; and

(b) Supplying all extensions, enhancements and other changes that Licensor, at its sole discretion, makes or adds to the Product and which Licensor furnishes, without charge, to other licensees generally of the Product that are enrolled in Support.

**6.3 TERMINATION OF SUPPORT.** Licensee may cancel enrollment in Support upon written notice to Licensor at least thirty (30) days prior to the next Support Anniversary Date. If Licensee has terminated its enrollment in Support, Licensee may re-enroll by paying a reinstatement fee consisting of all Support fees due for the period during which Licensee was not enrolled in Support. In addition, Licensee must pay the annual charge for Support for the next year in advance. Such reinstatement date shall then be considered the Support Anniversary Date. Licensee agrees not to modify the Product without the prior written approval of Licensor. Unapproved alterations to the Product shall void any obligation by Licensor to provide Support for the Product, pursuant to this Section 6, during the warranty period and any subsequent period in which Licensee is enrolled in Support. Enrollment of Support is required to continue to use License.

**6.4 CHANGE OF SUPPORT FEES.** Licensor reserves the right to change its then current published list prices for the Products and its charge for Support at any time upon thirty (30) days written notice to Licensee. Any such change to Support shall not take effect until the completion of the then current support term.

**7. PAYMENT SCHEDULE.** Payment for all License and Support fees shall be due thirty (30) following receipt by Licensee of an invoice by Licensor specifying the amounts due, unless otherwise set forth in an ordering document accepted by Licensor in writing. Licensor shall invoice Licensee for the initial Support fees upon the initial order of the licensed Products (the "Support Anniversary Date"). Sixty (60) days prior to each annual Support Anniversary Date of the licensed Products, Licensor shall invoice Licensee the then-current fee for the next year of Support.

**8. LIMITED WARRANTY AND CONDITIONS.** Licensor warrants and conditions for a period of sixty (60) days that the media on which the Product is furnished will be, under normal use, free from defects in material and workmanship. Licensor also warrants that the Product will perform in all material respects with the operating specifications contained in the accompanying Product documentation, for a period of sixty (60) days from the date of shipment. Other than with respect to any indemnification hereunder, Licensor's entire liability and Licensee's exclusive remedy under this provision will be for Licensor to use commercially reasonable efforts to remedy defects covered by this warranty and condition within a reasonable period of time or, at Licensor's option, either to replace the defective Product or to refund the amount paid by Licensee to license the use of the Product. Licensor does not warrant or condition that the operation of the Product will be uninterrupted or error free or that all software defects can be corrected. This warranty and condition shall not apply if (a) the Product is not used in accordance with applicable documentation; (b) Product defect has been caused by Licensee's malfunctioning equipment; or (c) Licensee has made modifications to the Product not expressly authorized in writing by Licensor. No employee, agent, or representative of Licensor has the authority to bind Licensor to any oral representations, warranties or conditions concerning the Product. Any written representation, warranty or condition not expressly contained in this Agreement shall not be enforceable. **THIS WARRANTY AND CONDITION IS IN LIEU OF ALL OTHER WARRANTIES AND CONDITIONS. THERE ARE NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS, INCLUDING WITHOUT LIMITATION THOSE OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT, REGARDING THIS AGREEMENT OR ANY PRODUCT (S) LICENSED HEREUNDER.**

**9. LIMITATION OF LIABILITY.** Neither Licensor nor Licensee shall be liable to the other party for consequential, indirect, incidental, exemplary, special or punitive damages from any cause, whether in contract, tort (including negligence) or otherwise, arising out of or in any way connected with the design, manufacture, sale, support or use of the Product. In no event shall Licensor's or Licensee's liability for direct damages resulting from the use of the Product exceed the amount paid by the Licensee to license the use of the Product.

**10. VERIFICATION.** By installing the Product on Licensee's computer, Licensee gives Licensor the permission to automatically validate the license each time the Product is used. Additionally Licensor may request Licensee to provide the list of all computers the Product is installed and list of all users who have used the Product. Licensee shall respond within 10 business days to Licensor's request and/or statement of breach of this Agreement found during the audit. In the event of the license key belonging to Licensee found to have been compromised, Licensor shall notify Licensee of such event in writing (email) or via phone call and allows Licensee 30 calendars to work with Licensor to resolve the issue.

**11. ASSIGNMENT.** Neither this Agreement nor any of Licensee's rights, licenses or obligations hereunder may be assigned or delegated by Licensee to any third party, including without limitation in connection with a merger, acquisition, reorganization, outsourcing, change of control or under any other circumstance. Any such purported assignment or delegation shall be void and of no effect and shall constitute an incurable breach of this Agreement resulting in the automatic termination of this Agreement and all rights and licenses granted to Licensee hereunder.

**12. SEVERABILITY.** Should any provision of this Agreement be determined to be invalid, ineffective, or unenforceable, under present or future laws, the remainder of the provisions shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

**13. NOTICE.** Notices to either party shall be in writing to the address indicated in this Agreement (or as later amended) and deemed effective when received, or twenty-four (24) hours following the date of the postmark, if sent by prepaid certified mail, return receipt requested.

**14. REFERENCING.** If applicable, Licensee agrees that Licensor may refer to the corporate name of Licensee as a customer of Licensor, both internally and in externally published media; any additional disclosure by Licensor with respect to Licensee shall be subject to the prior written approval of Licensee.

**15. FORCE MAJEURE.** Neither party will be in default of its obligations under this Agreement to the extent its performance is delayed or prevented by causes beyond its reasonable control, including but not limited to acts of God, earthquake, flood, embargo, riots, sabotage, utility or transmission failures, fire or labor disturbances. The party facing an event of force majeure shall use its commercially reasonable efforts in order to remedy that situation as well as to mitigate its effects.

**16. WAIVER.** The waiver by a party of one breach or default by another party under this Agreement will not constitute the waiver of any subsequent breach or default. No waiver shall be effective unless made in writing and signed by an authorized representative of the waiving party.

**17. SURVIVAL.** In the event of expiration or termination of this Agreement for any reason, the provisions of Sections 1, 4, 5, 7-9 and 12-18 shall survive in accordance with their respective terms.

**18. ENTIRE AGREEMENT.** Licensee agrees that this is the complete and exclusive statement of the agreement between the parties, and supersedes all prior proposals and understandings, oral and written, relating to the subject matter of this Agreement.

**19. GOVERNING LAW.** This Agreement shall be governed by and construed in accordance with the laws of the State of Minnesota without regard to conflicts of law principles. The provisions of the UN Convention on Contracts for the International Sale of Goods shall not apply.

**20. EVALUATION LICENSE.** Licensor is the owner and provider of certain proprietary software and documentation that Licensee desires to have tested and evaluated on the terms and conditions of this Section 20 ("Software").

a) For a term not to exceed thirty (30) days ("Evaluation Period") without Licensor's written authorization, the Software will be provided solely for evaluation purposes for Licensee's own internal use ("Evaluation") and Licensee is hereby granted a nontransferable, nonexclusive, limited license to operate and use the Software for such Evaluation. The Evaluation Period begins on the date Licensee downloads or unseals the Software. At the end of the Evaluation Period, Licensee shall cease using the Software. This requirement applies to copies of the Software in all forms (partial and complete) on all types of media and computer memory and whether or not merged into other materials.

b) Licensee agrees not to cause or permit the reverse engineering, disassembly, modification, translation or de-compilation of the Software. Licensee shall not copy the Software, or write or develop any derivative software.

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Sections 8, 10, 11 and 18 of the Agreement shall be deemed incorporated by this reference in the Evaluation license granted under this Section 20.

*Updated on May 15, 2015 for Release 4.6.*