End User License Agreement for Sparks® (Software Leasing)

As of February 2018

§ 1 Definitions

(1) "Activate" or "Activation" means the entry of the License Key in order to enable Using the Licensed Software.

(2) "Agreement" means this End User License Agreement for Sparks® which applies to the Purchase of Licensed Software.

(3) "Computer" means one single computer provided that a virtual machine is deemed to be one single computer as well.

(4) "Defect" is a collective term that encompasses (i) defects in quality (e.g. an error in the Licensed Software) and defects in title (e.g. infringement of Intellectual Property Rights).

(5) "Documentation" means the user documentation for the Licensed Software available for download from the Website.

(6) "Intellectual Property Rights" means any and all patent and patent applications, copyright, database right, trademark (whether registered or unregistered), internet domain names, design right, utility model, service mark, and all other intellectual property and proprietary rights (whether registered or unregistered, and any application for the foregoing), and all other equivalent or similar rights which may subsist anywhere in the world.

(7) "License" means the non-perpetual, fee-based right to Use the Licensed Software after the Purchase according to the terms and conditions of this Agreement.

(8) "License Key" means a unique serialization code or license file supplied by Licensor required to Activate and Use the Licensed Software for one (1) License Term.

(9) "License Term" means a license period of one (1) year.

(10) "Licensed Software" means the computer program Sparks®, for which Licensor grants a License to Licensee under the Agreement, including any updates, upgrades, releases, replacement or successor products, and defect corrections, if any, provided to Licensee for download on the Website, together with the related Documentation.

(11) "Licensee" means the corporate entity, enterprise, or commercial user that is entitled to download, Purchase, Activate and Use the Licensed Software pursuant to the terms and conditions set forth in the present Agreement.

(12) "Licensor" is Kern Aktiengesellschaft, Wentzinger Strasse 17, 79106 Freiburg (Breisgau), Germany.

(13) "Party / Parties" means Licensee and Licensor, or either of them.

(14) "Purchase" means the ordering of a License Key by Licensee against payment of a recurring license fee and the supply of such License Key by Licensor after receipt of payment in order to grant the respective License to Licensee.

(15) "Software Specification" means a description of the general functionality, compatibility and system requirements of the Licensed Software.

(16) "Sparks®" is a software solution proprietary to Licensor and based on Microsoft Excel forms that can be used for the simple creation of professional diagrams on the basis of modern visualization philosophies in order to simplify and condense the figures of reports in a flexible and intuitive manner.

(17) "Use" means (i) installing the Licensed Software on a single Computer, (ii) running the Licensed Software as an Microsoft Excel add-in, (iii) processing data with the Licensed Software and (iv) creating a reasonable number of backup copies of the Licensed Software, in each of the aforesaid cases in accordance with the terms and conditions of this Agreement including, but not limited to, the restrictions of Use applicable to the Licensed Software.

§ 2 Subject Matter of the Agreement

(1) The subject matter of this Agreement is the Purchase, Licensing and Use of Licensed Software. The relevant functions of the Licensed Software as well as the description of its technical realization have been specified in the Software Specification. The License is a temporary license which requires an annual renewal; otherwise the License expires.

(2) Licensor offers and provides the Licensed Software to entrepreneurs as defined by sec. 14 of the German Civil Code (BGB)* only, i.e. to entities or persons which or who act in exercise of their trade, business or profession, as well as to public bodies. Thus, only entrepreneurs and the employees appointed by companies or public bodies might benefit from Licensor's offer to download, Purchase, Activate and Use the Licensed Software under this Agreement. By downloading, Purchasing and Activating the Licensed Software, Licensee represents and warrants that it is an entrepreneur and not a consumer. For consumers a free version of Sparks® is available which is subject to a different end user license agreement.

(3) The provisions of this Agreement govern exclusively. Standard terms and conditions of Licensee will not apply, even if Licensor has not expressly rejected the application of such terms and conditions.

(4) Other services, in particular training, maintenance and support services beyond warranty, installation, implementation, modification, parameterization or customization of the Licensed Software are not subject to this Agreement. Nevertheless, Licensee may contact Licensor by phone, by e-mail (sales@kern.ag) or via Licensor's website to inquire about those services. If Licensor offers such services, they will be subject

to other contractual terms and conditions which apply independently and separately from this Agreement.

§ 3   Activation of Licensed Software

(1)   Use of the Licensed Software is subject to annual Activation of the Licensed Software which requires the Purchase of a License Key and entering the License Key in the Licensed Software's Activation dialogue. Each License Key can only be used by Licensee for Activation of the Licensed Software on one single Computer. Should the License Key be lost by Licensee prior to the Activation, Licensor will supply a replacement License Key free of charge and invalidate the former License Key permanently. A new License Key and a separate Activation is necessary for each single License Term (see also (3), Section (3)). The Purchase of the License Key for the initial License Term must be made on the Website. Any subsequent Purchase is deemed to be made by not terminating the License in due time.

§ 4   Term and Termination

(1)   The License Term commences on the day where the Licensed Software will have been Activated successfully. After expiry of the initial and any subsequent License Term, the License will be automatically extended by one (1) additional License Term, unless one of the Parties terminates the License ordinarily by giving written notice at least three (3) months prior to the end of the initial License Term or the respective subsequent License Term.

(2)   The right to extraordinary termination for good cause remains unaffected.

(3)   Each termination is required to be in writing, the text form (e. g. telefax or e-mail) is not sufficient for this purpose.

(4)   Upon termination or expiration of the License, Licensee's right to use the Licensed Software as well as any other rights granted herein shall cease with respect to the terminated License. Furthermore, Licensee shall represent to Licensor in writing within one (1) week after termination or expiration that the Licensed Software has been completely uninstalled from Licensee's Computers and that Licensee has destroyed irretrievably or has returned to Licensor the Licensed Software and all copies thereof (including not limited to backup and archival copies). This requirement applies to copies and storage in all forms, partial and complete, in all types of media and computer memory, and whether or not modified or merged into other materials.

§ 5   Usage Rights and Restrictions

(1)   Upon Purchase, Licensor grants to Licensee a worldwide, non-perpetual, non-transferable, non-exclusive license to Use the licensed Software during the initial and, if any, any subsequent License Term subject to the rights granted and restrictions stated in this Section § 5. Use of the Licensed Software requires Activation as stipulated in Section § 3.

(2)   The number of installations Licensee is allowed to make will be agreed upon between the Parties when Licensee Purchases the License Key on the Website.

(3)   Licensee is not allowed to copy, distribute and license the Licensed Software in whatever kind and form.

(4)   All Intellectual Property Rights to the Licensed Software made available by Licensor including without limitation the comprehensive copyright remains, as regards Licensee, with Licensor. This legal status enjoyed by Licensor remains unchanged by the grant of Licenses to Licensee in accordance with this Agreement.

(5)   The License Key which is necessary for Activation and Use of the Licensed Software will not be supplied before Licensor has received in full the license fee agreed for the relevant License Term.

(6)   Licensor makes the Licensed Software available in object code form only. Accordingly, Licensee can download from the Website executable files only and no source code.

(7)   In particular, Licensee's right to Use the Licensed Software does not include the rights to

- resell, lease or lend the Licensed Software;
- distribute or make the Licensed Software available to the public both online and offline;
- transfer the License;
- duplicate the Licensed Software in excess of the number of installations agreed between the Parties upon Purchase of the Licensed Software. Licensee's statutory rights to make a reasonable number of backup copies remain unaffected. Licensee is obligated to keep records of all copies or partial copies of the Licensed Software it makes, and to store them in a secure location, as well as to provide information to Licensor about such copies or partial copies upon request;
- adapt, modify, translate, arrange or otherwise change or revise the Licensed Software unless (i) such acts are necessary for the Use of the Licensed Software in accordance with its intended purpose, including for error correction, by any person authorized to use a copy of the Licensed Software concerned and (ii) Licensor does not offer to remedy the error under customary market terms and conditions or the offered remedy has failed twice due to the same defect or to defects which are directly related thereto. Apart from that, Licensee is authorized to adjust the customization and parameterization options contemplated in the Licensed Software, if any, in order to meet its own needs;
- de-compile or reverse engineer the Licensed Software unless and to the extent that de-compilation or reverse engineering is indispensable to obtain information necessary for the establishment of interoperability of the Licensed Software with another independently created computer program. Licensee shall, however, request Licensor for, and give Licensor an opportunity to provide within a reasonable time, the necessary operational information and documents for establishing interoperability before Licensee carries out any de-compilation or reverse engineering in accordance with sec. 69 e par. 1 of the German Copyright Act (UrhG)*. Licensee may exercise its rights under sec. 69 e par. 1 of the German Copyright Act (UrhG)* only if Licensor fails to comply with the aforesaid request. However, information obtained by way of de-compilation or reverse engineering must not be used or passed on to third parties for any other purpose than establishing interoperability of the Licensed Software with another independently created computer program and must not be used to create, produce or market a computer program substantially similar in its expression or for any other acts which infringe copyrights;
- change, delete or otherwise obliterate copyright notices, trademarks and commercial descriptions as well as all other notices (e.g. legal notices) contained in the Licensed Software.

(8)   Any Use of the Licensed Software beyond the agreed License requires an express separate agreement between the Parties before Licensee is entitled to make an extended Use of the Licensed Software.

§ 6   Audit Right

(1)   Licensee shall duly keep records about the Use of the Licensed Software and shall, supported by a reasonable Software Asset Management (SAM), ensure the lawful and contractually use of the Licensed Software.

(2)   Licensee grants Licensor the right to audit whether the Licensed Software is being used in compliance with the terms of this Agreement. For this purpose, Licensor shall be entitled to require Licensee once per calendar year that Licensee has to grant a certified public accountant (CPA) (i) remote access to Licensee's computer systems concerned, (ii) access to Licensee's business premises during its normal business hours and (iii) access to the relevant books, records, electronic

records as well as onsite access to the relevant computer systems of Licensee for this review. Although Licensor is authorized to determine the certified public accountant (CPA) as an auditor, the auditor must perform the audit autonomously and independently, even towards Licensor. Licensor shall notify Licensee of any upcoming review in writing at least fourteen (14) days in advance.

(3) All information of Licensee which the auditor receives or learns during an audit shall be considered as confidential information of Licensee being subject to the professional secrecy of the auditor. Accordingly, Licensor has to agree with the auditor in the context of the assignment that the auditor is allowed to disclose details of the audit results to Licensor only as far as Licensor requires such details to track License violations, if any, and to enforce the resulting claims. Insofar as Licensee has admitted License infringements to the auditor and has satisfied the resulting claims for damages of Licensor, details of the audit results shall not be disclosed to Licensor.

(4) Licensee shall inform the commissioned auditor to the extent necessary and request its employees to provide the required information. The transmission or disclosure of personal data is not allowed in the course of the audits without the prior consent of the data subjects concerned unless such transmission or disclosure is permitted by applicable law. Licensor is not entitled to request any audit that would violate the statutory data protection law.

(5) Licensor shall bear the costs of any such audit unless the inspection reveals that the annual License fees incurred for the detected scope of Use exceed the agreed annual fees by at least four percent (4%) or that Licensee had or has been using the Licensed Software for other exploitation methods than licensed. Licensor reserves the right to enforce any more extensive claims.

§ 7 Documentation

(1) Only an electronic version of the Documentation for the Licensed Software will be made available to Licensee. The Documentation is ready for download on the Website. There is no duty to supply any Documentation in hardcopy form. Should Licensee request Documentation in hardcopy form, it is recommended that a corresponding copy be printed out and carefully retained before working with the Licensed Software.

§ 8 License Fees

(1) The license fees for each Licensed Software which are annually recurring fees are specified on the Website. All prices shown on the Website are net prices excluding applicable VAT (if any). Any taxes, duties or other dues originating from the sphere of Licensee shall be borne by Licensee.

(2) The method of payment is set out in the course of the Purchase process. Invoices will be transmitted electronically to the email address submitted by Licensee. Unless the License has been terminated, Licensor will send an invoice for each new License Term one (1) month before the anniversary of the License.

(3) The License Key for the respective License Term will be sent to the email address submitted by Licensee after receipt of payment by Licensor on the bank account mentioned in Licensor's invoice.

(4) Only counterclaims that are undisputed or reduced to final non-appealable judgment may be set-off against any receivables held by Licensor. Licensee may enforce a right to withhold counter-performance only on the basis of claims that are undisputed or reduced to final non-appealable judgment and that are based on the same contractual relationship.

§ 9 Agreed Quality of Licensed Software

(1) The Parties agree that the Licensed Software must be in the condition documented in writing or electronically in the relevant Software Specification that was applicable and made available to Licensee when Purchasing the Licensed Software for the initial License Term. Provided that Licensor makes available and Licensee Uses updates, service packs or new releases during the License Terms, the then current Software Specification shall apply and replace or amplify, as the case may be, the former Software Specifications. Licensor publishes the Software Specifications on the Website and so they can be acknowledged by Licensee before the initial Purchase and during the License Term.

(2) Representations in the Software Specifications and in the Documentation are not considered to be features guaranteed by Licensor.

(3) For the avoidance of doubt, Licensor herewith clarifies that the Licensed Software is a software solution based on Microsoft Excel and, thus, can solely be used as an add-in thereto as long as Licensee uses Microsoft Excel run on Microsoft Windows (system requirements are as stated in the Software Specification). As a matter-of-fact, Licensee will not be able to use the Licensed Software stand-alone or together with or as add-in of any other spreadsheet software or in another system environment than Microsoft Windows.

§ 10 Warranty

(1) If a Defect exists or arises during the License Term, then Licensor shall remedy the Defect. Instead of remedying the Defect, Licensor has the option to supply a conforming (non-defective) item of Sparks® unless Licensee cannot reasonably be expected to accept this.

(2) Licensee shall grant Licensor a reasonable grace period in order to conduct the remedy. If the remedy fails, Licensee shall, according to the statutory provisions, be entitled to extraordinarily terminate the Agreement for good cause and without notice. If the Defect exists for more than one (1) month, Licensee is entitled to reduce the license fee according to the statutory provisions.

(3) No warranty will be incurred, if

- the Licensed Software has been modified by someone other than Licensor or one of its authorized agents, or
- the Licensed Software is used in a system environment other than Microsoft Windows as stated in the Software Specification.

This disclaimer of warranty will not apply, however, if Licensee can prove that the aforementioned actions have no causal connection to the Defects that arose. If an analysis or Defect remedy is significantly complicated through the aforementioned actions, however, then Licensee shall be responsible for bearing any additional remedy costs arising therefrom.

(4) The exposure of Licensor for strict liability under sec. 536a par. 1 of the German Civil Code (BGB)* for Defects is expressly excluded, provided that such Defects already exist when Licensee Purchases the Licensed Software for the initial License Term.

(5) To the extent Licensee caused the infringement of Intellectual Property Rights itself, claims for defects of title against Licensor are excluded.

§ 11 Co-operation in Case of Warranty

(1) Licensee shall promptly inform Licensor of any noticed Defect, specifying the nature of the error and the program execution in which the error occurs. Such notification must also be in writing if Licensor so requires. If the Defect is a defect in title, the notification must be given in writing without undue delay and Licensee shall inform Licensor of any claims arising in connection with the alleged infringements of Intellectual Property Rights.

(2) To the extent required for purposes of correcting the Defect, Licensee shall accept patches, updates, upgrades or a new version or release of the Licensed Software, unless this would lead to unreasonable adaptation and conversion problems on Licensee's part.

(3) Licensee shall provide reasonable assistance to Licensor in connection with localizing and correcting the Defect. In particular, Licensee shall make available all data, information and files necessary for correction of the error.

(4) A precondition for liability based on a defect in title is (i) that Licensee without undue delay informs Licensor in writing of any third party claims based on an Intellectual Property

Rights infringement, (ii) that it does not recognize the alleged infringement, and (iii) that it conducts any dispute (including any out-of-court settlement) solely with the consent of Licensor. If Licensee discontinues Using the Licensed Software in order to mitigate damages or for some other reasons, then it will be obligated to notify the allegedly infringed third party that any such discontinuation of Use shall not be deemed a recognition or admission of the alleged Intellectual Property Rights infringement. In the event of an unauthorized recognition or a failure to provide the aforementioned notice, a claim for damages or reimbursement of wasted expenditures, to which Licensee is entitled, will be reduced by the amount of detriment that Licensor suffers as a result of the unauthorized recognition or failed notice.

§ 12 Limitation of Liability

(1)   Licensor is liable in accordance with the statutory provisions for any intentional acts or omissions, fraud, product liability according to the German Product Liability Act (ProdHaftG)*, the lack of a certain quality guaranteed by Licensor as well as for losses based on an injury to life, body or health.

(2)   If the conduct of Licensor constitutes gross negligence, then the liability will be limited to the damages considered foreseeable for contracts of that type.

(3)   In the event of simple negligence, Licensor is liable based on whatever legal reason, only if a material contractual duty has been breached, i.e., a duty, the fulfillment of which makes the ordinary performance of this entire Agreement even possible and the compliance with which Licensee can and should regularly rely on (e.g., duty to deliver a conforming, non-defective Licensed Software). In this case, the liability will be limited to the damages considered foreseeable for contracts of that type at the time the relevant Purchase was made.

(4)   In the event Licensor is liable, Licensee's co-fault must be reasonably taken into consideration, including insufficient error reports or insufficient data backup, insufficient protection against damaging programs (computer viruses, Trojan horses, spyware, ransom ware, etc.) or a lack of precautionary measures to safeguard IT security.

(5)   To the extent that liability is limited to the damages considered foreseeable for contracts of this type in accordance with Sections (2) and (3), Licensor is assuming that the sum of five thousand euros (EUR 5,000) per event of damage and a total of twenty thousand euros (EUR 20,000) in total per Purchase and License Term are sufficient, in order to cover the damages considered foreseeable for contracts of this type in this particular event of damage. Should this amount not suffice to cover the foreseeable damages, then Licensee must inform Licensor thereof in writing in order to ensure that any corresponding adjustment to the liability sums will be made by the Parties and Licensor can in fact cover the increased risk, if necessary, by taking out an appropriate liability insurance policy. In this case, Licensee shall not Purchase the relevant Licensed Software on the Website without having contacted Licensor in advance to negotiate and agree upon the necessary liability.

(6)   The liability limitation agreed to under this Section § 12 also applies in favor of Licensor' statutory representatives and vicarious agents.

(7)   The foregoing provisions under this Section § 12 apply *mutatis mutandis*, where Licensor must reimburse wasted expenditures instead of compensate damages.

(8)   Any liability claims of Licensee that are more extensive than those expressly stated in this Section § 12 and that relate to compensatory damages and reimbursement of wasted expenditures, based on whatever legal reason, are excluded and disclaimed. The foregoing also applies, above all, to liability that is not based on fault.

§ 13 Miscellaneous

(1)   This Agreement constitutes the entire arrangement and understanding between the Parties and supersedes any prior arrangement and understanding between the Parties. This Agreement may be modified or amended by written instrument only, executed by a duly authorized officer of the Parties.

(2)   Other than as specifically provided for herein, this Agreement may not be assigned in whole or in part by either Party except with prior written consent of the other Party. Sec. 354 of the German Commercial Code (HGB)* remains unaffected.

(3)   If any provision of this Agreement or a part thereof should be or becomes invalid or unenforceable or violates any applicable law, this Agreement is to be considered severable as to such provision and such provision is to be deleted from this Agreement. In such case the remainder of this Agreement shall be deemed valid and binding as if such provision was not included herein and the Parties shall agree upon any necessary and reasonable adjustments in order to secure the vital interests of the Parties. The latter applies also in cases where in performing the Agreement an omission or contractual gap becomes apparent.

(4)   The failure by one Party at any time to require performance by the other Party or to claim a breach of any provision of this Agreement will not be construed as a waiver of any right accruing under this Agreement, nor will it affect any subsequent breach or the effectiveness of this Agreement or any part hereof, or prejudice any Party as regards any subsequent action.

(5)   This Agreement shall be governed by, and construed in accordance with, the laws of the Federal Republic of Germany without reference to conflict of laws principles and all provisions of the United Nations Convention on Contracts for the International Sale of Goods of 1980 being explicitly excluded.

(6)   The courts of Freiburg (Breisgau), Germany, have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement or the consequences of its nullity).

* Translations of the relevant sections of German Law can be found at http://www.gesetze-im-internet.de/Teilliste_translations.html