

Version 1.1  
Dated 2024/07/07

## TERMS AND CONDITIONS

These terms and conditions (hereinafter the "**Terms and Conditions**") set forth the conditions according to which Spark Photonics Design, Inc., a C-corporation incorporated and existing under the laws of Massachusetts, USA, with registered address at 303 Wyman Street, Suite 300, Waltham, MA 02451 USA, and registered with the Commonwealth of Massachusetts under employer identification number 83-3571058 (hereinafter: "**Spark Photonics Design**", "**we**", "**our**", or "**us**") agrees to grant the Licensee a License and/or to provide to the Licensee Maintenance and Support Services in relation to such License, as further determined in any applicable Quotation, Sales Order or Invoice (each capitalized term as hereinafter defined).

Spark Photonics Design and the Licensee are individually referred to as a "**Party**" and collectively as the "**Parties**".

## 1 DEFINITIONS

In these Terms and Conditions, the following words and expressions, when capitalized, shall have the meanings hereby assigned to them except where it is otherwise expressly stated:

- (a) "**Computer**" means an electronic device for storing and processing data, typically in binary form, according to instructions given to it in a variable program;
- (b) "**Configuration**" means the scope of the License granted, identified by the specification of the kind of License (Node Locked or Floating), the use of the License, the duration of the License (Perpetual or Lease) and the number of users which might use the License simultaneously;
- (c) "**Evaluation License**" means a Lease License granted for evaluation purposes (as the case may be, as specified by Spark Photonics Design in the applicable Quotation, Sales Order or Invoice);
- (d) "**Floating License**" means a License for a network of Computers that are managed by the Licensee. A Floating License therefore supports multiple machines with 1 concurrent user;
- (e) "**Intellectual Property Rights**" means any intellectual property (whether registered or not), including without limitation, any Marks, domain names, patents, patent applications, utility models, inventions and discoveries (whether or not patentable), designs, design rights, prototypes, copyrights (including, without limitation, rights in software and database rights) and moral rights, neighboring rights, and all rights or forms of protection having an equivalent or similar nature or effect in any relevant jurisdiction in any part of the world;
- (f) "**Invoice**" means the document entitled "Invoice", issued or to be issued by Spark Photonics Design to the Licensee on the basis of the Quotation and the Sales Order for the purchase of the License and its Configuration and/or the purchase of Maintenance and Support Services;
- (g) "**Lease License**" means a License granted for a certain period of time (as specified by Spark Photonics Design in the applicable Quotation, Sales Order or Invoice);
- (h) "**License**" means the authorization, subject to compliance with these Terms and Conditions, to execute a Program on one or more Computers, also including the use of the Packages as defined herein, in accordance with the Configuration;

- (i) "**Licensee**" means the person or company that either ordered or uses the License, that ordered or is provided with the Maintenance and Support Services or has access to the Program through any other means;
- (j) "**License File**" means a file containing one or more Configuration(s);
- (k) "**Maintenance and Support Services**" means maintenance and support services referred to in clause 8.2 and listed in **Appendix I** hereto, provided by Spark Photonics Design during the Warranty Period and, as the case may be and as agreed upon between the Parties for a Perpetual License, for a period after expiration of the Warranty Period;
- (l) "**Marks**" means any trademarks, trade names, logos, or other proprietary notices or markings belonging to Spark Photonics Design;
- (m) "**Node Locked License**" means a License which may only be used on a specific Computer and therefore supports one (1) identified machine;
- (n) "**Packages**" means the whole of pre-packaged software programs, either open source or owned by third party licensors, delivered by Spark Photonics Design to Licensee in addition to the Program, as listed in **Appendix II** hereto;
- (o) "**Perpetual License**" means a License granted perpetually (or at least of the entire duration of legal protection of the intellectual property rights concerned) against payment of a one-time fee;
- (p) "**Process Design Kit**" or "**PDK**" is a resource of documentation and other data used together with the Program, using the settings and configurations provided by the foundry, i.e., the photonic integrated circuit fabrication facility or its intermediary.
- (q) "**Program**" means the pre-packaged Spark Photonics Design proprietary software program, licensed by Spark Photonics Design to Licensee pursuant to these Terms and Conditions;
- (r) "**Quotation**" means the document entitled "Quotation", issued or to be issued by Spark Photonics Design to the Licensee in relation to the License and/or the Maintenance and Support Services;
- (s) "**Release Notes**" means the release notes published by Spark Photonics Design on its website (as may be amended from time to time) or at any time otherwise communicated to Licensee;
- (t) "**Sales Order**" means the document entitled "Order", issued or to be issued by Spark Photonics Design to the Licensee, confirming, inter alia, the purchase by the Licensee of the License and its Configuration and/or the purchase of Maintenance and Support Services on the basis of these Terms and Conditions;
- (u) "**Warranty Period**" means the period as described in clause 8.1 during which Maintenance and Support Services will be provided by Spark Photonics Design.

## **2 GRANT OF LICENSE**

2.1 Any License granted by Spark Photonics Design to Licensee will be governed by these Terms and Conditions.

- 2.2 The Program may link to third party software which requires the Licensee to purchase third-party licenses with the third-party vendor.
- 2.3 Spark Photonics Design does not provide access to any PDKs. Access is provided by the foundry, i.e., the photonic integrated circuit fabrication facility or its intermediary, that owns the PDK.
- 2.4 Licenses granted by Spark Photonics Design to Licensee will be non-exclusive and non-transferable and without the right to grant sublicenses (not even to subsidiaries or other affiliates of Licensee), except if expressly authorized otherwise in an applicable Quotation.
- 2.5 For each licensed Program, Licensee will receive a License File in which the Configuration(s) will be specified. As part of the Maintenance and Support Services, the Licensee is entitled to request reasonable changes to the License File issued by Spark Photonics Design, as far as such changes are actually required in order for Licensee to properly use the Program in accordance with the License granted.
- 2.6 Delivery dates quoted by Spark Photonics Design are estimates only and are in no way binding. Spark Photonics Design will however make every reasonable effort to ensure a timely delivery.
- 2.7 Licensee shall be responsible for installation of the Program(s). Licensee agrees to use the Program and any part thereof only in the Configuration and within the limits described in the latest (version of the) License File supplied by Spark Photonics Design.

### **3 LIMITATIONS OF USE**

- 3.1 Upon delivery of a new or updated License File by Spark Photonics Design at its sole discretion, Licensee agrees to discontinue the use of the previous (version of the) License File and waives all claims against Spark Photonics Design resulting from any continued use hereof.
- 3.2 Licensee agrees that for academic Licenses limited to teaching and publishable research work the following reference is required in publications: "Check Mate DRC by Spark Photonics - [www.sparkphotonics.com](http://www.sparkphotonics.com)".
- 3.3 Licensee agrees to not change, attempt to decode or tamper in any way with any License File provided by Spark Photonics Design, nor to try to duplicate such License File.
- 3.4 The Licensee may make one copy of the Program(s) only to the extent as strictly necessary for Licensee's own internal back-up or archival purposes of the Program(s) and strictly limited to internal use within the Licensee's organization.
- 3.5 Except as expressly permitted by Spark Photonics Design in writing, or as mandatorily provided by the applicable law, Licensee shall not (and shall not attempt to nor allow or permit any third party to or attempt to) adapt, alter, amend, modify, translate, reverse engineer, decompile, disassemble or decode the whole or any part of the object code of the Program(s), translate the whole or any part of the Program(s) into another language or create the source program or any part thereof from object programs and source code or from other information made available under these Terms and Conditions, nor to create any derivative work of the Program(s) or any part thereof or to convert all or any part of a Program in order to create software, a principal purpose of which is to perform the same or similar functions as Program(s) licensed by Spark Photonics Design or to replace any component of the Program(s). To the extent that the applicable law would expressly grant Licensee the right to decompile the Program(s), Licensee undertakes not to decompile (or attempt to do so) the Program(s) beyond the scope of this legal authorization, nor without first requesting such information from Spark Photonics Design. Spark Photonics Design shall have the right to impose reasonable conditions (such as the payment of a reasonable fee, if legally permitted) for making the information available.
- 3.6 Licensee shall use the Program(s) for Licensee's own internal data processing purposes and shall not make all or any part of the Program(s) available to persons other than its employees. Third party service providers who render in-house services to Licensee on an independent contractor basis, may have access to and use the licensed Program(s) as well, as long as they are using the licensed Program(s) for Licensee's benefit in the course of Licensee's business operations. No other use is allowed. Licensee will require any such third-party service provider to agree in writing to (i) use the Program(s) only to perform internal data processing services for Licensee, and (ii) to be bound by terms equivalent to those set out in these Terms and Conditions. Licensee remains responsible for the use of the Program(s) by all third-party service provider(s).
- 3.7 Unless for Licensee's own internal data processing, Licensee may not create itself or have created by a third party not being Spark Photonics Design, any application software based on a Program, using any of the supplied Program(s), without previous written approval of Spark Photonics Design. Licensee may not supply the Program or



any such application software to any third party either, whether free of charge or not, unless otherwise permitted in a separate written agreement executed by both Parties.

3.8 Licensee shall not provide access (directly or indirectly) to the Program(s) via a web or network application, to any third party, nor sell, license, sublicense, publish, display, distribute, disseminate, assign, or otherwise transfer (whether by sale, exchange, lease, gift, or otherwise) to a third party (including subsidiaries or other affiliates of Licensee) the Program(s), any copy or portion thereof, or any License or other rights thereto, in whole or in part, without Spark Photonics Design's express prior written consent, except as would be expressly permitted by Spark Photonics Design in the applicable Quotation.

3.9 Licensee agrees to abide by the Export Control Regulations of the United States of America and to alert Spark Photonics Design prior to licensing the software if the licensed software is intended for use in a prohibited end use per United States export control restrictions.

3.10 Licensee recognizes that this clause 3 is an essential condition of the License and shall fully indemnify Spark Photonics Design for any breach of this clause 3.

#### **4 PROPRIETARY RIGHTS**

4.1 Licensee hereby explicitly recognizes that all proprietary rights (including – without limitation – all Intellectual Property Rights and trade secrets) relating to the Program(s), will remain the sole property of Spark Photonics Design or, if licensed by other suppliers, the property of such suppliers. Licensee acknowledges that the use of the Program(s) under these Terms and Conditions will not, in any way, imply a transfer of title or any proprietary right in respect to the Program(s). Licensee agrees not to challenge Spark Photonics Design's ownership of the Program(s) or contest Spark Photonics Design's right, title, or interest in the Program(s).

4.2 Licensee agrees to install the Program(s) in whole or in part with the proper inclusion of Spark Photonics Design's copyright notice and Marks. Licensee shall not remove from the Program(s), or add or alter the Spark Photonics Design Marks contained within the Program(s), or add any other notices or markings to the Program(s). Spark Photonics Design may at any time and immediately without advance notice prohibit Licensee from further using the Marks. Marks may only be used for Licensee's own internal use and not for publications.

4.3 For the avoidance of doubt, the restrictions expressed in these Terms and Conditions shall in no way be construed to supersede or eliminate any rights which Spark Photonics Design may have pursuant to any applicable laws pertaining to trade secrets, in particular the trade secrets vesting in the source code of the Program(s). Licensee recognizes the value of such trade secrets and shall respect and ensure the strict confidentiality hereof.

## 5 CONFIDENTIALITY

5.1 This clause only applies insofar as it is not superseded by a separate confidentiality or non-disclosure agreement entered into by the Parties regarding the subject-matter of these Terms and Conditions.

5.2 Each Party agrees that it will not use for any purpose other than contemplated by these Terms and Conditions, will not disclose to any third party, and will cause its employees, independent contractors, and agents to not use or disclose any term of these Terms and Conditions, and/or any information which is identified as confidential or proprietary by the other Party (hereinafter collectively referred to as "**Confidential Information**"). Spark Photonics Design herewith explicitly identifies the (details and source code of the) Program, the License File, and its related documentation as being confidential.

5.3 The Parties agree that, during the License term and for a period of five (5) years after its termination (except for trade secrets, see below), they will use the same degree of care keeping the other Party's Confidential Information confidential as for their own confidential information. In no case will the degree of care exercised be less than equivalent to the applicable professional standards of care. Whenever any Confidential Information contains any trade secrets (such as the source code of the Program(s)), such trade secrets shall be kept strictly confidential by all reasonable means, for a period that is equivalent to the entire duration of legal protection of such trade secrets (i.e., until they lose their inherent secret nature through no fault or breach by Licensee).

5.4 The other Party's Confidential Information may only be disclosed to those of the receiving Party's employees that have a specific need to access such Confidential Information and that have been made aware of and agree to be bound by a written confidentiality obligation.

5.5 The Parties' obligations under this clause 5 will not extend to Confidential Information of which the receiving Party can furnish proof that:

- (a) it was in the public domain at the time it was disclosed;
- (b) it was known to the receiving Party at the time of its disclosure through no breach of any confidentiality undertaking;
- (c) it becomes part of public domain after disclosure and without breach of these Terms and Conditions or any other confidentiality undertaking; or
- (d) it is disclosed to the receiving Party by a third party without restrictions on such party's right to disclose or use the same.

5.6 Each Party will inform the other Party of any request by a court or government agency to disclose the other Party's Confidential Information, in order to enable the other Party to waive the provisions of this clause 5 or defend the nondisclosure.



## 6 FINANCIAL CONDITIONS

6.1 The License fee, the payment scheme and, as applicable, the fee for the Maintenance and Support Services will be specified by Spark Photonics Design in the applicable Quotation, Sales Order and/or Invoice. The License fee will depend on the License type (Node Locked or Floating; Perpetual, Lease or Evaluation License) and the then-current pricing scheme.

6.2 Prices and fees are exclusive of any applicable taxes or duties. Applicable taxes or duties, including but not limited to all taxes, charges, or assessments, related to the ownership, sale, possession, rental, use, operation, lease and license of the licensed software, are due solely by Licensee.

6.3 Unless otherwise indicated in the Quotation, Sales Order, or Invoice, the Licensee will pay all fees due within thirty (30) days of receipt of Spark Photonics Design's invoice.

6.4 In the event of default of payment on the due date:

(a) the outstanding amount shall by operation of law be increased by a late payment interest of 1% per month, as from the due date until the date of effective payment, without prejudice to any other rights which Spark Photonics Design may claim;

(b) Spark Photonics Design is entitled to a lump sum indemnity to compensate for administrative costs resulting from the late payment, equal to 5% of the outstanding invoice amount; and

(c) all outstanding payments and invoices not due from Licensee shall also become immediately payable to Spark Photonics Design by operation of law and without prior notice of default.

## 7 ACCEPTANCE

Receipt of a License File by Licensee (hereinafter: the "**Receipt**") implies acceptance of the related Program (and all visible non-conformities and visible defects) at the date of Receipt, unless Licensee refuses acceptance in a well-founded way in writing within fourteen (14) days after the date of Receipt, or unless the Parties agreed in writing upon a specific acceptance procedure.

## 8 WARRANTY AND MAINTENANCE AND SUPPORT

8.1 Spark Photonics Design warrants for the period as further defined in this clause (hereinafter: the "**Warranty Period**") that the Program(s) will in all material respects conform to the specifications supplied by Spark Photonics Design and in effect at the time of delivery:

(a) For all Programs licensed under Perpetual License model, a limited Warranty Period of one (1) year applies as from the start date of the Perpetual License; and

(b) For all Programs licensed under Lease License model, the Warranty Period will be equal to the entire duration of the License period.

8.2 During the Warranty Period, Spark Photonics Design will provide the Maintenance and Support Services. At the time of acceptance of these Terms and Conditions, the Maintenance and Support Services will consist of the services listed in **Appendix I** hereto. Spark Photonics Design may from time to time implement reasonable changes to the scope of these Maintenance and Support Services. Specifically for an Evaluation License, Spark Photonics Design shall not be obliged to provide the Maintenance and Support Services.

8.3 Specifically for the Perpetual License, the Parties may agree that Spark Photonics Design will provide Maintenance and Support Services after the expiration of the Warranty Period for (some or all of) the Programs in the License File. The fee and payment modalities for the Maintenance and Support Services after expiration of the Warranty Period will be specified in the applicable Quotation, Sales Order or Invoice, and, unless as specified otherwise in the applicable Quotation, Sales Order or Invoice, will be calculated as a fixed percentage of the official then-applicable price of the Licenses that are being serviced.

8.4 The Maintenance and Support Services shall not be provided (i) for any Program(s) that are not expressly listed as receiving those Maintenance and Support Services in the applicable Quotation, Sales Order or Invoice or (ii) to any company or entity other than the Licensee (including any affiliates of the Licensee), unless expressly agreed in writing between the Parties and included in the applicable Quotation, Sales Order or Invoice.

8.5 The Maintenance and Support Services are provided by Spark Photonics Design in accordance with these Terms and Conditions. The Maintenance and Support Services will be provided by Spark Photonics Design as a best-efforts obligation, without guaranteeing any outcome or result (e.g., in terms of error resolution) and in a professional manner within the reasonable possibilities of Spark Photonics Design. Any software programs, maintenance documentation or other materials or goods supplied by Spark Photonics Design while providing the Maintenance and Support Services are provided "as is" without warranty that they will produce a particular result or offer a particular solution. It is expressly accepted by the Licensee that under no circumstances does Spark Photonics Design represent or warrant that all Program errors can or will be remedied. CORRECTION OF ERRORS IS THE LICENSEE'S SOLE REMEDY. SPARK PHOTONICS DESIGN DOES NOT WARRANT THAT OPERATION OF THE PROGRAM WILL BE ERROR-FREE, SECURE OR UNINTERRUPTED, AND HEREBY DISCLAIMS ALL LIABILITY ON ACCOUNT THEREOF.

8.6 Unless stated otherwise in writing, any work arising from the Maintenance and Support Services shall be performed within the normal working days and working hours of Spark Photonics Design's offices. Weekends, applicable public holidays, and the annual closing days of Spark Photonics Design are expressly excluded. Service reports of the actions carried out shall subsequently be sent to the Licensee by e-mail. Faults or other problems must be reported in writing to the support service of Spark Photonics Design by sending a detailed description of the problem, the possible causes and any actions already taken in the manner prescribed on the support page of Spark Photonics Design's website (as may be amended from time to time):

<https://www.sparkphotonics.com/support>. Spark Photonics Design's maintenance service and contact information can be found on the support page of Spark Photonics Design's website (as may be amended from time to time).

8.7 The Maintenance and Support Services are limited to those services mentioned in the Quotation, Sales Order or Invoice. Any non-included services, if desired, can upon mutual agreement of the Parties be provided within the operational possibilities, and will be charged separately at the then-applicable rates.

8.8 Without prejudice to clause 8.7, Spark Photonics Design expressly points out and the Licensee acknowledges that the following is not included in the Maintenance and Support Services:

(a) **Support for outdated versions of the licensed Program(s)**. Spark Photonics Design provides contractual support only for the current and immediately preceding version of the License File, and only when used with interoperable hardware that is included in Spark Photonics Design-specified configurations (as disclosed to the Licensee from time to time).

(b) **Hardware and network maintenance and support**. Any such services involving hardware or network related problems will be subject to Spark Photonics Design's standard service rates unless the products are covered by an appropriate contractual hardware or network support service agreement.

(c) **Access to any new module and additional capacity** not covered by these Terms and Conditions.

(d) **Further professional assistance**, including problem analysis, design services, computing service, application development, or algorithms. Such assistance can however be covered through additional consulting service agreements between Spark Photonics Design and the Licensee.

(e) **Programs that have been modified by the Licensee** are not covered.

(f) **Formal Licensee education courses**, for which the Maintenance and Support Services are not a substitute.

8.9 Additionally, the Maintenance and Support Services will not apply for defects resulting from:

(a) improper use, installation misuse, neglect, accident, fire or other hazard, from any breach of these Terms and Conditions by the Licensee or from unauthorized alterations, modifications or enhancements to the Program;



(b) using the Program or any third-party software working with the Program, without respecting the hardware and software requirements as set out in the most current version of the applicable Release notes, in particular any interoperability requirements;

(c) the Licensee's attempt to fix the Program or any interventions by third parties in this respect; or

(d) the installation of the Program on other computers or devices than approved Computers.

8.10 In the cases listed above in clauses 8.8 and 8.9, the Licensee can request Spark Photonics Design's intervention, subject to payment for Spark Photonics Design's services on a time and materials basis at Spark Photonics Design's then-current rates plus any reasonable out-of-pocket expenses. Spark Photonics Design remains free to decide whether to agree to provide such additional intervention.

8.11 The Maintenance and Support Services will be provided subject at all times to the Licensee's compliance with these Terms and Conditions, the Quotation, Sales Order and Invoice and the following obligations:

(a) the Licensee will purchase and keep operational the infrastructure necessary for the proper performance of the services consisting of remote maintenance or support (telephone, e-mail, and/or internet connection). (b) the Licensee shall ensure that only members of its personnel that are qualified and skilled to operate the Program(s) shall have access to and be allowed to operate the Program(s).

(c) Error messages will always be reported in accordance with the procedure described by Spark Photonics Design on the support page of Spark Photonics Design's website (as may be amended from time to time). The Licensee shall describe in detail the errors that have occurred, the program version and hardware configuration used and the system environment. If necessary, the Licensee's employees shall provide assistance in detecting and resolving faults as instructed by Spark Photonics Design. All questions from Spark Photonics Design's service staff shall be answered without undue delay and all necessary information shall be provided at the first request of the service personnel.

(d) Passwords or access numbers provided by Spark Photonics Design for access to the services must be kept confidential and appropriately protected against unauthorized access, misuse, or loss. In the event of unauthorized access, misuse, or loss, the Licensee shall immediately notify Spark Photonics Design thereof.

(e) The Licensee is responsible for the regular storage of its data. Spark Photonics Design points out that data storage is particularly necessary for any maintenance measure. The data storage carried out must be made fully available to Spark Photonics Design in the context of a maintenance request in order to enable Spark Photonics Design to carry out a problem analysis. If the Licensee does not make the stored data available to Spark Photonics Design, Spark Photonics Design will provide the best possible solution with the information available, without any commitment to results.

8.12 Complaints regarding the Maintenance and Support Services shall only be considered if they reach Spark Photonics Design within eight (8) calendar days following the performance of such services at the contact details for escalation made available on the support page of Spark Photonics Design's website (as may be amended from time to time). After this period, the Maintenance and Support Services shall be deemed to have been approved and definitively accepted. If the complaint is accepted, the Licensee shall cooperate fully in resolving the problem. If the complaint is unfounded, the costs resulting from the complaint may be charged to the Licensee.

8.13 Error correction periods do not extend the Warranty Period. For Programs licensed under Lease License model, error correction periods do not extend the License duration.

8.14 EXCEPT FOR THE EXPRESS WARRANTIES STATED ABOVE, SPARK PHOTONICS DESIGN DISCLAIMS ALL WARRANTIES ON THE PROGRAM(S) FURNISHED UNDER THE SCOPE OF THESE TERMS AND CONDITIONS, INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS. THE STATED EXPRESS WARRANTIES ARE IN LIEU OF ALL OBLIGATIONS OR LIABILITY ON THE PART OF SPARK PHOTONICS DESIGN FOR DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE USE OF PERFORMANCE OF THE PROGRAM(S).

## **9 INFRINGEMENT OF THIRD PARTY INTELLECTUAL PROPERTY RIGHTS**

9.1 Spark Photonics Design agrees to defend Licensee from and against claims based on an allegation that the Program(s) may infringe upon a third party's Intellectual Property Rights, provided that Spark Photonics Design is notified promptly (and at the latest within five (5) calendar days) in writing of any notice of claim or of threatened or actual suit, and provided that Spark Photonics Design shall be in sole control of the response to and legal defense against such notice or claim and that Licensee, at Spark Photonics Design's request and expense, Licensee gives Spark Photonics Design reasonable assistance in the defense of the same. Spark Photonics Design's



indemnification obligation shall lapse as soon as Licensee responds to the notice or claim without Spark Photonics Design's express request hereto.

9.2 Following notice of a claim or of a threatened or actual suit, Spark Photonics Design will at its expense do its utmost effort to try to either procure for Licensee the right to continue the use of the Program(s) in accordance with these Terms and Conditions, or to replace or modify the Program(s) to make them non-infringing, at Spark Photonics Design's election. If Spark Photonics Design elects to replace or modify the Program(s), such replacement shall meet substantially the same specifications as the Program(s) to be replaced or modified. If neither of the foregoing options is available on terms which are reasonable in Spark Photonics Design's judgment, Licensee shall at Spark Photonics Design's request refrain from using and/or distributing those Spark Photonics Design components subject to such claim and, at the option of Spark Photonics Design, destroy or return any inventory of said components, and all copies thereof, to Spark Photonics Design within one (1) month from Spark Photonics Design's written request.

9.3 The foregoing states Spark Photonics Design's entire liability towards Licensee in the event of infringement of a third party's Intellectual Property Rights by Program(s) delivered under the scope of these Terms and Conditions.

## **10 INDEMNIFICATION AND LIMITATION OF LIABILITY**

10.1 Spark Photonics Design will not be liable for:

- (a) any unforeseeable, consequential or indirect damages, including but not limited to commercial losses, loss of profits, increase of expenses, loss of clientele, loss of databases or programs or actions and claims made by third parties;
- (b) any damages arising out of the act or omission, whether committed by fault or negligence or not, of Licensee or its personnel or independent contractors, the injured person or any person for whom Licensee or the injured person is responsible, including but not limited to any damages caused by the failure to observe any and all instructions, written or oral, provided by Spark Photonics Design or caused by the use of Spark Photonics Design products not in accordance with the written or verbal instructions of use provided by Spark Photonics Design or by the use of the Spark Photonics Design products for a purpose other than the intended or customary purpose for which the products are manufactured or developed;
- (c) any damages recovered by third parties from Licensee; or
- (d) any damages caused by hardware, software, other products or services furnished by others than Spark Photonics Design and any damages caused by the products which have been modified or maintained by others than Spark Photonics Design.

10.2 Without prejudice to clauses 10.1 and 10.3, Spark Photonics Design's liability under these Terms and Conditions is hereby limited to compensation of the direct damages caused to Licensee only, if and insofar as Licensee furnishes evidence of such damages. In addition hereto, Spark Photonics Design's liability to the Licensee for any claim related to a Program will in all cases be limited to the amount of the License fee paid by Licensee to Spark Photonics Design under these Terms and Conditions for the particular License of the Program which is the subject matter of the claim. For Programs licensed under the Lease License however, Spark Photonics Design's liability will be limited to the amount of the Lease License fees paid under these Terms and Conditions during the one (1) year preceding the occurrence of the damage. Spark Photonics Design's liability for any claim related to the Maintenance and Support Services will in all cases be limited to the amount of the fee paid by Licensee to Spark Photonics Design under these Terms and Conditions for such Maintenance and Support Services.

10.3 Notwithstanding any other provision of the agreement, the aggregate liability of Spark Photonics Design under these Terms and Conditions will be limited to the amount of \$100,000 (one hundred thousand United States dollars).

10.4 The provisions of the foregoing clauses, including all limitations of liability, will apply and remain enforceable except and to the extent that any mandatory law or regulation, if applicable, provide otherwise. In such case, they will be automatically rewritten in such a way that they will be valid and enforceable, while remaining as close as possible to their initial intention.

10.5 Licensee will indemnify and hold Spark Photonics Design harmless from and against any and all claims, demands, loss (financial or otherwise), damage, liabilities, costs, fees, increased taxes or expenses (including without limitation, court costs and reasonable attorneys' fees), which may be incurred or which may be claimed by any person arising out of or related to: (i) acts or omissions of Licensee, its directors, officers, employees or agents relating to the exercise of, or the failure to exercise, Licensee's obligations under these Terms and Conditions, or

(ii) any breach of these Terms and Conditions or any other agreement between Licensee and Spark Photonics Design.

## **11 TERM AND TERMINATION**

11.1 The License of a Program granted under the scope of these Terms and Conditions shall be effective from the actual date of delivery of the Program(s) to Licensee. It shall remain in effect for the duration specified in the License File specific to that License (which can be either limited or perpetual), until terminated as provided by these Terms and Conditions. The Maintenance and Support Services shall be effective for the Warranty Period as described in clause 8.1, or for the additional period as agreed upon between the Parties and as specified in the applicable License File and Invoice. The Maintenance and Support Services shall automatically expire at the end of such specified periods, without Licensee having the right to renew the Maintenance and Support Services after such expiration without Spark Photonics Design's consent.

11.2 Each of the Parties may terminate one or more License(s) and/or Maintenance and Support Services with immediate effect, without prior court intervention and without notice or any compensation, by written notice in the event of:

(a) any bankruptcy, liquidation or any similar proceedings started against or voluntarily by the other Party, the appointment of a receiver for the other Party, the assignment of the other Party's assets for the benefit of its creditors, or in case of dissolution or discontinuation of the other Party's business or any other event which would have a similar effect; or

(b) the other Party's failure to cure any default (other than Licensee's failure to pay) within thirty (30) days of receipt of written notice thereof from the non-defaulting Party.

11.3 Spark Photonics Design, at its sole discretion, may terminate one or more License(s) and/or Maintenance and Support Services with immediate effect, without prior court intervention and without notice or any compensation, by written notice in the event of Licensee's failure to pay any amount due to Spark Photonics Design, not being cured within ten (10) days after having received a notification to pay, sent by Spark Photonics Design.

11.4 Spark Photonics Design, at its sole discretion, may terminate one or more License(s), without prior court intervention or notice period and without compensation being due, by written notice in the event of a change in the direct or indirect ownership of or control over the Licensee.

11.5 Either Party may terminate, without prior court intervention, one or more License(s) and/or the Maintenance and Support Services for a License by giving the other Party at least 90 days prior written notice. In case of termination by Spark Photonics Design pursuant to this clause 11.5, the Licensee will be reimbursed as follows:

(a) In case Spark Photonics Design terminates a Lease License, it will reimburse the Licensee by repaying the pro rata part of the prepaid fee for the remaining term of the Lease License period, corresponding to the remaining term of such period, as calculated on a day-by-day basis. This reimbursement will be deemed to also include a reimbursement for the Maintenance and Support Services during the Warranty Period of such Lease License.

(b) In case Spark Photonics Design terminates a Perpetual License, it will reimburse the Licensee by repaying (i) 50% of the prepaid fee for the Perpetual License period in case of termination during the first year of the Perpetual License period (which payment will be deemed to include a reimbursement for the Maintenance and Support Services during the Warranty Period of such Perpetual License), (ii) 25% in case in case of termination during the second year of the Perpetual License period. After the second year, no reimbursement will be due by Spark Photonics Design.

(c) In case Spark Photonics Design terminates the Maintenance and Support Services as separately agreed between the Parties for a Perpetual License, it will reimburse the Licensee by repaying the pro rata part of the prepaid fee for the Maintenance and Support Services period, corresponding to the remaining term of such period, as calculated on a day-by-day basis.

11.6 The Maintenance and Support Services will terminate automatically, without court intervention and without any notice or compensation, when the License(s) for which the Maintenance and Support Services are provided terminate(s), for any reason whatsoever.

11.7 Termination shall not affect the Parties' obligation of confidentiality (as provided by clause 5 above) or the Licensee' obligation to comply with clause 4 above, and shall not affect the Parties' rights which have accrued prior to termination, such as the right for Spark Photonics Design with regard to the collection of fees owed.

11.8 The Licensee agrees, upon termination of a License for whatever reason, to discontinue immediately the use of the Program(s) and return or destroy the relevant media as directed by Spark Photonics Design, and, if requested by Spark Photonics Design, to certify in writing as to the destruction of the media and all copies thereof.

## **12 MISCELLANEOUS**

12.1 These Terms and Conditions, together with the applicable Quotation, Sales Order and/or Invoice, constitute the entire understanding between the Parties and supersede all prior communications, purchase orders, promises and proposals. In case of inconsistency between these Terms and Conditions, together with the Quotation, Sales Order and/or Invoice, and the terms of any license order or similar document submitted by the Licensee, these Terms and Conditions shall prevail.

12.2 To the extent that Spark Photonics Design processes any personal data, it shall ensure that such processing occurs in accordance with the applicable data protection legislation.

12.3 No modification of these Terms and Conditions will be binding to the Parties unless explicitly made in writing and accepted by both Parties.

12.4 The invalidity or unenforceability of any (part of a) provision of these Terms and Conditions will in no way affect the validity or enforcement of any other provision or the remainder of the provision. Any invalid or unenforceable provision will be stricken, and these Terms and Conditions will continue in full force and effect as if the invalid or unenforceable provision had not appeared. Moreover, in such an event, the Parties shall amend the invalid or unenforceable provision(s) or any part thereof and/or agree on a new provision in such a way as to reflect insofar as possible the purpose of the invalid, illegal or unenforceable provision(s).

12.5 Neither Party shall assign, license or transfer to a successor, affiliate or any other person, firm, or organization these Terms and Conditions without the other Party's prior written consent, which will not be unreasonably withheld. An assignee of either Party, if authorized hereunder, shall have all the rights and obligations of the assigning party as set forth in these Terms and Conditions.

12.6 Any notice with reference to these Terms and Conditions shall be validly made with respect to each of the Parties, when a registered letter is sent by mail or delivery to the other Party.

12.7 No failure or delay on the part of any Party in exercising any right under these Terms and Conditions will operate as a waiver of that right, nor will any single or partial exercise of any right preclude any further exercise of that right.

12.8 Neither Party will be liable to the other for any failure or delay in its performance of these Terms and Conditions in accordance with its terms (except for any payment obligations) if such failure or delay arises out of causes beyond the control and without the fault or negligence of such Party, including but not limited to natural disasters, riots, wars and military operations, national or local emergencies or emergency weather conditions, acts or omissions of public authorities, economic disputes of any kind, actions of employees, fire, telecom failures, epidemics or pandemics, bugs in third party software as well as any act or omission by a person or entity beyond the reasonable control of such Party ("**Force Majeure**"). Contractual obligations shall be suspended in case of a temporary event of Force Majeure. In the event that a Force Majeure lasts for a period greater than three consecutive (3) months, each Party will be entitled to suspend or terminate the License and/or Maintenance and Support Services without prior court intervention, without incurring any liability towards the other Party by reason of this suspension or termination.

## **13 APPLICABLE LAW AND COMPETENT JURISDICTION**

These Terms and Conditions will in all respects be exclusively governed by and construed in accordance with the laws of the Commonwealth of Massachusetts, United States of America. The Courts of Middlesex County, Massachusetts, USA will have full and exclusive jurisdiction in all matters related to or arising out of these Terms and Conditions.

## **APPENDIXES**

- I I. Maintenance and Support Services;
- II II. Packages included in the License.



**APPENDIX I**  
**MAINTENANCE AND SUPPORT SERVICES**

The Maintenance and Support Services will consist of:

- (a) The provision of new releases of the Program(s) upon Licensee's request.
- (b) In the event a malfunction occurs on the Licensee's server or on a designated Computer to which a Node Locked License was authorized, causing a Program to become inoperable in the Configuration authorized in the License File, the Licensee may request from Spark Photonics Design a temporary changed License File to be used until the defects are repaired. The Licensee agrees to discontinue the use of such temporary License File once the defects are repaired. In no event will the Licensee be allowed to use both License Files simultaneously.
- (c) In the event of a hidden defect which is reproducible by Spark Photonics Design and of which Spark Photonics Design is duly notified in writing by Licensee, Spark Photonics Design will use its best efforts to either supply avoidance procedures or corrections to the defect, at no additional charge.
- (d) The provision of future developments and software problem reporting, as a part of which Spark Photonics Design keeps track of all reported problems and enhancement requests and includes them in the planning for further software development.
- (e) Delivery of updates and enhancements to existing capabilities provided by Spark Photonics Design at regular intervals, bug fixes, solutions to known issues with the software version supported at this time, when such solutions become available to Spark Photonics Design.
- (f) Remote assistance during normal office hours of the Spark Photonics Design offices, consisting of the provision of advice on the use of software, suggestions for problem-solving strategies and recommendations in software maintenance.
- (g) Portal access through the support page of the Spark Photonics Design's website, as may be amended from time to time.



**APPENDIX II**  
**PACKAGES INCLUDED IN THE LICENSE**

Licensee recognizes that Packages including software components that have not been developed by Spark Photonics Design, in particular open source software components, can be included in the License. Licensee shall ensure that it complies at all times with the (open source and other) license terms hereof, and confirms that it has duly examined and agrees to be bound by those terms before accepting any Quotation from Spark Photonics Design.

The different Packages included in the License, with their respective licenses issued by third parties, are the following:

- Check Mate DRC: Spark Photonics Design, Inc.
- KLayout: <https://www.klayout.de/license.html>