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- (c) Modify, translate, adapt or otherwise create derivative works or improvements, whether or not patentable, of the Software or Documentation or any part thereof;
- (d) Reverse engineer, disassemble, decompile, decode or otherwise attempt to use, derive or gain access to the Source Code of the Software or any part thereof (except as licensed to Licensee in Section 1);
- (e) Utilize the Source Code of the Software, or any portion thereof that is visible or otherwise accessible to Licensee (through the normal installation or operation of the Software), to design, build (or guide, instruct, or train any Person, including any Third Party to design or build – regardless of whether such effort includes machine learning or other algorithmic techniques) any product or service with functionality(ies) that is substantially similar to the Software or that competes with the Software;
- (f) Remove, delete, alter or obscure any trademarks or any copyright, trademark, patent or other intellectual property or proprietary rights notices provided on or with the Software or Documentation, including any copy thereof;
- (g) Except as expressly permitted in Section 2, copy the Software or Documentation, in whole or in part;
- (h) Rent, lease, lend, sell, sublicense, assign, distribute, publish, transfer or otherwise make available the Software, or any features, functionality, components, elements or parts of the Software, to any Third Party for any reason, whether or not over a network or on a hosted basis, including in connection with the internet or any web hosting, wide area network (WAN), virtual private network (VPN), virtualization, software as a service, cloud hosting technology, or any other technology or service;
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(a “*Licensee Competing Product*”), BNW may request that Licensee provide BNW with an opportunity to, in a narrow and focused manner, examine the components of Licensee’s technical SAP development system (not production, but SAP transport system(s) only) that hosted the Software (whether currently or previously), solely to determine if a copy of the Software was made from such Licensee environment. Any such review would not involve access to any Licensee production systems or business data. Furthermore, any such review shall be performed by BNW or its appointed agent in strict confidence, under the control and supervision of Licensee or a party appointed by Licensee. If BNW requests to exercise its right to review a Licensee Competing Product pursuant to this clause, Licensee agrees to cooperate with BNW and with such request in good faith.

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**10. TERM AND TERMINATION.**

(a) This Agreement and the Software License granted hereunder shall remain in effect for the Software License Term, unless earlier terminated as set forth herein.

(b) Licensee may terminate this Agreement by ceasing to use and destroying all copies of the Software and Documentation.

(c) Either Party may elect not to renew the Software Licens(es) upon the completion of each corresponding Software License Term. This Agreement shall automatically terminate after the last day of the Software License Term of the last active Software License held by Licensee (except to the extent that any provisions hereof shall have survived termination). Sections 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of this Agreement shall survive termination hereof.

(d) Either Party may terminate this Agreement with immediate effect in the event of: (i) the suspension of business by the other Party; (ii) the insolvency, the institution of bankruptcy or liquidation proceedings by or against the other Party; (iii) the appointment of a trustee or receiver for the other Party's property or business; or (iv) in the case of any assignment, reorganization or arrangement by the other Party for the benefit of its creditors.

(e) Either Party may terminate this Agreement for cause with immediate effect upon written notice to the other Party, if the other Party breaches an obligation under the Agreement and such breach: (i) is incapable of cure; or (ii) being capable of cure, remains uncured for thirty (30) days after the non-breaching Party provides written notice thereof.

(f) Upon expiration or earlier termination of this Agreement, the license granted hereunder shall also terminate, and Licensee shall cease using and destroy all copies of the Software and any Documentation. In the event that Licensee terminates, or elects not to renew, one or more individual Software Licenses, but still retains license and use rights to at least one other Software License, and is otherwise in compliance with this Agreement, then this Agreement shall not terminate and shall remain in full force and effect. Upon such event, for the avoidance of any doubt, the Licensee shall cease using and destroy all copies of any Software and any Documentation related to any terminated or non-renewed Software Licenses.

## **11. LIMITED WARRANTIES, EXCLUSIVE REMEDY AND WARRANTY DISCLAIMER.**

(a) BNW represents and warrants that: (i) it has the authority required for it to enter into this Agreement; and (ii) at all times during the term of the Agreement, BNW will not knowingly introduce malicious code or other defects into the Software.

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- (vii) the operation (or failure in operation) of, or access (or failure of access) to Licensee's or a Third Party's system or network.

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(c) TO THE FULLEST EXTENT PERMITTED UNDER APPLICABLE LAW: IN NO EVENT WILL BNW’S COLLECTIVE AGGREGATE LIABILITY UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ITS SUBJECT MATTER, UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY AND OTHERWISE, EXCEED THE TOTAL NET AMOUNT LICENSEE ACTUALLY PAID TO BNW PURSUANT TO THIS AGREEMENT IN THE TWELVE (12) MONTH PERIOD THAT IMMEDIATELY PRECEDED THE EVENT GIVING RISE TO THE CLAIM.

(d) The limitations set out in Section 12(a), (b), and (c), above, shall not apply to claims and/or losses based on any of the following : (i) death and/or personal injury caused by BNW or its personnel; (ii) damage to real property and/or tangible property caused by BNW or its personnel; (iii) willful misconduct by BNW personnel; (iv) fraudulent misrepresentation by BNW or its personnel; (v) breaches of any obligation set out in Section 14 of this Agreement (Confidentiality); (vi) legal fees and costs incurred a claim under section 13 (Indemnity).

## **13. INDEMNITY.**

(a) Licensee shall promptly indemnify, defend, and hold harmless BNW, its parents, affiliates, successors and assigns, and all of their officers, directors, employees and agents from and against any and all claims and resulting costs, liabilities, losses, expenses, and damages (including reasonable attorney's fees) arising out of or resulting from: (i) misuse or unlawful use of the Software by Licensee or its Authorized Users; or (ii) breach of Section 3 (Use Restrictions), Section 9 (Intellectual Property), or Section 14 (Confidentiality) of this Agreement by Licensee or its Authorized Users.

(b) BNW agrees to indemnify, defend, and hold harmless Licensee, its parents, affiliates, successors and assigns, and all of their officers, directors, employees and agents from and against any and all claims and resulting costs, liabilities, losses, expenses, and damages (including reasonable attorney's fees) arising out of or resulting from: (i) breach by BNW of Section 14 (Confidentiality) of this Agreement; or (ii) any claims, suits or proceedings brought against Licensee alleging that the Software infringes upon the Intellectual Property Rights of a Third Party.

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(d) The obligation to provide indemnification is conditioned upon the indemnified Party: (i) timely notifying the indemnifying party of the claim; (ii) tendering the sole control over the defense and settlement of the claim to the indemnifying Party; and (iii) fully cooperating with the indemnifying Party in the defense and settlement of the claim at the indemnifying party's expense.

#### **14. CONFIDENTIALITY**

(a) The term "**Confidential Information**" means any proprietary, confidential, non-public, and/or trade secret information and data relating to a Party, which is in oral, written, electronic or any other form disclosed by a Party ("**Disclosing Party**") to the other Party ("**Recipient**") or which the Recipient otherwise learns or becomes aware of during the performance of this Agreement. Confidential Information shall include, but not be limited to, information about technological or organizational systems, customers, personnel, business activities, databases, intellectual property, the terms and conditions of this Agreement and other information in relation to it, and any other information which is reasonably or customarily considered to be of a confidential or otherwise sensitive nature, whether or not it is specifically marked confidential. Notwithstanding the foregoing, Confidential Information shall not include any information, which (i) was in Recipient's lawful possession without a confidentiality obligation prior to the disclosure and was not obtained by Recipient either directly or indirectly from the Disclosing Party, or (ii) is or becomes publicly available through authorized disclosure by the owner of such information, or (iii) is rightfully obtained by the Recipient from a Third Party, who has the right to transfer or disclose it on a non-confidential basis, or (iv) is independently developed by the Recipient without any reference to Confidential Information of the Disclosing Party, as evidenced by the records of the Recipient.

(b) Each Party agrees (i) to use the Confidential Information of the other Party only for the purposes described herein, (ii) not to reproduce the Confidential Information of the other party and to hold in confidence and protect the Confidential Information of the other party from dissemination to, or use by, any Third Party, (iii) not to create any derivative work of the Confidential Information of the other Party, (iv) to restrict access to the Confidential Information of the other Party to such of its personnel, agents or consultants who need to have access for the purposes of this Agreement, who have been advised of the confidential nature of such Confidential Information and who are bound by obligations of confidentiality no less protective of such Confidential Information than this Agreement (and, as respecting Licensee, to such persons as are also Authorized Users hereunder, to the extent otherwise required hereby), and (v) to return or destroy all Confidential Information of the other party in its possession upon termination or expiration of this Agreement.

(c) Notwithstanding the restrictions in Section 13.4(b), if the Recipient is required to disclose any of the Disclosing Party's Confidential Information by law, such as in response to a subpoena or requirement of any regulator, court, arbitral, administrative, or legislative body, the Recipient must: (a) where reasonably possible and permitted, immediately provide written notice to the Disclosing Party of the required disclosure to give the Disclosing Party an opportunity to move for a protective order or otherwise prevent the disclosure; (b) disclose only the minimum amount of Confidential Information required to satisfy the legal obligation; and (c) assert and take proper steps with the body requiring disclosure to maintain the confidentiality of the Confidential Information to be disclosed.

(d) Recipient will immediately, and at least within seventy-two (72) hours, notify Disclosing Party if Confidential Information of Recipient is used or disclosed in breach of this Agreement. As monetary damages may not be sufficient relief if anyone violates or threaten to violate the terms of this section, Disclosing Party is immediately entitled to enforce its rights by specific performance or injunction proceedings, in addition to any other rights or remedies it may have resulting from Recipient's breach of this Section.

(e) Upon the Disclosing Party's request and upon termination of this Agreement (unless agreed otherwise by the parties at the time), each party will return, destroy or delete permanently (at the Disclosing Party's election) the other Party's Confidential Information.

**15. US GOVERNMENT RIGHTS.** The Software is commercial computer software, as such term is defined in 48 C.F.R. §2.101. Accordingly, if the Licensee is the US Government or any contractor therefor, Licensee shall receive only those rights with respect to the Software and Documentation as are granted to all other end users under license, in accordance with (a) 48 C.F.R. §227.7201 through 48 C.F.R. §227.7204, with respect to the Department of Defense, as well as contractors thereto, or (b) 48 C.F.R. §12.212, with respect to any other licensee(s) that reasonably constitute(s) a facet of the US Government thereunder, as well as contractors thereto.

**16. MISCELLANEOUS.**

(a) **Governing Law.** This Agreement is governed by and to be construed in accordance with the internal laws of the State of Wisconsin, and the Federal laws of the United States, without giving effect to the principles of Wisconsin law relating to the conflict or choice of law. Application of the United Nations Convention on Contracts for the International Sales of Goods ("*CISG*") is expressly excluded.

(b) **Arbitration.** Except for claims arising from unauthorized disclosures of Confidential Information, or either Party's violation of the other Party's Intellectual Property Rights, to which traditional court remedies will apply, any controversy or claim arising out of or relating to this Agreement, or the breach, termination, or validity thereof, shall be determined exclusively by final and binding arbitration, as administered in accordance with the Commercial Arbitration Rules (the "*Rules*") of the American Arbitration Association ("*AAA*") by an Arbitrator appointed in accordance with the said Rules. The place of arbitration shall be Milwaukee Wisconsin and judgment on the award rendered by the Arbitrator may be entered in any court with jurisdiction. The arbitration shall be conducted in the English language. The parties agree that all of the rights and obligations of the parties under this Agreement, including the enforcement thereof, shall be governed by, and construed in accordance with, the laws of the State of Wisconsin, without giving effect to the principles of Wisconsin law relating to the conflict or choice of laws. The arbitration shall be conducted by three (3) neutral and impartial arbitrators (the "*Arbitrators*"). Each Party shall appoint a neutral and impartial Arbitrator of its choosing, and those Arbitrators agree upon and appoint the third neutral and impartial Arbitrator. The Arbitrator shall have the sole power to rule on matters of jurisdiction, arbitrability, timeliness of claims, issue preclusion, and to grant permanent equitable relief. Notwithstanding the foregoing, to the extent that it is necessary to prevent irreparable harm that may be caused to a party by the breach of this Agreement, that party will be entitled to equitable relief (including an injunction or preservation of evidence) in any court of law having proper jurisdiction, in addition to all other available remedies. The parties agree that the prevailing party in any arbitration action hereunder shall be entitled to receive, in addition to all other damages and awards, the costs incurred by such party in conducting the arbitration, including reasonable attorneys' fees and expenses, and arbitration costs.

(c) **Notices.** All notices, requests, consents, claims, demands, waivers and other communications to BNW hereunder shall be in writing to the following address: Suite B, Level 13, 500 Collins Street, Melbourne VIC 3000, Australia and shall be deemed to have been given: (a) when delivered by hand with written confirmation of receipt; or (b) when received by BNW, if sent by an internationally recognized courier with tracking confirmation. All notices, requests, consents, claims, demands, waivers and other communications to Licensee shall be provided to the email address and/or physical address that BNW has on file for Licensee, whether received from Licensee or otherwise, and shall be deemed to have been given immediately upon issuance thereof by BNW.

(d) **Entire Agreement.** The current and present version of this Agreement, together with the current and present version of any relevant Documentation for the Licensee's Licensed Software as may be applicable, constitutes the sole and entire agreement between Licensee and BNW with respect to the subject matter contained herein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such subject matter.

(e) **Assignment.** Licensee shall not assign or otherwise transfer any of its rights, or delegate or otherwise transfer any of its obligations or performance, under this Agreement, whether voluntarily, involuntarily, by operation of law or otherwise, without BNW's prior written consent, which consent the BNW may grant or withhold in its sole discretion. For purposes of the preceding sentence, and without limiting its generality, any merger, consolidation or reorganization involving Licensee (without regard to whether Licensee is a surviving or disappearing entity) will be deemed to be a transfer of rights, obligations or performance under this Agreement for which BNW's prior written consent is required. No delegation or other transfer will relieve Licensee of any of its obligations or performance under this Agreement. BNW may assign this Agreement at any time, in whole or in part by providing notice to Licensee, provided that any such assignment will not relieve BNW of any obligations that had accrued prior to the effective date of such assignment. Any purported assignment, delegation or transfer by Licensee in violation of this Section 16(e) is void. This Agreement is binding upon and inures to the benefit of the parties hereto and their respective permitted successors and assigns.

(f) **No Third-Party Beneficiaries.** This Agreement is for the sole benefit of the parties hereto and their respective permitted successors and assigns and nothing herein, express or implied, is intended to or shall confer on any Third Party any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

(g) **Waiver.** No waiver by BNW of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by an authorized signatory of BNW. Except as otherwise set forth in this Agreement, no failure of BNW to exercise, or delay in exercising, any right, remedy, power or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise by BNW of any right, remedy, power or privilege hereunder preclude by BNW any other or further exercise thereof or the exercise of any other of its rights, remedies, powers or privileges hereunder or otherwise.

(h) **Severability.** If any term or provision of this Agreement is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction.

(i) **Equitable Relief.** Licensee agrees and acknowledges that a breach of this Agreement would cause the BNW irreparable harm for which money damages alone would be inadequate. In addition to damages and any other remedies to which BNW may be entitled, both Parties acknowledge and agree that BNW will be entitled to injunctive relief against Licensee for the purpose of preventing the actual, threatened or continued breach of this Agreement.

(j) **Interpretation.** For purposes of this Agreement, (a) the words “include”, “includes” and “including” shall be deemed to be followed by the words “without limitation”; (b) the word “or” is not exclusive; and (c) the words “herein”, “hereof”, “hereby”, “hereto” and “hereunder” refer to this Agreement as a whole. Unless the context otherwise requires, references herein: (x) to Sections refer to the Sections of this Agreement; (y) to an agreement, instrument, Documentation or other document means such agreement, instrument, Documentation or other document as amended, supplemented and modified from time to time to the extent permitted by the provisions thereof and (z) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted.

(k) **Headings.** The headings in this Agreement are for reference only and do not affect the interpretation of this Agreement.

(l) **Conflicting Terms.** The terms and conditions set forth in this Agreement and in the Documentation (to the extent applicable) shall govern the terms and conditions of Licensee’s access and use to the Licensed Software, and shall expressly supersede and negate any contrary, additional or differing terms that may be set forth in any other purchase order, request for proposal, or any other document. The Parties agree that any contrary, additional or differing terms presented by Licensee that are not expressly included in this Agreement or the Documentation are automatically null and void.

**17. DEFINITIONS.** In addition to the terms defined within the body of this Agreement, the following definitions apply:

“AAA” has the meaning set forth in Section 16(b).

“*Arbitrator*” has the meaning set forth in Section 16(b).

“*Authorized Users*” means the final user who (a) is a physical person; (b) is an officer, employee, agent, sub-contractor, consultant or representative of Licensee; and (c) has been authorized to use the Software by Licensee pursuant to the license granted under this Agreement.

“*Confidential Information*” has the meaning set forth in Section 14(a).

“*Disclosing Party*” has the meaning set forth in Section 14(a).

“*Documentation*” means any user manuals, technical manuals and any other materials provided by BNW, in printed, electronic or other form, that describe the installation, operation, use or technical specifications of the Software. For the avoidance of any doubt, the Documentation may be updated or amended by BNW from time to time in its sole discretion, and such updated Documentation shall supersede and replace the then-existing Documentation in its entirety, immediately upon issuance of the updated Documentation by BNW.

“*Effective Date*” means the date on which this Agreement enters into effect.



**“Force Majeure”** means (i) acts of God, flood, fire, wind, storm, drought, earthquake or other natural disaster; (ii) epidemic or pandemic; (iii) terrorist attack, civil war, civil commotion or riots, war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, or breaking off of diplomatic relations; (iv) nuclear, chemical or biological contamination or sonic boom; (v) any law or any action taken by a government or public authority, including without limitation imposing an export or import restriction, quota or prohibition, or failing to grant a necessary license or consent; (vi) collapse of buildings, breakdown of plant or machinery, fire, explosion or accident; (vii) any labor or trade dispute, materials or transport, strikes, industrial action or lockouts; (viii) interruption or failure of utility service; or (ix) for any other cause, whether similar or dissimilar to those enumerated, that is beyond the reasonable control and without the fault or negligence of the party whose performance is affected.

**“Intellectual Property Rights”** means any and all registered and unregistered rights, granted, applied for or otherwise now or hereafter in existence under or related to any patent, copyright, trademark, trade secret, database protection or other intellectual property rights laws, and all similar or equivalent rights or forms of protection, in any part of the world. Intellectual Property Rights expressly includes any derivative works related to the Software.

**“Licensee Competing Product”** has the meaning set forth in Section 5(d).

**“Licensee Data”** has the meaning set forth in Section 8. As used in this Agreement, Licensee Data may include SAP Data.

**“Object Code”** means the fully-compiled version of the Software that can be executed by a computer and used by a user without further compilation.

**“Person”** means an individual, corporation, partnership, joint venture, limited liability company, governmental authority, unincorporated organization, trust, association or other entity.

**“Recipient”** has the meaning set forth in Section 14(a).

**“SAP Data”** has the meaning set forth in Section 8.

**“SAP Product”** means the specific SAP® software instance that Licensee will utilize in conjunction with the Software, as further defined by its unique installation number.

**“Software”** means the PowerConnect software that facilitates queries and visualizations that are available in or via Splunk® to be applied to data generated by Licensee’s SAP® Product. The term Software will include Object Code and Source Code, unless specified otherwise within the Agreement.

**“Software License”** means the specific right and license to the use of the Software provided to Licensee.

**“Software License Term”** has the meaning set forth in Section 1.

**“Source Code”** means computer programming code other than in Object Code form. Source Code includes code that may be displayed in a form readable and understandable by a programmer of ordinary skill, as well as any enhancements, corrections and documentation related thereto, and all related source code level system documentation, comments, procedural code, and explanatory materials.

**“Support Services”** means the maintenance and support provided in connection with the Software.

**“Term”** means the period of time during which this Agreement is in effect.

**“Third Party”** means any Person other than Licensee or BNW.

**“Update”** has the meaning set forth in Section 6.

**“Warranty Period”** has the meaning set forth in Section 11(b).