

# General Terms and Conditions for the Spectronaut License, Maintenance and Support Agreement

December 9<sup>th</sup>, 2016

## 1. Definitions

Capitalized terms used in this Agreement shall have the meanings assigned to them next to the defined term printed in bold letters. In addition, the following terms shall have the meaning defined in this Article 1:

**Affiliate** of Licensee shall mean any legal entity that is directly or indirectly controlled by Licensee, that directly or indirectly controls Licensee or that is directly or indirectly controlled by the same legal entity as Licensee.

**Agreement** shall mean the License, Maintenance and Support Agreement entered into by and between the Parties, which incorporates the GTC by reference.

**Annex** shall mean any of the annexes to the GTC.

**Article** shall mean any of the numbered articles contained in the GTC.

**Background Materials** shall mean any proprietary information of Licensor, including without limitation, Licensor's proprietary transition or fragmentation lists, assays, diagrams, graphs, analysis reports made available to Licensee in connection with Licensee's access to or use of the Software and the Documentation.

**Documentation** shall mean any materials, in electronic or written form, of Licensor made available to Licensee relating to the Software, including, without limitation, user guides, tutorial and other instruction materials and online help information made available via Licensor's webpage.

**GTC** shall mean these present General Terms and Conditions for the Spectronaut License, Maintenance and Support Agreement.

**Licensed Materials** shall mean the Software, the Documentation and the Background Materials as well as any further material or information made available to Licensee under or in relation to this Agreement.

**Licensee Data** shall mean Licensee's mass spectrometric data and any other data (including data sets or data files) of Licensee that Licensee uploads into the Software.

**New Version** shall mean any future update, upgrade, patch and new release version of the Software (to implement bug-fixes, changes to functionalities, etc.) generally made available by Licensor to all of its licensees during the term of this Agreement.

**Ordering Document** shall mean the document provided by Licensor to Licensee which sets forth the license types granted to Licensee, the applicable Initial Fee and payment terms.

**Party** shall mean, as the case may be, Licensor or Licensee, and **Parties** shall mean Licensor and Licensee collectively.

**Results** shall mean the Software-generated results of the analysis of Licensee's mass spectrometric data, including, without limitation, any visualization of the data, diagrams, statistical analysis related to signal processing (e.g., peak picking), quantification, or evaluation of statistical significance of or relating to any of the foregoing.

**Software** shall mean the software developed by Licensor called Spectronaut, which analyzes complex raw data that is generated by mass spectrometers, including any New Versions thereof, but excluding, for the avoidance of doubt, any third party application programming interfaces combined with the Software.

**Term** shall mean the Initial Term and, as the case may be, any Additional Term(s).

## 2. Execution of the Agreement and Activation of Software

This Agreement shall enter into effect between the Parties as of the day (the **Effective Date**) of this Agreement being physically executed by authorized representatives of each of the Parties or by Licensee agreeing to this Agreement as part of an online transaction regarding the procurement of the Software by Licensee (or any of its representatives on its behalf). In order to use the Software as provided for in this Agreement, Licensee will have to activate the Software with an activation key provided by Licensor, which Licensor will, unless expressly agreed otherwise between the Parties, provide to Licensee upon payment of the Initial Fee by Licensee. The day of the activation of the Software using this license key shall be referred to as the **Activation Date**.

## 3. Scope of the License

### 3.1 Limited License Grant

Subject to the restrictions and limitations set forth in Article 3.2 and all other terms and conditions of this Agreement, Licensor hereby grants to Licensee and Licensee hereby accepts a non-exclusive, non-transferable, non-sublicensable, license during the Term to copy and distribute the Licensed Materials solely as necessary for the purpose of making the Agreed Use of the Licensed Materials. **Agreed Use** shall mean, depending upon the applicable license type as stipulated in the Ordering Document, the following:

- (a) **Multi System License:** to install the Software on any number of physical or virtual servers and clients owned by and used for Licensee and to use the Licensed Materials solely in order (i) to upload Licensee Data into the Software, (ii) to analyze Licensee Data and to generate Results, (iii) to display, review and analyze the Results, (iv) to share the Results with other users of the Software, and (v) to export, publish and disclose the Results, all of

(i)-(v) as provided for by the Software's standard functionality and in accordance with this Agreement and the instructions included in the Documentation, for Licensee's own commercial and non-commercial purposes;

- (b) **Single System License:** to install the Software on one physical client (with up to four physical cores) of Licensee and to use the Licensed Materials solely in order (i) to upload Licensee Data into the Software, (ii) to analyze Licensee Data and to generate Results, (iii) to display, review and analyze the Results, (iv) to share the Results with other users of the Software, and (v) to export, publish and disclose the Results, all of (i)-(v) as provided for by the Software's standard functionality and in accordance with this Agreement and the instructions included in the Documentation, for Licensee's own commercial and non-commercial purposes;
- (c) **Single System View-Only License:** to install the Software on one physical client (with up to four physical cores) of Licensee and to use the Licensed Materials solely in order to display, review and analyze the Results provided by Licensor to Licensee under a separate service contract between the Parties, as provided for by the Software's standard functionality and in accordance with this Agreement and the instructions included in the Documentation, for Licensee's own commercial and non-commercial purposes; or
- (d) **Academic Single Named User License:** to install the Software on one physical client (with up to four physical cores) of Licensee and to use the Licensed Materials solely in order (i) to upload Licensee Data into the Software, (ii) to analyze Licensee Data and to generate Results, (iii) to display, review and analyze the Results, (iv) to share the Results with other users of the Software, and (v) to export, publish and disclose the Results, all of (i)-(v) as provided for by the Software's standard functionality, in accordance with this Agreement and the instructions included in the Documentation and solely for non-commercial, own academic research purposes of Licensee or, on an occasional basis only, of other individual researchers within the same non-commercial, academic research institution as the one Licensee belongs to.

## 3.2 Restrictions and Limitations

- (a) The license grant under Article 3.1 shall not include any rights other than those expressly set forth in Article 3.1 and it shall, in particular and without limitation to the generality of the foregoing, exclude the right (i) to make any use of the Licensed Materials that is not the Agreed Use or that is not any of the intended uses of the Licensed Materials, as provided for in the Documentation and the standard functionalities of the Software; (ii) to make any use of the Licensed Materials for the purpose of offering, directly or indirectly, any products or services that compete with any of Licensor's business, own products or services to third parties; (iii) to make any use of the Licensed Materials in a clinical diagnostic setting, to provide a diagnostic service or product, or to otherwise use the Licensed Materials for clinical diagnostic purposes; (iv) to make any amendment or modification to or to create any derivative work of the Licensed Materials or any part thereof; (v) to make the Licensed Materials or any part thereof available to any third party (other than, in case of an Multi

System License, a Single System License or a Single System View-Only License, to Licensee's own employees on a need-to-know basis in accordance with this Agreement); (vi) to reverse engineer, decompile, decrypt, disassemble the Software or any part thereof (except as may be permitted under mandatory applicable law); and (vii) to remove or alter any copyright notice or other proprietary rights notices placed on or embedded in the Licensed Materials or any part thereof. Further, Licensee shall not make any unlawful use of the Licensed Materials.

- (b) Unless as expressly set forth otherwise in Article 3.1, the Parties agree that the rights granted under an Academic Single Named User License, a Single System License, or a Single System View-Only License do, in each case, not include the right to make any use of the Licensed Materials for or on behalf of any third party (e.g., such as for providing any kind of services or work product, whether for commercial purposes or otherwise, to third parties which involve, in their provision or preparation, any use of the Licensed Materials). Such right shall, subject to the restrictions and limitations set forth otherwise in Article 3.2, be deemed included only in the Multi System License and only provided that the respective services or work product is offered and provided by Licensee solely to non-commercial academic third party customers, it being understood and agreed that the provision of any services or work product to non-academic or commercial third parties is not permitted.
- (c) Licensee shall not use the Software to practice the SWATH method as claimed in any valid claim of a patent belonging to the family WO2012035412 "DATA INDEPENDENT ACQUISITION OF PRODUCT ION SPECTRA AND REFERENCE SPECTRA LIBRARY MATCHING", unless Licensee has a valid copy of the Analyst® software installed or with the approval of the respective patent owner (which Licensee alone shall be responsible to obtain).

#### **4. Maintenance and Support**

Subject to the terms and conditions of this Agreement, Licensor agrees to provide during the Term New Versions to Licensee and certain other support services as set forth in Annex A to this Agreement (collectively referred to as **Maintenance and Support**).

#### **5. Additional Services**

Subject to the Parties reaching an agreement in relation thereto, Licensor agrees to provide, upon Licensee's reasonable request, certain additional services as set forth in Annex B and C to this Agreement (the **Additional Services** and **Trial Period Support Services**).

#### **6. Fees**

- (a) In consideration for the initial license grant as set forth in Article 2, the initial delivery of Licensed Materials and the provision of Maintenance and Support during the Initial Term (as defined below), Licensee agrees to pay to Licensor the initial fee applicable to the specific license type, as set forth in the Ordering Document (the **Initial Fee**) in accordance with Licensor's then-current pricelist (accessible via <https://www.biognosys.com/shop>).

- (b) In consideration for the provision of Maintenance and Support as from the expiry of the Initial Term, Licensee agrees to pay to Licensor the annual recurring fee applicable to the specific license type, as set forth in the Ordering Document (the **Recurring Fee**) in accordance with Licensor's then-current pricelist (accessible via <https://www.biognosys.com/shop>).
- (c) If no specific fees and/or payment terms are set forth in the Ordering Document, the Initial Fee will be invoiced upon the execution of this Agreement (or, in case of a Trial Term, upon the expiry of the Trial Term) and the Recurring Fee will be invoiced in advance prior to the beginning of each Additional Term, in each case as per Licensor's then-current pricelist (accessible via <https://www.biognosys.com/shop>).
- (d) All invoices for any fees payable under this Agreement shall be paid by Licensee within thirty (30) days of the date of Licensor's invoice.
- (e) All amounts set forth in this Agreement and in the Ordering Document shall be exclusive of VAT and other taxes, if applicable, and such VAT and/or taxes shall be borne by Licensee in addition to the respective fee.

## 7. Intellectual Property Rights

- (a) Each Party shall retain all rights to all intellectual property owned by such Party as of the Effective Date or thereafter acquired independently of the other Party.
- (b) Licensee shall own and retain title to all intellectual property rights that may exist in any of the Licensee Data and the Results. In particular, for the avoidance of doubt, the Parties agree that discoveries that Licensee makes while using the Licensed Materials in conjunction with Licensee Data are not considered to be intellectual property of Licensor. Licensee acknowledges and agrees that it shall itself be responsible for and assume the risk of the accuracy, integrity and legality of Licensee Data and of the means by which Licensee acquires, uploads, transmits and processes Licensee Data.
- (c) Licensee acknowledges that Licensor and, as the case may be, certain third parties own and shall retain all intellectual property rights that may exist in the Licensed Materials, including without limitation any derivative work, improvements or modifications of any of the foregoing, whether or not made by Licensor. The right to any modification to Licensed Materials made during the Term shall vest in Licensor, independently of whether or not Licensor contributed to such modification. If and to the extent Licensee provides to Licensor any suggestions, improvements, modifications, feedback, error identifications or other information related to the Licensed Materials (**Feedback**), Licensee hereby grants to Licensor a fully paid-up, irrevocable, perpetual, transferable, sublicensable, worldwide, non-exclusive license to: (i) use and exploit such Feedback to modify or improve the Licensed Materials or any other of Licensor's products and services, and (ii) use, copy, prepare derivative works of, display, make, sell and otherwise distribute any products and services incorporating or utilizing such Feedback.

Licensee acknowledges that certain third party application programming interfaces (the **API**) are combined, and may be made available by Licensor to Licensee, with the Software and that proprietary third party rights may exist in these API. The use of these API is not governed by this Agreement and Licensee's copying, installation, distribution and use of these API is subject to Licensee entering into and complying with an end user license agreement with the respective licensor. The list of API integrated with the Software, the respective licensors and the terms of the third party licensor end user license agreements are accessible via [www.biognosys.com/third-party-libraries](http://www.biognosys.com/third-party-libraries). If Licensee disagrees with the terms of any of these end user license agreements, Licensee may not use the Software.

## 8. Confidentiality

- (a) Information disclosed by a Party (the **Disclosing Party**) to the other Party (the **Receiving Party**) under this Agreement and designated by the Disclosing Party as proprietary or confidential (the **Confidential Information**) shall be kept confidential by the Receiving Party and the Receiving Party shall not, without prior consent of the Disclosing Party, disclose such Confidential Information to any third party (other than its own employees, subcontractors or agents on a need-to-know basis and subject to confidentiality obligations equivalent to those stipulated herein) or use such Confidential Information for any purpose other than as set forth in this Agreement. Notwithstanding the foregoing, Confidential Information may be disclosed by the Receiving Party if and to the extent such Confidential Information (i) is public knowledge at the time of disclosure or thereafter becomes generally known other than through an act of negligence by the Receiving Party; (ii) is already known to the Receiving Party prior to its receipt from the Disclosing Party; (iii) was demonstrably developed by the Receiving Party without using information disclosed by the Disclosing Party to the Receiving Party; or (iv) was rightfully obtained by the Receiving Party from unrestricted third parties. For the avoidance of doubt, the Parties expressly agree that Licensee Data and the Results shall be Confidential Information of Licensee and the Licensed Materials shall be Confidential Information of Licensor.
- (b) Licensee acknowledges and agrees that the Software, upon launch and thereafter in certain regular intervals, communicates its version number, the user account ID and certain other technical information to Licensor's systems in order to automatically check whether New Versions are available for download and Licensor may collect, analyze and retain such information for its own purposes. Such information provided to Licensor's system will, for the avoidance of doubt, not include any Licensee Data or other content data of Licensee.

## 9. No Warranty, Exclusion and Limitation of Liability

- (a) The Licensed Materials are provided to Licensee as-is and any express or implied representation, warranty or indemnification obligation, including, without limitation, any implied representation or warranty of merchantability, fitness for a particular purpose or non-infringement is hereby expressly excluded to the maximum extent permitted by applicable law.

- (b) To the maximum extent permitted by applicable law, Licensor shall not be liable to Licensee for lost profits, loss of business, loss of use, lost savings or other consequential, special, incidental, indirect, exemplary or punitive damages.
- (c) The aggregated total liability of a Party towards the other Party in respect of any cause of action relating to or arising out of this Agreement shall not exceed the total amount of fees payable by Licensee to Licensor under this Agreement.

## 10. Term and Termination

- (a) This Agreement shall be effective as from the Effective Date and it shall remain in force for twelve (12) months following the Activation Date (the **Initial Term**). Thereafter, the Agreement shall, unless terminated by either of the Parties by giving written notice to the other Party at least thirty (30) days prior to the expiry of the Initial Term or, as the case may be, any Additional Term, be renewed for additional terms of twelve (12) months each (each an **Additional Term**).
- (b) At the execution, Licensor may, in its own discretion, offer to Licensee to enter into this Agreement for a free trial term of thirty (30) days from the Activation Date (the **Trial Term**), in which case Licensee as well as Licensor may terminate the Agreement at any time during the Trial Term with immediate effect and the Agreement will, unless terminated in accordance with the foregoing in this Article 10(b), be continued as set forth in Article 10(a).
- (c) During the Initial Term and, as the case may be, any Additional Term, the Agreement may be terminated at any time with immediate effect by giving written notice to the other Party (i) by either Party if the other Party is in material breach of the Agreement and such breach, if curable, remains uncured for more than fifteen (15) days after the terminating Party requesting the other Party in text to cure the breach; (ii) by either Party if the other Party becomes or is declared insolvent, enters into liquidation or into any debt restructuring or similar proceedings; (iii) by Licensor if Licensee fails to pay any Initial Fee or any Recurring Fee that is outstanding for more than thirty (30) days and not paid within fifteen (15) days from the receipt of a reminder from Licensor requesting the payment of the outstanding fees; and (iv) by Licensor if Licensee delivers a Notice of Objection as set forth in Article 11.
- (d) Upon termination of this Agreement, Licensee shall cease all use of Licensed Materials and destroy all copies of Licensed Materials (excluding any Background Materials included in Results) in Licensee's possession or control.
- (e) Except as otherwise expressly provided in this Agreement, Articles 1 (Definitions), 3.2 (Restrictions and Limitations), 7 (Intellectual Property Rights), 8 (Confidentiality), 9 (No Warranty, Exclusion and Limitation of Liability), 10(d) and (e) (Effects of Termination), 12 (General Provisions) and 13 (Governing Law and Place of Jurisdiction) shall survive termination of this Agreement. The termination of this Agreement shall not affect the obligations of the Parties accrued during the Term.

## 11. Amendments of the Agreement

During the Term, Licensor shall be entitled to propose modifications to the provision of this Agreement by delivering a notice (a **Modification Notice**) to Licensee at least thirty (30) days prior to the proposed modification becoming effective. If Licensee disagrees with the modification proposed by Licensor, it shall deliver to Licensor a written notice of objection (a **Notice of Objection**) no later than within twenty (20) days from the receipt of Licensor's Modification Notice. If Licensee delivers a timely Notice of Objection to Licensor, this Agreement shall, subject to the termination right set forth in Article 10(c)(iv), remain unchanged. If Licensee does not deliver a timely Notice of Objection to Licensor, Licensee shall be deemed to have accepted the modification proposed by Licensor in the Modification Notice and the Agreement shall be deemed amended accordingly as from the date stipulated in the Modification Notice. If Licensor terminates the Agreement as set forth in Article 10(c)(iv), Licensor shall reimburse to Licensee any Initial Fee or, as the case may be, any Recurring Fee on a pro rata basis for the remainder of the Term.

## 12. General Provisions

- (a) Other than as expressly set forth in this Agreement, no person other than the Parties shall have any rights or benefits under this Agreement, and nothing in this Agreement is intended to confer on any person other than the Parties any rights, benefits or remedies.
- (b) All notices or other communications to be given under or in connection with the Agreement shall be made in text and in English, and shall be delivered by postal mail, by courier, by email or by telefax to the receiving Party's address indicated on the cover page of this Agreement, in the user account information provided by Licensee or to any substitute address as the Party may notify to the other in accordance with the above by not less than five days' notice. Any notice to be given hereunder shall be given prior to the expiry of a term or deadline set forth in this Agreement or by applicable law. All notices, communications, documents or other information shall be effective only if received by the Party to whom it is addressed irrespective of whether received prior to or after the expiry of such term or deadline (provided that the notice was timely and duly given in accordance with this Article).
- (c) This Agreement, including the Annexes and any other documents referred to herein, constitutes the entire agreement and understanding among the Parties with respect to the subject matter hereof, and shall supersede all prior oral and written agreements or understandings of the parties relating hereto. All references to this Agreement shall be deemed to include the Annexes hereto.
- (d) No failure to exercise, nor any delay in exercising, on the part of any Party, any right or remedy under this Agreement shall operate as a waiver, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise or the exercise of any other right or remedy.



- (e) Licensee shall not assign this Agreement or any rights or obligations hereunder, including, but not limited to, by way of a business transfer (*Vermögensübertragung*) or demerger (*Abspaltung*), to any third party without the prior written consent of Licensor. Licensor may assign this Agreement or any rights or obligations hereunder to any third party by giving written notice thereof to Licensee.
- (f) Should any part or provision of this Agreement be held to be invalid or unenforceable by any competent arbitral tribunal, court, governmental or administrative authority having jurisdiction, the other provisions of this Agreement shall nonetheless remain valid. In this case, the Parties shall negotiate in good faith a substitute provision that best reflects the economic intentions of the Parties without being unenforceable, and shall execute all agreements and documents required in this connection. If a Party to this Agreement (the **Failing Party**) should fail to take any action to be taken or to deliver any document to be delivered as of a specified date, the other Party shall not resort to any contractual remedies under this Agreement if such failure is promptly and fully cured in good faith by the Failing Party.

### 13. **Governing Law and Place of Jurisdiction**

- (a) This Agreement shall be governed by and construed in accordance with the substantive laws of Switzerland, with the exclusion of the Vienna Convention on the International Sale of Goods dated April 11, 1980.
- (b) The exclusive place of jurisdiction for any dispute, claim or controversy arising under, out of or in connection with or related to the Agreement (or subsequent amendments thereof), including, without limitation, disputes, claims or controversies regarding its existence, validity, interpretation, performance, breach or termination, shall be the city of Zurich, Switzerland.

## **Annex A**

### **Maintenance and Support**

Maintenance and Support shall include the provision of:

- New Versions, from time to time as Licensor deems reasonable in its own discretion, to provide new or amended functionalities, updates, upgrades and bug fixes for the Software;
- User support, including access to:
  - first-level telephone and email support during normal business hours on working days (Monday to Friday, excluding public holidays) 9 am to 5 pm (CET);
  - second-level email support with Licensor agreeing to use, depending on the availability of the relevant software developer(s) or other professional(s), commercially reasonable efforts to reply to request for second-level support within three business days;
  - one of Licensor's online introductory tutorial per year (once for a duration of two hours);
  - additional up to four of Licensor's online tutorials or online consultations (duration of one hour) upon reasonable request of Licensee to learn about the latest features of the Software, to review Licensee's usage of the Software and to propose possible improvements to increase the benefit Licensee is taking out of the Software; and
  - Licensor's available documentation for users and for IT personnel.

## **Annex B**

### **Additional Support Services**

Subject to an agreement of the Parties, Licensor is willing to provide the following additional support services to Licensee, at the following conditions:

— Provision of additional technical support at a rate agreed upon between the licensor and the licensee.

— Provision of on-site trainings:

Introductory short course to the Software (four hours on-site introductory tutorial, in one morning or one afternoon), at a rate agreed upon between the licensor and the licensee. Charges include preparation time, but not traveling time.

Full training on the software (eight hours on-site tutorial, in one full day or two adjacent half days), at a rate agreed upon between the licensor and the licensee. Charges include preparation time, but not traveling time.

— Provision of Data analysis services:

Data analysis services are provided on a project basis at a rate agreed upon between the licensor and the licensee

## **Annex C**

### **Trial Period Support Services**

Technical support for the duration of the trial shall include the provision of:

- (i) Unlimited first-level telephone and email support during normal business hours on working days (Monday to Friday, excluding public holidays) 9 am to 5 pm (CET);
- (ii) Unlimited second-level email depending on the availability of the relevant software developer(s) or other professional(s), commercially reasonable efforts to reply to request for second-level support within three business days;
- (iii) Unlimited number of consulting support offered as webinars based on availability and upon request
- (iv) Provision of on-site trainings:
  - (1) Full training on the software (eight hours on-site tutorial, in one full day or two adjacent half days), at a rate agreed upon between the licensor and the licensee. Charges include preparation time, but not traveling time.