

# AvailabilityGuard License Agreement

This Agreement shall govern the provision of the Licensed Software by Continuity Software Inc./Continuity Software Ltd. (“**Continuity**”) to the Customer. By downloading, installing or using the Licensed Software, you the Customer agree to be bound by the terms of this Agreement.

## 1. Definitions

For the purpose hereof the terms below are defined as follows:

“**Agreement**” means this license agreement together with any related commercial proposal (the “**Proposal**”).

“**DR/HA Services**” means the DR/HA assurance services provided by Continuity to the Customer, as set forth in the Proposal.

“**Installation**” means Continuity’s installation of the Licensed Software at the Site.

“**Intellectual Property**” means any and all patents, copyrights, trademarks, designs, trade secrets, know-how and any other intellectual property rights, whether registered or not, in the Licensed Software and/or created by Continuity during the course of the provision of the Services.

“**Licensed Software**” means the Continuity AvailabilityGuard™ software solution, as set forth in the Proposal.

“**Site**” means the Customer’s premises.

“**Services**” shall mean the DR/HA Services, Support Services, and any other professional services provided by Continuity to the Customer.

“**Support Services**” means the technical support and maintenance services provided by Continuity to Customer, in accordance with the Proposal.

## 2. Delivery

Continuity will deliver the Licensed Software.

If so selected by Customer in the Proposal, Continuity will carry out the installation of the Licensed Software at the Site and will provide the DR/HA Services.

The Licensed Software will be deemed accepted within 5 days of Continuity's and/or a third party's completion of installation of the Licensed Software at the Site, unless the Customer notifies Continuity in writing of its rejection thereof.

## 3. The License

As of delivery of the Licensed Software, Continuity will grant Customer a non-exclusive, non-transferable, royalty-free license to use the object form of the Licensed Software on the Customer’s computer systems at the Site for such number of servers as defined in the Proposal (the “**License**”). The License shall be perpetual or annual, as set forth in the Proposal. If annual, the License will be for an initial term of 1 year as of delivery of the Licensed Software (the “**Initial Term**”). At the end of the Initial

Term, the License will renew automatically for additional terms of 1 year each (each, the “**Additional Term**”), at the same price set forth in the Proposal unless a different price is agreed by the parties. In the event that the Customer does not wish to renew the License, it shall so notify Continuity within 90 days prior to the end of the Initial Term or the then current Additional Term.

The License is granted on a named-server basis. Customer may transfer License solely for hardware replacement purposes.

The License is personal to the Customer and does not include a right to grant sub-licenses of the Licensed Software, nor does it include a right to make copies of the Licensed Software, nor to market, distribute or sell the Licensed Software. Customer shall refrain from reverse engineering, reverse compiling or disassembling the Licensed Software and/or from making any modifications to the Licensed Software.

## 4. Payment

In consideration for the License, Customer will pay Continuity the fees set forth in the Proposal (the “**Fee**”), which will be due and paid by Customer to Continuity as set forth in the Proposal. Payment of the Fees to Continuity shall be made in accordance with the reasonable instructions of Continuity, and the costs associated with the wire transfer of such payments shall be fully met by Customer.

Should Continuity be required to collect or pay any tax, other than the taxes related to its income, in connection with the License and/or the Services, then such taxes shall be borne and paid by Customer.

If Customer fails to make payment within the specified time, Continuity reserves the right to discontinue the provision of the Services, by giving notice to the Customer, until payment is received, and Customer shall have 15 days to provide payment. If payment is not received within said 15 days, in addition to its other rights hereunder, including the right to terminate, Continuity may charge, and Customer agrees to pay, interest on any unpaid balance at a rate not to exceed the greater of 2% per month or the maximum amount allowed by applicable law, from the due date of any Fee until the date of its payment, for any amount not paid in accordance with the provisions herein.

## 5. Intellectual Property

Except for the rights granted pursuant to the License, this Agreement and the provision of the Services shall not confer upon Customer any rights, title or interest in the

Licensed Software, including any Intellectual Property therein, nor shall it confer on Customer any rights, title or interest in any technology and knowhow developed in connection with the Services, including any Intellectual Property therein. Without derogating from the generality of the above, ownership of all rights, title and interest in such Intellectual Property shall remain and/or vest exclusively with Continuity and/or its licensors.

## 6. Warranty

In the event that the Customer purchases an annual license, or a separate Services subscription, and at any time during the period of 12 months from the delivery of the Licensed Software, a significant error is discovered in the Licensed Software, Customer's exclusive remedy shall be for Continuity to attempt, through reasonable efforts, to provide a correction for such error as part of the provision of the Support Services (the "**Warranty**").

The following are excluded from the Warranty: (i) insignificant defects, such as errors that can be easily corrected and will not show up as a performance defect; (ii) defects discovered in the Licensed Software that has been modified, altered, or enhanced without Continuity's prior consent; and (iii) other damage caused by abuse, misuse, neglect, adjustment, or unauthorized repair or installation, or by the misuse of the Licensed Software.

THIS WARRANTY IS EXPRESSLY MADE IN LIEU OF ANY AND ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

## 7. Services

In the event that the Customer purchases an annual license, or a separate annual Support Services subscription, Continuity will provide Licensee with the Support Services, as provided in the Proposal.

In the event that the Customer purchases DR/HA Services, Continuity will provide the services and the reports, according to the scope of services purchased, as set forth in the Proposal.

The Support Services subscription and/or DR/HA Services will renew automatically for 1 year periods, according to the same terms set forth in the Proposal, unless different terms are agreed by the parties. In the event that the Customer does not wish to renew the Support Services subscription and/or the DR/HA Services, it shall so notify Continuity within 90 days prior to the end of the relevant term for such service.

The Services shall be provided by Continuity to Customer on a reasonable efforts basis, without any express or implied warranty by Continuity to Customer relating thereto, including, without limitation, any warranties that Continuity will find and solve all potential problems.

In the event that the Customer requires additional services not covered by the Support Services, Continuity

will provide such services at such hourly/daily rates as shall be agreed by the parties.

## 8. Liability

Continuity agrees to defend, at its expense, any suit or claim brought against Customer to the extent such suit or claim is based upon an assertion that the Licensed Software infringes any Intellectual Property of a third party, and Continuity will pay the amount of any settlement and/or the costs, damages, and reasonable attorney's fees finally awarded by a court in any such suit, claim or the like provided that (i) Continuity is notified promptly in writing by Customer of any notice of threatened or actual suit or claim; (ii) Customer makes no admission relating to the suit or claim; (iii) Continuity has sole control of the defense and settlement of such suit or claim or related settlement negotiations; (iv) Customer gives Continuity full information and reasonable assistance which is available to Customer and is useful or necessary to defend such claim; and (v) Customer has paid all fees due to Continuity under this Agreement and continues to pay all such fees as such fees become due. Continuity's duty of indemnification is in lieu of any and all other remedies of the Customer.

Continuity's liability to Customer under this Agreement shall be limited to the Fees actually paid by Customer to Continuity pursuant to this Agreement. Continuity's limitation of liability is cumulative with all Continuity's expenditures being aggregated to determine satisfaction of the limit.

EXCEPT IN RESPECT OF DEATH OR PERSONAL INJURY CAUSED BY CONTINUITY'S NEGLIGENCE, IN NO EVENT WILL CONTINUITY BE LIABLE TO CUSTOMER FOR ANY SPECIAL, INCIDENTAL, INDIRECT, EXEMPLARY OR CONSEQUENTIAL DAMAGES OR LOSS, INCLUDING BUT NOT LIMITED TO LOSS OF OPPORTUNITY, USE, INCOME OR PROFIT, OR INTERRUPTED OPERATION, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, OR ARISING OUT OF OR IN CONNECTION WITH CONTINUITY'S PERFORMANCE OR FAILURE TO PERFORM PURSUANT TO THIS AGREEMENT, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

## 9. Termination and Consequences

This Agreement shall come into effect upon execution of the Proposal by the parties and may be terminated by either party: (i) in the event of a breach of any material provision of this Agreement by the other party if such breach is not cured within 30 days of receiving notice demanding that such breach be cured; or should the other party: (a) file or have filed against it a petition in bankruptcy or seeking re-organization and such filing shall not be removed within 45 days; or (b) have a receiver appointed and such appointment is not revoked within 45 days; or (c) institute any proceedings for liquidation or winding up.

The provisions of sections 5 (Intellectual Property), 6 ("Warranty"), 8 (Liability), 9 (Termination and Consequences), 10 (Confidentiality), 11 (Jurisdiction) and 13 (General) of these Terms and Conditions shall survive termination of the Agreement.

#### **10. Confidentiality**

During the term of the Agreement and for 5 years thereafter, the parties shall (i) treat as confidential and proprietary all information which is disclosed by one party to the other and is identified as confidential or proprietary, or which can be reasonably deemed to be such ("**Confidential Information**"); (ii) shall take reasonable steps to protect such Confidential Information from disclosure (which steps should at least include those steps that it takes to protect its own Confidential Information); (iii) shall require any employee or subcontractor with access to such Confidential Information to have an executed confidentiality agreement protecting such information; and (iv) shall avoid disclosing Confidential Information to any employee or subcontractor not having a specific need to know such information for the purposes of the Agreement.

The foregoing shall not apply to any information which the receiving party can prove (i) is already in the receiving party's possession, other than as a result of the breach of a legal obligation; (ii) is or becomes a part of the public knowledge or literature through no wrongful act of the receiving party; (iii) is approved for release in writing by the disclosing party; (iv) is or was developed independently; or (v) is disclosed pursuant to the lawful requirement or request of a governmental agency or judicial process.

The parties acknowledge and agree that any breach of the restrictions contained in this section 9 may cause irreparable harm to the non-breaching party, entitling such party to seek injunctive relief in addition to all other legal remedies.

#### **11. Jurisdiction**

If the contracting party is Continuity Software Ltd, the Agreement shall be governed by and construed in accordance with the laws of the State of Israel, without reference to its conflict of laws principles and the competent courts of Tel-Aviv, Israel shall have exclusive jurisdiction over any dispute arising herein.

If the contracting party is Continuity Software, Inc, the Agreement shall be governed by and construed in accordance with the laws of the State of New York, USA, without reference to its conflict of laws principles and the competent courts of New York, NY shall have exclusive jurisdiction over any dispute arising herein.

#### **12. Assignment**

The Agreement may not be assigned by either party without the express written consent of the other party, which shall not be unreasonably withheld, provided that either party may assign or transfer the Agreement, in

whole or in part, to any of its affiliates or to any successors of substantially that part of its business to which the Agreement relates.

#### **13. General**

This Agreement may not be modified or any right of a party waived, except by means of an amendment which expressly refers to these terms and is duly executed by each of the parties.

Continuity shall not be liable for any delay or failure to perform resulting from acts beyond its control. Such acts shall include natural disasters, labor conflicts, acts of war or civil disruption, or governmental regulations beyond the reasonable control of Continuity. All such causes entitle Continuity' duties equal to the delay resulting from such cause.

The parties acknowledge and agree that they are dealing with each other hereunder as independent contractors. Nothing contained in this Agreement shall be interpreted as creating an employer-employee relationship or as constituting either party the joint venturer or partner of the other party or as conferring upon either party the power or authority to bind the other party in any transaction with third parties.

The terms of the Agreement comprise the entire understanding between the parties and they shall supersede and prevail over any oral or written understanding, commitment, representation, or undertaking entered into prior to the signing of the Agreement.

Any notice required or permitted hereunder shall be given in writing and shall be deemed given upon personal delivery confirmed in writing, or 5 business days after deposit with the postal service, if sent by registered airmail to the address of the other party as specified in the Proposal, or to such other address as one party notifies the other of in writing from time to time.