

## Rider to Software License Terms

This rider ("Rider") to the End User License Agreement ("License") between Progress Software Corporation, a Delaware Corporation ("Licensor") and the State of Oregon, acting through its Department of Administrative Services ("Licensee") amends and supersedes any provision to the contrary in the License, a copy of which is attached to this Rider as Exhibit A. This Rider and the Software License constitute the entire licensing agreement (collectively "Agreement") between Licensor and Licensee, and merge all prior and contemporaneous communications with respect to the matters described in this Agreement. Capitalized terms used but not defined in this Rider shall have the meaning ascribed to such terms in the Agreement.

Notwithstanding any language in the License to the contrary, Licensor and Licensee agree:

1. **Software.** This Rider pertains to the Licensor's WhatsUp Gold Software, and related Support, and related intellectual property, such as Documentation, licensed by Licensor to Licensee under this Agreement and paid for through Licensor's authorized reseller.
2. **Statewide Price Agreement.** The Software is available through a price agreement with a Licensor-authorized reseller. Such price agreement is held by the Oregon Department of Administrative Services under applicable Oregon law. Licensee will place Orders via a purchase order issued to the reseller. Licensor is not a party to the price agreement.
3. **Effective Date and Term.** This Agreement is effective on November 1, 2019 or when it is fully executed and approved according to applicable laws, rules and regulations, whichever date is later ("Effective Date"). This Agreement continues in effect unless it expires by its terms or is terminated by either party by providing notice in the manner specified in Section 10 of the License.
4. **Confidentiality.**
  - 4.1. Any obligation of Licensee to maintain the confidentiality of Licensor's proprietary information provided to Licensee is conditioned by and subject to Licensee's obligations under the Oregon Public Records Law, Oregon Revised Statutes (ORS) 192.410 to 192.505 which may require disclosure of proprietary information as a "public record" unless exempt under ORS 192.501 or ORS 192.502.
  - 4.2. Licensor acknowledges that, it and its employees, subcontractors or agents in the course of this Agreement may be exposed to or acquire information that is confidential to Licensee or Licensee's clients. Any information Licensor or its employees or agents receive or acquire relating to Licensee or Licensee's clients in the performance of this Agreement is deemed to be confidential information of Licensee ("Confidential Information"), with the exception of:
    - 4.2.1. Information that becomes part of the public domain through lawful means and without breach of any confidentiality obligation by Licensor;
    - 4.2.2. Information subsequently and rightfully received from third parties who have the necessary rights to transfer the information without any obligation of confidentiality;

- 4.2.3. Information that was known to Licensor prior to the Effective Date of the Agreement without obligation of confidentiality;
- 4.2.4. Information that is independently developed by Licensor and documented in writing without use of, or reference to, any confidential information of Licensee; and
- 4.2.5. Information required to be disclosed by compulsory judicial or administrative process or by law or regulation.
- 4.2.6. If Licensor is required to disclose Confidential Information, Licensor shall first give Licensee notice and shall provide such information as may reasonably be necessary to enable Licensee to take action to protect its interests.

4.3. Licensor shall comply with the Oregon Consumer Identity Theft Protection Act, ORS 646A.600 through 646A.628, to the extent applicable to this Agreement.

4.4. Licensor has no right of access to any locations, servers, computers, records, data, accounts, or other information protected by law from disclosure. Licensor shall not collect information on Licensee's customers.

## 5. Indemnification.

5.1. **Limits on Licensee Indemnification.** To the extent Licensee is required under the License to indemnify, defend, or hold Licensor harmless against claims brought by third parties against Licensor, Licensee's obligation to indemnify is subject to the limitations of Article XI, section 7 of the Oregon Constitution and the Oregon Tort Claims Act, ORS 30.260 through 30.300. Licensee has no obligation to defend Licensor.

6. **Defense of Claims.** To the extent Licensor is required under this Agreement to defend Licensee against claims asserted by third parties, including Section 7.1 of the License, Licensee shall reasonably cooperate in good faith, at Licensor's reasonable expense, in the defense of the claim and Licensor shall select counsel reasonably acceptable to the Oregon Attorney General to defend the claim, and Licensor shall bear all costs of counsel. The Oregon Attorney General's acceptance of counsel may not be unreasonably withheld. Counsel must accept appointment as a Special Assistant Attorney General under ORS Chapter 180 before counsel may act in the name of, or represent the interests of, the State of Oregon, Licensee, its officers, employees or agents. Licensee may elect to assume its own defense with an attorney of its own choice and its own expense at any time Licensee determines important governmental interests are at stake. Licensee will promptly provide notice to Licensor of any claim that may result in an obligation on the part of Licensor to defend. Subject to these limitations, Licensor may defend a claim with counsel of its own choosing, on the condition that no settlement or compromise of any claim may occur without the consent of Licensee, which consent must not be unreasonably withheld.

7. **Governing Law; Jurisdiction; Venue.** This Agreement is to be construed and enforced in accordance with the laws of the State of Oregon, without giving effect to its conflict of law principles, and applicable federal law. Any action or suit brought by the parties relating to this Agreement must be brought and conducted exclusively in the Circuit Court of Marion County for the State of Oregon in Salem, Oregon; provided, however, if a claim must be brought in a federal

forum, then it must be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. LICENSOR HEREBY CONSENTS TO THE PERSONAL JURISDICTION OF THIS COURT, WAIVES ANY OBJECTION TO VENUE IN THESE COURT, AND WAIVES ANY CLAIM THAT THIS COURT IS AN INCONVENIENT FORUM. In no way may this section or any other term of this Agreement be construed as a waiver by the State of Oregon of any form of defense or immunity, whether it is sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States, or otherwise, from any Claim or from the jurisdiction of any court.

8. **Attorney Fees.** Except as specified neither party to this Agreement is entitled to obtain judgment from the other party for attorney fees incurred in any litigation between the parties or in defense of any claim asserted by a third party.
9. **Access and Audit rights.** Licensor's audit rights in Section 3.4 of the License are modified to provide:
  - 9.1. Any audit will take place upon not fewer than 30 days' written notice, during normal business hours and in a manner that does not interfere unreasonably with Licensee's operations. Licensee will provide Licensor or the independent auditor with information reasonably requested in furtherance of the verification. As an alternative, Licensor can request Licensee complete a self-audit questionnaire.
  - 9.2. If the agreed-upon final audit report reveals that Licensee does not have sufficient licenses to meet its actual use, Licensee will order sufficient license(s) at then-current prices available to State of Oregon agencies under an Oregon software reseller price agreement. Licensee will not pay a penalty. Licensee may at its option purchase maintenance and support.
  - 9.3. Each party will bear its own costs of any activity conducted pursuant to Section 3.4 of the License.
10. **Dispute Resolution.** Any dispute between the parties under the License that is not resolved through informal discussions may be submitted to mediation upon the consent of both parties. If informal discussions or mediation are unsuccessful, either party may initiate litigation to resolve the dispute. The parties specifically disclaim any right to arbitration of disputes.
11. **Payment.** Section reserved.
12. **Incorporation of Oregon Statutes.** ORS 279B.220, 279B.230 and 279B.235 are incorporated into this Agreement by reference.
13. **Termination for Lack of Funding.** Nothing in this Agreement may be construed to permit any violation of Article XI, Section 7 of the Oregon Constitution or any other law regulating liabilities or monetary obligations of the State of Oregon. Licensee may immediately terminate this Agreement upon written notice if Licensee fails to receive funding, appropriations, limitations, allotments, or other expenditure authority as contemplated by Licensee's budget or spending plan and Licensee determines, in its assessment and ranking of the policy objectives explicit or implicit in its budget or spending plan, that it is necessary to terminate this Agreement.
14. **Independent Contractor.** Licensor is at all times an independent contractor and not as an agent, employee, or representative of Licensee. Licensor has no right or authority to incur or create any

obligation for or legally bind Licensee in any way. Licensor is not an "officer," "employee" or "agent" of Licensee or any other agency, office, or department of the State of Oregon, as those terms are used in ORS 30.265, and Licensor shall make no representations to third parties to the contrary. Neither party shall make any statements, representations, or commitments of any kind or take any action binding on the other except as provided for in the Agreement or authorized in writing by the party to be bound.

- 15. Order of Precedence.** In the event of any conflict between the Rider, the License, and any terms and conditions published by Licensor on or after the Effective Date of this Agreement and any terms presented to an end user in a 'click wrap' or end user agreement, the conflict will be resolved in that order. This Agreement may only be amended by a written amendment that, if required by applicable law, has been approved according to applicable laws, rules and regulations, and for legal sufficiency by DOJ. No amendment will be effective until all requisite signatures and approvals are obtained from both parties.
- 16. Publicity.** Licensor may disclose the form and existence of this Agreement in advertising, press releases or other materials distributed to prospective customers, but shall not otherwise attempt to obtain publicity from its association with Licensee or the State of Oregon, whether or not such disclosure, publicity or association implies an endorsement by Licensee or the State of Oregon of Licensor's Software, without the prior written consent of Licensee.
- 17. Counterparts.** This Rider may be executed in two or more counterparts, by facsimile or otherwise, each of which is an original, and all of which together constitute one and the same instrument, notwithstanding that all parties are not signatories to the same counterpart.
- 18. No Third Party Beneficiaries.** Licensee and Licensor are the only parties to this Agreement and are the only parties entitled to enforce its terms.
- 19. Survival.** The provisions of this Rider survive termination.
- 20. Non-Discrimination.** If the anticipated total value of the Software and services to be provided under this Agreement is \$150,000 or more, Licensor certifies that it has a written policy and practice that meets the requirements described in House Bill 3060 (2017 Oregon Laws, chapter 212, codified at ORS 279A.212) for preventing sexual harassment, sexual assault, and discrimination against employees who are members of a protected class. Licensor agrees, as a material condition, to maintain such policy and practice in force during the term of this Agreement. Licensor's failure to maintain such policy and practice constitutes a breach entitling Licensee to terminate this Agreement for cause.
- 21. Tax Compliance.** By executing this Rider, the undersigned certifies under penalty of perjury that Licensor has complied with the tax laws of the State of Oregon and the applicable tax laws of any political subdivision of this state. Licensor shall, for the duration of this Agreement and any extensions, comply with all tax laws of this state and all applicable tax laws of any political subdivision of this state. For the purposes of this section, "tax laws" includes: (i) All tax laws of this state, including but not limited to ORS 305.620 and ORS chapters 316, 317, and 318; (ii) Any tax provisions imposed by a political subdivision of this state that apply to Licensor, to Licensor's property, operations, receipts, or income, or to Licensor's performance of or compensation for

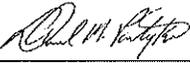
any work performed by Licensor; (iii) Any tax provisions imposed by a political subdivision of this state that apply to Licensor, or to goods, services, or property, whether tangible or intangible, provided by Licensor; and (iv) Any rules, regulations, charter provisions, or ordinances that implemented or enforced any of the foregoing tax laws or provisions.

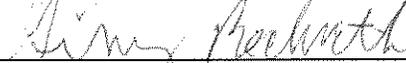
21.1. This Agreement will be reported to the Oregon Department of Revenue. The Department of Revenue may take any and all actions permitted by law relative to the collection of taxes due to the State of Oregon or a political subdivision, including (i) garnishing the Licensor's compensation under this Agreement or (ii) exercising a right of setoff against Licensor's compensation under this Agreement for any amounts that may be due and unpaid to the State of Oregon or its political subdivisions for which the Department of Revenue collects debts.

LICENSOR: Progress Software Corporation

LICENSEE:

The State of Oregon, acting through the Department of Administrative Services

By: 

By: 

As: Director of Revenue Operations

As: Procurement Svcs Mgr

Date: Jan 10, 2020

Date: 1/10/2020

Approved by DOJ via email on 01/09/2020  
Janet Borth, AAG  
pursuant to ORS 291.047 & OAR 137-045-0030

**Exhibit A**  
**END USER LICENSE AGREEMENT**  
**FOR IPSWITCH BRANDED SOFTWARE PRODUCTS**

(last updated May 8, 2019)

THIS END USER LICENSE AGREEMENT ("**AGREEMENT**") IS A BINDING AGREEMENT BETWEEN PROGRESS SOFTWARE CORPORATION ("**PROGRESS**", "**US**", "**WE**") AND YOU, OR, IF YOU REPRESENT A LEGAL ENTITY, THE LEGAL ENTITY YOU REPRESENT (COLLECTIVELY, "**YOU**"). PLEASE READ THIS AGREEMENT CAREFULLY, AS IT SETS FORTH THE TERMS AND CONDITIONS WHICH GOVERN YOUR USE OF THE IPSWITCH BRANDED SOFTWARE ("**SOFTWARE**" or "**IPSWITCH SOFTWARE**"). IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE LEGAL AUTHORITY TO BIND THAT LEGAL ENTITY TO THIS AGREEMENT. IF YOU DO NOT HAVE SUCH AUTHORITY, OR IF YOU DO NOT AGREE WITH ALL OF THE TERMS AND CONDITIONS OF THIS AGREEMENT, YOU ARE NOT PERMITTED TO DOWNLOAD, INSTALL OR USE THE SOFTWARE.

**1. DEFINITIONS**

**1.1 "Documentation"** means any user manuals or any other information or documentation relating to the Software that Progress provides to you.

**1.2 "End User"** means you, your employees, or any contractor or other third party that you authorize to access the Software on your behalf.

**1.3 "Fee-Based Software"** means the following Ipswitch Software titles, including any applicable re-naming or re-designation thereof: MOVEit Automation; MOVEit Transfer; MOVEit EZ; WS\_FTP Server; Web Transfer Module for WS\_FTP Server; Ad Hoc Transfer Module for WS\_FTP Server; WS\_FTP Pro; WhatsUp Gold; WhatsUp Gold Plugins; WhatsUp Gold Standalones; and Log Management.

**1.4 "Free Software"** means any Ipswitch Software that is not Fee-Based Software.

**1.5 "Hosting Provider"** means a third party hosting service provider approved in advance by Progress in writing that hosts the Software on your behalf.

**1.6 "Server"** means one physical server that is not running virtualization software, or one virtual server instance.

**2. License**

**2.1 General License Terms**

**(a) License Grant.** Subject to the terms and conditions of this Agreement, Progress hereby grants you a non-exclusive, worldwide, royalty-free, non-transferable license, without the right to sublicense and solely for your internal business purposes to (i) install and use the Software, in its object code form only, on computing resources owned and/or operated by you or your Hosting Provider; and (ii) use the Documentation solely as reasonably necessary to access and use the Software and/or allow your Hosting Provider to host the Software on your behalf. Unless otherwise stated on a particular order placed by you with Progress or a Progress distributor or reseller ("**Order**"), your license to the Software will be perpetual. You may copy reasonable quantities of any Documentation for your internal use or use by your Hosting Provider, and may make one copy of each Software program solely for your archival, back-up, disaster recovery, or emergency restart purposes, or to replace copies made on defective media, if applicable. You will reproduce and include our proprietary rights and copyright notices on any copies of the Software you make pursuant to this Section 2.1(a). The license includes the right to distribute and use any Progress programs associated with the Software, such as tools or utilities, that are listed in the Documentation. For the avoidance of doubt, and except as expressly permitted hereunder, the Software is licensed on a per-Server basis. This means you may only install and use the Software on the number of

Servers, including both production, non-production and failover, disaster recovery or high availability Servers, equal to the number of licenses you purchase via the applicable Order.

**(b) Optional Features and Functionality.** You may only use an optional feature or functionality associated with the Software if you have selected the feature or functionality in your Order and paid any additional fees for the feature or functionality.

**(c) Non-Production Licenses, High Availability and/or Disaster Recovery Purpose License.** Non-production licenses may be used solely for testing, training, development or other non-production and non-failover, disaster recovery or high availability purposes. If you obtain a license for failover, disaster recovery or high availability purposes ("Redundant Software"): (i) you may not run such Redundant Software on a primary production Server, unless (a) the primary production Server related to the primary production version of the Software fails, (b) the Software or Server associated with the primary production license is being upgraded or replaced or (c) other temporary reasons disrupt all or a material part of your business operations and (ii) you will promptly get the primary production Server hosting the primary production license operating correctly in order to support your daily activities.

**(d) Restrictions.** Except as expressly permitted hereunder, you will not: (i) decompile, disassemble or reverse engineer the Software; (ii) modify, publish, transmit, license, sublicense, assign, transfer, sell, grant a security interest in, distribute, reproduce, create derivative or collective works from the Software; (iii) disclose, divulge, communicate, or allow access to the Software to any person except your authorized agents, employees, or other parties expressly authorized hereunder; (iv) allow any Software to be used on an external commercial rental, time-sharing, or subscription basis or service bureau arrangement; or (v) isolate, extract, or otherwise utilize any components embedded in the Software for any purposes other than those supported by the core functions of the Software; (vi) install or configure, administer, customize, or directly access any third party components embedded in the Software independently of the APIs and functions of the Software; (vii) independently upgrade or change any third party components embedded in the Software in any way except through officially released Progress patches, updates or versions; (viii) remove or modify any proprietary markings or any notice of Progress' or its licensors' proprietary rights; or (ix) publish a review of the Software, information regarding any bugs or defects in the Software, or the results of any benchmark tests run on the Software, in each case, without the prior written consent of Progress.

**(e) Third Party Service Providers.** You may permit your Hosting Provider and any other agents, contractors, or other service providers (collectively, "Service Providers") to access and use the Software on your behalf, solely as necessary to provide services to you, and provided that you will remain responsible and liable for such Service Providers' use of the Software and compliance with the terms of this EULA.

**(f) Reservation of Rights.** The Software is licensed, not sold. You acknowledge that the Software (including any and all modifications, enhancements, or customizations thereof) consists of proprietary products of Progress or its licensors, and the proprietary rights that protect such property may include, but are not limited to, U.S. and international copyrights, trademarks, patents and trade secret laws of general applicability. All right, title and interest in and to the Software are and will remain with Progress or its licensors, as applicable. This Agreement does not convey to you any interest in or title to the Software, but only a limited right of use revocable in accordance with its terms.

**(g) Fee Based Software.** Fee Based Software is licensed subject to the payment of fees in accordance with Section 3.2.

**2.2 Additional Terms for Certain Fee Based Software.** The following additional terms and conditions apply with respect to Web Transfer Module for WS\_FTP Server, Ad Hoc Transfer Module for WS\_FTP Server, WS\_FTP Pro, WhatsUp Gold and MOVEit EZ.

**(a) License Terms.** You may use the Software on the number of computing devices identified in the Order. If you use the Software on a virtual machine or in an environment where multiple users share computer resources, each instance of Software in use at any time is considered one computing device. For Software in which more than one feature set (e.g., "standard", "premium") is available, you may solely use one specific feature set. If you desire a different feature set, you must purchase an upgrade. Feature sets are defined in the Documentation and identified at the time of purchase. For Software in which more than one level (e.g. "100 users", "300 devices") is available, you may solely use the specific level identified in the Order. If you desire a different level, you must purchase an upgrade.

**(b) Network Environments.** For Software in which more than one network environment (e.g. "internally owned and operated", "externally owned and operated") is available, you may solely use the Software in an internally or externally owned and operated network. If you desire to monitor an internal or external network environment that you do not own, you must purchase a separate license.

**(c) Dynamic Content.** For Software which includes dynamic content (e.g. anti-virus and anti-spam definitions), said content is sold on a subscription basis and remains current as long as you maintain an active subscription with Progress.

**(d) Software Development Kits.** For Software designated as a Software Development Kit (SDK), you may create, reproduce and distribute solutions, plug-ins or other derivative works solely to End Users who have a valid and current license for the associated Software. For SDK Software designated as "Internal Use", you must further restrict distribution solely to End Users in your organization.

**2.3 Free Software.** Notwithstanding Section 2.1, you may make unlimited copies of Software that is Free Software and may distribute such Free Software to any party as long as: (a) such distribution is performed without charge, (b) you include a copy of this EULA with such distribution, and (c) you reproduce and include our proprietary rights and copyright notices on all such distributions.

**2.4 Beta Testing, Release Candidate or Evaluation Purposes.** With respect to beta versions or release candidates of any Software, or Software provided to you for evaluation purposes only, the following terms and conditions apply, but Sections 2.1(a), 2.5, 5.1 and 7 of this Agreement do not.

**(a) License Grant.** Notwithstanding Section 2.1(a), we hereby grant you a non-exclusive, worldwide, royalty-free, non-transferable, license, without the right to sublicense, to use the Software, in its object code form only, and any associated Documentation, solely for your internal beta testing, internal release candidate testing or internal evaluation purposes. Your license will be effective during the time specified by Progress, or until terminated by Progress in its sole discretion. If the license is for beta testing purposes, you may install the Software only on a non-production Server.

**(b) Feedback and Improvements.** As consideration for the royalty free license granted herein, you agree (i) to advise us in writing of any problems or bugs in connection with the operation of the Software, and (ii) if the license is for release candidate or evaluation purposes, either obtain a commercial license for the Software, or advise us, in reasonable detail, of the reasons you have decided not to obtain a commercial license. Any improvements, revisions, or derivatives relating to the Software ("**Improvements**"), including without limitation any suggested by you or any of your employees, agents or affiliates, or any based on your use and license of the Software, will be the sole and exclusive property of Progress. You hereby assign to Progress any and all right, title and interest (including, but not limited to, any patent, copyright, trade secret, trademark, show-how, know-how, moral rights and any and all other intellectual property right) that you may have in and to any and all such Improvements. At our request, you will execute any document, registration or filing required to give effect to the foregoing assignment.

**(c) Confidentiality.** The features and functions of Software licensed for beta testing, release candidate or evaluation purposes are Confidential Information.

**2.5 Database Schema.** If we provide you with the database schema ("Schema"), you agree that your use of the Schema will be subject to the same license and restrictions with respect to the Software under this Agreement, including without limitation Sections 2.1(d), 2.1(f), 3.3, 8, 10.3 and 10.4. We may revise, modify or cease to provide the Schema or any part thereof at any time. You understand and agree that any change to the Schema or the database may adversely affect the Software and/or the operation or performance thereof, for which we will have no responsibility. Your use of the Schema will be at your own risk.

### **3. Registration and Orders**

**3.1 Orders.** Any Order you submit creates no contractual or other obligation on our behalf. Any such obligation will only be created by our acceptance of each Order, which will be solely within our discretion. We reserve the right to reject any Order. You will be solely responsible for the accuracy and truthfulness of the information you provide in any Order, and we will be entitled to rely on any and all such information. We will, and you expressly authorize us to, use the information you provide in any Order to: (a) process Orders including, without limitation, processing payments and communicating with you about the status of your Order; and (b) communicate with you about other products or services we offer or other topics we think you might find of interest (unless you choose to unsubscribe from such communications). Each Order submitted by you and accepted by us will be deemed to be part of, and will be governed by all of the terms and conditions of, this Agreement. In the case of a conflict between an Order and this Agreement, the terms of the Order will govern.

**3.2 Payment.** Progress will invoice you for the prices set forth in the applicable Order upon your download of the Software or our shipment of the Software to you. You will pay invoices within thirty (30) days of the invoice date. Progress may withhold shipments and cease providing Support until past-due payments are made. Late payments are subject to a charge of the lesser of 1.5% per month or the maximum allowed by law. Prices do not include, and you are responsible for, all applicable taxes of any kind due in respect of the transactions contemplated by this Agreement, except taxes on Progress' net income.

**3.3 Credentials.** You will be required to create a user name and password (" Credentials") that will be required to order Software or Support (as defined in Section 4). You may only access Software or Support using your Credentials, and may not access Software or Support using Credentials of any other person. You may not make your Credentials available to others, nor allow use of Software or Support by others through your Credentials. You agree to accept sole responsibility and liability for maintaining the confidentiality of your Credentials, for restricting access to your Credentials and for all use, whether authorized or unauthorized, of Software or Support under your Credentials.

**3.4 Audits.** Progress and its licensors will have the right to gain access to, examine and audit, during normal business hours upon reasonable prior written notice to you, all of your locations, Servers, computers, records, accounts and other information for purposes of determining your compliance with this Agreement. You agree to provide reasonable assistance and access to information in the course of any such audit. Any such audit will be at our expense provided that, if an audit reveals that you have exceeded the scope and number of licenses or have otherwise breached this Agreement, in addition to acquiring additional licenses or otherwise curing such breach, you will reimburse us for the reasonable cost of the audit. We will also have the right to share the results of any such audit with our licensors.

### **4. Support**

If and for so long as you maintain an active support subscription, we will provide to you support and assistance in accordance with the level of support you purchase ("Support"). More information regarding our support policies can be found at <https://www.ipswitch.com/support/about-support>. Annual or multi-year Support subscriptions are paid in advance and are non-refundable. Unless notice of intent not to renew is given by either party at least thirty (30) days before the end of the then-current

Support term, the Support term will automatically be extended for successive one-year terms upon the same terms and conditions in effect at the end of the then-current term, unless otherwise amended upon mutual agreement.

## **5. Warranties**

**5.1 Fee Based Software.** We warrant that for the warranty period specified in the Order, the Fee-Based Software will substantially conform to its specifications as set forth in the applicable documentation. In the event of a breach of the foregoing warranty, and provided you notify us in writing within thirty (30) days of such breach, we will, at our option and at no additional cost to you, and as your sole and exclusive remedy and our sole and exclusive liability or obligation with respect to such breach, (i) modify the applicable Fee Based Software to conform to the warranty, (ii) replace the non-conforming portion thereof, or, if neither (i) or (ii) are commercially practicable as determined in our sole discretion, accept the return of such Fee-Based Software and refund the license fees you paid therefor, reduced by two and seventy-seven one-hundredths percent (2.77%) per month from delivery. The remedy set forth in this Section 5.1 will not apply to the extent any failure of Fee-Based Software to conform to the warranty arises out of or is caused by: (a) a modification to the Fee-Based Software not performed or provided by us; (b) your failure to promptly install and utilize an update to the Fee-Based Software; (c) your failure to use Fee-Based Software in accordance with its documentation; or (d) the combination of Fee-Based Software with any items not provided by us.

**5.2 Disclaimer.** EXCEPT AS EXPRESSLY SET FORTH IN SECTION 5.1, THE SOFTWARE, SCHEMA AND ANY OTHER PRODUCTS OR SERVICES RELATED THERETO, ARE PROVIDED "AS IS" AND "AS AVAILABLE". TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, PROGRESS AND ITS LICENSORS DISCLAIM ANY AND ALL WARRANTIES, WRITTEN OR ORAL, EXPRESS, IMPLIED OR STATUTORY, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY, AND FITNESS FOR A PARTICULAR PURPOSE. WITHOUT LIMITING THE FOREGOING, PROGRESS AND ITS LICENSORS DO NOT WARRANT THAT (1) THE SOFTWARE WILL MEET YOUR REQUIREMENTS; (2) THE SOFTWARE WILL BE FREE OF BUGS, ERRORS, VIRUSES OR OTHER DEFECTS; (3) ANY RESULTS, OUTPUT OR DATA PROVIDED THROUGH OR GENERATED BY THE SOFTWARE WILL BE ACCURATE, UP-TO-DATE, COMPLETE OR RELIABLE; (4) THE SOFTWARE WILL BE COMPATIBLE WITH THIRD PARTY SOFTWARE; AND (5) ANY ERRORS IN THE SOFTWARE CAN OR WILL BE CORRECTED. YOU ASSUME FULL RESPONSIBILITY FOR SELECTION OF THE SOFTWARE TO ACHIEVE YOUR INTENDED RESULTS AND FOR YOUR USE AND OPERATION OF THE SOFTWARE.

## **6. Limitation of Liability**

**6.1 Fee Based Software.** This Section 6.1 applies with respect to Fee-Based Software: EXCEPT FOR YOUR BREACH OF SECTIONS 2 OR 3, OUR INDEMNIFICATION OBLIGATIONS UNDER SECTION 7 OR EITHER PARTY'S BREACH OF SECTION 9, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, PROGRESS, ITS LICENSORS AND YOU WILL NOT BE LIABLE FOR ANY LOSS OF PROFITS, REVENUE, DATA OR DATA USE, OR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE OR EXEMPLARY DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT, HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY AND EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. EXCEPT FOR YOUR BREACH OF SECTIONS 2 OR 3, OUR INDEMNIFICATION OBLIGATIONS UNDER SECTION 7 OR EITHER PARTY'S BREACH OF SECTION 9, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EACH PARTY'S TOTAL AGGREGATE LIABILITY FOR ALL CLAIMS ARISING OUT OF OR RELATED TO THIS AGREEMENT (EXCLUDING CLAIMS FOR FEES PAYABLE BY YOU HEREUNDER) WILL NOT EXCEED THE LICENSE FEES PAID OR PAYABLE TO PROGRESS UNDER THIS AGREEMENT.

**6.2 Free Software.** The Section 6.2 applies with respect to Free Software: TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, PROGRESS AND ITS LICENSORS WILL NOT BE LIABLE TO YOU FOR ANY DAMAGES WHATSOEVER ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE SOFTWARE,

HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY AND EVEN IF THEY HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

## **7. Intellectual Property Indemnity**

**7.1 Indemnity.** We will defend you and hold you harmless against any claim or action brought by a third party against you that alleges that MOVEit Automation or MOVEit Transfer, as licensed to you under this Agreement, infringes a United States patent, copyright, trade secret, or other proprietary right of a third party (a "Claim"), and we will pay resulting costs, damages, losses finally awarded by court of competent jurisdiction or agreed to by us in a written settlement agreement, and will pay reasonable attorneys' fees incurred, provided that you: (a) notify us in writing no later than thirty (30) days after the Claim is asserted; (b) allow us sole control of the defense and all related settlement negotiations; and (c) provide us with the information, authority, and all assistance reasonably necessary for us to provide the aforementioned defense. You will have the right to be represented in any such Claim by your own counsel, at your own expense. Our obligations under this Section 7.1 will not apply if and to the extent that the Claim results from: (i) a modification of the MOVEit Automation and MOVEit Transfer Software not performed or provided by us; (ii) your failure to promptly install and utilize an update to the Software (or if do not receive an update because you are no longer paying for support); or (iii) the combination of the MOVEit Automation and MOVEit Transfer Software with any items not provided by us.

**7.2 Other Remedies.** In addition to our obligations under Section 7.1, if as a result of any such Claim, you are enjoined from using MOVEit Automation or MOVEit Transfer, we will, at our sole option and expense: (a) procure for you the right to continue to use the MOVEit Automation and MOVEit Transfer Software, as applicable; (b) replace or modify the MOVEit Automation and MOVEit Transfer Software with functionally equivalent and non-infringing software; or (c) if neither (a) or (b) are commercially practicable as determined in our sole discretion, accept the return of the applicable Software and refund you the MOVEit Automation and MOVEit Transfer license fees, reduced by two and seventy-seven one-hundredths percent (2.77%) per month from delivery, and any prepaid amounts for Support for such Software.

**7.3 Disclaimer.** THIS SECTION 7 SETS FORTH YOUR SOLE AND EXCLUSIVE REMEDY AND OUR SOLE LIABILITY AND OBLIGATION WITH RESPECT TO ANY CLAIM THAT THE Software infringes a patent, copyright, trade secret, or other proprietary right of a Third Party.

## **8. Access to Data; Non-Disclosure; Transfers of data**

**8.1 System Data.** You acknowledge and agree that Progress and its subsidiaries will collect and use the following information about the use of the Software: install started; install finished (with error code if error); install type (evaluation, upgrade, new perpetual); hashed serial number for a generic ID; and additional technical information about your computer, system and application software, and peripherals that is gathered periodically to facilitate the provision of software updates, product support and other services to you (if any), and to verify compliance with the terms of this Agreement (any such data collected by Progress under this Section 8.1, "System Data"). System Data will not include any personally identifiable information and will be used only on an anonymous, aggregated basis for Progress' internal business purposes. Progress will own any and all such System Data, and you hereby assign to Progress all right, title and interest in and to the System Data.

## **9. Confidential Information**

**9.1 Definition.** As used in this Agreement, "Confidential Information" means any and all technical and non-technical data or information, in oral, written, graphic or electronic form, that is either indicated to be the proprietary or confidential information of the disclosing party, or which, by its nature, the receiving party would reasonably deem to be confidential or proprietary, including any information that

relates to the disclosing party's research, development or business activities, ideas, know-how, inventions, processes, testing methods, specifications, designs, schematics, techniques, technical documentation, marketing or business plans, and financial information. Without limiting the foregoing, the Software, its features and functions, the Schema and the Documentation all constitute the Confidential Information of Progress.

**9.2 Nondisclosure.** Each party will maintain in confidence all Confidential Information disclosed to it by the other party (the "Disclosing Party"). Each receiving party under this Agreement (a "Receiving Party") agrees not to use any Confidential Information it receives from a Disclosing Party except as expressly authorized by this Agreement, and further agrees not to disclose or grant use of such Confidential Information to any third party without the prior written consent of the Disclosing Party on a case-by-case basis. In addition, each Receiving Party will use at least the same standard of care as it uses to protect its own confidential information of similar nature to protect the confidentiality of the Confidential Information of the Disclosing Party, and in no event less than reasonable care. Each Receiving Party agrees to promptly notify the Disclosing Party upon discovery of any unauthorized use or disclosure of the Confidential Information. The restrictions on disclosure will not apply to Confidential Information which is required to be disclosed by a court, government agency or regulatory requirement, provided that recipient will first notify the Disclosing Party of such disclosure requirement or order and use reasonable efforts to obtain confidential treatment or a protective order.

**9.3 Exceptions.** The obligations of confidentiality contained in Section 9.1 will not apply to the extent that it can be established by the Receiving Party beyond a reasonable doubt that such Confidential Information: (a) was already known to the Receiving Party, other than under an obligation of confidentiality, at the time of disclosure by the Disclosing Party; (b) was generally available to the public or otherwise part of the public domain at the time of its disclosure to the Receiving Party; (c) became generally available to the public or otherwise part of the public domain after its disclosure and other than through any act or omission of the Receiving Party in breach of this Agreement; (d) was disclosed to the Receiving Party, other than under an obligation of confidentiality, by a third party who had no obligation to the other party not to disclose such information to others; or (e) was developed independently by the Receiving Party without any use of Confidential Information.

## **10. Term and Termination**

**10.1 Term.** This Agreement will commence upon your download or installation of the Software and will continue in effect for the license term specified in your Order, and any renewals of such term (or perpetually, if so stated in the Order), or until earlier termination in accordance with this Section. Unless notice of intent not to renew is given by either party at least thirty (30) days before the end of the then-current term, this Agreement will automatically be extended for successive one-year terms upon the same terms and conditions in effect at the end of the then-current term, unless otherwise amended upon mutual agreement.

**10.2 Termination by You.** You may terminate this Agreement at any time by uninstalling, ceasing all use of and returning the Software, Documentation, and all copies thereof to us or by certifying their destruction to Progress in writing.

**10.3 Termination by Progress.** We may terminate this Agreement immediately on written notice if: (a) you fail to pay any license or other fees or any part thereof; (b) you breach any material term or condition of this Agreement and do not remedy such breach within thirty (30) days after receiving written notice thereof; (c) you use, copy, distribute or disclose the Software or Documentation in violation of this Agreement or otherwise breach your confidentiality obligations under Section 9, or (d) bankruptcy or insolvency proceedings are instituted by or against you, or a receiver is appointed, or if the Software in your possession is the object of attachment, sequestration or other comparable action,

and any such proceeding or action is not vacated or terminated within sixty (60) days after commencement or filing.

**10.4 Effect of Termination.** Upon any termination of this Agreement, you will (a) immediately cease all use of the Software, (b) return the Software, Documentation, and all copies thereof to us or certify their destruction to Progress in writing, and (c) notify all of your End Users to do the same. You will receive no refund of any fees or other amount on termination unless this Agreement is terminated under Section 5.1 or 7.2(c) above. Exercise of the right of termination afforded to either party in this Agreement will not prejudice the legal rights or remedies either party may have against the other in respect of any breach of the terms of this Agreement.

**10.5 Survival.** The following provisions will survive any expiration or termination of this Agreement: 1, 2.1(f), 3.4, 5.2, 6, 7.3, 9, 10.4, 10.5, and 11.

## **11. Miscellaneous**

**11.1 Assignment.** You may not assign, novate or subcontract any of your rights or obligations under this Agreement in whole or in part without our prior written consent. Progress may freely assign this Agreement. Subject to the foregoing, this Agreement is binding upon and inures to the benefit of the parties hereto and their respective successors and assigns.

**11.2 Entire Agreement.** This Agreement (together with any applicable Orders accepted by Progress hereunder) sets forth the complete understanding of the you and Progress with respect to the subject matter hereof and supersedes all prior understandings and communications relating thereto. No term or condition of your purchase order or other document provided to Progress which is different from, inconsistent with, or in addition to the terms and conditions set forth herein will be binding upon Progress.

**11.3 Compliance with Laws.** You will comply with all applicable laws and regulations relating to your use of the Software, including without limitation, those relating to export and import, privacy and personal data protection, and will indemnify and hold Progress, its affiliates, and its and their officers, directors, employees, contractors, and agents harmless from any losses which it may incur in the event of any failure by you to so comply. Without limiting the foregoing, you agree that you will not directly or indirectly, export, re-export or transship the Software in violation of any applicable export control laws or regulations promulgated and administered by the governments of the countries claiming jurisdiction over the parties or transactions, including the U.S. Export Administrations Regulations (collectively, "Export Laws"). In addition, you represent and warrant that you are not a citizen of, or located within, an embargoed or otherwise restricted nation, nor are you listed on the U.S. Treasury Department's list of Specially Designated Nationals or similar lists of denied parties.

**11.4 Governing Law; Venue.** This Agreement will be governed by and construed under the laws of the Commonwealth of Massachusetts, without giving effect to principles of conflicts of law. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Computer Information Transaction Act are specifically excluded from application to this Agreement. You hereby consent to the exclusive jurisdiction of the state and federal courts in (a) in the case of any action initiated by you, Boston, Massachusetts, USA and (b) in the case of any action initiated by us, the city in which the address on your order form is located, if such city is within the USA, and otherwise in Boston, Massachusetts, USA, in order to settle any claim, action or controversy arising out of or related to this Agreement.

**11.5 Headings.** The section headings of this Agreement are for convenience of reference only and will not be considered in construing this Agreement.

**11.6 Force Majeure.** Neither party will be responsible for any failure to perform its obligations under this Agreement (other than obligations to pay money) caused by an event beyond its reasonable control,

including but not limited to, wars, riots, labor strikes, natural disasters, the infrastructure of the Internet, or any law, regulation, ordinance or other act or order of any court, government or governmental agency.

**11.7 Modification; Waiver.** This Agreement may not be modified or amended except pursuant to a written instrument signed by both parties. The waiver by either party of a breach of any provision hereof will not be construed as a waiver of any succeeding breach of the same or any other provision, nor will any delay or omission on the part of such party to avail itself of any right, power or privilege that it has or may have hereunder operate as a waiver of any right, power or privilege.

**11.8 Notices.** Any notice required or permitted to be given hereunder will be given by: (a) Registered or Certified Mail, Return Receipt Requested, postage prepaid; (b) by e-mail or facsimile; or (c) by nationally recognized courier service to the other party at the addresses set forth in the Order or to such other address as a party may designate in writing. Mail and courier notices will be effective upon receipt; email and facsimile notices will be effective upon confirmation of receipt by the recipient.

**11.9 Notice to U.S. Government End Users.** The Software and Documentation are "Commercial Items", as that term is defined at 48 C.F.R. 2.101, consisting of "Commercial Computer Software" and "Commercial Computer Software Documentation", as such terms are used in 48 C.F.R. 12.212 or 48 C.F.R. 227.7202, as applicable. Consistent with 48 C.F.R. 12.212 or 48 C.F.R. 227.7202-1 through 227.7202-4, as applicable, the Commercial Computer Software and Commercial Computer Software Documentation are being licensed to U.S. Government end users and U.S. Government contractors (a) only as Commercial Items, and (b) with only those rights as are granted to all other end users pursuant to the terms and conditions herein.

**11.10 Publicity.** Progress may include your name and logo on its customer lists and reference the fact that you are a customer of Progress, subject to Progress' confidentiality obligations under Section 9. However, neither party may issue a press release regarding this Agreement without the other party's prior written approval (which will not be unreasonably withheld or delayed).

**11.11 Relationship of Parties.** The parties expressly agree they are acting as independent contractors and under no circumstances will any of the employees of one party be deemed the employees of the other for any purpose. This Agreement will not be construed as authority for either party to act for the other party in any agency or other capacity, or to make commitments of any kind for the account of or on behalf of the other except as expressly authorized herein.

**11.12 Severability.** In the event that any provision contained herein will for any reason be held invalid, illegal or unenforceable in any respect by a court of competent jurisdiction, to such extent such provision will be deemed null and void and severed from this Agreement, and the remainder hereof will remain in full force and effect.

**11.13 Third Party Beneficiaries.** Except for Oracle America, Inc., which solely with respect to MOVEit Automation, MOVEit Transfer or MOVEit EZ, is an intended third party beneficiary of this Agreement, this Agreement is intended for the sole and exclusive benefit of the parties and is not intended to benefit any third party. Only the parties to this Agreement and, as applicable, Oracle America, Inc. may enforce it.