

**PENGUIN COMPUTING, INC.**  
**MASTER PURCHASE AND SERVICES AGREEMENT**

This Master Purchase and Services Agreement (this “**Agreement**”) governs the purchase and use of (a) hardware and software (“**Products**”), (b) Products sold on a subscription basis and Penguin on Demand (“**POD**”) (collectively, “**Subscriptions**”), and (c) professional and warranty services (“**Services**”) provided by Penguin Computing, Inc. (together with its Affiliates, “**Penguin**”) and the entity named on the purchase order accepted by Penguin (each, an “**Order**”) (together with its Affiliates, “**Customer**”). “**Affiliate**” means any entity controlled by, controlling, or under common control with a party.

**1. Orders.** Any purchase of Products, Subscriptions and/or Services by Customer shall be made pursuant to an Order, each of which shall be deemed accepted upon the earlier of Penguin’s written confirmation, commencement of Services, or purchase of products or services acquired for Penguin’s fulfillment of the Order. Products, Subscriptions and Services are further described in the official documentation provided, or otherwise made available, to Customer by Penguin, which may be modified by Penguin from time to time (collectively, the “**Documentation**”) or any fully executed statements of work as applicable to particular Services (each, an “**SOW**”).

**2. Delivery.** Unless otherwise agreed between the parties, hardware Products will be delivered “FCA Origin” (Incoterms 2020), and title shall pass to Customer upon Penguin’s delivery to the common carrier. Software Products will be delivered electronically where possible. The hardware, software, peripherals and other tangibles and intangibles used to provide POD (“**POD Infrastructure**”) will be delivered at Penguin’s expense once Penguin determines the datacenter is ready for installation of the POD Infrastructure. Unless otherwise agreed, Products provided via the internet are provided using a physically shared environment with limited capacity allocated based on availability. Delivery dates specified in an Order are non-binding, and any rescheduling of shipments and commencement dates, as applicable, will be at the sole discretion of Penguin and may result in additional costs.

**3. Subscriptions.** Subject to this Agreement, Penguin grants Customer a worldwide, royalty-free, non-exclusive, time-limited, non-transferable (except to a successor in interest as permitted herein), limited license to access and use any Subscriptions in the quantities and during the period of time commencing on the earlier of the date specified on the Order or the date the applicable Subscription is made available for Customer’s use and ending at the conclusion of such period of time or as earlier terminated pursuant to this Agreement (the “**Subscription Term**”). Subscriptions shall automatically renew for an additional Subscription Term of twelve (12) months. Each renewal term shall also be known as a “**Subscription Term**”. Unless otherwise agreed in the Order, Penguin will provide support during the Subscription Term as detailed in the Documentation. Penguin may substitute and modify POD Infrastructure components as required, in Penguin’s sole discretion, due to technological advancements, supply chain availability, and as otherwise necessary to ensure the agreed quality, functionality and performance of POD. Penguin and its suppliers exclusively retain all right, title, and interest in and to POD Infrastructure and all intellectual property rights therein, including without limitation all patent, trademark, trade secret, know-how, trade name and copyright, whether or not registered. No license or other implied rights of any kind are granted or conveyed to Customer except for the limited right to access and use Subscriptions pursuant to an Order subject to this Agreement.

**4. Fees and Payment.** Customer will pay the fees set forth in the Order (the “**Fees**”). All Fees are non-refundable, non-cancelable, and exclusive of (a) applicable taxes and duties, including, without limitation, VAT, Service Tax, GST, excise taxes, sales and transaction taxes, and gross receipts tax, and (b) associated third-party fees (including installation, shipping, and handling) unless otherwise quoted, all of which shall be invoiced to and paid by Customer. The aggregate Fees of a Subscription for the full Subscription Term set forth on the Order (the “**Minimum Commitment**”) shall not be reduced or cancelled at any time during the Subscription Term even if the Subscription is terminated prior to the end of the Subscription Term. Any use of a Subscription in excess of the quantities purchased during any monthly period during the Subscription Term will result in additional charges at the rates set forth in the Order for the duration of the Subscription Term, thereby increasing the Minimum Commitment. Penguin will charge separately for reasonable out-of-pocket expenses, such as travel expenses, incurred in providing Services. Unless otherwise agreed, all Fees are due and payable within thirty (30) days of receipt of the invoice (the “**Due Date**”). Subscriptions shall be paid annually in advance. Subject to a good faith dispute, any payment not received from Customer by the Due Date may accrue interest at the rate of one and one-half percent (1.5%) of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower, commencing on the Due Date plus any incurred costs of collection.

**5. Obligations.** Customer shall (a) use Products, Subscriptions and Services solely for its own internal benefit and in accordance with this Agreement and any applicable Documentation and SOW, (b) be solely responsible for compliance with this Agreement by its users, whether employees or contractors, (c) use reasonable efforts to prevent unauthorized use of or access to the Products, Subscriptions or Services or any related account or password and shall notify Penguin immediately of any such unauthorized use or access, (d) provide continuous access to POD Infrastructure with right of inspection by Penguin and its contractors and financing partners at any time during normal business hours and as otherwise necessary to ensure the agreed quality, functionality and performance of POD, (e) provide timely cooperation and accurate and complete information, assistance or access reasonably required by Penguin in order

to perform the Services, (f) be solely responsible for (i) the accuracy and legality of all data submitted by Customer for processing or use by Penguin in connection with this Agreement (the “**Customer Data**”), (ii) the means by which it acquires and uses such Customer Data, including compliance with any regulations and laws applicable to the Customer Data, (iii) having obtained all rights in the Customer Data necessary to permit Penguin’s compliance with its obligations under this Agreement, and (iv) backing up Customer Data such that it may be deleted at any time unless otherwise agreed in writing, and (g) promptly notify Penguin of any applicable regulatory or corporate security policies prohibiting Customer from returning faulty components or other items, all of which shall be purchased by Customer whether part of a Product or POD Infrastructure.

**6. Restrictions.** Customer shall not, and shall not allow others to (a) directly or indirectly sell, resell, transfer, sublicense, lease, time-share, market or otherwise make available to any third party (except subcontractors) any Product, Subscription or Documentation, or any portion thereof, (b) attempt to gain unauthorized access to or disrupt the integrity or performance of a Product or Subscription or the data contained therein (including but not limited to hacking or penetration testing Penguin’s systems), (c) modify, copy or create derivative works based on a Product, Services, or any Penguin Confidential Information, (d) decompile, disassemble, reverse engineer or otherwise attempt to derive source code from a Product, in whole or in part, (e) use or transport Products or Subscriptions in violation of applicable laws, rules or regulations, (f) access a Product or Subscription for the purpose of building or enabling a competitive product or service or copying its features or user interface, (g) circumvent or attempt to circumvent contractual or other usage restrictions, (h) use Products or Subscriptions for purposes of evaluation, benchmarking or other comparative analysis intended for publication outside the Customer organization without Penguin’s prior written consent, or (i) move, sell, encumber or otherwise dispose of any POD Infrastructure without Penguin’s prior written authorization.

**7. Acceptance.** Products, Subscriptions and Services shall not be subject to any acceptance criteria unless otherwise agreed in writing signed by authorized representatives of both parties, in which case all affected Products, Subscriptions and Services shall be deemed accepted by Customer after the end of the fifth (5<sup>th</sup>) day after delivery of the Product or performance of the Services (“**Acceptance Period**”) unless Penguin receives a written notice of rejection for reason of material non-conformity with the Documentation or SOW, if applicable, prior to the end of the Acceptance Period (“**Notice of Rejection**”). Such acceptance shall satisfy any specific requirement of acceptance by Customer. In the event Customer provides Penguin with Notice of Rejection, Penguin shall commence efforts to correct the non-conformity as Customer’s sole and exclusive remedy and Penguin’s entire liability for the non-acceptance.

**8. Open Source Software.** Products, Subscriptions, and Services may include individual open source software components, each of which has its own copyright and its own license conditions. Open source software is licensed to Customer under the terms of the applicable open source license conditions and copyright notices that can be found in the Documentation. In the event of a conflict between the licenses and restrictions set forth in this Agreement, the terms of the open source license governing open source software, the terms of the open source software license will prevail.

**9. Intellectual Property.** Unless explicitly stated in the applicable SOW, no transfer of ownership of any intellectual property will occur under this Agreement. Customer grants Penguin a non-exclusive, worldwide, royalty-free right and license to any intellectual property that is necessary for Penguin to perform its obligations for Customer. Customer acknowledges and agrees that Penguin may collect anonymized, aggregated, and/or de-identified statistical and other performance information related to Customer’s use of the Products or Subscriptions, which information will not include personal information, and Penguin may use such information for its own legitimate business purposes, including, among other things, support, reporting, research, improvements to the Products or Subscriptions, industry collaboration, and other reasonable business purposes. In the event that Customer provides Penguin with suggestions, enhancement requests, recommendations, proposals, documents, or other feedback (collectively, “**Communications**”), Customer grants Penguin a royalty-free, worldwide, transferable, sub-licensable, irrevocable, perpetual license to use, modify, and distribute such Communications in any manner without compensation to Customer or attribution of any kind. Notwithstanding anything to the contrary contained in this Agreement, third party products are governed by third party license terms.

## **10. Representations and Warranties.**

**10.1 Penguin Warranty.** Penguin warrants that, during the Warranty Period (defined below) (a) Products and Subscriptions will operate in substantial conformity with the Documentation and (b) Services will be provided in a professional and workmanlike manner and substantially in accordance with the specifications in the Documentation and any applicable SOW. If Customer believes there is a warranty violation, Customer must notify Penguin in writing promptly during the Warranty Period, stating in reasonable detail the nature of the alleged non-conformity. As Penguin’s sole obligation and Customer’s exclusive remedy for the warranty violation, Penguin will correct or re-perform, at no additional charge, any non-conforming Product, Subscription or Service. If Penguin is unable to correct any non-conformity reported in accordance with this Section 10.1 either party may terminate the affected portion of the applicable Order, and Customer, as its sole remedy, will be entitled to receive a refund of any prepaid unused Fees for the affected Products, Subscriptions or Services. This warranty will not apply if the non-conformity was caused by misuse of the Products, Subscriptions or Services by Customer or any third party, modifications to the Products,

POD or Services by Customer or any third party, or third-party hardware, software, or services used in connection with the Products, POD or Services (though Penguin will assist Customer as reasonably requested with any third-party warranty claims for Products). The applicable “**Warranty Period**” runs (a) from delivery date to the lesser of the manufacturer’s warranty period or thirty-six (36) months for hardware, ninety (90) days for software, (b) for the duration of any applicable Subscription Term, and (c) from the completion of any Services for thirty (30) days thereafter.

**10.2 Mutual.** Each party represents and warrants that it has the legal power to enter into and perform under this Agreement.

**10.3 Disclaimer.** EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH IN THIS SECTION 10, PENGUIN DISCLAIMS ANY AND ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AS WELL AS ANY WARRANTIES OF REGULATORY COMPLIANCE, PERFORMANCE, ACCURACY, AND RELIABILITY. PENGUIN DOES NOT WARRANT THE PRODUCTS, SUBSCRIPTIONS OR SERVICES WILL BE UNINTERRUPTED OR ERROR FREE, NOR DOES PENGUIN MAKE ANY CLAIMS REGARDING THE PERFORMANCE OR FUNCTIONALITY OF THIRD-PARTY COMPONENTS ALL OF WHICH SHALL BE WARRANTED BY THE MANUFACTURER.

**11. Confidentiality.** Information exchanged under this Agreement will be treated as confidential if identified as such at disclosure, or if a person obtaining the information under similar circumstances would consider the information confidential or proprietary reasonable (“**Confidential Information**”). Confidential Information shall be protected by the receiving party with the same degree of care it uses to protect its own similar information and, in no event less than a reasonable degree of care during the Term and for a minimum of five (5) additional years (or for as long as any Confidential Information remains Trade Secret as such term is defined by the Uniform Trade Secrets Act). For the avoidance of doubt, business plans, pricing, designs, solutions, inventions, know-how, customers, and any other technical and financial information is Confidential information. Confidential Information may not be used by the receiving party for any purpose other than as necessary to perform its obligations under this Agreement (the “**Purpose**”). Confidential Information may be shared by the receiving party only with those employees, agents or contractors with a need to know such information to support the Purpose, provided such persons or entities are bound by terms no less protective of the Confidential Information than those contained herein. Confidential Information is not information that (a) was known or becomes known to the receiving party without obligation of confidentiality, (b) is independently developed by the receiving party without use or knowledge of the other party’s Confidential Information, or (c) where disclosure is required by law or a governmental agency. The parties acknowledge and agree that the confidentiality obligations set forth in this Agreement are reasonable and necessary for the protection of the parties’ business interests, that irreparable injury may result if such obligations are breached, and that, in the event of any actual or potential breach related to Confidential Information, the non-breaching party may have no adequate remedy at law and shall be entitled to seek injunctive and/or other equitable relief as may be deemed proper by a court of competent jurisdiction.

**12. Data Privacy and Security.** Customer grants Penguin the non-exclusive right to access and process the Customer Data for the sole purpose and only to the extent necessary to provide the applicable Products, Subscriptions or Services. Penguin agrees not to use, access, disclose or process any Customer Data, except to (a) perform the obligations permitted by Customer under this Agreement, and (b) comply with applicable laws. Penguin will maintain commercially reasonable administrative, physical and technical safeguards and controls for the availability, security, confidentiality and integrity of Customer Data. Company’s security policy is set forth in the Documentation. To the extent the parties execute a data processing addendum (“**DPA**”) due to the processing of Personal Data (as defined in the DPA), which would be contained in the Customer Data, the terms of such DPA shall be incorporated into this Agreement by reference.

**13. Term and Termination.** This Agreement shall apply to the purchase and use of all Products, Subscriptions and Services sold by Penguin or its authorized representatives to Customer commencing on the Effective Date and ending with termination of this Agreement as permitted herein (the “**Term**”). Either party may terminate this Agreement or any Order or SOW if the other party fails to cure any material breach thereof within thirty (30) days (seven (7) days for non-payment) of being notified in writing of such breach. Customer may terminate a Subscription for any reason upon not less than sixty (60) days’ prior written notice provided that Customer promptly pays any remaining Minimum Commitment, including any balance past due and amounts that will become due from the date of termination through the end of the full Subscription Term as if it was not terminated. Neither Orders nor SOWs may be suspended or terminated by Customer without the express written consent of Penguin. Termination of this Agreement shall not release Customer from its obligation to pay all outstanding amounts including, but not limited to, any Minimum Commitment. On termination of this Agreement, Subscriptions shall automatically terminate with immediate effect, Customer will make available any POD Infrastructure for return, and each party shall promptly return or destroy the other party’s Confidential Information subject to its document retention policies or as required by applicable law. In the event of the termination or expiration of this Agreement, the provisions of this Agreement which by their nature should extend beyond the expiration or termination of this Agreement shall survive and any accrued rights to payment shall remain in effect beyond such termination or expiration until fulfilled.

**14. Suspension.** In addition to any of its other rights or remedies (including, without limitation, any termination rights) set forth in this Agreement, Penguin may suspend Subscriptions and/or Services (a) if Penguin reasonably deems such suspension necessary as a result of Customer's breach of Sections 5 or 6, (b) if Penguin reasonably determines suspension is necessary to avoid material harm to Penguin or its other customers, or (c) as required by law or pursuant to request of governmental entities. For the avoidance of doubt, payment obligations are not suspended or terminated if Penguin suspends access to Subscriptions or Services as permitted in this Section 14.

**15. Compliance.** Customer will be responsible for complying with all applicable laws and regulations and for obtaining any required export or import authorizations related to its movement or other transfer of Products. In the event Products are provided for use in the performance of a federal government prime contract or subcontract, Customer agrees that consistent with FAR 12.211 and 12.212, commercial computer software, documentation and technical data for commercial items are provided under Penguin's standard terms and conditions. Upon reasonable notice, Penguin may conduct an audit during normal business hours (with auditor's costs being at Penguin's expense) at Customer's premises for the purpose of verifying compliance with this Agreement.

**16. Indemnification.**

**16.1 By Customer.** Customer agrees to, and shall, indemnify, defend and hold Penguin harmless from the associated costs and fees (including reasonable attorneys' fees and expenses) finally awarded or agreed to in settlement or compromise, to the extent that such fees and costs arise from or relate to a claim, proceeding or suit based on a violation of Customer's obligations pursuant to Sections 3, 5, 6, 9, 10.2 and/or 15 (each a "Claim").

**16.2 By Penguin.** Penguin agrees to, and shall, indemnify, defend and hold Customer harmless from the associated costs and fees (including reasonable attorneys' fees and expenses) finally awarded or agreed to in settlement or compromise, to the extent that such fees and costs arise from or relate to a third party claim, proceeding or suit (a) alleging that the Products, Subscriptions or Services infringe a third party patent, copyright or trade secret that is protected under the applicable jurisdiction in which the Products are being used or where the POD Infrastructure is located or Services were performed, as applicable, or (b) based on a violation by Penguin of its obligations pursuant to Section 10.2 (each (a) and (b) also a "Claim"). Notwithstanding the foregoing, Penguin will have no obligation to Customer under this Section 16.2 to the extent that any such Claim (i) arises or results from the unauthorized or improper use by Customer or a third party of the Products, Subscriptions or Services, (ii) arises or results from the combination of the Products, Subscriptions or Services with other products or services not provided by Penguin, to the extent that such Claim would not have resulted except for such combination, (iii) arises or results from the alteration or modification of the Products, Subscriptions or Services by or for Customer without Penguin's written consent, or (iv) could be avoided by Customer's use of alternative products or services provided or offered to Customer by Penguin at no additional cost that perform in a substantially similar fashion as the Products, Subscriptions or Services at issue.

**16.3 Procedure.** A party's obligations under this Section 16 shall be conditioned on the party seeking indemnification promptly notifying the indemnifying party of any such Claim and permitting it to assume full control over the defense and settlement of such Claim provided however that (a) the indemnifying party shall keep the other party informed of the progress of any resulting litigation or settlement activities, and (b) the indemnifying party shall not have any right, without the other party's written consent (which shall not be unreasonably withheld), to settle any such Claim if such settlement contains a stipulation to or admission or acknowledgment of any liability or wrongdoing on the other party's part, or requires any specific performance or non-pecuniary remedy by the other party.

**16.4 IP Remedies.** Should Products, Subscriptions or Services provided under this Agreement become, or in Penguin's opinion be likely to become, the subject of an infringement Claim subject to Section 16.2(a), Penguin may, at its sole discretion and expense, either (a) procure for Customer the right to exercise its rights under this Agreement, or (b) replace or modify the item to make it non-infringing, provided that the same functions are performed by the replaced or modified item, or, in the case of Services, re-perform the Services in a manner that is non-infringing, provided that Customer receives the material benefits of the Services. If Penguin determines in its sole discretion that (a) and (b) are not commercially reasonable, then (c) Penguin shall notify Customer in writing and as applicable, terminate Customer's licenses to such affected items and/or suspend or cancel the Subscription Term or Services under this Agreement, and Customer shall return to Penguin all terminated items for a pro-rata refund of those Fees received by Penguin based on the item's useful life or Subscription Term as the case may be. The foregoing states the entire liability of Penguin and Customer's exclusive remedy with respect to any infringement Claim.

**17. Limitation of Liability.** EXCEPT FOR A PARTY'S INDEMNIFICATION OBLIGATIONS, DAMAGES RESULTING FROM EITHER PARTY'S GROSS NEGLIGENCE, FRAUD OR WILLFUL MISCONDUCT, CUSTOMER'S PAYMENT OBLIGATIONS, AND ANY DAMAGES THAT MAY NOT BE LIMITED AS A MATTER OF LAW, IN NO EVENT SHALL EITHER PARTY OR ITS LICENSORS OR SUPPLIERS HAVE ANY LIABILITY TO THE OTHER (A) FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT LIMITED TO

DAMAGES FOR LOSS OF PROFITS, LOSS OF DATA, BUSINESS INTERRUPTION, OR OTHER DAMAGES OR LOSSES, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY PRODUCTS, SUBSCRIPTIONS OR SERVICES PROVIDED BY PENGUIN OR ITS AUTHORIZED REPRESENTATIVES, HOWEVER CAUSED AND WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY AND WHETHER OR NOT THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR (B) FOR AN AMOUNT IN EXCESS OF THE FEES PAID OR PAYABLE BY CUSTOMER TO PENGUIN OR ITS AUTHORIZED REPRESENTATIVES UNDER THE APPLICABLE ORDER DURING THE TWELVE (12) MONTHS IMMEDIATELY PRECEDING THE EVENT THAT GAVE RISE TO THE CLAIM. NEITHER PARTY WILL BE LIABLE FOR PERFORMANCE DELAYS NOR FOR NON-PERFORMANCE DUE TO CAUSES BEYOND ITS REASONABLE CONTROL, EXCEPT FOR PAYMENT OBLIGATIONS.

**18. General.** This Agreement, including any linked terms set forth herein, together with all Orders and SOWs, constitutes the entire agreement of the parties and supersedes all prior or contemporaneous agreements, proposals or representations, written or oral, concerning its subject matter. No amendment or waiver of any provision of this Agreement shall be effective unless in writing and signed by the party against whom the amendment or waiver is to be asserted. Unless specifically agreed otherwise in a writing signed by both parties, any additional or pre-printed terms on a form submitted by or on behalf of Customer shall be void and of no effect. No failure or delay in exercising any right hereunder shall constitute a waiver of such right. If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, such provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions shall remain in effect. All notices shall be in writing to each party's address on the signature page of this Agreement (or as updated by a party in writing to the other) and effective upon receipt. Penguin shall have the right to sell, dispose of, assign, or otherwise grant any or all of its rights to POD Infrastructure, Subscriptions and/or Fees resulting therefrom (a "**Financing Assignment**") all of which Customer consents to. Any such Financing Assignment shall not, in any way, release Penguin from liability for performance of its obligations hereunder, nor will it materially change Customer's duties or obligations under any affected Order. Any change in payment recipient resulting from a Financing Assignment shall not be subject to any abatement, reduction, recoupment, defense, setoff, or counterclaim available to Customer against Penguin for any reason whatsoever. With the exception of Penguin's right to use subcontractors and any Financing Assignments, neither party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the prior written consent of the other (not to be unreasonably withheld). Notwithstanding the foregoing, either party may assign this Agreement in its entirety, without consent of the other party, to its successor in interest in connection with a merger, reorganization, or sale of all or substantially all assets or equity not involving a direct competitor of the other party. This Agreement shall be governed by the laws of the State of California without regard to its conflict of laws principles. EACH OF THE PARTIES HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THESE TERMS. Any judgment, order or other action by the cognizant court shall be enforceable by such court and/or any court or tribunal in any jurisdiction in which the losing party or any of its assets are located.