



Software License and Services Agreement

This Software License and Services Agreement (the "Agreement"), effective as of the ___ day of _____, 2019 (the "Effective Date"), is made by and between Turbonomic, Inc., 500 Boylston Street, 7th Floor, Boston, MA 02116 ("Turbonomic"), and [_____] , Inc., a _____ corporation with a principal place of business at [_____] ("Licensee").

1. DEFINITIONS

1.1 Documentation means the technical specifications contained in the user and system documentation that Turbonomic generally makes available to its licensees for use with the Software.

1.2 Maintenance and Support Services (or Services) mean those services provided by Turbonomic pursuant to Section 3 below, which includes the provision of Updates/Upgrades.

1.3 Maintenance Period means a period for which Licensee has purchased Maintenance and Support Services for the Software as set forth in an applicable Order Schedule.

1.4 Order Schedule means each Turbonomic ordering document signed by the duly authorized representative of Licensee, which identifies the Software or Services ordered by Licensee from Turbonomic and which incorporates the terms and conditions of this Agreement by reference.

1.5 Software means each software program (solely in object code form) of Turbonomic and its suppliers (where applicable) licensed by Licensee and governed by this Agreement, including any Updates/Upgrades or copies provided hereunder, and the related Documentation.

1.6 Subsidiary means an entity in which Licensee owns more than fifty percent (50%) of such entity's voting securities.

1.7 Updates/Upgrades means any subsequent release of the Software, which Turbonomic generally provides to its customers who are enrolled in, and fully paid-up under, Maintenance and Support Services. Updates/Upgrades do not include any Software that is marketed and priced separately by Turbonomic.

2. SOFTWARE LICENSE

2.1 License. Subject to the terms and conditions of this Agreement, Turbonomic hereby grants to Licensee a non-exclusive, non-transferable license

to install, execute and use the Software for the term set forth in the applicable Order Schedule in accordance with its related Documentation, solely for Licensee's own internal business operations, and in accordance with the scope and type of use set forth in such Order Schedule.

2.2. Order, Delivery and Copies. An order for Software licenses shall be delivered either by means of (a) an electronic mail from Turbonomic that will provide Licensee with a link to access Turbonomic's web site and instructions for downloading the Software or (b) to the extent that Licensee is unable to download the Software, a CD or other electronic media with the Software. In either case, the Software may be activated only by means of an electronic mail from Turbonomic that will provide Licensee with the license keys required to activate the Software ("License Keys"). Delivery and acceptance of the Software shall be deemed to have been made upon Turbonomic sending Licensee the License Keys, regardless of whether Licensee actually uses the License Keys. Notwithstanding anything to the contrary herein, Licensee may make a reasonable number of copies of the Software for the sole purpose of backing-up and archiving the Software. Each copy of the Software is subject to all of the terms and conditions of this Agreement and Licensee must retain all titles, trademarks, and copyrights as delivered in the original.

2.3. Restrictions. Licensee's use of the Software is limited to the equipment and operating system configurations specified in the Documentation, and other restrictions as are set forth on an Order Schedule. Turbonomic reserves any and all rights, implied or otherwise, that are not expressly granted to Licensee hereunder, and retains all rights, title and interest in and to the Software. Licensee shall not modify, adapt, resell, rent, lease, loan, create or prepare derivative works based upon the Software or any part thereof. Except with respect to Subsidiaries, Licensee may not use the Software as a service bureau, as an application service provider, to perform consulting or training services for a third party or in any commercial time share arrangement. Licensee may not use the Software in contravention to any applicable laws or government regulations. Licensee shall not decompile, disassemble or otherwise reverse engineer the Software. If the immediately foregoing provision is prohibited by applicable law, Licensee shall provide Turbonomic with a detailed

prior written notice of any such intention to reverse engineer the Software and shall provide Turbonomic with a right of first refusal to perform such work. Licensee shall take all reasonable precautions to prevent unauthorized or improper use or disclosure of the Software.

2.4. Subsidiaries. Licensee may make the Software available to any Subsidiary subject to this Agreement, provided that all licensing restrictions are complied with in the aggregate by Licensee and Subsidiary, and that Licensee remains liable for Subsidiary's obligations hereunder.

2.5. Product Diagnostic Reporting. Licensee acknowledges that the Software will store certain diagnostic information about the routine operations of the Software (including, without limitation, its performance, Licensee infrastructure topology, configuration data, and Software faults) and may periodically transmit this diagnostic information to Turbonomic. For clarity, no actual user data of Licensee will be accessed, transmitted or provided to Turbonomic as part of this process (other than related to infrastructure topology), and no interruption of service is required to gather such detailed diagnostics. Licensee hereby grants to Turbonomic a perpetual, irrevocable, sublicenseable, and royalty-free right to use this diagnostic information in any manner (provided that information does not identify Licensee as the source of such information), and Licensee will not interfere with the collection or transmission of such information to Turbonomic.

3. SERVICES

During a Maintenance Period, Turbonomic will provide Licensee with Updates/Upgrades and the level of Maintenance and Support Services set forth in the applicable Order Schedule in accordance with Turbonomic's then-current Maintenance and Support program as published from time to time on the product documentation section of Turbonomic's website

(<https://greencircle.vmturbo.com/docs/DOC-1773>). If Turbonomic provides support other than as described in its maintenance policy or for deliverables, such support will be treated, billed, and paid for, as other professional services in accordance with Turbonomic's then current rates for such professional services. Turbonomic makes no representation or warranty that all bugs will be fixed or all Software will be updated.

4. FEES AND PAYMENT TERMS

Licensee shall pay Turbonomic the fees, charges and other amounts specified in an Order Schedule within thirty (30) days of the date of invoice. Turbonomic is expressly authorized by Licensee to invoice: (a) for such Software upon delivery and (b) in advance for the provision of Services unless otherwise set forth in the applicable Order

Schedule. In addition to paying the applicable fees, Licensee shall also pay all reasonable travel and out-of-pocket expenses incurred by Turbonomic in connection with any professional services rendered. Maintenance in years 2 and beyond will be billed at the same amount as maintenance for the previous year + 3%. Licensee shall provide a purchase order or notice that a purchase order is not required for purchase or payment prior to the shipment of any Software or the provision of any Services. Overdue balances are subject to a service charge equal to the lesser of 1.5% per month or the maximum legal interest rate allowed by law. Licensee shall be responsible for taxes levied on any transaction under this Agreement, including all federal, state, and local taxes, levies and assessments, excluding any tax based on Turbonomic's income.

5. CONFIDENTIALITY

5.1. Confidential Information. Each party will regard any information provided to it by the other party and designated in writing as proprietary or confidential to be confidential ("Confidential Information"). Confidential Information shall also include information which, to a reasonable person familiar with the disclosing party's business and the industry in which it operates, is of a confidential or proprietary nature. A party will not disclose the other party's Confidential Information to any third party without the prior written consent of the other party, nor make use of any of the other party's Confidential Information except in its performance under this Agreement. Each party accepts responsibility for the actions of its agents or employees and shall protect the other party's Confidential Information in the same manner as it protects its own valuable confidential information, but in no event shall less than reasonable care be used. The parties expressly agree that the Software and the terms and pricing of this Agreement are the Confidential Information of Turbonomic. Licensee will not remove or destroy any proprietary markings or restrictive legends placed upon or contained in the Software. A receiving party shall promptly notify the disclosing party upon becoming aware of a breach or threatened breach hereunder, and shall cooperate with any reasonable request of the disclosing party in enforcing its rights.

5.2. Exclusions. Information will not be deemed Confidential Information hereunder if such information: (a) is known prior to receipt from the disclosing party, without any obligation of confidentiality; (b) becomes known to the receiving party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing party; (c) becomes publicly known or otherwise publicly available, except through a breach of this Agreement; or (d) is independently developed by the receiving party. The receiving party may disclose Confidential Information

pursuant to the requirements of applicable law, legal process or government regulation, provided that it gives the disclosing party reasonable prior written notice to permit the disclosing party to contest such disclosure, and such disclosure is otherwise limited to the required disclosure.

6. LIMITED WARRANTY

6.1. *Warranty.* Turbonomic warrants that: (a) it has the right to grant the license to use the Software as set out in this Agreement; and (b) for a period of thirty (30) days following the initial delivery of the Software to Licensee the Software will perform in substantial conformity with its Documentation.

6.2. *Third Party Products.* Licensee acknowledges that the Software may contain or be accompanied by certain third party hardware and software products ("Third-Party Products"). These Third Party Products, if any, are identified in, and subject to, special license notices, terms and/or conditions as set forth in the Order Schedule, the Third Party Product packaging and/or in the "notices.txt" file accompanying the Software ("Third-Party Notices"). The Third-Party Products are not warranted by Turbonomic. The Third-Party Notices may include important licensing and warranty information and disclaimers. In the event of conflict between the Third-Party Notices and the other portions of this Agreement, the Third-Party Notices will take precedence (but solely with respect to the Third-Party Products to which the Third-Party Notices relate).

6.3. *No Other Warranty.* THE ABOVE WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, NONINFRINGEMENT, TITLE, QUALITY, OR FITNESS FOR A PARTICULAR PURPOSE.

6.4. *Remedy.* If the above warranties are breached, Turbonomic will, at its option and at no cost to Licensee, (a) provide remedial services necessary to enable the Software to conform to the warranty, or (b) replace any defective Software, or (c) refund amounts paid in respect of the defective Software. Turbonomic's warranty obligations will only extend to material errors that can be demonstrated to exist in an unmodified version of the Software except where the modifications were carried out by Turbonomic or with its written approval. Licensee will notify Turbonomic promptly in writing of any breach of warranty. Licensee will provide Turbonomic with a reasonable opportunity to remedy any breach and reasonable assistance in remedying any defects. The remedies set out in this subsection are Licensee's sole remedies for breach of the above warranties.

7. LIMITATION OF LIABILITY.

7.1. *Consequential Damage Waiver.* EXCEPT AS MAY ARISE OUT OF EITHER PARTY'S BREACH OF SECTION 5, NEITHER PARTY (NOR TURBONOMIC'S SUPPLIERS) WILL BE LIABLE TO THE OTHER OR ANY THIRD PARTY FOR LOSS OF PROFITS, OR SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL OR EXEMPLARY DAMAGES, INCLUDING COSTS, IN CONNECTION WITH THE SUPPLY, USE OR PERFORMANCE OF THE SOFTWARE OR SERVICES, OR THE PERFORMANCE OF ITS OTHER OBLIGATIONS UNDER THIS AGREEMENT, EVEN IF IT IS AWARE OF THE POSSIBILITY OF THE OCCURRENCE OF SUCH DAMAGES.

7.2. *Limitation of Liability* IN ANY EVENT, THE TOTAL LIABILITY OF TURBONOMIC (INCLUDING ANY OF ITS SUPPLIERS) TO LICENSEE FOR ANY CLAIM UNDER THIS AGREEMENT AND ANY ORDER SCHEDULE, WHETHER IT ARISES BY STATUTE, CONTRACT OR OTHERWISE, WILL NOT EXCEED THE AMOUNTS PAID BY (AND NOT OTHERWISE REFUNDED TO) LICENSEE TO TURBONOMIC UNDER ANY ORDER SCHEDULE FOR THE SOFTWARE OR SERVICES IN THE SIX (6) MONTHS IMMEDIATELY PRECEDING THE EVENT FIRST GIVING RISE TO THE CLAIM. THE FOREGOING LIMIT DOES NOT APPLY TO TURBONOMIC'S OBLIGATIONS UNDER SECTIONS 5 AND 8. THE PROVISIONS OF THIS AGREEMENT ALLOCATE RISKS BETWEEN THE PARTIES. THE PRICING SET FORTH IN THE ORDER SCHEDULES REFLECTS THIS ALLOCATION OF RISK AND THE LIMITATION OF LIABILITY SPECIFIED HEREIN. EXCEPT WITH RESPECT TO CLAIMS RELATED TO LICENSEE'S FAILURE TO PAY OR LICENSEE'S BREACH OF THE LICENSE GRANT UNDER THIS AGREEMENT, ANY ACTION, CLAIM OR PROCEEDING RELATING TO THIS AGREEMENT MUST BE BROUGHT WITHIN TWELVE (12) MONTHS FOLLOWING THE ACTION OR EVENT GIVING RISE TO SUCH ACTION, CLAIM OR PROCEEDING.

8. INTELLECTUAL PROPERTY INDEMNIFICATION

8.1. *Indemnity.* Turbonomic shall defend Licensee (at Turbonomic's expense) against any claim or suit brought by a third party against Licensee alleging that the Software, or any part thereof, infringes upon a copyright or misappropriates a trade secret of such third party. Turbonomic shall pay any damages finally awarded to such third party by a court of competent jurisdiction resulting from such claim or suit, or agreed to in a written settlement by Turbonomic. Turbonomic's obligations under this Section shall arise only if: (a) Licensee promptly notifies Turbonomic in writing of any such claim or suit in writing within seven (7) days of learning of any action, or any threatened action; (b) Turbonomic

has sole control of the defense and settlement of such claim or suit; and (c) Licensee fully cooperates with Turbonomic. If the Software, or any part thereof, is held to infringe a copyright or misappropriate a trade secret, or in Turbonomic's sole discretion, is likely to infringe a copyright, Turbonomic (at Turbonomic's sole option) shall (r) procure for Licensee the right to continue using the Software; (s) replace or modify the Software with products of equivalent functionality; or (t) refund to Licensee an amount equal to the Licensee fee paid by Licensee for the affected Software as depreciated on a straight-line basis over a period of three (3) years following delivery of the Software in accordance with the terms of this Agreement. Turbonomic shall have no responsibility under this Section if the suit or claim arises from: (w) modification of the Software not carried out by Turbonomic; (x) Licensee's failure to install an Update/Upgrade that would have avoided the alleged infringement; (y) failure to use the Software in accordance with the Documentation; or (z) combination of the Software with products not provided by Turbonomic.

8.2. Sole Obligation. This Section 8 states Turbonomic's sole obligation and Licensee's sole remedy concerning any claim that the Software infringes or misappropriates any intellectual or proprietary rights of any third party.

9. USAGE VERIFICATION

At Turbonomic's written request, and no more than every six months, Licensee shall (a) provide Turbonomic with a signed certification (i) verifying that the Software is being used pursuant to the provisions of this Agreement and (ii) listing all copies and the respective locations of the Software and (b) permit Turbonomic to verify Licensee's deployment and use of the Software for compliance with the terms and conditions of this Agreement by reviewing log reports maintained and generated by the Software. Any such review shall be conducted remotely and scheduled during Licensee's normal business hours so as to not interfere unreasonably with Licensee's business activities. Licensee will maintain all log files and provide Turbonomic access to such files during the review. If Licensee's use of the Software is found to be greater than contracted for, Licensee will be invoiced for the additional licenses and the unpaid license fees shall be payable in accordance with this Agreement. Licensee also acknowledges that the Software may include password protection, anti-copying subroutines or other security measures designed to monitor the usage of the Software for license management purposes and Licensee will take no action to circumvent or otherwise tamper with such measures.

10. TERMINATION

This Agreement or an Order Schedule hereunder may be terminated (a) by mutual agreement of Turbonomic and Licensee, (b) by either party if the other party is adjudicated as bankrupt, or if a petition in bankruptcy is filed against the other party and such petition is not discharged within sixty (60) days of such filing, or (c) by either party if the other party materially breaches this Agreement and fails to cure such breach to such party's reasonable satisfaction within thirty (30) days following receipt of written notice thereof. Upon any termination of this Agreement or an Order Schedule, all applicable licenses are also terminated, and Licensee shall immediately cease use of the applicable Software and certify in writing to Turbonomic within thirty (30) days after termination that Licensee has destroyed or returned to Turbonomic such Software and all copies thereof. However, if this Agreement is terminated, but not outstanding Order Schedule(s), the terms and conditions of this Agreement shall continue to govern such Order Schedules. Termination of the term of this Agreement or an Order Schedule shall not limit either party from pursuing any remedies available to it, including injunctive relief, or relieve Licensee of its obligation to pay all fees that have accrued, have been paid, or have become payable by Licensee hereunder. All provisions of this Agreement which by their nature are intended to survive the termination of this Agreement (including, without limitation, the provisions of Sections 4, 5, 6, 7, 8, 9, 10 and 11) shall survive such termination.

11. GENERAL PROVISIONS

11.1. Entire Agreement and Controlling Documents. This Agreement, including any Order Schedules, contains the entire agreement between the parties with respect to the subject matter hereof, and supersedes all proposals, understandings, representations, warranties, covenants, and any other communications (whether written or oral) between the parties relating thereto and is binding upon the parties and their permitted successors and assigns. Only a written instrument that refers to this Agreement or the applicable Order Schedule and is duly signed by the authorized representatives of both parties may amend this Agreement or such Order Schedule. The terms and conditions contained in any purchase order issued by Licensee shall be of no force or effect, even if the order is accepted by Turbonomic. In the event of a conflict in terms among the Agreement and an Order Schedule, the Agreement shall control unless the Order Schedule expressly states the provision that it intends to amend. This Agreement shall apply to all Software and Services ordered by Licensee or delivered to Licensee by Turbonomic.

11.2. Assignment. This Agreement shall be binding upon and for the benefit of Turbonomic, Licensee and their permitted successors and assigns. Licensee may not assign its rights under this Agreement either in whole or in part without the prior written consent of Turbonomic. Turbonomic shall have the right to assign this Agreement in whole as part of a corporate reorganization, consolidation, merger, or sale of all or substantially all of the assets to which this Agreement relates. Any attempted assignment or delegation without such consent will be void.

11.3. Export. Licensee acknowledges that the export of any Software is subject to export or import control and Licensee agrees that any Software or the direct or indirect product thereof will not be exported (or re-exported from a country of installation) directly or indirectly, unless Licensee obtains all necessary licenses from the U.S. Department of Commerce or other agency as required by law.

11.4. US Government Rights. The Software is a "Commercial Item," as that term is defined in 48 C.F.R. 2.101 (Oct. 1995), and is comprised of "commercial computer software" and "commercial computer software documentation". If acquired by or on behalf of a civilian agency, the U.S. Government acquires this commercial computer software and/or commercial computer software documentation subject to the terms of this License as specified in 48 C.F.R. 12.212 (Computer Software) and 12.211 (Technical Data), as well as Part 27.405(b)(2) of the Federal Acquisition Regulation ("FAR") and its successors. If acquired by or on behalf of any agency within the Department of Defense ("DOD"), the U.S. Government acquires this commercial computer software and/or commercial computer software documentation subject to the terms of this License as specified in 48 C.F.R. 227.7202-3 of the DOD FAR Supplement ("DFARS") and its successors. This U.S. Government Rights clause is in lieu of, and supersedes, any other FAR, DFARS, or other clause or provision that addresses Government rights in computer software or technical data under this License. Any restrictive markings or legends on the software shall not be removed by any party.

11.5. Governing Law; Jurisdiction. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts, without regard to its conflict of law provisions. The United Nations Convention on Contracts for the International Sale of Goods is specifically excluded from application to this Agreement. Each party consents to, and agrees that each party is subject to, the exclusive jurisdiction of the District Court of Massachusetts or the Suffolk Superior Court of the Commonwealth of Massachusetts with respect to any actions for enforcement of or breach of this Agreement.

11.6. Headings; Counterparts. The headings to the sections of this Agreement are for ease of reference only and shall not affect the interpretation or construction of this Agreement. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original and all of which shall be deemed to be an original instrument. Once signed, any reproduction of this Agreement made by reliable means (e.g., photocopy, facsimile) shall be considered an original.

11.7. Relationship of the Parties. Turbonomic and Licensee are independent contractors, and nothing in this Agreement shall be construed as making them partners or creating the relationships of employer and employee, or principal and agent between them, for any purpose whatsoever. Neither party shall make any contracts, warranties or representations or assume or create any obligations, express or implied, in the other party's name or on its behalf.

11.8. Force Majeure. Except for the obligation to make payments, nonperformance of either party shall be excused to the extent that performance is rendered impossible by strike, fire, flood, governmental acts or orders or restrictions, failure of suppliers, or any other reason where failure to perform is beyond the reasonable control of the non-performing party.

11.9. Notices. Any demand, notice, consent, or other communication required by this Agreement must be given in writing and shall be deemed delivered upon receipt when delivered personally or upon confirmation of receipt following delivery by internationally recognized overnight courier service, in each case addressed to the receiving party at its address set forth on an Order Schedule, with a copy to the Legal Department at the address first listed above for each party. Either party may change its address by giving written notice of such change to the other party.

11.10. Waiver and Severability. Performance of any obligation required by a party hereunder may be waived only by a written waiver signed by an authorized representative of the other party, which waiver shall be effective only with respect to the specific obligation described therein. The failure of either party to exercise any of its rights under this Agreement will not be deemed a waiver or forfeiture of such rights. The invalidity or unenforceability of one or more provisions of this Agreement will not affect the validity or enforceability of any of the other provisions hereof, and this Agreement will be construed in all respects as if such invalid or unenforceable provision(s) were omitted.

11.11. Publicity. Either party shall obtain the prior written approval of the other for any press release or media advertisement that concern the transactions contemplated by this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

Licensee: [_____]

Turbonomic, Inc.

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____