

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

This Master Purchase and Services Agreement (“**Agreement**”) governs the purchase, license, and use of Products and the Services provided by Penguin Computing, Inc. (“**Penguin**”) and the entity named in the Order (as defined below) (the entity, together with its Affiliates, is “**Customer**”). Penguin and Customer are each individually a “Party” and collectively, the “Parties.”

**1. Definitions.**

- 1.1** “**Affiliates**” means any and all entities controlled by, controlling, or under common control with a Party.
- 1.2** “**Order**” means a Penguin Product quotation that has been executed by the Customer and Penguin. This Agreement shall apply separately to each Order. Customer’s order forms may be used for invoicing or administrative purposes but are not considered part of the Order.
- 1.3** “**Products**” means Penguin-provided hardware products, Software, any related-media, and the Specifications.
- 1.4** “**Services**” means services provided by Penguin to Customer.
- 1.5** “**Software**” means the Penguin software Products including all updates, supplements, corrections or bug fixes thereto, but excluding all Third Party Products.
- 1.6** “**SOW**” or “**Statement of Work**” means the mutually executed statement of work providing a description of the Services to be provided by Penguin under this Agreement.
- 1.7** “**Specifications**” mean the user manuals and other written materials that describe the Products which Penguin generally makes available to its customers for use with the Product and any updated, improved, or modified version(s) of such materials.
- 1.8** “**Subscription**” means the time period for which the Software is licensed to Customer for use in accordance with the terms and conditions of this Agreement.
- 1.9** “**Subscription Term**” means the period of time which Customer is licensed to use the Software as described in this Agreement commencing on the earlier of the date specified on the Order or the date the applicable Software 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.
- 1.10** “**Third Party Products**” means any individual open-source software components or additional third-party software provided by Penguin pursuant to an Order.

**2. Orders.**

Any purchase of Products 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/license of Products or Services by Penguin for Penguin’s fulfillment of the Order. Products are described in the Specifications. Services may be further described in any SOWs applicable to particular Services.

**3. Delivery.**

Unless otherwise agreed in writing in the Order between the Customer and Penguin, Products will be delivered “FCA Origin” (Incoterms 2020), and title shall pass to Customer upon Penguin’s delivery to the common carrier. Software will be delivered electronically where possible. Unless otherwise agreed, software provided via the internet is 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.

**4. Fees and Payment.**

- 4.1** **Fees and Payment Terms.** Customer hereby agrees to pay the fees set forth in the Order (“**Fees**”). All Fees are non-refundable, non-cancelable, and exclusive of (a) applicable taxes and duties, including, without limitation, VAT, service taxes, 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. Unless otherwise agreed, all Fees are due and payable within thirty (30) days of receipt of the invoice (the "**Due Date**"). 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.

**4.2 Subscription Fees.** The aggregate Fees for a Subscription for the initial Subscription Term as set forth on the Order (the "**Minimum Commitment**") may 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 any Software 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. Subscriptions shall be paid annually in advance prior to the start of the Subscription Term.

**4.3 Service Fees.** Services Fees will be detailed in the applicable Order or SOW. Penguin will charge separately for reasonable out-of-pocket expenses, such as travel expenses incurred in providing Services.

## **5. Acceptance.**

Products, Subscriptions and Services are sold or licensed (as applicable) on a non-cancellable, non-returnable basis, and, subject to the terms of this Agreement, shall not be subject to any acceptance criteria unless otherwise agreed in writing signed by authorized representatives of both Customer and Penguin, 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 Software or performance of the Services ("**Acceptance Period**") unless Penguin receives a written notice of rejection for reason of material non-conformity with the Specifications or SOW, if applicable, prior to the end of the Acceptance Period ("**Notice of Rejection**"). In the event Customer provides Penguin with a 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.

## **6. Customer Obligations.**

Customer shall (a) use Products and Services solely for its own internal benefit and in accordance with this Agreement and any applicable Specifications and SOW's; (b) be solely responsible for compliance with this Agreement by its users, whether employees, contractors, or other service providers; (c) use reasonable efforts to prevent unauthorized use of or access to the Products 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 hardware Products with right of inspection by Penguin and its contractors and financing partners at any time during normal business hours and as otherwise necessary to monitor the functionality and performance of such hardware Products; (e) provide timely cooperation and accurate and complete information, assistance or access reasonably required by Penguin in order to perform the Services; and (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) adequately backing up Customer Data on a periodic basis.

## **7. Software License Terms.**

**7.1** Penguin and its licensors ("**Licensors**") own all title, copyright and other intellectual property rights in the Software and any copies. Subject to the terms and conditions of this Agreement, Penguin hereby grants Customer a worldwide, royalty-free, non-exclusive, time-limited, non-transferable limited license to access and use the Software in the quantities and during the Subscription Term. Subscriptions shall automatically renew for an additional Subscription Term of twelve (12) months, and each renewal term shall also be known as a Subscription Term. Penguin and its suppliers exclusively retain all right, title, and interest in and to the Software 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 the Software as described herein. Customer may make a single copy of the Software in object code form for archival or backup purposes, provided the copy retains all copyright notices, proprietary

rights notices, restricted rights legends and other notices included with or on the Software.

- 7.2** Customer may not (i) reverse engineer, decompile or disassemble the Software, (ii) use any portions or files of the Software except in connection with the entire Software program, or (iii) attempt to gain access to the source code for the Software except to the extent that the foregoing rights are expressly permitted by applicable law. To the extent applicable law permits contractual waiver of such source code access rights, Customer hereby waives its rights to do so.
- 7.3** The Software may contain programmatic components and subroutines that perform automated collection of system data and/or automated software updating services. System data collected through such programs may be used by Penguin, its affiliates, subcontractors, and its service delivery partners for the purpose of providing improved Products.
- 7.4** Customer may permanently transfer the Software only as part of a one-time sale of the system on which the Software is installed to a transferee who is not a competitor of Penguin and who agrees to be bound in writing by all the terms of this Agreement. Upon such transfer Customer agrees that it will (i) transfer all the Software with the subject system, (ii) retain no copies of the Software, (iii) assign all rights and delegate all obligations under this Agreement to Customer's transferee, and (iv) promptly notify Penguin in writing of the name and address of the transferee and the date of transfer.
- 7.5** **Open Source/Third Party Software.** Third Party Software is licensed to Customer under the terms of the applicable license conditions and copyright notices that can be found in the applicable end user agreement. For Open Source or Third Party Software only, in the event of a conflict between the licenses and restrictions set forth in this Agreement, the terms of the license governing the Third Party Software will prevail.

## **8. 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, or any portion thereof; (b) use or transport Products in violation of applicable laws, rules or regulations; (c) access a Product for the purpose of building or enabling a competitive product or service or copying its features or user interface; or (d) circumvent or attempt to circumvent contractual or other usage restrictions, including but not limited to the restrictions set forth in this Agreement.

## **9. Intellectual Property.**

No transfer of ownership of any intellectual property to Customer 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, 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, 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 hereby 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.

## **10. Warranties.**

- 10.1 Software Warranty.** Penguin warrants that, during the Warranty Period (defined below) the Software will operate in substantial compliance with its Specifications.
- 10.2 Services Warranty.** Penguin warrants that, during the Warranty Period (defined below), the Services will be provided in a professional and workmanlike manner and substantially in accordance with any applicable SOW.
- 10.3 Software and Services Warranty Remedies and Disclaimers.** 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 Software or Service. If Penguin is unable to correct any non-conformity reported in accordance with this Section, either Party may terminate

the affected portion of the applicable Order, and Customer, as its sole remedy, will be entitled to receive a prorated refund of any prepaid unused Fees for the affected Software or Services. These warranties will not apply if the non-conformity was caused by misuse of the Software or Services by Customer or any third party, modifications to the Software or Services by Customer or any third party, or Third Party Products (though Penguin will assist Customer as reasonably requested with any third-party warranty claims for Third Party Products). The applicable "**Warranty Period**" for (a) Software commences on the delivery date and continues for a period of ninety (90) days for software thereafter and (b) Services commences upon the completion of the Services and continues for a period of thirty (30) days thereafter.

**10.4 Hardware Product Warranty.** The applicable warranty for hardware Products is stated in the Limited Hardware Product Warranty, attached hereto as Exhibit A.

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

## **11. Additional Services.**

For Customers who have purchased additional post-implementation Penguin Service offerings, the terms and conditions applicable to such offerings are found at Exhibit B to this Agreement.

## **12. Confidentiality.**

"Confidential Information" means all technical, financial, and business information disclosed by a Party ("Discloser") to the other Party ("Recipient"), including, but not limited to, trade secrets, know-how, techniques, data, specifications, software, programs, documentation, training materials, product roadmaps, business plans, business operations and systems information, strategies, and information that is marked or identified as confidential or proprietary, or which, given the nature of the information and the circumstances surrounding disclosure, should reasonably be understood by the Recipient to be confidential.

Confidential Information does not include any information which the Recipient can demonstrate was: (i) rightfully in its possession prior to disclosure without restriction, (ii) generally available to the public or became generally available to the public through no breach of this Agreement, (iii) rightfully received from a third party without restriction, or (iv) independently developed by or for the Recipient without use of or reference to Confidential Information of the Discloser.

During the term of the Agreement and for three years following the last disclosure, a recipient of Confidential Information related to this Agreement must protect Confidential Information using at least the same care used for its own information (not less than reasonable care) and use it solely for the essential purposes of the Agreement. Recipient may only disclose Confidential Information to its representatives with a need to know who are bound by similar confidentiality terms, and Recipient remains fully responsible for any unauthorized disclosure by those representatives. Disclosure may be made to comply with governmental orders if Recipient gives notice, discloses only what's required, and seeks confidential treatment. No license to Confidential Information under any intellectual property right is granted, its ownership remains with Discloser, and Recipient must return or destroy all Confidential Information upon request. All Confidential Information is provided "as-is" with no warranties as to accuracy, completeness, or usefulness. The parties acknowledge and agree that the confidentiality obligations set forth in this Agreement are reasonable and necessary for the protection of the parties' respective 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.

## **13. 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 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 (including any applicable SOW), 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. 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.

#### **14. Term and Termination.**

This Agreement shall apply to the purchase, license, and use of all Products and Services sold by Penguin or its authorized representatives to Customer commencing with the acceptance of an Order and ending with termination of this Agreement as permitted herein (the “**Term**”). Either Customer or Penguin 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. Orders or SOWs may not 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, any licenses to Software shall automatically terminate with immediate effect, 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. Rights to payment of any amount and Sections 6 (Customer Obligations), 7 (Software License Terms), 8 (Restrictions), 9 (Intellectual Property), 10 (Warranties), 12 (Confidentiality), 17 (Indemnification), 18 (Limitation of Liability/Direct Damages Cap), and 19 (General Provisions) shall survive termination of this Agreement for any reason.

#### **15. 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 any Software licenses and/or Services (a) if Penguin reasonably deems such suspension necessary as a result of Customer’s breach of Sections 6 (Customer Obligations), 7 (Software License Terms), or 8 (Restrictions) of this Agreement, (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 Software or Services as permitted in this Section 15.

#### **16. 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.

#### **17. Indemnification.**

**17.1 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, investigation, proceeding or suit based on a violation of Customer’s obligations pursuant to Sections 6 (Customer Obligations), 7 (Software License Terms), 8 (Restrictions), 9 (Intellectual Property), and 16 (Compliance).

**17.2 By Penguin.** Except with respect to (i) software products licensed under any version of the GNU General Public License Agreement or any other open-source license agreement and (ii) any matter for which Customer is obligated to provide indemnification to Penguin, Penguin will defend any claim brought against Customer by an unaffiliated third party alleging that a Penguin-labeled Product infringes a U.S. patent or U.S. registered copyright and shall indemnify Customer against all damages and costs finally awarded against Customer by a court of competent jurisdiction, provided that Customer gives Penguin (a) prompt written notification of the claim, (b) full authority, information and assistance for the defense and/or

settlement of such claim, and (c) sole control of the defense and/or settlement of the claims. If a claim has occurred, or in Penguin's sole judgment is likely to occur, Customer agrees to permit Penguin, at its sole discretion and expense, to procure for Customer the right to continue using the subject Product(s), or to replace or modify the subject Product(s) so that they are, in Penguin's reasonable opinion, non-infringing. If, in Penguin's sole judgment, none of the foregoing alternatives is commercially practicable, Penguin may remove the allegedly infringing Product(s), terminate any applicable Software licenses, and refund to Customer the purchase price and/or license fees as depreciated or amortized by an equal annual amount over the lifetime of the returned Products taking into account generally accepted accounting practices. THIS STATES PENGUIN'S ENTIRE LIABILITY FOR INFRINGEMENT.

- 17.3 Limitations.** Penguin's obligations and liability to defend and indemnify Customer shall not apply to any claims of infringement based on or arising out of (a) the operation or use of Microsoft, Linux, open source, or any other third party products, equipment or devices operating alone or in combination with the Products, (b) the alteration or modification of any Products, (c) use other than in accordance with the Specifications, or (d) the continued use of the Products after Penguin has directed Customer to cease such use of the Products. TO THE FULL EXTENT PERMITTED BY LAW, THIS SECTION STATES THE ENTIRE LIABILITY OF PENGUIN AND THE LICENSORS AND CUSTOMER'S SOLE REMEDY WITH RESPECT TO ANY CLAIM OF INFRINGEMENT.

**18. Limitation of Liability/Direct Damages Cap.**

TO THE MAXIMUM EXTENT PERMITTED BY LAW, PENGUIN SHALL NOT BE LIABLE FOR ANY COSTS OF PROCUREMENT OF SUBSTITUTE PRODUCTS OR ANY INDIRECT, SPECIAL, EXEMPLARY, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES OF ANY KIND OR NATURE (INCLUDING WITHOUT LIMITATION LOSS OF USE, DATA, PROFIT, OR BUSINESS) ARISING OUT OF OR RELATED TO THIS AGREEMENT, REGARDLESS OF THE FORM OF ACTION OR LEGAL THEORY, WHETHER IN CONTRACT, TORT (INCLUDING BUT NOT LIMITED TO NEGLIGENCE), STRICT LIABILITY, OR OTHERWISE. EXCEPT FOR COMPANY'S BREACH OF OBLIGATIONS OF CONFIDENTIALITY UNDER SECTION 12 AND TO THE MAXIMUM EXTENT PERMITTED BY LAW, PENGUIN'S CUMULATIVE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT SHALL NOT EXCEED THE AMOUNTS ACTUALLY RECEIVED BY PENGUIN UNDER THIS AGREEMENT FOR THE PRODUCTS OR SERVICES GIVING RISE TO THE CLAIM.

**19. General Provisions.**

- 19.1** This Agreement, together with any exhibits, schedules, or attachments hereto, constitutes the complete and entire agreement of the Parties with respect to the subject matter contained herein, and supersedes all prior and contemporaneous understandings and agreements, both written and oral, with respect to such subject matter. This Agreement supersedes all pre-printed terms and conditions contained in any purchase order or other business form submitted hereafter by either Party.
- 19.2** No amendment or waiver of this Agreement is effective unless in writing and signed by both Parties. Except as expressly stated, no failure or delay in exercising any right or remedy under this Agreement constitutes a waiver, nor does any partial exercise preclude further or other exercises thereof.
- 19.3** The Parties shall not be liable for failure or delay in performing obligations (except payment obligations) caused by events beyond its reasonable control, including acts of God, natural disasters, war, terrorism, civil unrest, strikes, government actions, pandemics, or utility failures ("Force Majeure Event"). The affected Party shall promptly notify the other Party in writing and use commercially reasonable efforts to mitigate impacts and resume performance. Obligations shall be suspended during the Force Majeure Event while mitigation efforts continue. If a Force Majeure Event prevents material performance for thirty (30) or more days, the unaffected Party may terminate this Agreement by written notice without breach, with Customer paying for all delivered Products, performed Services, and unavoidable costs incurred by Penguin prior to termination. During Force Majeure Events, Penguin may allocate resources among customers at its discretion without liability or price adjustment obligations.
- 19.4** If any provision of this Agreement is determined to be invalid or unenforceable, it shall be adjusted rather than voided, if possible, to achieve the intent of the Parties. All other provisions shall be deemed valid and enforceable to the maximum extent possible.
- 19.5** All notices shall be in writing to Customer's address or email listed in the Order or to Penguin at the address listed in the Order or via email to [legal@penguinsolutions.com](mailto:legal@penguinsolutions.com). Notices shall be effective upon receipt by the other Party.

- 19.6** Penguin shall have the right to sell, dispose of, assign, or otherwise grant any or all of its rights to Products and/or Fees resulting therefrom (a “**Financing Assignment**”) all of which Customer hereby 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.
- 19.7** Neither Party may assign or transfer any of its rights or delegate any of its obligations under this Agreement without the other Party's prior written consent, which shall not be unreasonably withheld. Notwithstanding the foregoing, Penguin may assign this Agreement to an Affiliate or to a successor following a Change of Control (defined as acquisition of 50% or more of voting securities, business combination, or transfer of substantially all assets). Any unauthorized assignment, transfer, or delegation shall be void. This Agreement shall bind and benefit the Parties' permitted successors and assigns.
- 19.8** This Agreement shall be governed by and construed in accordance with the laws of the State of California, United States of America, without giving effect to any choice of law or conflict of law provisions or rules. The United Nations Convention on Contracts for the International Sale of Goods (1980) is specifically excluded and shall not apply.
- 19.9** Penguin may seek interim or injunctive relief in any court to protect intellectual property rights, enforce payment, or prevent irreparable harm.

**EXHIBIT A**  
**PENGUIN LIMITED HARDWARE PRODUCT WARRANTY**

This Limited Hardware Product Warranty (“**Hardware Warranty**”) applies to the hardware Products sold to Customer with this Warranty only if Customer is the original purchaser of the hardware Products and purchased them from Penguin or an authorized Penguin distributor or reseller.

**1. Hardware Warranty**

Penguin warrants that the hardware Products will be free from defects in material and workmanship and conform to its specifications during the applicable Warranty Period as described in the following:

| <b>Hardware</b>                                                                                                          | <b>Hardware Warranty Period (From date of Penguin Shipment)</b>      |
|--------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------|
| *Systems (Hardware Only)                                                                                                 | 3 Years                                                              |
| Add-on Hardware Components                                                                                               | 90 Days                                                              |
| **Pass Through Hardware Products (including GPU)                                                                         | “AS IS” from Penguin; direct Manufacturer’s warranty if transferable |
| *processing model and associated components ordered contemporaneously with and factory installed on the processing model |                                                                      |
| **third party hardware is provided as a convenience to Customers                                                         |                                                                      |

**2. Hardware Warranty Terms and Conditions**

Customer must notify Penguin of any claimed defect within the applicable Hardware Warranty Period defined above.

Customer must remove and install parts designated as “**Customer Replaceable Units**” (“**CRUs**”) under the direction of Penguin or its authorized service representative. For a list of CRUs, please refer to the Penguin support website at <https://www.penguinsolutions.com/en-us/support>.

Unless otherwise stated, and to the extent permitted by applicable law, hardware Products provided as “new” may be manufactured using new materials or new and used materials equivalent to new in performance and reliability. Hardware Products may be repaired or replaced with either new or previously used products or parts equivalent to new in performance and reliability, or with equivalent products to an original Product that has been discontinued.

Penguin reserves the right, at its option, to fulfill its Hardware Warranty obligations hereunder either directly or through its designee. All Products (including constituent parts) that are replaced under this Hardware Warranty become the property of Penguin, and any replacement Product or part returned to Customer takes on the Hardware Warranty status of the replaced Product or part.

Returned Products and parts may be inspected and evaluated, and if it is determined that the returned Product or part is not defective, Customer may be charged a restocking fee and billed for any freight charges.

This Hardware Warranty does not apply to any Product the serial number of which has been altered or removed, or any Product that has been damaged or rendered defective as a result of: (1) its use with equipment or software not furnished or authorized by Penguin; (2) the use of products or parts not manufactured or sold by Penguin or its authorized representatives; (3) modification or alteration of Products without Penguin’s prior written approval; (4) accident, neglect, misuse, abuse or other external cause; or (5) exposure to conditions outside the range of environmental, power and operating specifications for the Product.

**THE HARDWARE WARRANTY IS VOIDED FOR ANY PRODUCTS OR PARTS IMMERSSED IN A LIQUID COOLING SOLUTION.**

**3. Hardware Warranty Support**

Customer must first contact Penguin, or the party from which you purchased your Penguin Product if other than Penguin, for return instructions prior to returning any defective Product. Customer may also obtain return instructions or other Hardware Warranty information by contacting your local Penguin sales representative, the Penguin support website at <https://www.penguinsolutions.com/en-us> or your local authorized Penguin service



representative. Returned Product(s) may be refused if Customer does not first obtain return instructions or if Customer fails to follow the provided return instructions. Customer is responsible for all shipping charges for returned Product(s). Penguin's sole obligation and Customer's exclusive remedy under this Hardware Warranty will be, at Penguin's option, to repair or replace any Product(s) that are defective and returned by Customer within the applicable Hardware Warranty Period to the location designated by Penguin or the authorized Penguin distributor or reseller from which Customer purchased the Product. Penguin will use commercially reasonable efforts to ship a repaired or replacement Product to Customer as soon as practicable. These are Customer's exclusive remedies for defective Products.

PENGUIN IS NOT RESPONSIBLE FOR DAMAGE TO OR LOSS OF ANY PROGRAMS, DATA, OR REMOVABLE STORAGE MEDIA. PENGUIN IS NOT RESPONSIBLE FOR THE RESTORATION OR REINSTALLATION OF ANY PROGRAMS OR DATA OTHER THAN SOFTWARE INSTALLED BY PENGUIN WHEN THE PRODUCT WAS MANUFACTURED.

Before returning any unit for service, be sure to back up data and remove any confidential, proprietary, or personal information.

#### **4. Pass-through Hardware Products**

Pass-through Hardware Products are provided "AS IS" but may be provided with warranties from their respective non-Penguin manufacturers or suppliers. For more information, contact your local Penguin sales office, the Penguin Web site at <https://www.penguinsolutions.com/en-us> or your local authorized Penguin service representative.

## EXHIBIT B

### POST-IMPLEMENTATION SERVICES TERMS AND CONDITIONS

These Post-Implementation Services Terms and Conditions (“**Post-Implementation Terms**”) apply to Orders by Customer for post-implementation Services as described herein.

Penguin will provide the Services as described in these Post-Implementation Terms for the applicable Service Level described in the Service Level Table for the Penguin Products listed in Customer’s Order. Penguin will provide the Services only at the locations(s) specified upon purchase of a Service Level unless Penguin agrees otherwise, in writing.

#### 1. **Definitions.**

- 1.1. “**Covered Product**” means the Product listed in Customer’s Order.
- 1.2. “**Critical Problem**” means a problem with a Product that is severe and needs immediate correction.
- 1.3. “**Service Center**” means the resources through which Penguin delivers support and services.
- 1.4. “**Customer Replaceable Units**” or “**CRUs**” means Hardware that requires no formal training to achieve replacement. Replacement can be performed using Penguin provided procedural documents.
- 1.5. “**Field Replaceable Units**” or “**FRU**” means parts or subassemblies that require formal training to achieve replacement. FRUs are listed and identified in the User Manual(s) accompanying the Products when shipped by Penguin or its designee.
- 1.6. “**Optional Services**” means supplemental services available for purchase with a Service Level.
- 1.7. “**Problem**” means an instance where the Product does not substantially conform to the published documentation delivered by Penguin as part of the Penguin supplied Product.
- 1.8. “**Service Level**” refers to the packaged Service offerings that Customer purchases from Penguin for Covered Systems as set forth in Table 1.
- 1.9. “**Updates**” means a release of Baseboard Management Controller (“**BMC**”)/firmware Software that contains fixes produced over a period of time.
- 1.10. “**Upgrade**” means a new release of BMC/firmware’s previous release.

#### 2. **Customer’s Responsibilities.**

Penguin’s obligations under these Post-Implementation Terms are dependent upon Customer’s reasonable cooperation with Penguin and upon Customer taking the following actions:

- 2.1. Upon escalation to Penguin, providing Penguin all relevant Product information reasonably requested by Penguin including a description of the reported problem and the Product serial number;
- 2.2. Maintaining the Covered Product per the applicable manufacturers’ specifications, guidelines, and environmental conditions;
- 2.3. Replacing Customer Replaceable Units under the remote direction of the Penguin Service Center, Penguin support engineer, or Penguin authorized service representative; and
- 2.4. Installing Software Updates and Upgrades as made available. Supported versions are subject to Penguin’s standard published policies.

#### 3. **Problem Escalation to Penguin.**

Subject to the purchased Service Level described in the table below, Customer may escalate Problems to Penguin by telephone or through the Penguin Service Portal based on the following:

- 3.1. **Telephone Support.** Penguin provides access to the Penguin Service Center for support on supported Products:

- Phone – Penguin Support can be reached at US Toll-Free: 800-221-6588 or International: +1 602-852-3200. For a complete list of international numbers for contacting Penguin Support please go to <https://www.penguinsolutions.com/en-us/support>.

### 3.2. Penguin Service Portal Support.

- Penguin provides escalation Support on supported Products via the Penguin Service Portal.
- Penguin Service Portal – Penguin Support can be reached via <https://www.penguinsolutions.com/en-us/support>.

3.3. All communication between Customer and Penguin will be in the English language. Where and when reasonably available, local language may be provided.

3.4. Except as otherwise specified in this Post-Implementation Terms, all Services required of Penguin shall be provided only during the hours of 9:00 A.M. to 5:00 P.M., Monday through Friday, local time to the Covered Product(s), excluding locally observed holidays.

## 4. Software Support.

Penguin will provide technical support which shall include, where applicable, Updates and Upgrades. Penguin will use commercially reasonable efforts to respond, based on the severity of the problem and in accordance with the Service Level purchased as indicated in the Service Level table below. Software Services apply to the then-currently supported version of the supported Software. Resolution of problems may consist of the provision of a workaround, fix, or Upgrade. An Upgrade to a later version of the Product may be required in cases where a fix is not possible.

4.1. **Supported Versions.** Support on versions of Software will be provided based on Penguin's published support policy which can be found at <https://www.penguinsolutions.com/en-us/support>.

### 4.2. Operating System Support.

| Operating System                             | Total Assurance Support                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Other Service Levels                                                                                                                                                                         |
|----------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Linux (including Red Hat, Ubuntu, and Rocky) | <p>Service for Critical and Serious problems (as defined in Service Level Table 1) related to the Penguin supported version of the applicable Operating System. Penguin technical support personnel will troubleshoot and work to resolve problems and provide root cause determination. If required, Penguin will work collaboratively with the Operating System support provider.</p> <p>Customer shall establish the connection between Penguin and Customer's Operating System support provider.</p> | Isolate the problem up to the Hardware or the Operating System. If the problem pertains to the Operating System, Customer shall be advised to contact its Operating System support provider. |

4.2.1. Operating System support examples include technical assistance with general questions or problems pertaining to the Operating System, how to use a specific feature of the Operating System running on the Covered System, resolving an error condition as it relates to the Covered System, technical assistance with installation of the Operating System and related updates, information about the installation process, troubleshooting problems or failures during installation.

4.2.2. Operating System Support excludes expertise and support for routine Operating System problems or for systems administration issues such as assistance with system administration tasks, administering user passwords and permissions, creation or configuration of virtual machines, import and export of virtual machines, troubleshooting and root cause of guest Operating Systems, system backup or snapshot procedures, creation of, troubleshooting or ongoing maintenance of data stores, storage

management and maintenance activities including local disk storage, Storage Area Network (SAN) or Network Attached Storage (NAS), network configuration & troubleshooting including virtual networking, isolating performance issues, system security settings and best practices.

#### **4.3. Software Upgrade Planning and Deployment Assistance (applies to BMC/firmware).**

Penguin will conduct an annual in-depth review and planning session to collaborate with Customer in creating a recommended BMC/firmware Upgrade strategy to ensure systems are maintained at the most current releases. This includes proactive notification to Customer if Upgrades are advised based on performance enhancements or security fixes and any specific instructions for performing the Upgrade. Penguin Support will assist Customer remotely in performing BMC/firmware Software Upgrades on up to three (3) devices (i.e., servers, switches, storage).

#### **5. Penguin Services Portal.**

Penguin will provide Customer 24x7 access to the Penguin Services Portal, which is a web-based application that provides on-line, real-time case management and communication functionality. The Services Portal includes access to:

- Penguin's knowledge base
- Frequently asked questions
- Product video tutorials
- Bug fixes
- Technical documents

#### **6. Hardware Services.**

- 6.1. Parts Replacement.** Advanced parts exchange excludes GPU. Penguin will use commercially reasonable efforts to provide same business day, pre-paid shipment of a replacement part for an automatic or telephone call-in parts request that is received before 3:00 P.M local time. Restrictions may apply in certain countries. Replacement part shipments will include shipping material and a pre-paid freight bill for return of the defective part. Customer must return the defective part to Penguin within fourteen (14) calendar days from the date of the parts request, otherwise Customer will be billed and must pay Penguin the list price for the replacement part(s) shipped. Penguin assumes all risk of loss or damage to Products or parts that are in transit to and, provided Customer properly packed them for transportation, from Customer's location.
- 6.2. CRU Replacement.** Customer must remove and install CRUs a) per the instructions provided with the replacement part; b) under the direction of the Penguin Service Center; or c) under the direction of an authorized Penguin service representative.
- 6.3. FRU Replacement.** Parts replacements for FRUs will be performed by Penguin or its authorized Penguin service representative, subject to the purchased Service Level described in Service Level Table below.
- 6.4. Root Cause Determination (applies to Critical Problems).** Subject to the purchased Service Level described in the Service Level Table below, a Penguin service provider will conduct an analysis of the root cause(s) of the issue, using log files, interactions from troubleshooting, or inspection of returned failed Products. Upon request, Penguin will provide a summary analysis through a Customer accessible case update or via telephone. When reasonably appropriate, a formal root cause report will be provided.
- 7. On-Site Services (Applies to hardware Products only).** Penguin will provide on-site support only under the following circumstances:
- 7.1.** Penguin will provide on-site assistance if the Product experiences a problem and cannot be restored to operational status through remote support means.
- 7.2.** Penguin's obligation to provide on-site hardware Services is subject to the following conditions:
- 7.2.1. While Penguin is on-site, Customer must provide Penguin with all reasonable assistance and cooperation and must allow Penguin to work without interruption or interference;
- 7.2.2. Subject to Penguin's reasonable judgment, on-site Services will be provided until such time as the Product is operational or if reasonable progress is being made; and

7.2.3. Services may be suspended if additional parts or resources are required.

#### **8. Media Retention (Optional Service).**

Customer may elect to not return non-volatile memory computer storage devices to Penguin for replacement.

#### **9. Technical Account Management (“TAM”) Services.**

Penguin will assign a TAM, who shall act as technical advisor and shall be the direct intermediary between Customer and Penguin technical teams. The TAM will perform the duties indicated below:

- Act as point of contact for all technical issues related to the supported Products.
- Manage critical situations and utilize Penguin technical resources to resolve difficult issues related to the Products. Acting as an internal link, the TAM shall obtain from Penguin management its involvement, when necessary, to reach a quick and satisfactory resolution of such situations that arise.
- Arrange and attend remote quarterly review meetings to address any pending issues.

#### **10. Renewal of Services.**

Renewal of the Services will occur automatically, unless earlier terminated by either party with at least sixty (60) days written notice prior to the expiration of the current service term. If Services have been terminated because of non-renewal or non-payment, and Customer desires to reinstate the Services, Penguin will reinstate such Services only after completion of all the following:

10.1.1. At Customer's cost, update the Product to a Service ready condition; and

10.1.2. Pay Penguin: (a) all undisputed invoices, (b) the annual support fee for at least the next one-year period, and (c) the amount equal to what Customer would have paid Penguin for the period of time in which the Services has lapsed, and (c) a reinstatement fee.

#### **11. End of Support Life for Supported Product.**

In the event Penguin determines that it will no longer support a Product, that Product is said to enter an “End of Support” or “EOS” status. The EOS status of Penguin Products can be found on the Penguin website at <https://www.penguinolutions.com/en-us/support>. Customer is responsible for keeping up to date on Penguin Product EOS status.

#### **12. Limitations and Exclusions.**

This Post-Implementation Terms is of limited duration and coverage. These Post-Implementation Terms extend only to the original purchaser of the Covered Products and only to uses for which the Products were designed. Penguin is not obligated to repair any Covered Product, subassembly, or component part which has been damaged as a result of: (i) fire, natural disaster, neglect, misuse, abuse and war or other events or causes of force majeure, (ii) unauthorized modifications, use of non-Penguin supplied equipment or software, damage resulting from environmental considerations such as electrical power, heat, cold, or humidity outside the published product specifications.

**SERVICE LEVEL TABLE IS ON THE NEXT PAGE**

**Service Level Table:**

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <b>Total Assurance</b>        | <b>Extended Platform Support</b> | <b>Platform Support</b>       |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------|----------------------------------|-------------------------------|
| <b><i>Service Response Times</i></b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                               |                                  |                               |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                               |                                  |                               |
| <b>Service Center Availability</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 24x7                          | 24x7                             | 9x5                           |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                               |                                  |                               |
| <b>Critical:</b> Is a condition whereby the Supported Product or the operating environment is substantially inoperable and or severely impacts the customer business operation and no procedural avoidance exists. Some examples include Penguin Product or Software components that are inoperable, hung, or unavailable; A problem resulting in data corruption or data loss; Unexpected shutdown or reboot; and severe performance problem resulting in application instability impacting business operations. |                               |                                  |                               |
| Initial Response**                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 30 minutes                    | 1 hours                          | 2 local business hours        |
| Remedial Efforts†                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Engineer on-going work effort | Engineer on-going work effort    | Engineer on-going work effort |
| <b>Serious:</b> Is a condition in which Product functionality or performance problems are experienced with various degrees of business impact. Some examples include system is degraded but not disruptive (no outage); Expired software/hardware license; Transient performance issues.                                                                                                                                                                                                                          |                               |                                  |                               |
| Initial Response**                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 2 local business hours        | 4 local business hours           | 6 local business hours        |
| Remedial Efforts*                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | During local business hours   | During local business hours      | During local business hours   |
| <b>Moderate:</b> Is a condition in which the Product operation is not substantially impacted but does require attention. Appropriate for low impact issues, how to questions and low impact performance issues with a workaround.                                                                                                                                                                                                                                                                                 |                               |                                  |                               |
| Initial Response**                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 8 local business hours        | 8 local business hours           | 8 local business hours        |
| Remedial Efforts*                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | As agreed by Penguin          | As agreed by Penguin             | As agreed by Penguin          |
| <b>Minor:</b> Means general usage or information requests, future product enhancements or modifications. There is no impact to the quality, performance, or functionality of the Product.                                                                                                                                                                                                                                                                                                                         |                               |                                  |                               |
| Initial Response**                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 12 local business             | 12 local business                | 12 local business             |

|                                                                                                                                                                                                  | hours                | hours                | hours                |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------|----------------------|----------------------|
| Remedial Efforts*                                                                                                                                                                                | As agreed by Penguin | As agreed by Penguin | As agreed by Penguin |
| <b>Software Support</b>                                                                                                                                                                          |                      |                      |                      |
| Operating System Support                                                                                                                                                                         | Yes                  | Not available        | Not available        |
| Operating System Root Cause Determination                                                                                                                                                        | Yes                  | Not available        | Not available        |
| BMC/firmware Updates/Upgrades                                                                                                                                                                    | Yes                  | Yes                  | Yes                  |
|                                                                                                                                                                                                  |                      |                      |                      |
| <b>Software Upgrade Planning and Deployment Assistance (BMC/firmware)</b>                                                                                                                        | Yes                  | Not available        | Not available        |
|                                                                                                                                                                                                  |                      |                      |                      |
| <b>Service Portal</b>                                                                                                                                                                            | 24x7                 | 24x7                 | 24x7                 |
|                                                                                                                                                                                                  |                      |                      |                      |
| <b>Parts Repair/Replacement</b>                                                                                                                                                                  |                      |                      |                      |
| Advanced Parts Exchange - Delivery                                                                                                                                                               | Next business day    | Next business day    | Next business day    |
| Root Cause Détermination (Critical Problems)                                                                                                                                                     | Yes                  | Not available        | Not available        |
|                                                                                                                                                                                                  |                      |                      |                      |
| <b>On-Site Services†</b>                                                                                                                                                                         | Within 4 hours       | Next business day    | Next business day    |
|                                                                                                                                                                                                  |                      |                      |                      |
| <b>Media Retention***</b>                                                                                                                                                                        | Optional service     | Optional service     | Optional service     |
|                                                                                                                                                                                                  |                      |                      |                      |
| <b>Technical Account Management (TAM) Services</b>                                                                                                                                               | Yes                  | Not available        | Not available        |
|                                                                                                                                                                                                  |                      |                      |                      |
| * Available during local business hours only. Local business hours mean 9:00 a.m. until 5:00 p.m. local time (excluding Penguin observed holidays).                                              |                      |                      |                      |
| ** Initial Response means time from receipt of call to time work commences.                                                                                                                      |                      |                      |                      |
| *** Available for purchase with a Service Level.                                                                                                                                                 |                      |                      |                      |
| † Restoration of system to service/restoration of substantially all system functionalities.                                                                                                      |                      |                      |                      |
| ‡ Requires Customer have on-site spares, otherwise Penguin will ship replacement part to arrive next business day (subject to Section 9), and we will provide next business day on-site Service. |                      |                      |                      |