Standard Software Reseller Terms and Conditions

The following Standard Software Reseller Terms and Conditions ("Terms and Conditions") shall apply to all orders submitted by resellers (the "Reseller") authorized by Turbonomic, Inc., or its affiliates ("Turbonomic") to re-sell Turbonomic software and maintenance and support and other products and services. The following Terms and Conditions shall not apply to the extent that a Reseller and Turbonomic have agreed in writing to different terms and conditions.

BY (I) AGREEING TO BECOME A TURBONOMIC PARTNER, (II) REGISTERING A TRANSACTION THROUGH THE TURBONOMIC PARTNER PORTAL, (III) SUBMITTING ACCEPTING A QUOTE FROM TURBONOMIC OR (IV) ISSUING A PURCHASE ORDER TO TURBONOMIC YOU AGREE TO BE BOUND BY THESE TERMS AND CONDITIONS UNLESS YOU HAVE EXECUTED AN ALTERNATIVE WRITTEN AGREEMENT WITH TURBONOMIC.

1. Definitions

1.1 "Commercial Terms" means the commercial terms and conditions set forth in the Turbonomic Partner Portal or otherwise agreed to by Turbonomic in writing, including program criteria, discounts and other benefits available to Reseller hereunder, as in effect from time to time.

1.2 "Documentation" means the user guide(s) and other documentation and information that Turbonomic generally makes available to the End-Users with respect to the Licensed Software.

1.3 "End-User" means any customer of Reseller that installs the Licensed Software and agrees to be bound by the terms of one or more Turbonomic License Agreements.

1.4 "Licensed Materials" means the Licensed Software, Documentation and Trademarks.

1.5 "Licensed Products" means the Licensed Software, Maintenance and Support Services.

1.6 "Licensed Software" means the current version of any Turbonomic computer program (including modules) (in object code) provided by Turbonomic for resale hereunder.

1.7 "Maintenance and Support Services" means the maintenance and support services offered by Turbonomic to End-Users under the Turbonomic License Agreements.

1.8 "Trademarks" means the trademarks, trade names, service marks, trade dress, logos and names of Turbonomic.

1.9 "Turbonomic License Agreement" means a license agreement pursuant to which Turbonomic grants an End-User the right to use the Licensed Software.

1.10 "Turbonomic Partner Portal" means Turbonomic website portal, which sets forth the Commercial Terms and describes the other policies, programs, procedures, requirements and benefits available to Reseller from time to time hereunder.

2. APPOINTMENT AND LICENSES.

2.1 Reseller Appointment. Turbonomic hereby appoints, and Reseller hereby accepts the appointment of, Reseller as an authorized, non-exclusive reseller of Licensed Products to End Users under these Terms and Conditions and the Commercial Terms.

2.2. Reseller License. Subject to these Terms and Conditions, Turbonomic grants to Reseller a nonexclusive, nontransferable, right and license (without right to sublicense) to market and distribute the Licensed Materials to End Users.

2.3. NFR License. Turbonomic may provide the Reseller with a Not For Resale demonstration license ("NFR License"), the quantity and term of which are determined at Turbonomic's sole discretion. Reseller may use the NFR License for internal training, testing and product demonstration purposes in a non-production environment solely for the purpose of promoting and advancing the sale of Licensed Software and not for any other purpose. Reseller shall not license, sublicense, sell, resell, rent, lease, transfer, assign, distribute, share, transfer, or otherwise commercially exploit or make the NFR Licenses available to any third party apart from the permitted purpose of these Terms and Conditions. At all times the Reseller will use reasonable efforts to assist Turbonomic enforce the applicable Turbonomic License Agreement, to protect Turbonomic's proprietary rights and to cooperate, without charge, in Turbonomic's efforts to protect its proprietary rights. Reseller shall notify Turbonomic of any known or suspected violation of any Turbonomic License Agreement, or infringement or misappropriation of Turbonomic's proprietary rights.

2.4. Restrictions. Except as specifically permitted in these Terms and Conditions, Reseller shall not directly or indirectly: (a) use any of Turbonomic's Confidential Information to create any software or documentation that is similar to any of the Licensed Products; (b) disassemble, decompile, reverse engineer or use any other means to attempt to discover any source code or underlying ideas, algorithms or organization of the Licensed Software, except to the extent and solely for the purposes permitted by applicable law (provided, that prior to commencing any such activity, Reseller shall give Turbonomic written notice and a reasonable opportunity to provide the desired information); (c) encumber, sublicense, transfer, rent, lease, time-share or use any Licensed Software in any service bureau arrangement or otherwise for the benefit of any third party; (d) copy, distribute, manufacture, adapt, create derivative works of, translate, localize, port or otherwise modify any Licensed Product; (e) use the Licensed Products, or allow the transfer, transmission, export or re-export of all or any part of the Licensed Products, in violation of any export control laws or regulations of the United States or any other relevant jurisdiction; or (f) authorize any third party to engage in any of the foregoing proscribed acts.

2.5. No Implied License. Except for the limited rights and licenses expressly granted hereunder, no other license is granted, no other use is permitted and Turbonomic (and its licensors) shall retain all right, title and interest in and to the Licensed Materials (including all intellectual property and proprietary rights embodied therein). Reseller agrees not to take any action inconsistent with such title and ownership.

2.6. Markings. Reseller shall not alter, remove or fail to reproduce any printed or on-screen proprietary or legal notice contained on or in copies of any Licensed Product.

3. CONFIDENTIALITY.
3.1. **Definition.** "Confidential Information" means all non-public and/or confidential information of either Turbonomic or Reseller that has been or may be disclosed by one party to the other hereunder. Confidential Information does not include information (i) already rightfully in the possession of the receiving party without an obligation of confidentiality to the disclosing party, (ii) hereafter rightfully furnished to the receiving party by a third party without a breach of any separate nondisclosure obligation to the disclosing party, (iii) publicly available without breach of these Terms and Conditions or (iv) independently developed by the receiving party without reliance on such information.

3.2. **Confidentiality.** Except for the specific rights granted by these Terms and Conditions, neither party shall use or disclose any Confidential Information of the other party without the written consent of the disclosing party. A party receiving Confidential Information from the other shall use commercially reasonable care to protect it. Each party shall bear the responsibility for any breach of confidentiality by its employees and contractors. Promptly after request by the disclosing party, and in the disclosing party's sole discretion, the receiving party shall return to the other or, if so directed by the other party, destroy all originals and copies of any Confidential Information and all information, records and materials developed therefrom.

3.3. **Compelled Disclosure.** Nothing herein shall prevent a receiving party from disclosing the other's Confidential Information as necessary pursuant to any court order, lawful requirement of a governmental agency or when disclosure is required by operation of law (including disclosures pursuant to any applicable securities laws and regulations); provided, that prior to any such disclosure, the receiving party shall use reasonable efforts to (a) promptly notify the disclosing party in writing of such requirement to disclose, and (b) cooperate with the disclosing party in protecting against or minimizing any such disclosure or obtaining a protective order.

3.4. **Relief.** Any breach or threatened breach of this Section 3 will cause irreparable harm to the disclosing party for which money damages would not be an adequate remedy. Therefore, the disclosing party shall, in addition to any other legal or equitable remedies, be entitled to an injunction against any such breach or threatened breach without the necessity of posting any bond.

4. **PAYMENTS.**

4.1. **Payments.** Reseller will issue to Turbonomic a purchase order for Licensed Products ordered by Reseller hereunder for End-Users. Reseller will pay Turbonomic fee for the Licensed Products, which shall be at Turbonomic's then-current price for the Licensed Products as determined by Turbonomic in its sole discretion, subject to the Commercial Terms. In addition, Turbonomic may make available to Reseller such additional commissions and/or rebates as it determines from time to time.

4.2. **Costs.** Except as specifically provided in this Terms and Conditions, each party shall be responsible for all of their own costs and expenses incurred in connection with their performance hereunder.

4.3. **Payment Terms.** Unless specified otherwise, all amounts due hereunder shall be paid within forty five (45) days after invoice for such charges. All payments shall be in U.S. dollars without deduction of exchange, collection or other charges. Reseller will reimburse Turbonomic for all reasonable costs (including attorneys' fees) incurred by Turbonomic in collecting late payments. In the event of nonpayment, in addition to any other remedies Turbonomic might have available at law or equity, Turbonomic reserves the right to assess Reseller any late-payment penalty equal to the lesser of 1.5% per month or the maximum legal interest rate allowed by law.

4.4. **Taxes.** All payments required by these Terms and Conditions are exclusive of federal, state, local and foreign taxes, duties, tariffs, levies, withholdings and similar assessments (including without limitation, sales taxes, use taxes and value added taxes), and Reseller agrees to bear and be responsible for the payment of all such charges, excluding taxes based upon Turbonomic's net income.

4.5. **Records and Audit.** Reseller will keep true, accurate and complete records and accounts of all copies of Licensed Products made or distributed by it for not less than one year. Upon reasonable advance written notice, Turbonomic shall have the right to have an independent auditor not more than once each 12 months, verify Reseller's compliance with these Terms and Conditions. Reseller shall make all of its applicable books and records available for such inspection during normal business hours at Reseller's principal place of business. Any such audit shall be at the expense of Turbonomic, unless it discloses an underpayment by Reseller for the audited period in excess of five percent (5%), in which case Reseller shall reimburse Turbonomic for such reasonable expenses. If the audit discloses any underpayment by Reseller, Reseller shall promptly make payment to Turbonomic of such underpayment.

5. **TERMINATION.**

5.1. **Termination.** Turbonomic may terminate Reseller's appointment hereunder at any time upon written notice if Reseller fails to comply with any Turbonomic policy.

5.2. **Effects of Termination.** Termination of Reseller's appointment shall not be an exclusive remedy for breach and, whether or not termination is effected, all other remedies described herein will remain available. Upon any termination or expiration of Reseller's appointment, all rights, obligations and licenses of the parties hereunder shall cease, except that (a) Reseller shall immediately stop using all Trademarks, and destroy all copies of the Licensed Materials, (b) each party shall promptly return to the other or, if so directed by the other party, destroy all originals and copies of any Confidential Information and all information, records and materials developed therefrom (including any marketing collateral), (c) Turbonomic will continue to provide support to End Users in accordance with the applicable Turbonomic License Agreement, but only to the extent Turbonomic has received corresponding maintenance payments, (d) upon expiration of the then current support term anticipated by Section 5.2(c), Reseller will reasonably cooperate with Turbonomic in communicating with End User for contracting directly with Turbonomic for continued provision of technical support and maintenance services for the Licensed Products and (e) the provisions of Sections 3 (Confidentiality), 4 (Payments), 8 (Indemnification), 9 (Limitation of Liability), 10 (General Provisions) and this Section 5 (Termination), any accrued right to payment and any remedies for breach of this Agreement shall survive any termination or expiration. End user licenses properly granted hereunder prior to termination shall continue in effect in accordance with their terms.

5.3. **No Liability.** The rights of termination hereunder are absolute and no party has any right to a continued relationship with the other after termination, except as expressly stated herein. Neither party shall incur any liability whatsoever for any damage, loss or expense of any kind suffered or incurred by the other (or for any compensation to the other) arising from or incident to any termination of Reseller's appointment hereunder that complies with these Terms and Conditions whether or not such party is aware of any such damage, loss or expense.

6. **SUPPORT.**

6.1. **Support by Reseller.** Reseller shall reasonably cooperate with Turbonomic in communicating with End Users for contracting directly with Turbonomic for continued provision of technical support and maintenance services for the Licensed Products.

6.2. **Support by Turbonomic.** Turbonomic will use commercially reasonable efforts to provide End Users that are entitled to maintenance under the Turbonomic End-User License Agreement or Reseller (in the event that Reseller installs the Licensed Software and runs it on an End User's behalf) with
technical support and maintenance services for the Licensed Products in accordance with the terms of the Turbonomic End-User License Agreement. Turbonomic shall have no obligation to support any version of the Licensed Software or Documentation other than the then current version and the immediately preceding version. Without limiting Turbonomic's right to charge for maintenance services in general, Reseller agrees that Turbonomic will have the right to charge in accordance with its then current policies for any support services resulting from (a) problems, errors or inquiries relating to computer hardware or software other than the Licensed Software or (b) use of any version of the Licensed Products other than the then current or immediately preceding version.

6.3 Updates. Turbonomic shall have no obligation to revise or update the Licensed Software or Documentation (any such revisions and updates, “Updates”). Any Update delivered by Turbonomic shall be treated for all purposes under these Terms and Conditions as Licensed Software or Documentation as the case may be, and all intellectual property rights therein shall be retained by Turbonomic.

7. WARRANTY AND DISCLAIMERS.

7.1 Authority: No Conflict. Reseller represents and warrants to Turbonomic that (a) Reseller (x) is a legal entity duly organized, validly existing and in good standing under the laws of its jurisdiction of organization and has all requisite power and authority to agree to these Terms and Conditions and (y) is duly authorized and empowered to perform its obligations under these Terms and Conditions and to grant the rights and consummate the transactions contemplated hereby, and that the same will not conflict or cause a default with respect to its obligations under any other agreement; and (b) neither these Terms and Conditions, nor any term hereof, nor the performance of or exercise of rights hereunder, is contrary to or in conflict with, or is ineffective, requires registration, approval or tax withholding under, or affects Turbonomic’s proprietary rights under, any law or regulation of any political or governmental.

7.2 Licensed Products Warranty. Turbonomic warrants to Reseller that as delivered by Turbonomic, the Licensed Software shall operate in accordance with the applicable Turbonomic License Agreement, which shall run in favor of the End User.

7.3 No Unauthorized Warranties. In no event shall Reseller make any written representation, warranty or offer concerning the Licensed Products to any End User, prospect or other third party, except as expressly authorized in writing by Turbonomic. Reseller shall indemnify and hold harmless Turbonomic from and against all damages, liabilities, losses, claims, settlements, costs and expenses (including, but not limited to, legal expenses and reasonable attorneys’ fees) arising out of any such unauthorized written representation, warranty or offer made by or for Reseller.

7.4 Disclaimers. EXCEPT AS EXPRESSLY PROVIDED IN THIS SECTION 7, TURBONOMIC MAKES NO WARRANTIES WITH RESPECT TO ANY SUBJECT MATTER HEREUNDER, AND HEREBY EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, ORAL OR WRITTEN, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE. ALL IMPLIED WARRANTIES OF TITLE, NON-INFRINGEMENT, ACCURACY, INTEGRATION, MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE AND ALL WARRANTIES ARISING FROM ANY COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF TRADE. WITHOUT LIMITING THE FOREGOING, NEITHER RESELLER ON THE ONE HAND, NOR TURBONOMIC ON THE OTHER HAND, MAKES ANY WARRANTY THAT THE LICENSED SOFTWARE WILL MEET RESELLER’S OR ANY END USERS REQUIREMENTS, THAT THE OPERATION OF THE LICENSED SOFTWARE WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT ANY ERRORS WHICH MAY BE CONTAINED IN THE LICENSED SOFTWARE CAN OR WILL BE FIXED.

8. INDEMNIFICATION.

8.1 Infringement. Except as provided below, Turbonomic will defend Reseller against any claim by a third party that the Licensed Software infringes a valid US patent or any copyright or trade secret, of such third party, and will indemnify Reseller for settlement amounts or damages, liabilities, costs and expenses (including reasonable attorneys' fees) finally awarded and arising out of such claim; provided that (a) Reseller promptly provides Turbonomic written notice thereof and reasonable cooperation, information, and assistance in connection therewith, and (b) Turbonomic has sole control and authority to defend, settle or compromise such claim. If any Licensed Software becomes or, in Turbonomic's opinion, is likely to become the subject of any injunction preventing its use as contemplated herein, Turbonomic may, at its sole option, (x) obtain for Reseller the right to continue using such Licensed Software, (y) replace or modify such Licensed Software so that it becomes non-infringing without substantially compromising its principal functions, or (z) if (x) and (y) are not reasonably available to Turbonomic, terminate Reseller's appointment upon written notice to Reseller and, after return of the Licensed Software, refund to Reseller payments made with respect to such returned Licensed Software.

8.2 Exclusions. Turbonomic shall have no liability or obligation to Reseller hereunder with respect to any claim based upon (a) use of the Licensed Software not strictly in accordance with the Documentation, (b) use of any Licensed Software in an application or environment or on a platform or with devices for which it was not designed or contemplated, (c) alterations, combinations or enhancements of the Licensed Software not created or authorized by Turbonomic, (d) Licensed Software created to the specifications of Reseller's specific design requirements, (e) Reseller's continuing allegedly infringing activity after being notified thereof or its continuing use of any version of the Licensed Software after being provided modifications that would have avoided the alleged infringement, or (f) any intellectual property or proprietary right in which Reseller or any of its affiliates has an interest.

8.3 Entire Liability. The foregoing states the entire liability of Turbonomic, and Reseller's exclusive remedy, with respect to any actual or alleged violation of intellectual property rights by the Licensed Software or any part thereof or by its use or operation.

9. LIMITATION OF LIABILITY.

IN NO EVENT SHALL EITHER PARTY BE LIABLE CONCERNING THE SUBJECT MATTER OF THESE TERMS AND CONDITIONS, REGARDLESS OF THE FORM OF ANY CLAIM OR ACTION (WHETHER IN CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE), FOR ANY (A) MATTER BEYOND ITS REASONABLE CONTROL, (B) LOSS OF DATA, LOSS OR INTERRUPTION OF USE OF THE LICENSED SOFTWARE, OR COST OF PROCURING SUBSTITUTE TECHNOLOGY, GOODS OR SERVICES, (C) INDIRECT, PUNITIVE, INCIDENTAL, RELIANCE, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES INCLUDING, BUT NOT LIMITED TO, LOSS OF BUSINESS, REVENUES, PROFITS OR GOODWILL, OR (D) AGGREGATE DAMAGES IN EXCESS OF THE AMOUNT PAID TO TURBONOMIC HEREUNDER FOR THE LICENSED SOFTWARE THAT GAVE RISE TO THE CLAIM, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THESE LIMITATIONS ARE INDEPENDENT FROM ALL OTHER PROVISIONS OF THESE TERMS AND CONDITIONS AND SHALL APPLY NOTWITHSTANDING THE FAILURE OF ANY REMEDY PROVIDED HEREIN. THE LIMITATIONS SET FORTH IN THIS SECTION SHALL NOT APPLY TO (a) TURBONOMIC’S INDEMNIFICATION OBLIGATIONS CONTAINED IN SECTION 8 ABOVE, (b) TO THE EXTENT THAT ANY EXCLUSION OR LIMITATION OF LIABILITY IS VOID, PROHIBITED OR UNENFORCEABLE BY APPLICABLE LAW, OR IN THE CASE OF (A) DEATH, BODILY INJURY OR FRAUD, (B) BREACH OF THE SCOPE OF ANY LICENSE OR OBLIGATION OF CONFIDENTIALITY OR (C) AMOUNTS PAYABLE TO ANY THIRD PARTY PURSUANT TO SECTION 8.

10. GENERAL PROVISIONS.

10.1 Relationship of Parties. The parties hereto shall each be independent contractors in the performance of their obligations under these Terms and Conditions, and nothing contained herein shall be deemed to constitute either party as the agent or representative of the other party, or both parties as joint ventures or partners for any purpose.
10.2. Notices. All notices under these Terms and Conditions will be in writing, in English, delivered to the address specified to the other party, and will be deemed to have been duly given when received, if personally delivered; when receipt is electronically confirmed, if transmitted by facsimile or email; the day after being sent, if sent for next day delivery by recognized overnight delivery service; or upon receipt, if sent by certified or registered mail, return receipt requested.

10.3. Force Majeure. If either party is unable to perform any of its obligations under these Terms and Conditions, other than payment obligations, due to any cause beyond the reasonable control of such party, the affected party's performance shall be extended for the period of its inability to perform due to such occurrence.

10.4. Assignment. Reseller's appointment and the rights and obligations hereunder may not be assigned or otherwise transferred by Reseller without the prior written consent of Turbonomic, except that Reseller may (without consent) assign this Agreement as a whole to any successor to all or substantially all of its business (whether by sale of equity or assets, merger, consolidation or otherwise). Any attempted transfer in violation hereof will be void and of no effect. This Agreement will be binding upon, and inure to the benefit of, the successors, representatives, and permitted assigns of the parties.

10.5. Governing Law. These Terms and Conditions shall be governed by and construed in accordance with the laws of the State of Delaware and the United States, without regard to its conflicts of law provisions. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to these Terms and Conditions.

10.6. Entire Agreement. These Terms and Conditions (including any applicable purchase orders or other ordering documents) constitutes the entire agreement between the parties with regard to, and supersedes all prior negotiations, understandings or agreements (oral or written) between the parties relating to, the subject matter of the Terms and Conditions (and all past dealing or industry custom). Any inconsistent or additional terms on any related purchase order, confirmation or similar form, even if signed by the parties after the date hereof, shall have no force or effect under these Terms and Conditions. Turbonomic may amend these Terms and Conditions at any time with or without notice to Reseller and such Terms and Conditions (as amended) will govern the obligations of the parties to each other thereafter. The failure of either party to enforce its rights under these Terms and Conditions at any time for any period will not be construed as a waiver of such rights. Except as specifically provided otherwise, each right and remedy under these Terms and Conditions is in addition to any other right or remedy, at law or in equity, and the exercise of one right or remedy will not be deemed a waiver of any other right or remedy. If any provision of these Terms and Conditions is determined to be illegal or unenforceable, that provision will be limited or eliminated to the minimum extent necessary so that these Terms and Conditions will otherwise remain in full force and effect and enforceable.

10.7. Government End Users. If any user of the Licensed Software or Documentation is an agency, department or other entity of the United States Government, the use, duplication, reproduction, modification, release, disclosure or transfer of the Licensed Software or Documentation is restricted in accordance with FAR 12.212 for civilian agencies and DFAR 227.7202 for military agencies. The Licensed Software is commercial computer software and the Documentation is commercial computer software documentation. The use of the Licensed Software and Documentation is further restricted in accordance herewith.

10.8. Compliance with Laws. Both Parties shall comply with all applicable laws, legislation, rules, regulations, and governmental requirements with respect to the Licensed Materials and Reseller's performance hereunder.

Last Updated Date: September 1, 2017