

# APRICORN PRODUCT SALES AGREEMENT

BY PURCHASING AND/OR USING THE APRICORN PRODUCTS YOU ORDERED, YOU (THE PURCHASING INDIVIDUAL ACTING ON BEHALF OF YOURSELF OR AS AN AUTHORIZED REPRESENTATIVE ACTING ON BEHALF OF A LEGAL ENTITY) AGREE TO BE BOUND BY THE TERMS OF THIS PRODUCT SALES AGREEMENT (“AGREEMENT”).

## 1. PURCHASE AND USE.

- 1.1 Contract; Payment. You agree that Your order is an offer to purchase, under this Agreement, all Apricorn products selected in Your order (the “Products”). You agree to pay all shipping charges unless otherwise agreed by Apricorn and applicable government taxes. Once Apricorn accepts your order, Apricorn will ship the Products. Apricorn’s acceptance of your order and the formation of the contract of sale between You and Apricorn only occurs when (a) You agree to or have made full payment for Your order including any shipping fees and taxes, and (b) Apricorn has shipped the Products You ordered. Apricorn will retain the title to the Products and a security interest in the Products until all payments are received by Apricorn. Risk of loss in the Products will pass to You when they are transferred to the carrier.
- 1.2 Responsible Use. Apricorn may provide You with user manuals, technical manuals, and other materials (in printed or electronic form) that describe the installation, operation, use or technical specifications of the Products (the “Documentation”). It is Your responsibility to use the Products in accordance with the Documentation and with reasonable care to ensure that the Products continue to function as expected, including the use or enablement of any security features on the Products. Apricorn is not responsible for lost, stolen or misplaced data that You store on or otherwise input into the Products.

## 2. LICENSE; RESTRICTIONS.

- 2.1 License. Subject to the terms of this AGREEMENT, Apricorn grants You a non-exclusive, non-transferable and limited license to use the software associated with the Products in accordance with the Documentation. As used in this Agreement, the terms “sale,” “purchase” and the like when used in reference to any software shall mean a limited license to use.
- 2.2 Government End User. All Apricorn software is a “commercial item,” as that term is defined in 48 C.F.R. 2.101, consisting of “commercial computer software” and “commercial computer software documentation,” as such terms are used in 48 C.F.R. 12.212. Consistent with 48 C.F.R. 12.212 and 48 C.F.R. 227.7202-1 through 227.7202-4, all U.S. government end users acquire the Software with only those rights explicitly set forth herein.
- 2.3 Restrictions. You acknowledge that the Product structure, design, organization and any computer software or other code embedded in the Products constitute valuable intellectual property (“IP”) of Apricorn. The IP of Apricorn also includes any and all registered and unregistered rights granted, applied for, or otherwise now or hereafter in existence under or related to any patent, copyright, trademark, trade secret, design, database protection, or other intellectual property right laws, and all similar or equivalent rights or forms of protection, in any part of the world, relating to the Products. Accordingly, except as expressly permitted in Section 2 or as otherwise authorized by Apricorn in writing, You will not and will not permit any third party to: (a) sell, lease, license, distribute, sublicense or otherwise transfer in whole or in part such IP to any third party; (b) decompile, disassemble, reverse engineer, or otherwise attempt to derive source code from the Products, in whole or in part; (c) copy such IP; (d) create, develop, license, install, use, or deploy any pproducts or services to circumvent, enable, modify or provide access, permissions or rights which violate the technical restrictions of the Products as described in this AGREEMENT or the Documentation; (e) translate, modify or create derivative works based upon the Products; or (f) remove any product identification, proprietary, copyright or other notices contained in the Products.
- 2.4 Ownership. The IP rights in Products and Documentation, all copies and portions thereof, and all improvements, enhancements, modifications and derivative works thereof, are and shall remain the sole and exclusive property of Apricorn and its licensors. Your rights to use them in association with Products shall be limited to those expressly granted in this AGREEMENT.

## 3. WARRANTY; DISCLAIMER

- 3.1 Product Warranty. Please refer to: <http://www.apricorn.com/warranty-return-policy/> for Apricorn Warranty and Return Policy. Apricorn warrants that at the time of shipment and for the applicable warranty period described in the Policy, Apricorn Products will materially be free from material defects in material and workmanship and will materially conform to applicable Product specifications. If Apricorn determines that a defective Product is covered by its Warranty and Return Policy and Apricorn is unable to repair or replace the defective Product in accordance with such Policy, Apricorn will refund to You the purchase price for the Product actually paid by You, in which case the License for the applicable Product and Your right to use such Product will terminate.
- 3.2 Disclaimer of Warranties. EXCEPT FOR THE EXPRESS WARRANTY IN SECTION 3.1 ABOVE, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, APRICORN AND ITS LICENSORS DISCLAIM ALL OTHER WARRANTIES, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, TITLE, NON-INFRINGEMENT AND ANY WARRANTIES ARISING FROM COURSE OF DEALING OR PERFORMANCE REGARDING OR RELATING TO THE PRODUCTS, THE DOCUMENTATION, OR ANY MATERIALS FURNISHED OR PROVIDED TO YOU UNDER THIS AGREEMENT.

## 4. LIMITATION OF LIABILITY.

- 4.1 Limitation of Liability. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT WILL APRICORN OR ITS AFFILIATES AND LICENSORS BE LIABLE FOR ANY LOST PROFITS OR BUSINESS OPPORTUNITIES, LOSS OF USE, LOSS OF REVENUE, LOSS OF GOODWILL, BUSINESS INTERRUPTION, LOSS OF DATA OR INFORMATION, OR ANY OTHER INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES UNDER ANY THEORY OF LIABILITY, WHETHER BASED IN CONTRACT, TORT, NEGLIGENCE, PRODUCT LIABILITY, OR OTHERWISE. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE PRECEDING LIMITATION MAY NOT APPLY TO YOU. APRICORN’S AND ITS LICENSORS’ LIABILITY UNDER THIS AGREEMENT WILL NOT, IN ANY EVENT, REGARDLESS OF WHETHER THE CLAIM IS BASED IN CONTRACT, TORT, STRICT LIABILITY, OR OTHERWISE, EXCEED THE PURCHASE PRICE YOU PAID FOR THE PRODUCTS GIVING RISE TO THE LIABILITY. THE FOREGOING LIMITATIONS SHALL APPLY REGARDLESS OF WHETHER APRICORN OR ITS AFFILIATES AND LICENSORS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND REGARDLESS OF WHETHER ANY REMEDY FAILS OF ITS ESSENTIAL PURPOSE.
- 4.2 Further Limitations. Apricorn’s licensors shall have no liability of any kind under this AGREEMENT and Apricorn’s liability with respect to any third party products or materials embedded in the Products shall be subject to Section 4.1. You may not bring a claim under this AGREEMENT more than twelve (12) months after the cause of action arises.
5. **CONFIDENTIAL INFORMATION.** You acknowledge and agree that all Product related information provided by Apricorn to You noted as confidential is Apricorn’s confidential information and that You will not disclose such information to any third parties without Apricorn’s prior written consent. Your obligation to protect Apricorn’s confidential information shall survive for a period of five (5) years from the date of disclosure by Apricorn.

## 6. TERMINATION.

- 6.1 Termination for Breach. Apricorn may terminate this AGREEMENT in its entirety effective immediately upon written notice to You if: (a) You breach any provision in Sections 2 & 5 and do not cure the breach within ten (10) days after receiving written notice thereof from Apricorn; (b) You fail to pay any portion of the purchase price for the Products within ten (10) days after receiving written notice from Apricorn that the payment is past due; (c) You breach any other provision of this AGREEMENT and You do not cure the breach within thirty (30) days after receiving written notice thereof from Apricorn; or (d) You commit a material breach that is not capable of being cured.
- 6.2 Effect of Termination. If Apricorn terminates this AGREEMENT under this Section 7: (a) all licensed rights to all Products granted to You under this AGREEMENT will immediately cease to exist; and (b) You must promptly discontinue all use of all Products, and return, or if requested by Apricorn, destroy, any related Apricorn confidential information in Your possession or control and certify in writing to Apricorn that You have fully complied with these requirements. Sections 2.3, 2.4, 3.2, 4, 5.2 and 6 will survive termination of this AGREEMENT.

## 7. GENERAL.

- 7.1 Assignment. This AGREEMENT, and any of Your rights or obligations thereunder, may not be assigned, subcontracted or transferred by You, in whole or in part, whether voluntary, by operation of contract, law or otherwise, without the prior written consent of Apricorn. Any attempted assignment or transfer in violation of the foregoing will be null and void. Apricorn may assign, subcontract, or transfer this Agreement or any of its rights or obligations herein without Your consent.
- 7.2 Waiver. The waiver of a breach of any provision of this AGREEMENT shall not constitute a waiver of any other provision or any subsequent breach.
- 7.3 Severability. If any provision of this AGREEMENT is held to be illegal, invalid or unenforceable, the provision will be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remaining provisions of this AGREEMENT will remain in full force and effect.
- 7.4 Compliance with Laws; Export Control; Government Regulations. Each party shall comply with all laws applicable to the actions contemplated by this AGREEMENT. You acknowledge that the Product is provided subject to the U.S. Export Administration Regulations, may be subject to the export control laws of the applicable territory, and that use or distribution contrary to applicable export control laws is prohibited. You represent that (1) You are not, and are not acting on behalf of, (a) any person who is a citizen, national, or resident of, or who is controlled by the government of any country to which the United States has prohibited export transactions; or (b) any person or entity listed on the U.S. Treasury Department list of Specially Designated Nationals and Blocked Persons, or the U.S. Commerce Department Denied Persons List or Entity List; and (2) You will not permit the Products to be used for any purposes prohibited by law.
- 7.5 Governing Law. This Agreement shall be construed in accordance with the laws of the State of California without regard to the conflicts of law provisions thereof and to the exclusion of the law of any other forum, without regard to the jurisdiction in which the action or proceeding may be instituted. All actions or proceedings arising in connection with this Agreement shall be tried and litigated exclusively in the state or federal courts located in the County of San Diego. This choice of venue is intended by the parties to be mandatory and not permissive in nature, and to preclude the possibility of litigation between the parties with respect to, or arising out of, this Agreement in any jurisdiction other than that specified in this Section. Each party waives any right it may have to assert the doctrine of forum non conveniens or similar doctrine or to object to the venue with respect to any proceeding brought in accordance with this Section. The United Nations Convention for the International Sale of Goods shall not apply.
- 7.6 Entire Agreement. This AGREEMENT contains the entire agreement of the parties with respect to the subject matter of this AGREEMENT and supersedes all previous or contemporaneous communications, representations, proposals, commitments, understandings and agreements, whether written or oral, between the parties regarding the subject matter hereof. This AGREEMENT may be amended only in writing signed by authorized representatives of both parties.
- 7.7 Contact Information. Please direct all correspondence or any questions concerning this AGREEMENT to the attention of Apricorn President through the means listed on Apricorn’s website contact page: <https://apricorn.com/contact-us-form>, or call the toll free number 800-458-5448.