



TERMS AND CONDITIONS

These Terms and Conditions are entered into by and between Duboce Labs, Inc., dba pganalyze, a Delaware corporation with its principal place of business located at 2201 12th Avenue, San Francisco, CA 94116 ("pganalyze") and the entity or individual that accepts these Terms and Conditions ("Customer") by purchasing pganalyze's services through acceptance of a Subscription Order through the AWS Marketplace. pganalyze and Customer shall individually be referred to as a "Party" and collectively as the "Parties."

- 1) **Definitions.** The following terms shall be capitalized throughout these Terms and Conditions and shall be defined as follows:
 - a) **Authorized Users.** The term "Authorized Users" refers to all individuals authorized by Customer to access and use the Services.
 - b) **Customer Data.** The term "Customer Data" refers to any data captured and uploaded from Customer's database servers by Customer and/or its Authorized Users into or through the Enterprise Cloud Services, including Personal Data.
 - c) **Enterprise Cloud Services.** The term "Enterprise Cloud Services" means the cloud-based PostgreSQL Performance Monitoring services provided by pganalyze to Customer as selected by Customer pursuant to a Subscription Order.
 - d) **Enterprise Server Services.** The term "Enterprise Server Services" means the deployment of PostgreSQL Performance Monitoring services through installation and downloading of the pganalyze Software within Customer's own environment as selected by Customer pursuant to a Subscription Order.
 - e) **Personal Data.** The term "Personal Data" means any personal data, personally identifiable information, or personal information as defined by applicable data privacy laws.
 - f) **Services.** The term "Services" means pganalyze's PostgreSQL Performance Monitoring services provided to Customer through the Enterprise Cloud or Enterprise Server deployment method pursuant to these Terms and each Subscription Order.
 - g) **Software.** The term "Software" refers to pganalyze's proprietary software which integrates with Customer's database server to provide its PostgreSQL Performance Monitoring Services.
 - h) **Subscription Order.** The term "Subscription Order" means the subscription order or private offer accepted by Customer through the AWS Marketplace in connection with Customer's purchase of the Services, setting forth the pricing details, Subscription Term, and other terms and conditions applicable to the Services.
 - i) **Subscription Term.** The term "Subscription Term" means the contract duration commencing on the Start Date set forth in the Subscription Order and expiring on the End Date specified in the Subscription Order.
- 2) **Access and Use of the Services.** During the Subscription Term, pganalyze grants to Customer a non-exclusive, non-transferable, non-sublicensable, non-assignable (except as otherwise permitted pursuant to Section 23), worldwide (i) right and license, for Enterprise Server Services, to download, install, backup and utilize the Software; or (ii) right, for Enterprise Cloud Services, to access and utilize the Services, in each case only for Customer's internal use in connection with its ordinary business operations, in accordance with the terms of this Agreement. Notwithstanding any language in this Agreement that may suggest otherwise, it is expressly understood and agreed that any reference to the terms "purchase," "sold," or any similar terms shall not imply or confer any transfer of ownership rights in any Services.
- 3) **Open Source License.** pganalyze utilizes multiple third party open source software as part of its Software. Customer's use of the Software and Services is subject to the terms and conditions of those Open-Source licenses. A full list of the licenses can be requested by emailing pganalyze at team@pganalyze.com.
- 4) **Authorized Users.** Access by Authorized Users shall be subject to these Terms and Conditions. Customer and its Authorized Users shall safeguard account access credentials. Customer will promptly notify pganalyze in the event of

any unauthorized use of access credentials or any breach of the security of such credentials.

5) Licenses; Reservation of Rights.

- a) **Customer Data.** Customer grants to pganalyze a limited, non-exclusive license to use Customer Data solely as necessary for purposes of providing the Services during the Subscription Term. Except for the limited license granted herein, Customer retains all right, title and interest, including, without limitation, all intellectual property rights, in and to any Customer Data.
 - b) **pganalyze Intellectual Property.** pganalyze has and will retain all right, title and interest, including, without limitation, all intellectual property rights, in and to the pganalyze Confidential Information, Services, and all source code and object code related thereto, and all copies, modifications and derivative works thereof. Any and all rights not expressly granted herein by pganalyze are reserved by pganalyze.
 - c) **Use Restrictions.** Customer will not use the Services to develop, directly or indirectly, any product or application that is similar to or competitive with any pganalyze product or service. Customer will not use the Services for evaluation, benchmarking or other comparative analysis or publish any reports without pganalyze's prior written consent. Customer will not distribute, redistribute, disseminate, resell, or sublicense the Services, or use the Services on behalf of any third party, including as part of a time-sharing, outsourcing or service bureau environment. Customer will not, directly or indirectly, alter or modify the Services, or reverse engineer, decompile, disassemble or otherwise attempt to discover the source code, object code or underlying structure, ideas, know-how or algorithms relevant to the Services or any documentation or data related thereto. Customer will not make the Software or Services available for the benefit of any third party, or sell, resell, license, sublicense, distribute, rent or lease the Software or Services to any third party for any purpose, commercial or otherwise. Customer acknowledges that it is obtaining only a limited end user license to the applicable Software and/or Services and that irrespective of any use of the words "purchase", "sale" or like terms hereunder no ownership rights are being conveyed to Customer under this Agreement or otherwise. Any and all rights not expressly granted herein by pganalyze are reserved by pganalyze.
 - d) **Customer Feedback.** Customer grants to pganalyze a limited, non-exclusive, non-sublicensable, non-transferable, non-assignable (except as otherwise permitted pursuant to Section 23), royalty-free license to collect, process, store, use, display, distribute, and disseminate any suggestions or ideas, whether solicited or unsolicited (collectively, the "Feedback"), submitted to pganalyze, provided however, that any public disclosure of Feedback shall not include any Customer Personal Data or Customer Confidential Information.
- 6) Utilization Overages.** If Customer exceeds the committed number of units specified in the Subscription Order, Customer shall be responsible for payment of overage fees as set forth in the Subscription Order. When subscribing to Enterprise Server Services, Customer is responsible to self-report to pganalyze when exceeding the number of committed units or upon pganalyze written request. Overage fees shall be invoiced quarterly during a billing cycle, or within **sixty (60) days** of the end of the billing cycle during which such overages were incurred, and shall be subject to the payment terms of the most recent Subscription Order.
- 7) Fees and Taxes.** Payment terms and consequences of non-payment shall be governed by Customer's agreements with AWS Marketplace. pganalyze reserves the right to suspend or terminate Services for non-payment in accordance with AWS Marketplace policies. Tax collection and payment shall be handled through AWS Marketplace in accordance with AWS Marketplace policies and applicable law. Customer is responsible for any applicable taxes as determined by AWS Marketplace.
- 8) Non-Refundable.** Except in the event of pganalyze's uncured material breach or as otherwise set forth in this Agreement, (a) fees will not be prorated upon cancellation or early termination of this Agreement, and (b) all fees paid are non-refundable.
- 9) Term; Renewal.** This Agreement shall continue for the Subscription Term specified in the Subscription Order. This Agreement shall renew in accordance with the auto-renew option selected by Customer through the Subscription Order.
- 10) Termination.** Either Party may terminate this Agreement immediately if the other Party breaches any material provision of this Agreement and, if such breach is curable, fails to cure such breach within **thirty (30) days** after receiving written notice of such breach. The following Sections survive termination of this Agreement: Individual Binding Arbitration, Customer Feedback License, Reservation of Rights, Confidentiality & Non-Disclosure, Disclaimer of Warranties, Indemnity, Limitation of Liability, and Choice of Law.
- 11) Effect of Termination.** Upon termination, Customer must (a) delete the Software and all copies thereof from all systems on which the Software is installed, and (b) provide written notice of Customer's compliance with this Section

within **ten (10) days** of termination of this Agreement.

- 12) Security.** pganalyze implements and will maintain reasonable administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of the Services and Customer Data in accordance with industry standard security requirements.
- 13) Privacy.** Each Party shall comply with all applicable data protections laws and regulations and the obligations set forth within the [Data Processing Addendum](#), which is executed concurrently with the execution of this Agreement and is expressly incorporated herein by reference.
- 14) Confidentiality & Non-Disclosure.**
 - a) During the Subscription Term, each Party may disclose its nonpublic and proprietary information to the other Party, that is either marked as confidential or would reasonably be understood to be confidential (collectively “Confidential Information”), subject to the terms and conditions of this Section. All Customer Data shall be treated as Customer’s Confidential Information.
 - b) **Confidential Information Use and Non-Disclosure.** Each Party shall (a) use Confidential Information only to perform under this Agreement and (b) not disclose Confidential Information to any third party without the disclosing Party’s prior written consent. Disclosure is permitted to personnel and agents who (i) need to know the information to perform under this Agreement, (ii) are bound by written confidentiality obligations at least as protective as this Agreement, and (iii) are informed of the information’s confidential nature. Each Party is responsible for any confidentiality breaches by its personnel or agents.
 - c) **Required Disclosure.** In the event the receiving Party is requested or required by legal process to disclose any of the Confidential Information, the receiving Party shall give the disclosing Party prompt written notice so that the disclosing Party may seek a protective order or other appropriate relief prior to any such disclosure. In the event that such protective order is not obtained, the receiving Party shall disclose only that portion of the Confidential Information that its legal counsel advises that it is legally required to disclose.
 - d) **Injunctive Relief.** Each Party understands and agrees that monetary damages will not be a sufficient remedy for any breach of either Party’s confidentiality obligations under this Section, and that the non-breaching Party may seek equitable relief in addition to all other remedies available at law or in equity.
 - e) **Return or Destruction of Confidential Information.** Upon either Party’s written request at any time, or upon termination or expiration of this Agreement, and subject to any contrary obligations under applicable law, the other Party shall, at the requesting Party’s option, return or destroy all of the requesting Party’s Confidential Information and, if requested by the requesting Party, certify in writing that it has complied with the foregoing.
- 15) Representations and Warranties.**
 - a) Each Party represents and warrants that it is duly organized, validly existing and in good standing under the laws of its jurisdiction of formation, possesses all the necessary authority to enter into and perform its obligations under this Agreement.
 - b) pganalyze warrants that the Services will materially conform to the specifications set forth in the AWS marketplace and any documentation provided by pganalyze to Customer.
- 16) Compliance with Applicable Laws.** Customer shall not, nor allow any third party to, export from the United States or allow the re-export or re-transfer of any part of the Services: (a) to any country or territory subject to export control embargo or economic sanctions implemented by any agency of the U.S. Government; (b) to any person or entity on any of the U.S. Government’s Lists of Parties of Concern or otherwise in violation of any export or import laws, regulations or requirements of any United States or applicable foreign agency or authority.
- 17) Individual Binding Arbitration.** Any claim or controversy arising out of or relating to the Services, and/or this Agreement (including its formation, interpretation, performance and breach) shall be settled by binding arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, ***excluding any rules or procedures governing or permitting class actions.*** Any judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The Federal Arbitration Act shall govern the interpretation and enforcement of this Agreement.
- 18) Future Functionality.** Customer’s acceptance of this Agreement and use of the Services is not contingent on the delivery of any future functionality or features, or dependent on any oral or written public comments made by pganalyze regarding future functionality or features.
- 19) DISCLAIMER OF WARRANTIES. TO THE EXTENT PERMITTED BY APPLICABLE LAW, THE SOFTWARE, SERVICES AND DOCUMENTATION INCLUDED ON OR OTHERWISE MADE AVAILABLE THROUGH THIS AGREEMENT, INCLUDING ANY “BETA” RELEASES, ARE PROVIDED ON AN “AS IS”**

AND “AS AVAILABLE” BASIS. EXCEPT AS OTHERWISE SET FORTH HEREIN, PGANALYZE DOES NOT REPRESENT OR WARRANT THAT THE SOFTWARE OR SERVICES INCLUDED ON AND/OR OTHERWISE MADE AVAILABLE TO CUSTOMER (I) WILL BE UNINTERRUPTED, TIMELY OR 100% SECURE, (II) WILL BE FREE OF DEFECTS, INACCURACIES OR ERRORS, (III) WILL MEET CUSTOMER’S REQUIREMENTS, OR (IV) WILL OPERATE IN THE CONFIGURATION OR WITH CUSTOMER’S HARDWARE OR SOFTWARE. EXCEPT WHERE PROHIBITED BY LAW, PGANALYZE EXPRESSLY DISCLAIMS ANY AND ALL REPRESENTATIONS, WARRANTIES OR CONDITIONS OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY AND NON-INFRINGEMENT AND WILL NOT BE LIABLE FOR CUSTOMER’S USE OF OR RELIANCE ON THE SOFTWARE OR SERVICES.

20) DISCLAIMER OF THIRD PARTY CONDUCT. EXCEPT WITH RESPECT TO OBLIGATIONS PURSUANT TO THE DATA PROCESSING ADDENDUM, PGANALYZE DISCLAIMS ANY AND ALL LIABILITY FOR THE ACTS, OMISSIONS AND CONDUCT OF ANY THIRD PARTIES IN CONNECTION WITH OR RELATED TO CUSTOMER’S USE OF THE SOFTWARE OR SERVICES. **TO THE EXTENT PERMITTED BY APPLICABLE LAW, PGANALYZE MAKES NO WARRANTIES** REGARDING THIRD PARTY SOFTWARE OR SERVICES, INCLUDING, WITHOUT LIMITATION, WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY AND NON-INFRINGEMENT AND WILL NOT BE LIABLE FOR CUSTOMER’S USE OF OR RELIANCE ON SUCH THIRD PARTY SOFTWARE OR SERVICES.

21) LIMITATION OF LIABILITY. TO THE EXTENT PERMITTED BY APPLICABLE LAW, NEITHER PGANALYZE NOR ANY OTHER PARTY INVOLVED IN CREATING, PRODUCING, OR DELIVERING THE SOFTWARE OR SERVICES WILL BE LIABLE TO CUSTOMER OR ANY THIRD PARTY FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, PUNITIVE OR SPECIAL DAMAGES (INCLUDING DAMAGES FOR LOST PROFITS, SECURITY BREACH, LOST DATA OR LOSS OF GOODWILL) ARISING OUT OF, RELATING TO OR CONNECTED WITH THE USE OF THE SOFTWARE OR SERVICES, EVEN IF PGANALYZE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. **TO THE EXTENT PERMITTED BY APPLICABLE LAW,** IN NO EVENT WILL PGANALYZE’S AGGREGATE LIABILITY, OR THAT OF ITS OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS, ARISING OUT OF OR IN CONNECTION WITH CUSTOMER’S USE OF, OR OF THE INABILITY TO USE, THE SOFTWARE OR SERVICES, EXCEED THE FEES PAID FOR THE SOFTWARE OR SERVICES IN THE **TWELVE (12) MONTHS** PRIOR TO THE EVENT GIVING RISE TO THE CLAIM.

22) INDEMNITY.

a) By pganalyze: pganalyze agrees to indemnify, defend and hold harmless Customer for (1) any damages award issued by a court of competent jurisdiction against Customer, and (2) direct expenses, including reasonable attorneys’ fees (but excluding any lost revenues, lost profits or other consequential economic damages of Customer) as a result of any action brought against Customer if and to the extent the action is based on a valid claim that the Software or Services infringe another person’s U.S. patent, copyright, trade secret or trademark. pganalyze will not have liability for, and Customer will defend pganalyze against, and pay any damages awarded against pganalyze and direct expenses, including reasonable attorneys’ fees (but excluding any lost revenues, lost profits or other consequential economic damages of pganalyze) to the extent the claimed infringement is based on or results in any material part from (i) any use of the Software other than in accordance with pganalyze’s published instructions, (ii) any unauthorized modification or alteration of the Software, (iii) any combination or use of the Software with any other product or system or technologies not supplied by pganalyze, (iv) pganalyze’s compliance with Customer’s design or specifications, and/or (v) any refusal to accept or use suitable modified or replacement software provided by pganalyze to avoid infringement. If a claim of infringement or misappropriation under this Section occurs, or if pganalyze reasonably determines that such a claim is likely to occur, pganalyze shall, at its option: (i) obtain a right for Customer to continue using the Software or Services for no additional fee; (ii) modify the Software or Services to make it and/or them non-infringing; (iii) replace the Software or Services with a non-infringing replacement with materially equivalent functionality, features, and performance; or (iv) terminate this Agreement and refund on a pro-rata basis any unused fees paid by Customer for the remainder of the Term. The foregoing states pganalyze’s sole and exclusive liability and Customer’s sole and exclusive remedy for any claims of intellectual property infringement.

b) By Customer: To the maximum extent permitted by law, Customer agrees to indemnify, defend and hold harmless pganalyze, and its subsidiaries, officers, directors, shareholders, employees, and each of their respective

successors and assigns from and against all damages, losses, liabilities, expenses, fees or costs (including, without limitation, reasonable attorneys' fees and costs) incurred in connection with a third party claim, demand or action arising out of or relating to (a) Customer's violation of any third party intellectual property right, and (b) a claim that Customer did not have the right to authorize pganalyze to process any personally identifiable information.

- c) **Notice.** A Party's indemnification obligations under this Agreement are conditioned on the indemnified Party providing prompt written notice to the indemnifying Party of any claim, action, or demand for which indemnification is claimed, provided, however, that any delay in such notice will relieve the indemnifying Party of its indemnification obligations only to the extent such delay materially prejudices the indemnifying Party's defense. The indemnifying Party shall be entitled to assume control of the defense and any settlement negotiations. In the event the indemnifying Party assumes control of the defense and negotiations, the indemnified Party shall be entitled, at its sole cost and expense, to participate in the defense and negotiations. In the event the indemnifying Party does not assume control of the defense and negotiations, then the indemnified Party may take control of the defense and negotiations, and its reasonable costs and expenses shall be subject to indemnification. The indemnified Party will reasonably cooperate, at the indemnifying Party's expense, in the defense of such claim as the indemnifying Party may request. The indemnifying Party will not enter into or agree to any settlement that requires any action or admits any liability by the indemnified Party or imposes any restrictions on the indemnified Party, in each case without the prior written consent of the indemnified Party, such consent shall not unreasonably be withheld.

- 23) **Miscellaneous. Force Majeure.** Any delay in the performance of any duties or obligations of a Party will not be considered a breach of this Agreement if the delay is caused by an event beyond its reasonable control, including, without limitation, adverse weather conditions, internet outage or interruption of service, telecommunications or power outage, fire, flood, civil disobedience, labor disruptions, strikes, lockouts, freight embargoes, government ordered closures, pandemic, terrorism, natural disaster, denial of service attacks, war or acts of God, or any other event beyond the reasonable control of the Party. **Independent Contractors.** The Parties to this Agreement are independent contractors. This Agreement does not create a relationship of partnership, joint venture, employment, franchise, or agency between the Parties. Neither Party has the authority to bind the other or incur obligations on the other's behalf without the other Party's prior written consent. **Severability.** The validity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement. **Modifications.** No modification of this Agreement shall be effective unless it is in writing and signed by an authorized representative of each Party. **Choice of Law.** This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of California without regard to or application of California's conflict of law principles. The Parties consent to the exclusive jurisdiction of the state and federal courts located in San Francisco County, California with regard to any controversy or claim arising out of or relating to this Agreement, or the breach thereof, and waive any objection to venue in such courts. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods will not apply to this Agreement. **Assignment.** Neither Party shall assign any of the rights or obligations under this Agreement without the prior written consent of the other Party, which consent shall not unreasonably be withheld. However, consent is not required for an assignment of this Agreement in connection with a change of control, merger, stock transfer, sale or other disposition of substantially all the assets of the assigning Party's business. **Successors and Assigns.** This Agreement is binding on and inures to the benefit of the Parties and their respective successors and permitted assigns. **No Waiver.** No failure or delay by a Party exercising any right, power or privilege under this Agreement will operate as a waiver thereof. **Interpretation.** Headings are for reference purposes only and do not limit the scope or extent of such section.

- 24) **Notices.** All notices required or permitted to be given under this Agreement will be in writing and delivered by certified mail or overnight courier to pganalyze at **2201 12th Avenue, San Francisco, CA 94116**, with an email copy to legal@pganalyze.com and to Customer at the address set forth in the Subscription Order.
- 25) **Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall constitute an original and all of which shall be deemed a single agreement.
- 26) **Entire Agreement.** This Agreement and the Subscription Order comprises the entire agreement between the Parties and supersedes all prior or contemporaneous agreements, written or oral, between the Parties regarding the subject matter contained herein.