**WEBSITE DEVELOPMENT AND SERVICE AGREEMENT**

This Website Development and Service Agreement (the "Agreement") is effective [DATE].

**BETWEEN: [YOUR COMPANY NAME]** (the "Client"), a company organized and existing under the laws of the [State/Province] of [STATE/PROVINCE], with its head office located at:

[YOUR COMPLETE ADDRESS]

**AND: [COMPANY NAME]** (the "Consultant"), an individual or company organized and existing under the laws of the [State/Province] of [STATE/PROVINCE], with its head office located at:

[COMPLETE ADDRESS]

WHEREAS, [COMPANY NAME], (the “Consultant” hereinafter) is in the business of providing certain software and computer consulting services pertaining to [SPECIFY]; and

WHEREAS, [YOUR COMPANY NAME], (the “Client”, hereinafter) wishes to retain the services of Consultant to:

1. locate, establish, install and maintain computer hardware and software to provide Client with a system to provide information via the World Wide Web protocol of the Internet (the "World Wide Web"), and allow Internet users to make transactions (the "Transaction Server");
2. assist Client with Client's development and operation of a content server to make Client-related multimedia information accessible via the World Wide Web to Internet users (the "Client Server") (the Client's presence on the World Wide Web under this Agreement by the Transaction Server and the Client Server referred to herein as the "Site");
3. promote the Site;
4. develop and improve computer programs and other deliverables to be used in connection with the Site; and
5. consult with Client with respect to the ultimate transfer of all hardware and software components of the Transaction Server to Client's location and facilities.

WHEREAS, Consultant wishes to provide Client with such services;

NOW, THEREFORE, in consideration of the conditions and covenants set forth hereinafter, it is agreed as follows:

# RETENTION

Client hereby retains Consultant effective as of the date first set forth above (the "Effective Date") and Consultant hereby accepts retention by the Client.

# CONSULTANT SERVICES

Upon the terms and subject to the conditions contained herein, Consultant agrees to provide to Client consulting services as described in statements of work to be agreed to in writing between the parties from time to time during the term hereof (the "Statements of Work") and which shall be consecutively numbered and annexed hereto as Schedule [SPECIFY]. Such services shall be provided in accordance with the provisions of this Agreement and the applicable Statement of Work.

# ADDITIONAL SERVICES

In addition to the services described in this agreement, Consultant shall perform the following additional services in accordance with the timetable set forth as Schedule [SPECIFY] (the "Timetable"):

## **Training**

Provide such training (not to exceed [NUMBER] days), advice and information concerning the use and features of the Site as Client shall reasonably request. Any additional training will be compensated pursuant to Schedule [SPECIFY], attached.

## **Internet Protocol Address and Corresponding Domain Name**

## Obtain, at the request of Client, on Client's behalf and in Client's name, an Internet Protocol address and corresponding "domain name" chosen by Client, and do all other acts necessary to establish the address of the Site. All right, title and interest in the domain shall vest exclusively in Client. Consultant shall have no liability whatsoever in connection with or arising out of the domain name which is obtained for Client. Consultant's use of the domain name shall be governed by Section [NUMBER] herein. Other than the Initial Fee, Consultant's services under this section shall be at no cost to Client.

## **Configuration and Operation of Transaction Server**

## Configure and operate the Transaction Server upon a computer hardware server with a direct Internet connection of at least [SPECIFY]. Consultant shall locate the Transaction Server at Consultant's premises (or at a locked and secured location at a third party's premises, provided no third party will have access to the Transaction Server or any Confidential Information of Client) and shall operate and maintain the Transaction Server in accordance with the performance levels set forth herein. Prior to the establishment of the Site, Consultant shall consult with Client with respect to the hardware and software leases, licences, maintenance agreements and operating agreements to be obtained on behalf of Client to implement the Transaction Server. Consultant shall pay all costs and fees in connection with such agreements during the term of this Agreement until the Transaction Server is relocated to Client's premises pursuant to Section [NUMBER] herein. Without limitation of the foregoing, to the extent that any third party software licences are required to be obtained by Consultant to perform its obligations hereunder, Consultant shall obtain such licences on Client's behalf at no additional cost. Other than the Initial Fee, Consultant's services under this section shall be at no cost to the Client.

## **Access to Telecommunications Software and/or Hardware**

## Obtain access to, and the right to use telecommunications software and/or hardware to function with the Transaction Server. Consultant shall arrange for the installation of telecommunication lines for the Transaction server in accordance with the Timetable. Consultant shall also advise and consult with Client with respect to Client's procurement of telecommunications services for the client Server to be located at Client's premises. Consultant shall have no liability with respect to performance by any third-party telecommunications service provider except that Consultant shall require confirmation of the number of possible simultaneous users and speed of transmission. Consultant's services under this section shall be at no cost other than the Initial Fee.

## **HTML Format**

## Provide consulting services to Client and translate Client-supplied text, graphics and other materials into Hypertext Markup Language (HTML) format for use on the Site (such materials, as periodically updated by Client as part of the Client Server, shall be known as the "Internet Display"). Additional obligations of the parties with respect to the development of the Internet Display are further set forth below in Section [NUMBER]. Other than the Initial Fee, Consultant's services with respect to the development of the Internet Display under this section shall be at no cost to Client.

## **Site Related Programs and Other Deliverables**

## Develop, in accordance with Section [NUMBER] herein, the Site Related Programs and other Deliverables (as defined herein).

## **Site Related Software Development by Client**

## Copy, reformat, improve, review or advise on Site related software developed by the Client, as requested by Client and as set forth in any Statement of Work. Consultant will be compensated for such services pursuant to the "Payment Schedule", Schedule [SPECIFY], attached.

## **Software Scripting Routines**

## In accordance with the Timetable, develop software scripting routines in [SPECIFY] which will generate HTML to make Client's catalog information of retain merchandise appear on the Transaction Server as specified herein (the catalog, together with the software routines and underlying database is referred to herein as (the "Catalog") and install, configure and customize the Transaction Server to enable and track purchases from the Catalog. Other than the Initial Fee, Consultant's services with respect to the Catalog under this section shall be at no cost to Client. Consultant shall be compensated for the development of any updates (as opposed to bug fixes or error corrections which are addressed in Section [NUMBER] herein) to the Catalog after Client's acceptance of the initial version of the Catalog pursuant to Schedule [SPECIFY], attached.

## **Transmission of Information**

## Cooperate with Client to make available the ability to transmit information from the Transaction Server to Client. Consultant shall provide Client, at no additional cost, with consulting ad advice on obtaining software which will provide Client with the capability to receive encrypted Email communications of all User Information, at Client's facility, in the most efficient manner. Client will bear the cost of obtaining such software. Upon establishment of encrypted E-Mail access, Consultant shall transmit accurately and completely no less than once daily (Monday through Friday, excluding national holidays) the User Information received at the Site. With consultant from Consultant, Client shall be responsible for obtaining and installing the appropriate software at Client's location for receiving transmission of the User Information.

## **Recordation**

## Manage the recordation of all information made available from people accessing the Site, or purchasing items from the Catalog, including, without limitation name, address, credit card numbers, products requested and any other information directly or indirectly obtained from such users (collectively, "User Information"). Consultant will be compensated for such services pursuant to Schedule [SPECIFY], attached.

## **Website Promotion**

## Provide assistance as requested by Client in promoting the Site through press releases and messages to Usenet newsgroups, selected World Wide Web sites or selected other sites. Consultant will not place any such promotional material without written approval by Client in each instance as set forth in Section [NUMBER] herein. Other than the foregoing, Consultant shall not be obligated to provide commercial advertising services to Client under this Agreement. Consultant shall not promote the Site by either random or broadcast use of the Internet. Other than the Initial Fee, consultant's services under this section shall be at no cost to Client. Consultant will have no liability for the inaccuracy of any material used for promotional purposes and provided by Client, provided that Consultant does not alter, modify or change in any way such materials as provided by Client, and provided further that Consultant use such materials in strict compliance with the directions provided by the Client.

## **Return of Merchandise**

## Consultant shall have no liability or obligations in connection with merchandise acquired by credit card which is subsequently returned to Client by customer(s) or for the credit of Client's customer, unless such return is caused by a breach of Consultant's obligations under this Agreement. Other than the Initial Fee, Consultant's services under this section up until establishment of an encrypted [SPECIFY] mail capability shall be at no cost to Client. Consultant shall be compensated for any subsequent services rendered hereunder pursuant to Schedule [SPECIFY], attached.

# INTERNET DISPLAY DEVELOPMENT

Consultant shall develop the Internet Display for use on the Client Server, provided such Internet Display shall not exceed [NUMBER] pages of content. Upon the provision by Client to consultant of text, graphics or other information (collectively, "Content") for use in the Internet Display, Consultant shall promptly adapt, translate and reformat the Content as necessary into HTML format. Consultant shall make no changes to the text or appearance of any graphics in the Content without the prior written approval of Client. Client shall make the final determination of all Content to be used on the Internet Display. All photographs, trademarks, images or other works owned or controlled by Client and which are specified by Client for inclusion in the Internet Display shall be provided by Client in clear and camera ready form necessary for digital translation, or in other format agreed upon by the parties. The completed version of the Internet Display shall be provided to Client for acceptance in accordance with the Timetable set forth in Schedule [SPECIFY].

# STATEMENTS OF WORK

## **Site Related Programs**

## As used in this Agreement, the term "Site Related Programs" shall mean the software deliverables (other than the Internet Display) to be produced by Consultant hereunder.

## **Milestone Schedule**

## As used in this Agreement, the term "Milestone Schedule" shall mean the schedule for the development of Site Related Programs as set forth as part of the relevant Statement of Work.

## **Information Client Must Supply**

## To implement a Statement of Work, client shall supply to Consultant the Specifications, Milestone Schedule, pricing and payment terms (including an estimate of required hours or a fixed price proposal) and any other information that Consultant may reasonable require to evaluate the performance of the services desired by Client (the "Proposal"). Within [NUMBER] business days of Consultant's receipt of the Proposal, Consultant shall respond, either accepting the Proposal as a Statement of Work, or requiring changes thereto. All work hereunder, other than fixed-price proposals, shall be compensated pursuant to Schedule [SPECIFY], attached. The parties shall negotiate in good faith with respect to the Proposal, until both parties agree to implement the Proposal, as it may be mutually revised in writing, as a Statement of Work. Consultant shall not be required to commence work until both parties have agreed in writing to the Statement of Work. The performance of the services required in the Statement of Work shall be completed in accordance with the time frame set forth in the Statement of Work, provided Client shall have delivered all necessary information and materials in a timely fashion, and if not, then Consultant's obligations which are dependent on such information or materials shall be extended to reflect such delay.

## **Specifications**

## As used in this Agreement, the term "Specifications" shall mean the requirements for the development of a Site Related Program or other Deliverable, including operational and functional capabilities and performance, all as set forth as part of the relevant Statement of Work.

# DELIVERY AND DELIVERABLES

As used in this Agreement, the term "Deliverable" shall mean any product produced by Consultant hereunder in connection with the Internet Display or any Statement of Work.

## **Time and Manner of Delivery**

## Consultant shall deliver each Deliverable at the times and in the manner specified therefore under this Agreement, including any relevant Statement of Work. Notwithstanding the foregoing, if Client fails to provide Consultant the information or responses required under the acceptance test procedure set forth herein within the applicable time period, then Consultant's obligations which are dependent on such information or approval shall be extended to reflect such delay.

## **Procedure of Acceptance**

## The procedure for acceptance of any Deliverable shall be as follows:

### Client shall have [NUMBER] days to inspect and test each such Deliverable when received to determine if it conforms to the Specifications.

### If any Deliverables fails to conform to its Specifications, Client shall give Consultant written notice of the failure stating the defect in the Deliverables. Consultant shall then have [NUMBER] days to remedy such failure and redeliver such failure and redeliver such Deliverable to Client. After resubmission, Client shall again inspect the Deliverable to confirm that it conforms to the Specifications. If the resubmitted Deliverable again fails Client's acceptance testing, Client may, in its sole discretion (a) deem the failure to be a material breach under this Agreement; or (b) accept the Deliverable as a non-conforming Deliverable. If Client elects to accept the Deliverable as a non-conforming Deliverable, Client may in its sole discretion either:

### withhold a mutually agreed upon offset from the development fees payable to Consultant for the Deliverable or

### invoice and recover from consultant the amount of Client's reasonable out-of-pocket costs to correct, modify, and/or complete the Deliverable in accordance with the Specifications.

### Each Deliverable shall be deemed to be accepted upon written notice by Client to Consultant of such acceptance. Client will not unreasonably withhold or delay acceptance.

### Except in instances of Force Majeure or in case of an extension pursuant to Sections [SPECIFY] herein, a failure by Consultant to provide Deliverables to Client within the agreed upon time period shall be a material breach under this Agreement.

# NO SOLICITATION OF EMPLOYMENT

During the term of this Agreement, Client shall not solicit for employment any of Consultant's then-current employees without Consultant's prior written consent.

# CONFIDENTIALITY

## **Confidential Information**

Except to the extent required by law, the parties hereto agree that no disclosure or public announcement with respect to this Agreement or the transactions herein contemplated shall be made by any Party hereto without the prior written consent of the other Party.

## **Confidentiality of User Information**

## Without limitation of the foregoing, Consultant acknowledges and agrees that the User Information shall be deemed to be Confidential Information of the Client, and that Consultant not use User Information for any purpose other than that of fulfilling Consultant's obligations under this Agreement. Neither consultant nor any third party on behalf of consultant, shall have the right, directly or indirectly, to use, exploit, disclose, transmit, sell, assign, lease or otherwise convey or make available for access by third parties, any User Information.

# ACKNOWLEDGMENT OF CONSULTANT

Client shall acknowledge Consultant as the site developer of the Site in text in an "acknowledge page" of the Internet Display, which will include a hyperlink to Consultant's site on the World Wide Web. The format of such development credit shall be at the sole discretion of Client. It shall be the sole responsibility of Consultant to provide Client with sufficient information to create and update such hyperlink. Such development credit will remain on the Site for until [NUMBER] years from the Initial Display Date (as defined herein) or the termination of this Agreement, whether or not the Site is transferred in-house to facilities at the premises of Client. Such development credit shall not give Consultant any trademark, copyright or other proprietary interest or rights in the Internet Display. Nothing herein shall be construed to require the Client to promote the Site and the level of effort and spending in promotion of the Site, if any, shall be in Client's sole discretion.

# INTELLECTUAL PROPERTY

## **Consultant Materials**

## All techniques, algorithms and methods or rights thereto owned by Consultant at the time this Agreement is executed and employed by Consultant in connection with the Site Related Programs (Consultant Materials) shall be and remain the property of Consultant unless they are in the public domain. Consultant grants to Client a perpetual, irrevocable, royalty free, unrestricted right to use, modify, transfer and maintain the Consultant Materials.

## **Property of Client**

## Nothing herein shall be construed to grant any right or licence to Consultant or to any Content or other material provided to Consultant hereunder by Client, other than the right to use such material solely on behalf of Client in accordance with the terms hereto. All of the foregoing materials, including without limitation any and all copyrights, trademarks or trade names, are and shall remain the property of Client.

## **Site Related Programs**

## Client and Consultant recognize that Site Related Programs may contain code created during the development of such Site Related Program. Notwithstanding any other provisions of this Agreement Consultant shall retain a royalty-free licence to utilize any other code developed by it hereunder.

## **Ownership**

## Unless otherwise specified in a Statement of Work, and except for the Consultant Materials, all Deliverables and other materials, products, modifications developed or prepared for Client by Consultant under this Agreement (including any Statement of Work) including without limitation program images and text viewable on the Internet, any HTML Code relating thereto, or any program code created at the request of Client, is the property of Client and all title and interest therein shall vest in Client and shall be deemed to be a "work made for hire" and made in the course of the services rendered hereunder. The extent that title to any such works may not, by operation of law, vest in Client or such works may be considered works made for hire, all right, title and interest therein are hereby irrevocably assigned to Client. All such materials shall belong exclusively to Client with Client having the right to obtain and to hold in its own name, copyrights, registrations or such other protection as may be appropriate to the subject matter, and any extensions and renewals thereof. Consultant agrees to give Client and any person designated by Client, any reasonable assistance required to perfect the rights defined in this Section.

# WARRANTIES

## **Consultant Warranties**

## Consultant represents and warrants that:

## all of the services to be performed by it hereunder will be rendered using sound, professional practices and in a competent and professional manner by knowledgeable, trained and qualified personnel;

## Consultant is the owner of or otherwise has the right to use and distribute all materials and methodologies used in connection with providing the Deliverables;

## the Deliverables are and will be free of any software disabling devices or internal controls, including, without limitation, time bombs, viruses, or devices of similar nature;

## the Deliverables will operate in conformance with the relevant terms of this Agreement, including without limitation, the Statements of Work;

## Consultant will comply with all applicable federal, state and local lows in the performance of its obligations hereunder,

## all Deliverables hereunder will be compatible and operate in conjunction with all software and hardware previously delivered under this Agreement; and

## the Deliverables (other than information or materials supplied by Client and reproduced accurately in the Deliverables) shall not infringe upon any third party copyright, patent, trade secret or other proprietary right;

## the Transaction Server shall be maintained and kept up-to-date to utilize current developments in Internet-related technology within a reasonable time after such technology becomes generally commercially available.

## **Client Warranties**

## Client represents and warrants that:

## the use, as contemplated by this Agreement, of the material supplied by Client hereunder shall not infringe any copyright, trademark, trade secret or other third party proprietary right; and

## there is no impediment to Client's performance of its obligations hereunder.

## **Consultant Warranties**

## Consultant makes the representations and warranties regarding uptime, response time, and service responses as set forth in Schedule [SPECIFY] hereto.

# INDEMNIFICATION

## **Consultant Indemnification**

## Consultant agrees to indemnify and hold harmless Client, its directors, officers, employees and agents, and defend any action brought against same with respect to any claim, demand, cause of action, debt or liability, including reasonable attorney's fees, to the extent that it is based upon a claim that:

## if true, would constitute a breach of any of Consultant's representations, warranties, or agreements hereunder,

## arises out of the negligence or wilful misconduct of Consultant; or

## any of the consultant Materials, Deliverables or services to be provided by consultant hereunder infringes or violates any patents, copyrights, trade secrets, licences, or other property rights of any third party.

## **Client Indemnification**

## Client agrees to indemnify and hold harmless Consultant, its directors, officers, employees and agents, and defend any action brought against same with respect to any claim, demand, cause of action, debt or liability, including reasonable attorneys' fees, to the extent that it is based upon a claim that:

## if true, would constitute a breach of any of Client's representations, warranties, or agreements hereunder;

## arises out of the negligence or wilful misconduct of Client; or

## any of the Content provided by Client hereunder and used by Consultant as contemplated in this Agreement infringes or violates any patents, copyrights, trade secrets, licences, or other property rights of any third party

## **Notice of Claim**

## In claiming any indemnification hereunder, the indemnified party shall promptly provide the indemnifying party with written notice of any claim which the indemnified party believes falls within the scope of the foregoing paragraphs. The indemnified party may, at its own expense, assist in the defence if it so chooses, provided that the indemnifying party shall control such defence and all negotiations relative to the settlement of any such claim and further provided that any settlement intended to bind the indemnified party shall not be final without the indemnified party's written consent, which shall not be unreasonably withheld.

## **Survival of Indemnification Obligation**

## Each party's indemnification obligations shall survive any termination of this Agreement.

# MAINTENANCE AND SUPPORT

During the term of this Agreement, Consultant agrees that at no extra cost to Client:

1. to the extent that any Deliverable or service provided by Consultant shall fail to fulfil any warranty therefor, Consultant shall, upon written notice by Client of such failure, use its best efforts to promptly remedy such failure; and
2. Consultant shall, upon written notice by Client of such failure, use its best efforts to promptly deliver to Client all software containing bug fixes or error corrections to any software or other Deliverable provided hereunder to Client, including without limitation the Internet Display, the Catalog and Site Related program, at no additional cost to Client. In connection with such maintenance, Client shall provide Consultant with such information as Consultant reasonably requires in a reasonable time to allow Consultant to provide such maintenance. Consultant shall be party to standard third party hardware and software maintenance agreements related to the Transaction Server. Consultant shall have no responsibility for the maintenance of any third party software or hardware, other than as provided for herein or pursuant to any agreement entered into by Consultant pursuant to the terms of this Agreement.

# LIMITATION OF LIABILITY

## It is furthermost understood and agreed that with the exception for the indemnification obligations set forth herein, neither party hereto will not be liable for lost profits, lost opportunities, or indirect, incidental or consequential damages under any circumstances.

## Except for the indemnification obligations set forth herein, Consultant's liability to Client for any and all other matters related to this Agreement shall not exceed the total amount paid by Client to Consultant hereunder. Except for the indemnification obligations set forth herein, Client's liability to Consultant for any and all matters related to this Agreement shall not exceed the total of payments due to Consultant from Client hereunder.

THE LEGAL WARRANTIES WHICH ARE OF PUBLIC ORDER UNDER THE LAWS OF [STATE/PROVINCE] AND THE REMEDIES THEREFOR ARE THE SOLE AND EXCLUSIVE WARRANTIES AND REMEDIES FOR WHICH [SPECIFY] IS LIABLE AND ARE IN LIEU OF ALL OTHER WARRANTIES (WHETHER WRITTEN OR ORAL, EXPRESSED OR IMPLIED) INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF MERCHANTABILITY AND WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, AND [SPECIFY] SHALL NOT BE LIABLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES, OR DAMAGES OF ANY KIND BASED UPON ANY CLAIM FOR BREACH OF WARRANTY, OTHER THAN AS STATED ABOVE.

# COMPENSATION

## **Initial Display Date**

## As used herein, "Initial Display Date" shall mean the date upon which Client's Internet Display can be accessed by users of the Internet in accordance with the terms and conditions of this Agreement. The "Catalog Display Date" shall mean the date upon which the Catalog may be accessed, and purchases may be made from the Catalog, by users of the Internet in accordance with the terms and conditions of this Agreement.

## **Fees**

## Client shall pay Consultant an initial fee in accordance with the amount and payment schedule as set forth in Schedule [SPECIFY]. For the services to be rendered by Consultant to Client hereunder, Client shall pay to Consultant the agreed upon fees, in accordance with Schedule [SPECIFY], attached.

## For the services provided by Consultant to Client indicated in Section [NUMBER] (including monthly service fees, credit card transaction fees, catalog request fees, and processing fees), Client shall compensate Consultant, in accordance with Schedule [SPECIFY], attached.

## **Non-Exclusivity**

## Nothing herein shall be construed to preclude Client from distributing mail-order catalogs, selling any merchandise (whether or not appearing in the Catalog), or selling Client Memberships:

## on any proprietary on-line service (for example, but without limitation, CompuServe, America On-line, Prodigy, the Microsoft Network, Delphi or any other on-line service); or

## on any World Wide Web Site.

# TERM

This Agreement shall commence as of the Effective Date and shall continue until the earlier of (a) [NUMBER] years after the Catalog Display Date; or (b) prior termination according to the terms hereof (the Term).

# TERMINATION OF AGREEMENT

## **Consultant Termination**

## Consultant may terminate this Agreement:

## upon filing of any voluntary petition by the Client or upon the filing of any involuntary petition against the Client under the Bankruptcy Code that is not dismissed within [NUMBER] days after filing, or upon any appointment of a receiver for all or any portion of Client's business or operations, or any assignments of all or substantially all the assets of Client for the benefit of creditors; or

## upon Client's material breach of this Agreement, if client fails to cure such default within [NUMBER] days after receipt of notice specifying the default in reasonable detail; or pursuant to the terms of Section [NUMBER]

## **Client Termination**

## Client may terminate this Agreement:

## upon filing of any voluntary petition by Consultant or upon the filing of any involuntary petition against Consultant under the Bankruptcy Code that is not dismissed within [NUMBER] days after filing, or upon any appointment of a receiver for all or any portion of Consultant's business or operations, or any assignment of all or substantially all the assets of Consultant for the benefit of creditors;

## upon Consultant's material breach of this Agreement, if Consultant fails to cure such default within [NUMBER] days after receipt of notice specifying the default in reasonable detail;

## upon Client's written request to terminate the Site, which shall be given no less than [NUMBER] days prior to the effective date of such termination; or

## pursuant to the terms of Section [NUMBER]

## **Rights After Termination**

## In the event of a termination of this Agreement:

## the provisions of Sections [NUMBER] shall survive the termination of this Agreement;

## each party shall return all copies of Confidential Information and all other property belonging to and/or received from the other party. Consultant agrees that upon the termination of this Agreement for any reason, or at any time during the Term as requested by Client, Consultant shall return (or, at Client's request, destroy) all records of User Information in the possession or control of Consultant; and

## except as otherwise stated herein, each party may pursue claims it has against the other for any breach of the terms of this Agreement.

# USE IN ADVERTISING

Consultant agrees that it will not, without the written consent of Client in each instance:

1. use in advertising, publicity or otherwise (including without limitation on the Internet) the name of Client, Client's domain name, any trademark, trade name, symbol or any abbreviation or contraction thereof owned by or referring to the Client; or
2. represent, directly or indirectly, that any product or service offered by Consultant has been approved by or endorsed by Client.

# TRANSITION

## **Client Options**

## Upon the termination of this Agreement for any reason, or at any time during the term of this Agreement later than [NUMBER] months from the Effective Date, Client shall have the option of transitioning either the [SPECIFY] Version or the [SPECIFY] Version of the Transaction Server to Client's premises (the "Transition") upon written notification to Consultant. Within [NUMBER] days of Client's written notification to Consultant of the exercise of such an option, Consultant shall:

## deliver to Client and install upon the Client's hardware the source code, object code, documentation and any other software or materials related to the [SPECIFY] Version or [SPECIFY] Version of the Transaction Server;

## take all other steps necessary to promptly transfer all ongoing rights and obligations under any third party agreements relating to the Transaction Server (including without limitation, software licence and maintenance agreements) to Client; and

## perform up to [NUMBER] hours of transition assistance services identified in Schedule [SPECIFY] hereto over a period not to exceed [NUMBER] days from Client's exercise of the option at no extra cost to Client. Without limitation of the foregoing, upon Client's written notification of the exercise of this option, Consultant shall be deemed to have:

## granted to Client a right (revocable only in the case of the Client's breach of Section [NUMBER] herein) to use, copy, and maintain all Consultant owned or controlled Transaction Server software (including source code, object code and documentation) (the "Transition Deliverables") for the [SPECIFY] Version and [SPECIFY] Version; and

## conveyed to Client all of Consultant's right, title and interest to third party software which Consultant used or incorporated into the Transaction Server.

## **Acceptance of Transition**

## Client shall have [NUMBER] business days to accept the [SPECIFY] Version or the [SPECIFY] Version as transitioned to Client. Client shall have all acceptance rights set forth herein with respect to the transitioned software.

## **Acceptance Fee**

## Upon Client's acceptance of the transitioned software (i.e. the [SPECIFY] Version or [SPECIFY] Version as the case may be), Client shall pay to Consultant the agreed upon acceptance fee as set forth in Schedule [SPECIFY], attached, and any fees due for consulting services rendered by Consultant.

# GENERAL PROVISIONS

## **Force Majeure; Disaster Recovery**

Each party shall be released from and shall have no liability for any failure beyond its reasonable control, including, but not limited to, acts of God, labor troubles, strikes, lockouts, severe weather, delay or default of utilities or communications companies or accidents.

## **Waiver**

No modification of or amendment to this Agreement shall be valid or binding unless set forth in writing and duly executed by both parties and no waiver of any breach of any term or provision of this Agreement shall be effective or binding unless made in writing and signed by the Party purporting to give the same and, unless otherwise provided, shall be limited to the specific breach waived. No failure on the part of either Party to exercise, and no delay in exercising, any right under this Agreement shall operate as a waiver of such right. No single or partial exercise of any such right shall preclude any other or further exercise of any such right or the exercise of any other right.

## **Partial invalidity**

## Should any provision of this Agreement be held to be void, invalid or inoperative, the remaining provisions of this Agreement shall not be affected and shall continue in effect and the invalid provision shall be deemed modified to the least degree necessary to remedy such invalidity.

## **Independent Contractor**

## Consultant is acting, in performance of this Agreement, as an independent contractor. Consultant shall provide under this Agreement the services of only those personnel who are employees of Consultant for federal tax purposes. Consultant shall be solely responsible for the payment of compensation of personnel assigned to perform services hereunder. Client shall not be responsible for payment of worker's compensation, disability benefits and unemployment insurance or for withholding or paying employment related taxes for any Consultant employee, but such responsibility shall be solely that of Consultant. In the event that any federal, state or local government agency, any court or any other applicable entity determines that the personnel provided by Consultant or any permitted subcontractor or assignee of Consultant hereunder are employees of Client for any purpose, Consultant agrees to indemnify and hold Client harmless from all liabilities, costs and expenses (including, but not limited to, attorneys' fees) associates with such determination. Notwithstanding any other provision of this Agreement, Consultant may assign or subcontract work to be performed hereunder with the express written consent of Client, and Consultant shall remain primarily liable for all obligations hereunder.

## **Source Code Escrow Agreement**

## Consultant agrees to negotiate in good faith and enter into a Source Code Escrow Agreement (SCEA) with Client and a third party escrow agent (Escrow Agent). Consultant will provide Escrow Agent with a copy of the source code of the Transaction Server software (the Unix Version and the NT Version as it is developed) and documentation therefor (the Deposit), to be held in escrow pursuant to the terms and conditions of the SCEA. The SCEA will provide that the Deposit will be released to Client;

## upon Consultant making an assignment for the benefit of its creditors,

## upon the filing under any voluntary bankruptcy or insolvency law, the reorganisation of Consultant's assets or the appointment of a trustee or receiver for Consultant property; or

## upon the material breach of this Agreement relating to services to be provided by Consultant to Client, unless within [NUMBER] days of written notice from Client, Consultant has remedied the breach. Client will be responsible for the Escrow Agent's fees. The Deposit shall be updated by Consultant no less than quarterly with the current version of the source code and documentation for the [SPECIFY] Version and the [SPECIFY] Version, and shall be updated whenever Consultant changes the source code in productive use on behalf of Client.

## **Insurance**

## Consultant shall purchase and keep in force at its own cost and expense the minimum coverages with such insurers as set forth in "Insurance Coverage", Schedule [SPECIFY], attached, including:

## Worker's Compensation and Employees Liability Insurance;

## Commercial General Liability Insurance, including Contractual Liability, completed operations, personal injury coverage, broad form property damage;

## Errors and Omission Insurance; and

## Umbrella coverage for (b) and (c) above. Minimum coverage amounts are set forth in Schedule E, attached. Each and every policy and certificate shall contain an endorsement stating that the insurance company will not, prior to the expiration or termination of this Agreement or any policy expiration date shown on the policy and certificate, terminate the policy or change any coverage therein without giving written notice to Client. This notice shall be provided by certified mail to Client and shall arrive at least [NUMBER] days prior to the termination or change.

## **Notices**

Any demand, notice or other communication to be given in connection with this Agreement shall be given in writing and shall be given by personal delivery, by registered mail or by electronic means of communication addressed to the recipient as follows:

**If to Client:**

[YOUR COMPANY NAME]

[YOUR COMPLETE ADDRESS]

Attention: [INDIVIDUAL NAME]

Fax: [YOUR FAX NUMBER]

**If to Consultant:**

[COMPANY NAME]

[COMPLETE ADDRESS]

Attention: [INDIVIDUAL NAME]

Fax: [FAX NUMBER]

or to such other address, individual or electronic communication number as may be designated by notice given by either Party to the other. Any demand, notice or other communication given by personal delivery shall be conclusively deemed to have been given on the day of actual delivery thereof and, if given by registered mail, on the third Business Day following the deposit thereof in the mail and, if given by electronic communication, on the day of transmittal thereof if given during the normal business hours of the recipient and on the Business Day during which such normal business hours next occur if not given during such hours on any day. If the Party giving any demand, notice or other communication knows or ought reasonably to know of any difficulties with the postal system which might affect the delivery of mail, any such demand, notice or other communication shall not be mailed but shall be given by personal delivery or by electronic communication.

## **Assignment**

This Agreement and all rights, duties and obligations arising hereunder may not be assigned by either Party without the prior written consent of the other Party.

## **Entire Agreement**

This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and cancels and supersedes any prior understandings and agreements between the Parties with respect thereto. There are no other representations, warranties, terms, conditions, undertakings or collateral agreements, express, implied or statutory, between the parties other than as expressly set forth in this Agreement.

## **Governing Law**

This Agreement shall be governed by and construed in accordance with the laws of [COUNTRY].

## **Arbitration**

In the event of any dispute or difference arising between the parties in connection with this Agreement, the parties shall use their best efforts to settle the dispute amicably and by mutual agreement. If the parties are unable to resolve the dispute by mutual agreement, any party may notify the other party that it wishes to commence arbitration proceedings under the provisions of this Agreement.

Any arbitration shall be settled by arbitration in accordance with the Arbitration Rules of [OFFICIAL ARBITRATION BODY OF STATE/PROVINCE].

The parties grant a special and irrevocable power of attorney to the [ARBITRATION BODY], so that upon a written request of any one of them the [ARBITRATION BODY] may appoint an arbitrator from among the members of the arbitration body. A decision and an award of the arbitrator will be final. The parties expressly waive all legal recourse in respect of a decision of the arbitrator. The arbitrator is specially empowered to resolve all matters related with his competence and/or jurisdiction.

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement as of the date first above written.

# **CLIENT CONSULTANT**

Authorized Signature Authorized Signature

Print Name and Title Print Name and Title