

Master Services Agreement

Prepared For: Test Client

Date: August 4, 2023



THIS MASTER SERVICES AGREEMENT (the “Agreement”) is entered into by and between the undersigned Buyer and Service Provider as of the Effective Date.  The Buyer and Service Provider are sometimes referred to collectively herein as the “**Parties**” and individually as a "Party."  This Agreement is made in pursuance of the Services described herein.

# BACKGROUND & SERVICES SUMMARY

## The "Buyer" is:

Test Client

123 Apple Street

Los Angeles, CA 90057

## The "Service Provider" is:

Software Company

456 Pear Street

Pleasant Grove, UT 84062

test@domain.com

## The "Services" are:

* + 1. General software research and development, software architecture, and custom software consulting. The original work created as part of Services provided shall be considered a "work made for hire" as defined by the copyright laws of the United States. See Section 6 for “Terms and Conditions For Use, Reproduction, or Distribution.”
  1. The “Effective Date” of this Agreement is:
     1. The date of last signature set forth on the signature page below.

# ENGAGEMENT AND PERFORMANCE OF SERVICES

## Scope of Work: This Agreement governs each Scope of Work (“SOW”) with respect to the Services provided by Service Provider, except that any conflict between the terms of this Agreement and a separate SOW will be resolved in favor of the SOW if the SOW explicitly states that it is intended to modify the conflicting terms of this Agreement. This Agreement does not obligate Service Provider to perform any Services, or Buyer to perform any Services, until both parties have signed an SOW and then only for the Project specified in the SOW. Both parties must sign an SOW for it to be effective. However, a Purchase Order, herein understood to be a verbal or written request for services which reasonably includes the verbiage “purchase order” (each, a “Purchaser Order”), is effective if Service Provider: (a) signs and returns it to Buyer; (b) begins performance; or (c) acknowledges it by email or any other commercially reasonable means. If Service Provider commences Services for Buyer in the absence of a SOW or a Purchase Order and Buyer accepts such Services, this Agreement will nevertheless apply, unless the parties otherwise mutually agree in writing.

## Service Delivery: Buyer hereby engages Service Provider to provide the Services to Buyer, and Buyer will pay Service Provider for the Services, in accordance with the terms and conditions of this Agreement. It is agreed and understood that Service Provider is providing a “service” and not a “good,” as those terms may be used under the Uniform Commercial Code, as adopted by the governing law of this Agreement (independent of any final software deliverables to Buyer).

## Performance: Service Provider will perform the services of this Agreement in a timely and professional manner, consistent with industry standards, at a location, place and time that Service Provider deems appropriate, and all in accordance with this Agreement.  It is understood that there are inherent uncertainties in custom software development and Service Provider does not guarantee, represent, or warrant that the code will work within the exact scopes or time or cost constraints requested by Buyer. Any specific warranties or guarantees regarding bug fixes and performance of code may be outlined and agreed by both parties in the applicable SOW, but otherwise the Services and any underlying code are provided “as is”. The manner and means that Service Provider chooses to complete the Services are in Service Provider's sole discretion and control.

## Testing and Acceptance: At the time of completion of the Services, Service Provider will submit the completed deliverables, code, or other Services to Buyer for inspection and testing during a 3-day period (provided, such inspection period is also subject to any additional testing periods in the applicable SOW). Acceptance of the Services on the part of Buyer is constituted by any of the following conditions being met: (i) final payment from Buyer for Services billed, (ii) passage of the 3-day inspection period without notice of non-functioning code to Service Provider, or (iii) the usage of any of the software code or other Services in a production environment. ALL ACCEPTED SERVICES ARE OFFERED “AS IS” WITH NO ATTACHED GUARANTEES, REPRESENTATIONS, OR WARRANTIES *UNLESS* EXPRESSLY DESCRIBED AND AGREED TO BY THE PARTIES IN THE APPLICABLE SOW.

## Hosting and maintenance: Hosting and Maintenance of any developed software are typically necessary for the services described under this Agreement and are NOT included in this Agreement unless otherwise specifically stated in a separate SOW associated with this Agreement.

## Software Training: Training on the use of the software developed is NOT included in this Agreement unless otherwise specifically stated in a separate SOW associated with this Agreement.

# COMPENSATION Each of Service Provider and Buyer agree that:

* 1. Projects and work completed under this Agreement will be defined by written SOWs, which will operate as addendums to this Agreement, and which will state project-specific terms for the Services (each, a “Project”).
  2. Buyer will pay Service Provider according to the terms set forth in the SOWs. Service Provider will commit the necessary hours to complete projects in a timely manner.
  3. In addition to the payment for Services specified in the applicable Statement of Work, Buyer shall reimburse Service Provider for all reasonable out-of-pocket costs and expenses incidentally incurred or advanced by Service Provider or its employees, independent contractors or agents in connection with the Services rendered under this Agreement or any Project in a SOW, provided that such material expenses (in excess of $500) have been approved in advance by Buyer or its representative.
  4. Until such time as the amounts due under Service Provider’s outstanding invoices are paid by Buyer in full for the completed Services, Buyer acknowledges and agrees that Service Provider retains, and holds in escrow for immediate release on payment, all rights and powers to the provided code, its application, and use in connection with the Services (including all intellectual and proprietary rights therein).
  5. Any balance left unpaid beyond the due date of the invoice associated with the SOW will be considered a “Late Payment” and charged a $300 late fee, in part to address administrative costs and expenses associated with a missed payment. In addition, all amounts not paid by the due date will accrue interest at a rate of 2% per month at compounded interest, accruing on the first day overdue. All payments are first applied to Late Fees and interest, and then applied to outstanding principal amounts. If any balance or other amounts due and payable under this Agreement are referred by Service Provider to an attorney or third party debt collection agency for collection, Buyer agrees to be responsible for all collection costs, reasonable attorney’s fees, court costs, and a collection fee as allowed by applicable law (including, without limitation, Utah Code § 12-1-11).

# CONTRACTUAL RELATIONSHIP

* 1. Service Provider's relationship with Buyer will be that of a contractor, and nothing in this Agreement should be construed to create a partnership, joint venture, or employer-employee relationship. Service Provider (i) is not the agent of Buyer; (ii) is not authorized to make any representation, contract, or commitment on behalf of Buyer; (iii) will be solely responsible for all tax returns and payments required to be filed with or made to any federal, state, or local tax authority with respect to Service Provider's performance of services and receipt of fees under this Agreement.
  2. Service Provider does not provide any guarantee, representation, or warranty on any third party services utilized to fulfill requirements under this Agreement or any Project.

# CONFIDENTIAL INFORMATION; DATA PRIVACY

# Non-Disclosure and Confidentiality. Service Provider agrees that during the Term of this Agreement and thereafter for a period of three (3) years, except as expressly authorized in writing by Buyer, it (a) will not use or permit the use of Confidential Information (defined below) in any manner or for any purpose not expressly set forth in this Agreement; (b) will not disclose, lecture upon, publish, or permit others to disclose, lecture upon, or publish any such Confidential Information to any third party without first obtaining Buyer's express written consent on a case-by-case basis, except for production or disclosures for legal requests; (c) will limit access to Confidential Information to Service Provider personnel who need to know such information in connection with their work for Buyer; and (d) will maintain in strict confidentiality all Confidential Information. "Confidential Information" includes, but is not limited to, all non-public information related to Buyer's business and its actual or anticipated research and development, including without limitation (i) trade secrets, inventions, ideas, processes, computer source and object code, formulae, data, programs, other works of authorship, know-how, improvements, discoveries, developments, designs, and techniques; (ii) information regarding products or plans for research and development, marketing and business plans, budgets, financial statements, contracts, prices, suppliers, and customers; (iii) information regarding the skills and compensation of Buyer's employees, contractors, and any other service providers; (iv) the existence of any business discussions, negotiations, or agreements between Buyer and any third party; and (v) all such information related to any third party that is disclosed to Buyer or to Service Provider during the course of Buyer's business ("Third Party Information").  Notwithstanding the foregoing, it is understood that Service Provider is free to use: (A) information that is generally known in the public, trade, or industry; (B) information that is not gained as a result of a breach of this Agreement, including through independent development by Service Provider; and (C) Service Provider's own skill, knowledge, know-how, and experience.

# Disclosures for Legal Proceedings. If Service Provider is required to disclose any Confidential Information in a judicial or other formal proceeding (including for audits from administrative parties), Service Provider will exercise best efforts to give Buyer advance written notice before disclosing the Confidential Information in any such proceeding and, to the extent permitted by applicable law, will seek to limit disclosures in the proceeding to the Confidential Information that is strictly necessary for the proceeding (as determined by legal counsel of Service Provider).

# Employee Non-Recruitment. It is agreed that the employees and professional personnel (each, an “Impacted Employee”) of both Service Provider and Buyer are highly trained individuals whose talents are important and valuable assets to their respective companies. The parties recognize and agree that the loss of such Impacted Employees, from their respective businesses, is a material cause for concern to both parties and that the needs of Impacted Employees and of the parties change over time. It is therefore agreed that neither Buyer nor Service Provider shall, during the Term and for a period of six (6) months thereafter, approach, solicit, recruit, offer for employment, or hire any Impacted Employee of the other Party without prior written and informed consent of the other Party. In the event that Buyer breaches this Section, it is recognized that irreparable injury to Service Provider would result from any such breach, especially in light of the potential need for the Impacted Employee to provide the Services and complete Projects hereunder. Service Provider shall be entitled to injunctive relief in the event of any breach or threatened breach of this Section, in addition to any other remedy in law or equity arising therefrom (including, without limitation, consequential, special, and punitive damages for loss profits or inability to perform Services).

# Processing of Personal Data. Buyer acknowledges and agrees that Service Provider may need to collect and process personal data of Buyer’s natural-person end users or clients (collectively, “Personal Data”) in the course of the Services to adequately provide software deliverables and solutions. In such circumstances, Service Provider will collect and process Personal Data only as a service provider and processor acting on behalf of Buyer, according to the written instructions of Buyer. In no event will Service Provider be a controller or joint controller with Buyer for processing of Personal Data. Service Provider will not directly or indirectly sell any Personal Data or retain, use, or disclose any Personal Data for any reason other than for the purpose of providing the Services to Buyer under the terms of this Agreement and in accordance with applicable privacy laws. To the extent Service Provider may receive, maintain, use, process, or disclose Personal Data on behalf of Buyer in circumstances or with respect to Personal Data that is subject to strict U.S. consumer privacy laws (such as CPRA or VCDPA) or international data protection laws (such as GDPR) that require a formal data processing agreement (a “DPA”), Buyer acknowledges and agrees that Service Provider shall engage in processing all Personal Data subject to the terms of a mutually acceptable DPA, which shall be incorporated into the terms of this Agreement on execution.

# TERMS AND CONDITIONS FOR USE, REPRODUCTION, OR DISTRIBUTION

* 1. Given the nature of the software development process, it is understood that many of the elements used to develop the software for Buyer may be drawn from open-source libraries or segments of code from the internal libraries of Service Provider for the purpose of producing code which meets the requirements and specifications set forth by Buyer in the SOW and subsequent planning and software development activities (consistent with the Sections that follow).
  2. Subject to Section 6.c below, for the general purposes of this Agreement, software developed for and on behalf of Buyer (which has been fully paid for) will be provided with perpetual license and right of access to Buyer during the Term and thereafter to install, operate, or use in object code for Buyer’s internal business operations and in accordance with this Agreement and each SOW. However, any license to software under this Section shall be subject to, and limited by, Service Provider’s rights (or the lack thereof) to license and convey such rights to Buyer; provided, however, that such access and license are not redundant based on ownership of the final Services deliverables or software to Buyer for each Project (i.e., if such works are work made for hire rather than licensed to Buyer). AS A DIRECT LIMITATION ON THE LICENSE AND RIGHTS UNDER THIS SECTION, AND SUBJECT TO ANY OPEN SOURCE PROVISIONS OF THIS AGREEMENT, THE BUYER AGREES NOT TO REVERSE ENGINEER, DISASSEMBLE, DECOMPILE, DECODE, OR OTHERWISE ATTEMPT TO DERIVE OR GAIN ACCESS TO THE SOURCE CODE OF THE SERVICES DELIVERABLES OR ANY SOFTWARE PORTION THEREOF.
  3. If the original work created as part of Services is stated to be “a work made for hire” in Section 1.c, Buyer shall be the sole and exclusive owner and copyright proprietor of all rights and title in and to the results and proceeds of original work created as part of the Services provided that Service Provider has the right to convey. If for any reason the results and proceeds of original work created as part of the Services provided are determined at any time not to be a "work made for hire,” Service Provider hereby irrevocably transfers and assigns to Buyer all of its rights, titles and interests therein, including all copyrights, as well as all renewals and extensions thereto. Service Provider agrees to execute, at its standard list rate outlined in the most recent SOW with Buyer, any further transfers, assignments or other documents, as may be requested by Buyer or its designees from time to time, necessary to facilitate the transfer of copyright in the work product from Service Provider to Buyer. To the extent this Section applies to the Services, during the Term, Buyer hereby grants Service Provider a fully paid, non-assignable, non-exclusive license and right of access to use the original work in connection with Service Provider providing or supporting the Services and any further Projects.
  4. Service Provider may utilize tools, components, source code, or other property governed by a public use license. Non-original tools, components, source code, or other property are identified in the source code with reference to the applicable licenses.
  5. Service Provider may also utilize tools, components, source code, or other property which has been previously developed by Service Provider for the purpose of reuse across multiple Services and for multiple buyers or clients of Service Provider.  Service Provider shall maintain a copyright to these components, but grants to Buyer a license as defined in the source code. To the actual knowledge of Service Provider, these tools, components, source code, or other property are distinct from the business functionality contemplated under this Agreement; accordingly, such tools are not “a work made for hire” under this Agreement.
  6. With Buyer’s written consent (which may be documented through email confirmation), Service Provider may retain a limited license to post the name and likeness (i.e., branded name, mark, logo, or icon) of Buyer in Service Provider’s informational and marketing pieces, such as a logo list on Service Provider’s website.

# LIABILITY

* 1. WITH REGARD TO ANY CLAIM ASSERTED BY THE BUYER AGAINST THE SERVICE PROVIDER RELATING TO THIS AGREEMENT, ASSOCIATED SOW, OR THE SERVICES, WHETHER SAID CLAIM ARISES IN LAW OR IN EQUITY, SERVICE PROVIDER’S LIABILITY IS LIMITED TO, AND THE MAXIMUM DAMAGE, LOSS, OR JUDGMENT THAT CAN BE AWARDED TO THE BUYER IS, BEFORE ATTORNEYS’ FEES AND COSTS, THE TOTAL AMOUNT PAID BY THE BUYER TO THE SERVICE PROVIDER. EXCEPT FOR BUYER’S LIABILITY UNDER SECTION 5.B, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, PUNITIVE, OR SPECIAL DAMAGES, WHATSOEVER, INCLUDING WITHOUT LIMITATION, DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, LOSS OF USE, AND THE LIKE, ARISING OUT OF THIS AGREEMENT OR ASSOCIATED SOW, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
  2. Except for any liability which is caused by the sole negligence, gross negligence or willful misconduct of Service Provider, its employees, agents or contractors, or where Service Provider is found guilty of infringement on delivered code, Buyer shall defend, indemnify, and hold harmless Service Provider, its affiliates, and their respective officers, directors, agents and employees from any and all claims, demands, losses, causes of actions, damage, lawsuits, judgements, including attorneys’ fees and costs (collectively, “Losses”), arising out of or relating to: (i) the use and implementation of the Services by Buyer after acceptance, (ii) breach or alleged breach by Buyer of this Agreement or any associated SOW, including misuse of the Services or any software deliverables thereunder on the part of Buyer, or (iii) any claim by any third party or data subject that the Personal Data processed by Service Provider under this Agreement was not lawfully collected by Buyer or otherwise breaches the privacy rights of the third party or data subject under the policies and procedures of Buyer.
  3. Except for any liability which is caused by the sole negligence, gross negligence or willful misconduct of Buyer, its employees, agents or contractors, or for any liability based on Buyer’s breach of the terms of this Agreement, Service Provider shall defend, indemnify, and hold harmless Buyer, its affiliates, and their respective officers, directors, agents and employees from any and all Losses arising out of or relating to: (i) Service Provider’s obligations under this Agreement or (ii) Service Provider’s obligations under any related Project or SOW.
  4. In the event of any action at law or in equity between Buyer and Service Provider to enforce any of the provisions hereof, the prevailing Party to such litigation shall recover from the other Party all costs and expenses, including actual attorneys’ fees and costs, incurred therein by the prevailing Party; and if the prevailing Party shall recover judgment in any such action or proceeding, such costs, expenses and attorneys’ fees may be included in and as part of such judgment. THE AFOREMENTIONED NOTWITHSTANDING, BUYER SPECIFICALLY AGREES THAT THE LIABILITY OF SERVICE PROVIDER SHALL BE CAPPED BY AND SUBJECT TO THE LIMITATIONS IN SECTION 7.A ABOVE.

# TERMINATION

## Term. Unless specifically outlined in the SOW, it is understood that Service Provider intends to provide uninterrupted Services until the Services and Projects outlined in each SOW are complete (such period being the “Term”).

## Notice of Termination: In the event of termination of this Agreement according to this Section 8, the terminating Party must give a final written notice through normal historical communication methods (requiring at a minimum to be an Email and Phone Call) and captioned “Notice of Termination”. The day the notice was sent to Buyer or Service Provider from the other Party shall be understood to be the “Date of Notice of Termination”.

## Termination with Cause: Either Party has the right to terminate this Agreement, for cause, in the event that the other Party has materially breached the Agreement and fails to cure such breach within fifteen (15) days of receipt of written notice from the non-breaching Party, setting forth in reasonable detail the nature of the breach.

## Early Termination by Buyer: If Buyer intentionally or by an act of omission withholds or inhibits Service Provider from fulfilling the Services or any Project outlined in a SOW (e.g., not providing access to necessary portions of Buyer’s systems after request), and such actions of Buyer last five (5) business days or more after Service Provider has given a Notice of Termination or other reasonable notice detailing the actions of Buyer that are inhibiting the Services, Buyer shall be considered in material breach of this Agreement by means of an ”Early Termination”. For any Early Termination on the part of Buyer, (i) Buyer shall promptly pay Service Provider for all earned but unpaid fees, as may be detailed in a final invoice or written request for payment from Service Provider and (ii) this Agreement may be terminated, in the discretion of Service Provider, immediately after receipt of payment. If Buyer fails to make final payment of fees due to Service Provider within ten (10) days after Service Provider’s written request for payment (which may be through the Notice of Termination described in this Section), all remaining fees due from Buyer shall be overdue and be considered a Late Payment under Section 3 above.

## Termination by Frustration of Purpose, Impossibility, or Insolvency of a Party: In the case of an unforeseen event which makes performance impossible, illegal, or materially different from what was originally intended under this Agreement or an applicable SOW, Buyer will be obligated to pay the amount earned under the Agreement up to the Date of Notice of Termination by frustration of purpose, and this Agreement shall thereafter immediately terminate.

## Return of Property: Upon termination of the Agreement or upon Buyer’s written request, Service Provider will promptly deliver to Buyer or delete all of Buyer's property together with all copies thereof, and any other material containing or disclosing Third Party Information or Confidential Information.

## Survival: The following provisions will survive termination of this Agreement: any Sections titled "Confidential Information; Data Privacy," “Liability,” "Return of Property," "Survival," and "General Provisions."

# GENERAL PROVISIONS

## Governing Law and Venue: This Agreement and the Services provided to Buyer are governed by Utah law (without regard to its conflict of laws provisions), and Buyer agrees that any dispute shall be brought exclusively by the parties in Utah’s Third District Court or in the United States District Court for the District of Utah. BUYER EXPRESSLY WAIVES (i) ANY OBJECTION TO THE JURISDICTION OF SAID COURTS AND (ii), TO THE EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT TO TRIAL BY JURY IN ANY DISPUTE OR CLAIM UNDER THIS AGREEMENT, IN LIGHT OF THE COMPLEX NATURE OF THE SERVICES.

## Warranty of Authority: Each individual signing this Agreement warrants and represents that he or she has the full authority to execute this Agreement on behalf of the Party on whose behalf he or she has executed this document and that he or she is acting within the express scope of such authority.

## Severability: If any provision of this Agreement is, for any reason, held to be invalid or unenforceable, the other provisions of this Agreement will be unimpaired and the invalid or unenforceable provision will be deemed modified so that it is valid and enforceable to the maximum extent permitted by law.

## Assignment: Subject to the limitations in this Section, this Agreement, and the Party's rights and obligations herein, are personal to the Party and may not be assigned, delegated, or otherwise transferred by either Party without the other's prior written consent, and any attempted assignment, delegation, or transfer in violation of the foregoing will be null and void. Service Provider may transfer and assign, whether by operation of law, merger, direct assignment, or otherwise, any of its rights and obligations under this Agreement without consent of Buyer, provided that such assignment does not materially impact the rights of Buyer and the timely completion of the Services and any related Project.

## Waiver: Any waiver or failure to enforce any provision of this Agreement on one occasion will not be deemed a waiver of any other provision or of such provision on any other occasion.

## Entire Agreement; Counterparts: This Agreement is the final, complete and exclusive agreement of the parties with respect to the subject matters hereof and supersedes and merges all prior discussions between the parties with respect to such subject matters. No modification of or amendment to this Agreement, or any waiver of any rights under this Agreement, will be effective unless in writing and signed by Service Provider and Buyer. This Agreement may be executed in counterparts, each of which is deemed an original, but all of which together constitute one and the same instrument. A signed copy of this Agreement delivered by e-mail or other means of electronic transmission has the same legal effect as delivery of an original signed copy of this Agreement.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be approved by their duly authorized representatives and executed and delivered with the intention of becoming legally bound hereby, as of the respective dates below.

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John Doe, CEO [name of signing party], [title]

Software Company Test Client

Date: Date: