**AGREEMENT FOR DEVELOPMENT SERVICES BY \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**[Note: This form is mostly a developer-favorable document, but contains some provisions favorable to the customer. It is intended to illustrate provisions that should differ from ordinary development or consulting agreements arising from use of open source software. It should only be used after consideration of the issues specific to your situation and is not suitable for use without customization.]**

**Updated April 20, 2018**

This Agreement (“**Agreement**”) is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 201\_\_ by and between \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“**Developer**”) a corporation organized under the laws of **[California]** with offices at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, and the party indicated in **Exhibit A** (“**Customer**”). In consideration of the mutual promises contained herein, the parties agree as follows:

# **STATEMENTS OF WORK**.

## **Statements of Work.** From time to time, Customer and Developer may agree on certain services to be performed under this Agreement, and in that case, shall prepare a statement of work in substantially the form set forth in **Exhibit A** (“**Statement of Work**”). Each Statement of Work, upon execution by both of the parties hereto, will be incorporated into this Agreement. Developer shall perform for Customer the services described in each Statement of Work. (“**Services**”). Customer shall perform the tasks designated as the responsibility of Customer, if any, set forth in the Statement of Work. Where Services are to be performed upon Customer’s premises, Customer shall provide the following as reasonably required by Developer at Customer’s premises: office space, telephone and high-speed Internet connections.

## **Lost Time.** If the Statement of Work indicates any responsibilities on the part of Customer, Developer’s obligations related thereto will be subject to the complete and timely performance by Customer of Customer’s responsibilities. The remainder of this Section will only apply to Services performed by Developer pursuant to a Statement of Work on a fixed-fee basis. Any delays or additional costs incurred by Developer during the course of a fixed-fee engagement as a result of Customer’s failure to provide timely and properly the co-operation described in this Agreement (“**Lost Time**”) shall be the responsibility of Client and payment for all Lost Time shall be made to Developer at Developer’s then-current rates. Any payments for Lost Time will be in addition to any fixed-fee for Services. For purposes of this Agreement, “Lost Time” will include without limitation: (i) any time Developer stands idle as a result of any failure of Customer to perform Customer’s responsibilities as set forth in the applicable Statement of Work; and (ii) any time and materials expended by Developer in an attempt to correct discrepancies in Services that are demonstrated by Developer to the reasonable satisfaction of Customer to have been the result of an error or discrepancy in materials, technology or information provided by Customer rather than errors of Developer.

## **Acceptance Testing**. For purposes of this Section, a “**Milestone**” is a task described in the Statement of Work to be performed by Developer, and “**Deliverable**” is an item or materials to be delivered to Customer as described in the Statement of Work. Developer will notify Customer when it believes it has completed a Milestone and will deliver to Customer the associated Deliverable, along with the acceptance form attached hereto as **Exhibit [\_\_\_]**. Customer will evaluate the Milestone or Deliverable. When Customer has assessed whether Developer has completed a Milestone or Deliverable in accordance with the applicable specifications provided to Developer by Customer, and in accordance with this Agreement, it will promptly provide a written acceptance or rejection to Developer. Customer shall not reject any Milestone or Deliverable that meets the requirements of this Agreement. In the event Customer has not provided a written notice of rejection within 10 business days after delivery of the Deliverable, the Deliverable will be deemed accepted. Any notice of rejection shall set forth in reasonable detail the basis for Customer’s’ rejection. Upon receipt of a written notice of rejection, Developer shall make commercially reasonable efforts to submit a corrected Milestone or Deliverable within 30 days, and the Deliverable shall again be subject to the acceptance procedure described above.

# **COMPENSATION**

## **Services**. Customer shall pay Developer for performing the Services as shown in the applicable Statement of Work.

## **Status Reports**. Developer shall from time to time during the term of this Agreement keep Customer advised as to Developer’s progress in performing the Services hereunder. Developer shall, as requested by Customer, prepare written reports with respect thereto; provided however, that if the Services are performed on a time and materials basis, the time for preparing such reports will be deemed time spent performing the Services.

## **Expenses**. Customer shall also reimburse Developer for the reasonable actual travel and living expenses of its personnel engaged in the performance of Services at locations other than Developer facilities, together with other reasonable out-of-pocket expenses incurred in connection with performance of the Services. Developer shall adhere to any travel and expense policy reasonably promulgated by Customer.

## **Payments**. Developer shall invoice Customer for all amounts on or after the due date. Payment terms will be net 30 days. Any amounts due Developer under this Agreement not received by the date due will be subject to a service charge of 1% per month, or the maximum charge permitted by law, whichever is less.

# **CONFIDENTIALITY**

## **Definition**. “**Confidential Information**” means any Customer proprietary information, technical data, trade secrets or know-how, including, but not limited to, research, product plans, products, services, customers, customer lists, markets, software, developments, inventions, processes, formulas, technology, designs, drawings, engineering, hardware configuration information, marketing, finances or other business information disclosed by Customer either directly or indirectly in writing, orally or by drawings or inspection of parts or equipment.

## **Non-Use and Non-Disclosure**. Developer shall not, during or subsequent to the term of this Agreement, use Customer’s Confidential Information for any purpose whatsoever other than the performance of the Services on behalf of Customer or disclose Customer’s Confidential Information to any third party. It is understood that said Confidential Information will remain the sole property of Customer. Developer further shall take all reasonable precautions to prevent any unauthorized disclosure of such Confidential Information including, but not limited to, having each employee of Developer, if any, with access to any Confidential Information, execute a nondisclosure agreement containing provisions in Customer’s favor identical to this Section 3. Confidential Information does not include information that: (i) is known to Developer at the time of disclosure to Developer by Customer as evidenced by written records of Developer; (ii) has become publicly known and made generally available through no wrongful act of Developer; or (iii) has been rightfully received by Developer from a third party who is authorized to make such disclosure. Without Customer’s prior written approval, Developer shall not directly or indirectly disclose to anyone the existence of this Agreement or the fact that Developer has this arrangement with Customer.

## **Return of Materials**. Upon the termination of this Agreement, or upon Customer’s earlier request, Developer shall deliver to Customer all of Customer’s property or Confidential Information that Developer may have in Developer’s possession or control.

## **Compliance with Copyleft Licenses**. The provisions of this Section 3 are not intended to violate any requirement in the GNU General Public License, or any other license that may apply to third party open source software. However, Developer shall consult with Company prior to disclosing any Confidential Information in connection with the distributin of any third party open source software.

# **INTELLECTUAL PROPERTY**

## **Deliverables**.

### **[Option 1: Deliverables provided to Customer under open source license.]** All copyrightable material, software, documentation, and other works of authorship embodied in materials delivered to Customer hereunder (“**Deliverables**”) will be provided to Customer under the terms of the open source license agreements described in the applicable Statement of Work.

### **[Option 2: Deliverables contributed to open source project]** Upon final acceptance of the Deliverable under the applicable Statement of Work, Developer shall contribute the final Deliverables to the \_\_\_\_\_ project for release under the \_\_\_\_\_\_\_\_\_\_ version \_\_\_ license. To the extent that such project does not include the Deliverables (or any portion thereof) in a public release under such license, in such a manner that Customer is able to access the Software under such terms, Developer hereby grants to Customer, under all of Developer's rights in and to the Software, a perpetual, irrevocable, worldwide, non-exclusive, sublicenseable license to use, copy, prepare derivative works of, publicly perform and display the Deliverables and derivative works thereof.

### **[Option 3: Modifications to Customer-developed open source code]** Developer acknowledges that all copyrightable material, notes, records, drawings and other works of authorship embodied in Deliverables provided to Company hereunder (“**Work Product**”) will be the sole property of the Company. Developer hereby assigns and shall assign (or cause to be assigned) to the Company all rights in the Work Product and any intellectual property rights embodied therein. **[Add further assurances clause as necessary][Note that “work made for hire” language is not included due to employment law implications under California law.]**

### **[Option 4: Modifications to third party-developed copyleft code (without Company modifications)]** The parties acknowledge that Customerwishes Developer to develop additional, changes, or derivative works of certain software (“**Third Party Copyleft Materials**”) that is made generally available by third parties under the terms of **[the GNU General Public License version 2].** Company shall acquire copies of such Third Party Copyleft Materials directly from the applicable third party and Company will not be required to deliver any Third Party Copyleft Materials to Developer. Developer acknowledges that all copyrightable material, notes, records, drawings and other works of authorship embodied in materials delivered to Company hereunder (“**Work Product**”) will be the sole property of the Company. Developer hereby assigns and shall assign (or cause to be assigned) to the Company all rights in the Work Product and any intellectual property rights embodied therein. The parties acknowledge that the delivery by Developer to Company of the Work Product hereunder is for Company’s private use only and not intended for public availability, and that the Work Product will be deemed Company’s Confidential Information subject to the terms of Section 3. Except as otherwise expressly required by Company, Developer shall provide the Work Product to Company only in a test environment operated by Developer on Developer’s servers. Developer shall deliver the Work Product to Company, upon completion, only in the form of a “diff” file or patch, and shall not under any circumstances deliver to Company any Third Party Copyleft Materials.

### **[Option 5: Modifications to third party-developed open source code previously modified by Company]** The parties acknowledge that Customerwishes Developer to develop additional, changes, or derivative works of certain software licensed by third parties under the terms of **[the GNU General Public License version 2]** that have been modified by Company for its own internal use and not distributed to any third party (“**Copyleft Materials**”).The parties acknowledge that Developer’s development thereof will be performed on behalf of Company as directed by Company, and on development servers and using development tools provided by Company. Developer shall not transfer any copy of any Copyleft Materials to Developer’s computers or servers. Accordingly, Developer acknowledges that all copyrightable material, notes, records, drawings and other works of authorship embodied in materials delivered to Company hereunder (“**Work Product**”) will be the sole property of the Company. Developer hereby assigns and shall assign (or cause to be assigned) to the Company all rights in the Work Product and any intellectual property rights embodied therein. The parties acknowledge that it is their intent to refrain from any distribution of Copyleft Materials from Company to Developer or vice versa. Developer shall take all reasonable measures to assist Company in performing the Services in a fashion to accomplish such intent.

### **[Use for options 3, 4 and 5]**The parties acknowledge that, for avoidance of doubt, Developer may use and otherwise exploit generally applicable ideas, concepts, and know-how of Developer that that may be embodied in the Work Product, or that Developer may use in the preparation of the Work Product, subject to Company’s rights in its Confidential Information as described in Section 3.

### **No Patent Claims.** Developer shall not prosecute any patent application with respect to the Software. Developer shall not assign to any third party the right to pursue any patent application related to the Software.

## **Third Party Open Source Materials**. The parties acknowledge that Developer may use or incorporate certain third party open source software in the Deliverables. Developer may determined such materials in its discretion, subject to the guidelines in **Exhibit [\_\_\_]. [Attach the Company’s open source policy]**

## **Intellectual Property Claims**. Each party shall, at its own expense, defend or at its option settle any claim brought against the other party on the issue of infringement of any copyright or trade secret of any third party by (in the case of Developer) the Deliverables or (in the case of Customer) any materials provided by Customer hereunder, (“**Indemnified Materials**”), provided that the other party provides such party with (i) prompt written notice of such claim, (ii) control over the defense and settlement of such claim and (iii) proper and full information and assistance to settle and/or defend any such claim. The foregoing provisions of this Section 4.3 state the entire liability and obligation of each party, and the exclusive remedy of each party, with respect to any actual or alleged infringement of any intellectual property right or breach of any intellectual property non-infringement warranty. Nothing in this Agreement will be construed as a warranty of non-infringement of third party patent rights.

## **Warranty and Disclaimer**. Developer hereby warrants that (a) the Deliverables will not contain any virus, trap door, worm, or any other device that is injurious or damaging to software or hardware used in conjunction with the Deliverables; and (b) except as may be otherwise indicated in the applicable Statement of Work and as allowed under Section 4.2, the Deliverables are the original work of authorship of Developer, or Developer otherwise has the right to provide the Deliverables under the terms of this Agreement; provided, however, that the sole remedy for breach of the warranty in this subsection (b) is Developer’s indemnity obligation sunder Section 4.3. EXCEPT FOR THE WARRANTIES EXPLICITLY SET FORTH IN THIS AGREEMENT, NEITHER PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER ORAL OR WRITTEN, WHETHER EXPRESS, IMPLIED, OR ARISING BY STATUTE, CUSTOM, COURSE OF DEALING OR TRADE USAGE, WITH RESPECT TO THE SUBJECT MATTER HEREOF, IN CONNECTION WITH THIS AGREEMENT. EACH PARTY SPECIFICALLY DISCLAIMS ANY AND ALL IMPLIED WARRANTIES OR CONDITIONS OF TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT.

# **TERM AND TERMINATION**

## **Term**. This Agreement will commence on the date first written above and will continue until final completion of the Services or termination as provided below.

## **Termination**. Customer may terminate this Agreement or any Statement of Work without cause upon giving 10 business days prior written notice thereof to Developer. If Customer terminates this Agreement under the prior sentence, Customer shall pay to Developer the fees for any Services performed before the effective date of termination on a time and materials basis. If the fees for the applicable Statement of Work to be paid on a milestone basis, such fees will not exceed the amount associated with the next uncompleted milestone. Any such notice must be addressed to Developer at the address shown below or such other address as either party may notify the other of and will be deemed given upon delivery if personally delivered, or 48 hours after deposited in the United States mail, postage prepaid, registered or certified mail, return receipt requested. Customer may terminate this Agreement immediately and without prior notice if Developer refuses to or is unable to perform the Services or is in breach of any material provision of this Agreement.

## **Survival**. Upon such termination all rights and duties of the parties toward each other will cease except: (a) Customer shall pay, within 30 days after the effective date of termination, all amounts owing to Developer for Services completed prior to the termination date and related expenses, if any, in accordance with the provisions of Section 2; and (b) Sections 3, 4 and 6 will survive termination of this Agreement.

# **MISCELLANEOUS**

## **Nonassignment/Binding Agreement**. The parties acknowledge that the unique nature of Developer’s services are substantial consideration for the parties’ entering into this Agreement. Neither this Agreement nor any rights under this Agreement may be assigned or otherwise transferred by Developer, in whole or in part, whether voluntarily or by operation of law, without the prior written consent of Customer, which consent will not be unreasonably withheld. Subject to the foregoing, this Agreement will be binding upon and will inure to the benefit of the parties and their respective successors and assigns. Any assignment in violation of the foregoing will be null and void.

## **Notices**. Any notice required or permitted under the terms of this Agreement or required by law must be in writing and must be (a) delivered in person, (b) sent by first class registered mail, or air mail, as appropriate, or (c) sent by overnight air courier, in each case properly posted and fully prepaid to the appropriate address set forth in the preamble to this Agreement. Either party may change its address for notice by notice to the other party given in accordance with this Section. Notices will be considered to have been given at the time of actual delivery in person, three business days after deposit in the mail as set forth above, or one (1) day after delivery to an overnight air courier service.

## **Waiver**. Any waiver of the provisions of this Agreement or of a party’s rights or remedies under this Agreement must be in writing to be effective. Failure, neglect, or delay by a party to enforce the provisions of this Agreement or its rights or remedies at any time, will not be construed as a waiver of such party’s rights under this Agreement and will not in any way affect the validity of the whole or any part of this Agreement or prejudice such party’s right to take subsequent action. No exercise or enforcement by either party of any right or remedy under this Agreement will preclude the enforcement by such party of any other right or remedy under this Agreement or that such party is entitled by law to enforce.

## **Severability**. If any term, condition, or provision in this Agreement is found to be invalid, unlawful or unenforceable to any extent, the parties shall endeavor in good faith to agree to such amendments that will preserve, as far as possible, the intentions expressed in this Agreement. If the parties fail to agree on such an amendment, such invalid term, condition or provision will be severed from the remaining terms, conditions and provisions, which will continue to be valid and enforceable to the fullest extent permitted by law.

## **Integration**. This Agreement (and all Statements of Work) contains the entire agreement of the parties with respect to the subject matter of this Agreement and supersedes all previous communications, representations, understandings and agreements, either oral or written, between the parties with respect to said subject matter. No terms, provisions or conditions of any purchase order, acknowledgement or other business form that either party may use in connection with the transactions contemplated by this Agreement will have any effect on the rights, duties or obligations of the parties under, or otherwise modify, this Agreement, regardless of any failure of a receiving party to object to such terms, provisions or conditions. This Agreement may not be amended, except by a writing signed by both parties.

## **Counterparts**. This Agreement may be executed in counterparts, each of which so executed will be deemed to be an original and such counterparts together will constitute one and the same agreement.

## **Governing Law**. This Agreement will be interpreted and construed in accordance with the laws of the State of **[California]** and the United States of America, without regard to conflict of law principles. All disputes arising out of this Agreement will be subject to the exclusive jurisdiction of the state and federal courts located in [\_\_\_\_\_\_\_\_\_\_] County, California, and each party hereby consents to the personal jurisdiction thereof.

## **Independent Contractors**. It is the express intention of the parties that Developer is an independent contractor. Nothing in this Agreement will in any way be construed to constitute Developer as an agent, employee or representative of Customer, but Developer shall perform the Services hereunder as an independent contractor. Developer shall furnish (or reimburse Customer for) all tools and materials necessary to accomplish this contract, and will incur all expenses associated with performance, except as expressly provided on the applicable Statement of Work. Developer acknowledges and agrees that Developer is obligated to report as income all compensation received by Developer pursuant to this Agreement, and Developer acknowledges its obligation to pay all self-employment and other taxes thereon. Developer further shall indemnify and hold harmless Customer and its directors, officers, and employees from and against all taxes, losses, damages, liabilities, costs and expenses, including attorney’s fees and other legal expenses, arising directly or indirectly from (i) any negligent, reckless or intentionally wrongful act of Developer or Developer’s assistants, employees or agents, (ii) a determination by a court or agency that the Developer is not an independent contractor, or (iii) any breach by the Developer or Developer’s assistants, employee or agents of any of the covenants contained in this Agreement.

## **Non-Solicitation**. Customer acknowledges and agrees that the employees and contractors of Developer who perform the Services are a valuable asset to Developer and are difficult to replace. Accordingly, Customer agrees that, for the term of this Agreement and for a period of 12 months thereafter, it will not solicit for employment as an employee, independent contractor, or Developer to any Developer employee or Developer. In the event Customer breaches the provisions of this Section, the parties agree that it would be difficult to determine the amount of actual damages to Developer that would result from such breach. The parties further agree that in the event Customer breaches the provisions of this Section 6, Customer shall pay Developer liquidated damages of $50,000 for each such breach, which is the parties’ good faith estimate of the amount of damages to Developer from such breach. **[Note: this section should be reviewed by employment counsel to ensure adherence to law, particularly in California.]**

## **LIMITATION OF REMEDIES AND DAMAGES**. **[Note: this section is highly favorable to Developer.]**THE LIABILITY OF DEVELOPER ARISING HEREUNDER WILL BE LIMITED TO FEES PAID BY CUSTOMER HEREUNDER. DEVELOPER SHALL NOT BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, OR INDIRECT DAMAGES, INCLUDING WITHOUT LIMITATION DAMAGES FOR LOSS OF BUSINESS PROFITS AND/OR BUSINESS INTERRUPTION, WHETHER FORESEEABLE OR NOT, AND WHETHER ARISING IN CONTRACT, TORT, OR NEGLIGENCE, EVEN IF A REPRESENTATIVE OF DEVELOPER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.

**“CUSTOMER” “DEVELOPER”**

By: By:

Print Name: Print Name:

Title: Title:

**STATEMENT OF WORK**

**Sample Statement of Work with Milestone Schedule**

**Customer:**

**[Fill in name and address]**

**Services to be performed by Developer:**

**Deliverables and Milestone Schedule**. Developer shall perform the tasks set forth below (each a “**Milestone**”) in accordance with the following schedule indicating each deliverable item of work product (“**Deliverable**”), and the associated due date and payment.

**Milestone Schedule**

|  |  |  |  |
| --- | --- | --- | --- |
| **Deliverable/Milestone** | **Due Date** | **Responsible Party (Customer or Developer)** | **Payment** |
|  |  |  |  |

**SAMPLE STATEMENT OF WORK** **for Time and Materials Work**

**Customer:**

**[Fill in name and address]**

**Services to be performed by Developer:**

Compensation of Developer:

(a) Rate of pay:  per

(b) Total payment limitation:

(c) Advance payment:

(d) Expenses authorized for reimbursement by Developer:

(e) Other:

(f) Expected duration of project:

Developer may revise these rates from time to time but shall give Developer 30 days prior written notice of any such revision.

**Exhibit [\_\_\_\_]**

**Guidelines for Use of Third Party Open Source Code**

**[This is only an example.]**

Developer may use third party open source materials as described below. Licenses applying ot third party materials are categorized as OK, Confirm Approval, and Do Not Use.

For licenses categorized as OK, Developer may use such materials in its discretion, consistent with the technical requirements and considerations of efficiency in developing the Work Product.

For licenses categorized as Confirm Approval, Developer may use such materials according to any limitations described in the table below. Developer shall advice Company that it intends to use such materials, and such use will be deemed approved unless Company disapproves in writing within 10 business days.

For licenses categorized as Do Not Use, Developer may not use such materials without Company’s prior written approval, which it may give or withhold in its sole discretion.

|  |  |
| --- | --- |
| **License** | **Category** |
| BSD | OK |
| MIT | OK |
| Apache 1.0 | Seek Approval |
| Apache 1.1 | OK |
| Apache 2.0 | OK |
| Artistic | Seek Approval |
| zlib/libpng License | OK |
| Open LDAP | OK |
| LGPL 2.1 | Seek Approval |
| Mozilla (MPL) 1.0 | Seek Approval |
| CDDL | Seek Approval |
| CPL or IBM | Seek Approval for unmodified code  Do Not Use modified code |
| GPL 2.0 | Do Not Use |
| GPL 2.0 plus exception | Seek Approval |
| GPL 2.0 plus FLOSS exception (applies to MySQL) | Seek approval |
| GPL 3.0 | Do Not Use |
| LGPL 3.0 | Do Not Use |
| Sleepycat | Do Not Use |
| Boost Software License | OK |
| Affero GPL (any version | Do Not Use |

**Exhibit [\_\_\_\_]**

**Developer Certification**