

**WEBSITE DEVELOPMENT AND ACCESSORIES TERMS AND CONDITIONS**  
**RECITALS**

WHEREAS, Access Web, LLC (“VENDOR”) provides a variety of Internet design and consulting services, including, without limitation, designing HOME PAGES for the WEB, maintaining WEB PAGES and WEBSITES, and providing related training and consulting services; and a variety of technical services relating to the installation and maintenance of hardware, software, and communications facilities relating to the operation of WEBSITES;

WHEREAS, CUSTOMER is in the business of providing e-commerce services to its own clients via its WEBSITE;

WHEREAS, CUSTOMER desires to engage the services of VENDOR to host a WEBSITE and provide support thereof;

WHEREAS, VENDOR desires to host a WEBSITE for CUSTOMER and provide support thereof;

NOW THEREFORE, in consideration of the mutual covenants herein and other good and valuable consideration, the receipt of which is hereby acknowledged, VENDOR and CUSTOMER agree as follows:

1. **Order, Acceptance and Service.**

- a. When Accepted by VENDOR, the Order submitted by CUSTOMER creates a contract between CUSTOMER and VENDOR, consisting of the Order, the applicable Service Description and these Terms of Service. An Order is “**Accepted**” by VENDOR when (i) with respect to Orders submitted online, VENDOR provides Services in response to the Order or bills CUSTOMER for payment and (ii) with respect to Orders reduced to writing and signed on an approved VENDOR form, when an authorized representative of VENDOR executes and delivers such form signed by CUSTOMER.
- b. VENDOR will provide, and CUSTOMER will purchase and pay for, the Services specified in the Order for the service fees specified in the Order and the applicable Service Description (the “**Service Fees**”).
- c. In connection with any Hosting Services, CUSTOMER will not use storage space in excess of the storage limits established for the Services in the Service Descriptions, plus any storage space purchased by CUSTOMER. If CUSTOMER uses storage space in excess of such amounts, VENDOR may, without limiting its other rights or remedies, assess CUSTOMER with additional fees.
- d. In connection with any Hosting Services, if CUSTOMER’S actual bandwidth usage in any month exceeds the limit in the Service Description, CUSTOMER will pay VENDOR such additional fees as may be specified in the Service Description.

2. **Fees, Taxes and Payment.** CUSTOMER will pay to VENDOR the Service Fees in the manner set forth in the Order. VENDOR may increase the Service Fees (i) in the manner permitted in the Service Description and (ii) at any time by providing ten (10) days prior written notice thereof to CUSTOMER. The Service Fees do not include any applicable sales, use, revenue, excise or other taxes imposed by any taxing authority with respect to the Services or any software provided hereunder (excluding any tax on VENDOR’S net income). All such taxes will be added to VENDOR’S invoices for the Service Fees as separate charges to be paid by CUSTOMER. All fees are fully earned when due and non-refundable when paid. Unless otherwise specified, invoices for the Service Fees and related charges shall be due and payable within 15 days after the date of the invoice. If any invoice is not paid within 30 days after the date of the invoice, VENDOR may charge CUSTOMER a late fee of \$25 for such invoice; in addition any amounts payable to VENDOR not paid when due will bear interest at the rate of one and one half percent (1.5%) per month or the maximum

CUSTOMER INITIALS: \_\_\_\_\_

rate permitted by applicable law, whichever is less. Delinquent accounts may be suspended at VENDOR'S sole discretion. In the event of a suspension of the Services, upon a reactivation request by CUSTOMER, CUSTOMER shall pay VENDOR a reactivation fee in addition to full payment of the outstanding balance due. Reactivation of services will only be performed during VENDOR'S normal business hours (Monday through Friday, 9:00 am - 5:00 p.m., Pacific Time, excluding holidays.) If VENDOR collects any payment due at law or through an attorney at law or under advice there from or through a collection agency, or if VENDOR prevails in any action to which the CUSTOMER and VENDOR are parties, CUSTOMER will pay all costs of collection, arbitration and litigation, including, without limitation, all court costs and VENDOR'S reasonable attorneys' fees. If any CUSTOMER payment – including credit card transactions - is returned for insufficient funds or any other reason - VENDOR will impose a processing charge of \$25. If two or more CUSTOMER payments are returned for insufficient funds in any 6 month period, VENDOR in its sole discretion may require alternative payment methods for all future CUSTOMER payments including, without limitation, credit card, money order, or cashier's check.

3. **Term and Termination.**

- . Hosting Services will commence on the Effective Date indicated in the Order and continue for the duration of the Initial Term. Thereafter, the Order will automatically renew for successive one month periods unless the Order is earlier terminated in accordance with its terms or either party gives written notice to the other party of non-renewal at least 30 days prior to expiration of the then-current term.
- a. Either party may terminate this Agreement immediately upon the occurrence of any one or more of the following events: (i) the other party fails to pay when due any amounts required to be paid under this Agreement; (ii) the other party breaches any material term or provision of this Agreement (other than a breach described in subsection (i) above), and if capable of cure, such breach remains uncured 30 days after the non-breaching party gives written notice thereof to the breaching party; or (iii) the other party becomes insolvent, makes an assignment for the benefit of its creditors, institutes or becomes subject to any proceeding under any bankruptcy or similar laws for the relief of debtors, or seeks the appointment of, or becomes subject to the appoint of, any trustee or receiver for all or any portion of such party's assets
- b. VENDOR may terminate this Agreement (i) if the Services are prohibited by applicable law, or become impractical or unfeasible for any technical, legal or regulatory reason, by giving CUSTOMER as much prior notice as reasonably practicable or (ii) immediately by giving written notice to CUSTOMER, if VENDOR determines in good faith that CUSTOMER'S use of the CUSTOMER Web site or the CUSTOMER Content violates the Acceptable Use Policy.
- c. Upon termination of this Agreement for any cause or reason whatsoever, neither party shall have any further rights or obligations under this Agreement, except as expressly set forth herein. The provisions of **Sections 3(d), 4, 8, 10, 11, 13 and 15** of this Agreement shall survive the expiration or termination of this Agreement for any cause or reason whatsoever, and, notwithstanding the expiration or termination of this Agreement, the parties shall each remain liable to the other for any indebtedness or other liability theretofore arising under this Agreement. Termination of this Agreement and retention of pre-paid fees and charges shall be in addition to, and not be in lieu of, any other legal or equitable rights or remedies to which VENDOR may be entitled.
- d. With respect to Non-Prepaid Plans, within 30 days after the termination of this Agreement, CUSTOMER will pay the Termination Charge to VENDOR unless (i) VENDOR terminated the Order under **Section 3(c)** or (ii) CUSTOMER terminated the Order under **Section 3(b)**. With respect to Prepaid Plans, CUSTOMER will pay the Termination Charge as provided in the Service Description. The parties agree that the Termination Charge constitutes consideration for VENDOR'S time, effort and expense in preparing and reserving the capacity to perform its obligations hereunder, as actual damages are difficult to ascertain. If CUSTOMER terminates the Order in accordance with **Section 3(b)**, or if VENDOR terminates the Order under **Sections 3(c)(i) or 12(c)**, VENDOR shall return to CUSTOMER, and CUSTOMER shall accept, as CUSTOMER'S sole and exclusive remedy for VENDOR'S breach of the Order, any Service Fees paid in advance by CUSTOMER hereunder attributable to Services not yet rendered as of the date of termination.

CUSTOMER INITIALS: \_\_\_\_\_

4. **CUSTOMER'S Representations and Warranties.** CUSTOMER hereby represents and warrants to VENDOR, and agrees that during the Term CUSTOMER will ensure that: (a) CUSTOMER is the owner or valid licensee of the CUSTOMER Content and each element thereof, and CUSTOMER has secured all necessary licenses, consents, permissions, waivers and releases for the use of the CUSTOMER Content and each element thereof, including without limitation, all trademarks, logos, names and likenesses contained therein, without any obligation by VENDOR to pay any fees, residuals, guild payments or other compensation of any kind to any Person; (b) CUSTOMER'S use, publication and display of the CUSTOMER Content will not infringe any copyright, patent, trademark, trade secret or other proprietary or intellectual property right of any Person, or constitute a defamation, invasion of privacy or violation of any right of publicity or any other right of any Person, including, without limitation, any contractual, statutory or common law right or any "moral right" or similar right however denominated; (c) CUSTOMER will comply with all applicable laws, rules and regulations regarding the CUSTOMER Content and the CUSTOMER Web site and will use the CUSTOMER Web site only for lawful purposes; (d) CUSTOMER has used its best efforts to ensure that the CUSTOMER Content is and will at all times remain free of all computer viruses, worms, trojan horses and other malicious code; and (e) CUSTOMER will use the Services only for business purposes and not for any family, household or personal use.
5. **License to VENDOR.** CUSTOMER hereby grants to VENDOR a non-exclusive, royalty-free, worldwide right and license during the Term to do the following to the extent necessary in the performance of Services under the Order: (a) digitize, convert, install, upload, select, order, arrange, compile, combine, synchronize, use, reproduce, store, process, retrieve, transmit, distribute, publish, publicly display, publicly perform and hyperlink the CUSTOMER Content; and (b) make archival or back-up copies of the CUSTOMER Content and the CUSTOMER Web site. Except for the rights expressly granted above, VENDOR is not acquiring any right, title or interest in or to the CUSTOMER Content, all of which shall remain solely with CUSTOMER.
6. **VENDOR'S Acceptable Use Policy.** CUSTOMER will abide by, and utilize the Services and the CUSTOMER Web site only in accordance with, the Acceptable Use Policy (the "**Acceptable Use Policy**") that VENDOR posts on its Web site, as such Acceptable Use Policy may be changed by VENDOR from time to time. The Acceptable Use Policy is hereby incorporated herein and made a part hereof by this reference. CUSTOMER shall impose the Acceptable Use Policy on its customers and End Users to the extent necessary to ensure their compliance. CUSTOMER shall familiarize itself with the Acceptable Use Policy and periodically access VENDOR'S Web site to determine if VENDOR has made any changes thereto. CUSTOMER warrants that all information submitted to, stored or distributed via the Service does not infringe copyright or any other intellectual property right. CUSTOMER grants VENDOR the right to reproduce, copy use and distribute any materials submitted to, stored on or distributed via the Service to the extent needed to operate the Service. CUSTOMER agrees that its use of the Service and the software used to provide the Service will be in a manner consistent with this Agreement. CUSTOMER shall not use, nor permit the use by any person of, the Service or any part thereof, including any hyperlinks, in violation of the Usage Policy.
7. **CUSTOMER'S Responsibilities.**
  - . CUSTOMER is solely responsible for the quality, performance and all other aspects of the CUSTOMER Content and the goods or services provided through the CUSTOMER Web site.
  - a. CUSTOMER will cooperate fully with VENDOR in connection with VENDOR'S performance of the Services. CUSTOMER must provide any equipment or software that may be necessary for CUSTOMER to use the Services. Delays in CUSTOMER'S performance of its obligations under this Agreement will extend the time for VENDOR'S performance of its obligations that depend on CUSTOMER'S performance on a day for day basis. CUSTOMER will notify VENDOR of any change in CUSTOMER'S mailing address, telephone, e-mail or other contact information.
  - b. CUSTOMER assumes full responsibility for providing End Users with any required disclosure or explanation of the various features of the CUSTOMER Web site and any goods or services described therein, as well as any rules, terms or conditions of use.

CUSTOMER INITIALS: \_\_\_\_\_

- c. CUSTOMER will provide VENDOR with a registered domain name for the CUSTOMER Web site. VENDOR will register an Internet domain name on behalf of CUSTOMER.
- d. Because the Hosting Services permit CUSTOMER to electronically transmit or upload content directly to the CUSTOMER Web site, CUSTOMER shall be fully responsible for uploading all content to the CUSTOMER Web site and supplementing, modifying and updating the CUSTOMER Web site. CUSTOMER is also responsible for ensuring that the CUSTOMER Content and all aspects of the CUSTOMER Web site are compatible with the hardware and software used by VENDOR to provide the Hosting Services, as the same may be changed by VENDOR from time to time. Specifications for the hardware and software used by VENDOR to provide the Hosting Services will be available on VENDOR'S Web site. CUSTOMER shall periodically access VENDOR'S Web site to determine if VENDOR has made any changes thereto. VENDOR shall not be responsible for any damages to the CUSTOMER Content, the CUSTOMER Web site or other damages or any malfunctions or service interruptions caused by any failure of the CUSTOMER Content or any aspect of the CUSTOMER Web site to be compatible with the hardware and software used by VENDOR to provide the Hosting Services.
- e. Unless the applicable Service Description provides otherwise, CUSTOMER is solely responsible for making back-up copies of the CUSTOMER Web site and CUSTOMER Content.
8. **VENDOR Intellectual Property.**  
VENDOR hereby grants to CUSTOMER a non-exclusive, non-transferable, royalty-free license, exercisable solely during the term of this Agreement, to use applicable VENDOR Technology solely for the purpose of accessing and using the Services. CUSTOMER may not use the VENDOR Technology for any purpose other than accessing and using the Services. Except for the rights expressly granted above, this Agreement does not transfer from VENDOR to CUSTOMER any VENDOR Technology, and all rights, titles and interests in and to the VENDOR Technology shall remain solely with VENDOR. CUSTOMER shall not, directly or indirectly, reverse engineer, decompile, disassemble or otherwise attempt to derive source code or other trade secrets from any of the VENDOR Technology.
- a. VENDOR'S trademarks, tradenames, service marks, logos, other names and marks, and related product and service names, design marks and slogans are the sole and exclusive property of VENDOR. CUSTOMER may not use any of the foregoing in any advertising, publicity or in any other commercial manner without the prior written consent of VENDOR. VENDOR shall maintain and control ownership of all Internet protocol numbers and addresses that may be assigned by VENDOR to CUSTOMER. VENDOR may, in its sole discretion, change or remove any and all such Internet protocol numbers and addresses.
- b. Any feedback, data, answers, questions, comments, suggestions, ideas or the like which CUSTOMER sends to VENDOR relating to the Services will be treated as being non-confidential and non-proprietary. VENDOR may use, disclose or publish any ideas, concepts, know-how or techniques contained in such information for any purpose whatsoever.
9. **Limited Warranty.**  
VENDOR represents and warrants to CUSTOMER that the Services will be performed (i) in a manner consistent with industry standards reasonably applicable to the performance thereof; (ii) at least at the same level of service as provided by VENDOR generally to its other customers for the same services; and (iii) in compliance in all material respects with the applicable Service Descriptions. CUSTOMER will be deemed to have accepted such Services unless CUSTOMER notifies VENDOR within 30 days after performance of any Services of any breach of the foregoing warranties. CUSTOMER'S sole and exclusive remedy, and VENDOR'S sole obligation, for breach of the foregoing warranties shall be for VENDOR, at its option, to re-perform the defective Services at no cost to CUSTOMER, or, in the event of interruptions to the Services caused by a breach of the foregoing warranties, issue CUSTOMER a credit in an amount equal to the current monthly Service Fees pro rated by the number of hours in which the Services have been interrupted. VENDOR may provision the Services from any of its data centers and may from time to time re-provision the Services from different data centers.

CUSTOMER INITIALS: \_\_\_\_\_

- a. The foregoing warranties shall not apply to performance issues or defects in the Services (i) caused by factors outside of VENDOR'S reasonable control; (ii) that resulted from any actions or inactions of CUSTOMER or any third parties; or (iii) that resulted from CUSTOMER'S equipment or any third-party equipment not within the sole control of VENDOR.
- b. **EXCEPT AS EXPRESSLY PROVIDED IN THIS SECTION 9 OR AS MODIFIED BY ADDENDUM, VENDOR MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, WITH RESPECT TO THE SERVICES OR ANY SOFTWARE PROVIDED UNDER THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OF THIRD-PARTY RIGHTS, AND VENDOR HEREBY EXPRESSLY DISCLAIMS THE SAME. WITHOUT LIMITING THE FOREGOING, ANY THIRD-PARTY SOFTWARE PROVIDED TO CUSTOMER HEREUNDER IS PROVIDED "AS IS" WITHOUT ANY CONDITION OR WARRANTY WHATSOEVER. VENDOR DOES NOT WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED, ERROR-FREE OR COMPLETELY SECURE.**
10. **Limitation of Liability.**
- . **IN NO EVENT WILL VENDOR'S LIABILITY IN CONNECTION WITH THE SERVICES, ANY SOFTWARE PROVIDED HEREUNDER OR ANY ORDER, WHETHER CAUSED BY FAILURE TO DELIVER, NON-PERFORMANCE, DEFECTS, BREACH OF WARRANTY OR OTHERWISE, EXCEED THE AGGREGATE SERVICE FEES PAID TO VENDOR BY CUSTOMER DURING THE 12-MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO SUCH LIABILITY.**
- a. **VENDOR CANNOT GUARANTEE CONTINUOUS SERVICE, SERVICE AT ANY PARTICULAR TIME, INTEGRITY OF DATA, INFORMATION OR CONTENT STORED OR TRANSMITTED VIA THE INTERNET. VENDOR WILL NOT BE LIABLE FOR ANY UNAUTHORIZED ACCESS TO, OR ANY CORRUPTION, ERASURE, THEFT, DESTRUCTION, ALTERATION OR INADVERTENT DISCLOSURE OF, DATA, INFORMATION OR CONTENT TRANSMITTED, RECEIVED OR STORED ON ITS SYSTEM.**
- b. **EXCEPT AS EXPRESSLY PROVIDED BELOW, NEITHER PARTY SHALL BE LIABLE IN ANY WAY TO THE OTHER PARTY OR ANY OTHER PERSON FOR ANY LOST PROFITS OR REVENUES, LOSS OF USE, LOSS OF DATA OR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS, LICENSES OR SERVICES OR SIMILAR ECONOMIC LOSS, OR FOR ANY PUNITIVE, INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR SIMILAR DAMAGES OF ANY NATURE, WHETHER FORESEEABLE OR NOT, UNDER ANY WARRANTY OR OTHER RIGHT HEREUNDER, ARISING OUT OF OR IN CONNECTION WITH THE PERFORMANCE OR NON-PERFORMANCE OF ANY ORDER, OR (EXCEPT AS PROVIDED IN SECTIONS 11 AND 12) FOR ANY CLAIM AGAINST THE OTHER PARTY BY A THIRD PARTY, REGARDLESS OF WHETHER IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH CLAIM OR DAMAGES.**
- c. The limitations contained in this **Section 10** apply to all causes of action in the aggregate, whether based in contract, tort or any other legal theory (including strict liability), other than claims based on fraud or willful misconduct. The limitations contained in **Section 10(c)** shall not apply to liability arising on account of a party's breach of **Section 13** or to CUSTOMER'S indemnification obligations under **Section 11**.
11. **Indemnification of VENDOR.** CUSTOMER shall defend, indemnify and hold harmless VENDOR, its affiliates and their respective present, former and future officers, directors, employees and agents, and their respective heirs, legal representatives, successors and assigns (collectively the "**VENDOR Indemnities**"), from and against any and all losses, damages, costs, liabilities and expenses (including, without limitation, amounts paid in settlement and reasonable attorneys' fees) which any of the VENDOR Indemnities may suffer, incur or sustain resulting from or arising out of (i) CUSTOMER'S breach of any representation, warranty, or covenant contained in the Agreement, (ii) the CUSTOMER Content, the CUSTOMER Web site or any End User's use of the CUSTOMER Content or the CUSTOMER Web site, (iii) violation by

CUSTOMER INITIALS: \_\_\_\_\_

CUSTOMER or any of its officers, directors, employees or agents of the Acceptable Use Policy or any applicable law, (iv) claims or actions of third parties alleging misappropriation of trade secrets or infringement of patents, copyrights, trademarks or other intellectual property rights arising from the use, display or publication of CUSTOMER'S domain names, the CUSTOMER Web site, the CUSTOMER Content, or the use of the Services in combination with hardware, software or content not provided by VENDOR, (v) claims or actions by third parties relating to or arising out of CUSTOMER'S use of the Services, and (vi) any failure of the CUSTOMER Content or any aspect of the CUSTOMER Web site to be compatible with the hardware or software used by VENDOR to provide the Services, including any damage to VENDOR'S servers or other hardware caused thereby.

**12. Indemnification of CUSTOMER.**

- . Subject to **Section 10**, CUSTOMER agrees to cooperate with and assist VENDOR in the defense or settlement of any such claim or suit. CUSTOMER shall be reimbursed for all reasonable out-of-pocket expenses incurred in providing any cooperation or assistance requested by VENDOR, but VENDOR will not be liable for any costs or expenses incurred without its prior written authorization.
- a. Promptly after receipt by CUSTOMER of a threat of any claim or suit, or a notice of the commencement or filing of any claim or suit, against which CUSTOMER may be indemnified hereunder, CUSTOMER shall give written notice thereof to VENDOR, provided that failure to give or delay in giving such notice to VENDOR shall not relieve VENDOR of any liability it may have to CUSTOMER hereunder, except to the extent that the defense of such claim or suit is prejudiced thereby. VENDOR shall have sole control of the defense, and of all negotiations for settlement, of such claim or suit. Subject to the foregoing, CUSTOMER may participate in the defense of any such claim or suit at CUSTOMER'S own expense.
- b. If an injunction, decree or judgment is, or VENDOR believes in its sole discretion is likely to be, entered providing that CUSTOMER may not use the Services as contemplated in this Agreement without violating the intellectual property rights of a third party, VENDOR may, at its sole option and expense, either (i) procure for CUSTOMER the right to use the Services or affected part thereof as provided in this Agreement; (ii) replace the Services or affected part thereof with other non-infringing services or modify the Services or affected part thereof so as to be non-infringing; or (iii) terminate this Agreement upon written notice to CUSTOMER.
- c. Notwithstanding **Section 12(a)**, VENDOR assumes no liability for infringement claims arising from (i) use of the Services with third-party products or services where the third-party products or services cause the infringement, (ii) any modification of the Services not authorized by VENDOR in writing, (iii) the CUSTOMER Content, the CUSTOMER Web site or any content, data or information provided or supplied by an End User, or (iv) CUSTOMER'S use of any third-party software provided hereunder. **THE FOREGOING DEFENSE AND INDEMNIFICATION PROVISIONS STATE THE ENTIRE LIABILITY AND OBLIGATION OF VENDOR, AND THE EXCLUSIVE REMEDY OF CUSTOMER, WITH RESPECT TO ANY ACTUAL OR ALLEGED INFRINGEMENT OF ANY INTELLECTUAL PROPERTY RIGHT BY THE SERVICES PROVIDED HEREUNDER.**

**13. Confidentiality; Non-Solicitation.**

- . Each party will not, without the prior written consent of the other party, use or disclose to any Person any Proprietary Information of the other party disclosed or made available to it, except for use of such Proprietary Information as required in connection with the performance of its obligations or use of the Services hereunder. Subject to **Section 13(b)**, each party will (i) treat the Proprietary Information of the other party as secret and confidential, (ii) limit access to the Proprietary Information of the party to those of its employees who require it in order to effectuate the purposes of this Agreement, and (iii) not disclose the Proprietary Information of the other party to any other Person without the prior written consent of the other party.
- a. Notwithstanding **Section 13(a)**, the following shall not be considered Proprietary Information: (i) any information that the receiving party can demonstrate by written documentation was within its legitimate possession prior to the time of disclosure by the disclosing party; (ii) any information that was in the public domain prior to disclosure by the disclosing party as evidenced by documents that were published prior to

CUSTOMER INITIALS: \_\_\_\_\_

such disclosure; (iii) any information that, after disclosure by the disclosing party, comes into the public domain through no fault of the receiving party, (iv) any information that is disclosed to the receiving party without restriction by a third party who has legitimate possession thereof and the legal right to make such disclosure; or (v) any information that, two years after expiration or termination of this Agreement, does not constitute a trade secret under applicable law.

- b. Each party acknowledges that disclosure of any aspect of the Proprietary Information of the other party shall immediately give rise to continuing irreparable injury to the other party inadequately compensable in damages at law, and, without prejudice to any other remedy available to the other party, shall entitle the other party to injunctive or other equitable relief. Upon expiration or termination of this Agreement for any reason, each party shall promptly return to the other party all Proprietary Information of the other party (including all copies thereof) in its possession or control.
- c. During the term of this Agreement and for two years following expiration or termination of this Agreement, CUSTOMER will not, directly or indirectly, solicit or recruit the services of any employee of VENDOR performing services under this Agreement, while such employee is employed by VENDOR and for a period of six months after such employee has left the employment of VENDOR.

14. **Optional Services.** In connection with any Optional Services:

- . CUSTOMER must provide VENDOR with any information, login identifications, passwords or other information or access to facilities that VENDOR may reasonably require to provide the Optional Services VENDOR will have no responsibility for any delays or increased costs or expenses associated with CUSTOMER'S failure to provide any of such information. If CUSTOMER does not provide any such information or access requested by VENDOR within fifteen (15) days of VENDOR'S request therefore, VENDOR may terminate the Order and retain any Service Fees paid.
- a. If CUSTOMER requested that VENDOR perform the Optional Services by a particular deadline or that VENDOR achieve some particular result or outcome, VENDOR will use commercially reasonable best efforts to perform the Services by any such deadline and achieve the result requested by CUSTOMER; provided, however, that (i) VENDOR'S ability to perform the Services is subject to CUSTOMER'S provision of information and access as provided above and (ii) VENDOR has no liability or obligation to complete the Services by any deadline or achieve any particular outcome or result
- b. If CUSTOMER wishes to convey documents or files to VENDOR, CUSTOMER should deliver to VENDOR a copy or duplicate of such documents or files and not the original copy. VENDOR will not return to CUSTOMER any documents or files conveyed to VENDOR.
- c. **VENDOR will have no liability or responsibility for any damage, loss of data, loss of use or other loss occurring in connection with VENDOR'S provision of Optional Services requested by CUSTOMER.**

15. **Miscellaneous.**

- . **Independent Contractor.** VENDOR and CUSTOMER are independent contractors and nothing contained in this Agreement places VENDOR and CUSTOMER in the relationship of principal and agent, master and servant, partners or joint venturers. Neither party has, expressly or by implication, or may represent itself as having, any authority to make contracts or enter into any agreements in the name of the other party, or to obligate or bind the other party in any manner whatsoever.
- a. **Governing Law; Jurisdiction.** Any controversy or claim arising out of or relating to this Agreement, the formation of this Agreement or the breach of this Agreement, including any claim based upon arising from an alleged tort, shall be governed by the substantive laws of the State of California, except that all arbitration and related proceedings conducted pursuant to Section 15(c) below, including without limitation confirmation proceedings, shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1, et. seq. . The United Nations Convention on Contracts for the International Sale of Goods does not apply to this Agreement. **ANY SUIT, ACTION OR PROCEEDING CONCERNING THIS AGREEMENT THAT IS NOT SUBJECT TO MANDATORY ARBITRATION PURSUANT TO SECTION 15(C) BELOW MUST BE BROUGHT IN A CALIFORNIA STATE OR FEDERAL COURT LOCATED IN FULTON COUNTY, CALIFORNIA, AND EACH OF THE PARTIES HEREBY IRREVOCABLY CONSENTS TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS (AND OF THE APPROPRIATE APPELLATE**

CUSTOMER INITIALS: \_\_\_\_\_



COURTS THEREFROM) IN ANY SUCH SUIT, ACTION OR PROCEEDING AND IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY OBJECTION WHICH IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF THE VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY SUCH COURT OR THAT ANY SUCH SUIT, ACTION OR PROCEEDING WHICH IS BROUGHT IN ANY SUCH COURT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM.

- b. Mandatory Arbitration. Notwithstanding Section 15(b) above, each party agrees that any dispute between the parties arising out of this Agreement or in any manner relating to the Services must be submitted by the parties to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as administered by Resolutions Resources Corp. of Atlanta, California (or such other recognized provider of arbitration services agreed upon by both parties) before a single arbitrator, appointed in accordance with such rules. Any such arbitrator must render a reasoned opinion in writing only where the amount in dispute exceeds \$100,000. Judgment upon the award may be entered in any court having jurisdiction thereof. Any such arbitration will be held in Atlanta, California. Any action filed by either party in any court in violation of this Section should be dismissed pursuant to this Section.
- c. Headings. The headings herein are for convenience only and are not part of this Agreement.
- d. Entire Agreement; Amendments. This Agreement, including documents incorporated herein by reference, supersedes all prior discussions, negotiations and agreements between the parties with respect to the subject matter hereof, and this Agreement constitutes the sole and entire agreement between the parties with respect to the matters covered hereby. In case of a conflict between this Agreement and any purchase order, service order, work order, confirmation, correspondence or other communication of CUSTOMER or VENDOR, the terms and conditions of this Agreement shall control. No additional terms or conditions relating to the subject matter of this Agreement shall be effective unless approved in writing by any authorized representative of CUSTOMER and VENDOR. This Agreement may not be modified or amended except by another agreement in writing executed by the parties hereto; provided, however, that these Terms of Service may be modified from time to time by VENDOR in its sole discretion, which modifications will be effective upon posting to VENDOR'S web site.
- e. Severability. All rights and restrictions contained in this Agreement may be exercised and shall be applicable and binding only to the extent that they do not violate any applicable laws and are intended to be limited to the extent necessary so that they will not render this Agreement illegal, invalid or unenforceable. If any provision or portion of any provision of this Agreement shall be held to be illegal, invalid or unenforceable by a court of competent jurisdiction, it is the intention of the parties that the remaining provisions or portions thereof shall constitute their agreement with respect to the subject matter hereof, and all such remaining provisions or portions thereof shall remain in full force and effect.
- f. Notices. All notices and demands required or contemplated hereunder by one party to the other shall be in writing and shall be deemed to have been duly made and given upon date of delivery if delivered in person or by an overnight delivery or postal service, upon receipt if delivered by facsimile the receipt of which is confirmed by the recipient, or upon the expiration of five days after the date of posting if mailed by certified mail, postage prepaid, to the addresses or facsimile numbers set forth below the parties' signatures. Either party may change its address or facsimile number for purposes of this Agreement by notice in writing to the other party as provided herein. VENDOR may give written notice to CUSTOMER via e-mail to the CUSTOMER'S e-mail address as maintained in VENDOR'S billing records.
- g. Waiver. No failure or delay by any party hereto to exercise any right or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right or remedy by any party preclude any other or further exercise thereof or the exercise of any other right or remedy. No express waiver or assent by any party hereto to any breach of or default in any term or condition of this Agreement shall constitute a waiver of or an assent to any succeeding breach of or default in the same or any other term or condition hereof.
- h. Assignment; Successors. CUSTOMER may not assign or transfer this Agreement, or any of its rights or obligations hereunder, without the prior written consent of VENDOR. Any attempted assignment in

CUSTOMER INITIALS: \_\_\_\_\_



violation of the foregoing provision shall be null and void and of no force or effect whatsoever. VENDOR may assign its rights and obligations under this Agreement, and may engage subcontractors or agents in performing its duties and exercising its rights hereunder, without the consent of CUSTOMER. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.

- i. Limitation of Actions. No action, regardless of form, arising by reason of or in connection with this Agreement may be brought by either party more than two years after the cause of action has arisen.
- j. Counterparts. If this Agreement is signed manually, it may be executed in any number of counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. If this Agreement is signed electronically, VENDOR'S records of such execution shall be presumed accurate unless proven otherwise.
- k. Force Majeure. Neither party is liable for any default or delay in the performance of any of its obligations under this Agreement (other than failure to make payments when due) if such default or delay is caused, directly or indirectly, by forces beyond such party's reasonable control, including, without limitation, fire, flood, acts of God, labor disputes, accidents, acts of war or terrorism, interruptions of transportation or communications, supply shortages or the failure of any third party to perform any commitment relative to the production or delivery of any equipment or material required for such party to perform its obligations hereunder.
- l. No Third-Party Beneficiaries. Except as otherwise expressly provided in this Agreement, nothing in this Agreement is intended, nor shall anything herein be construed to confer any rights, legal or equitable, in any Person other than the parties hereto and their respective successors and permitted assigns. Notwithstanding the foregoing, CUSTOMER acknowledges and agrees that Microsoft, and any supplier of third-party supplier that is identified as a third-party beneficiary in the Service Description, is an intended third-party beneficiary of the provisions set forth in this Agreement as they relate specifically to its products or services and shall have the right to enforce directly the terms and conditions of this Agreement with respect to its products or services against CUSTOMER as if it were a party to this Agreement.
- m. Government Regulations. CUSTOMER may not export, re-export, transfer or make available, whether directly or indirectly, any regulated item or information to anyone outside the United States in connection with this Agreement without first complying with all export control laws and regulations which may be imposed by the United States government and any country or organization of nations within whose jurisdiction CUSTOMER operates or does business.
- n. Marketing. CUSTOMER agrees that during the term of this Agreement VENDOR may publicly refer to CUSTOMER, orally and in writing, as a customer of VENDOR. Any other public reference to CUSTOMER by VENDOR requires the written consent of CUSTOMER.
- o. Telephone Monitoring. To ensure VENDOR'S customers receive quality service, VENDOR randomly selects phone calls for monitoring. These calls, between VENDOR'S customers and employees, are evaluated by supervisors. This is to guarantee that prompt, consistent assistance and accurate information is delivered in a professional manner. VENDOR has been properly licensed by the California Public Service Commission to use such service observing equipment.
- p. Third party Terms: CUSTOMER agrees that services provided by VENDOR are subject to third party approval and terms and CUSTOMER agrees to all third party terms and conditions for services they receive from such parties through this Agreement. VENDOR will not be held liable for CUSTOMER violation of said third party terms.
16. Definitions. For purposes of this Agreement, the following terms have the meanings specified below:
  - . **"Agreement"** means each contract created between VENDOR and CUSTOMER for the provision of Services consisting of an Order, the applicable Service Description and these Terms of Service.
  - a. **"CUSTOMER Content"** means all data, graphics, text, names, marks, logos, hypertext links to other Web sites and other information incorporated in, transmitted through or published or displayed on the CUSTOMER Web site.

CUSTOMER INITIALS: \_\_\_\_\_

- b. **“CUSTOMER Web site”** means CUSTOMER’S site on the World Wide Web portion of the Internet that VENDOR hosts under this Agreement.
- c. **“End User”** means any Person who accesses or uses the CUSTOMER Web site via the Internet.
- d. **“VENDOR Technology”** means VENDOR’S proprietary technology, including, without limitation, VENDOR services, software tools, hardware designs, algorithms, software (in source code and object code forms), user interface designs, architecture, class libraries, objects and documentation (both printed and electronic), network designs, know-how, trade secrets and any related intellectual property rights throughout the world (whether owned by VENDOR or licensed to VENDOR from a third party), and also including any derivatives, improvements, enhancements, updates, modifications or extensions of VENDOR Technology conceived, reduced to practice or developed during the term of this Agreement by either party.
- e. **“Person”** means any individual, partnership, joint venture, corporation, limited liability company, trust, unincorporated association or organization, or government or any agency or political subdivision thereof.
- f. **“Proprietary Information”** means all technical, business and other information of a party (i) that is not generally known to the public, (ii) that derives value, economic or otherwise, from not being generally known to the public or to other Persons who can obtain value from its disclosure or use, and (iii) which information is subject to efforts that are reasonable under the circumstances to maintain the secrecy thereof.
- g. **“Order”** means the Order submitted by the CUSTOMER to VENDOR for Services, whether such Order is submitted online through VENDOR’S Web site or on a written Order form.
- h. **“Prepaid Plan”** means Hosting Service provided by VENDOR to CUSTOMER where the Order provides that the CUSTOMER must pay for the Hosting Service in advance for the Initial Term. **“Non-Prepaid Plan”** means any Hosting Service provided by VENDOR to CUSTOMER that is not a Prepaid Plan.
- i. **“Termination Charge”** means, with respect to Non-Prepaid CUSTOMERs only, as of any date of calculation, an amount equal to one hundred percent (100%) of the fees that would become due over the balance of the then-current Term.
- j. **“Terms of Service”** means these Terms of Service, as the same may be modified, altered or amended from time to time by VENDOR.
- k. **“Service”** means either Hosting Service or Optional Service. **“Hosting Service”** means the Service provided by VENDOR in response to an Order whereby VENDOR provides the CUSTOMER with specified connectivity, storage space and bandwidth for the hosting of a CUSTOMER Web site as more particularly described in the applicable Service Description. **“Optional Service”** means any additional Service (other than Hosting Service) VENDOR may provide in response to an Order, as more particularly described in the applicable Service Description.
- l. **“Service Description”** means the applicable documents made available by VENDOR to CUSTOMER to describe the applicable Services at the time the Order is accepted by VENDOR.
- m. **“Term”** means the duration of any Agreement between VENDOR and CUSTOMER. With respect to Hosting Services, the **“Initial Term”** is the initial term specified in the Order and the Term continues beyond the Initial Term for any renewal period as specified in Section 3. . With respect to Optional Services, the **“Term”** begins when VENDOR accepts the Order and ends on the first to occur of (i) VENDOR’S completion of performance, or (ii) the earlier termination of the Order in any manner permitted by these Terms of Service.

CUSTOMER INITIALS: \_\_\_\_\_