

## **MASTER SERVICES AGREEMENT**

This Master Services Agreement (“MSA”) is between GrayWebGraphics.com LLC, D.B.A Gray Digital Group, a Texas limited liability company having its principal place of business at 816 Camaron Street, Suite 1.23, San Antonio, TX 78212 (“Consultant”) and the customer ordering the Services (“Customer”, “Client”, or “you”) each a “party” and together the “parties”.

In consideration of the agreements, representations, warranties, covenants and promises contained herein, and other good and valuable consideration, the receipt, sufficiency and adequacy of which are hereby acknowledged, the parties, intending to be legally bound, agree to the foregoing and as follows:

### **Article I SERVICES**

1.1 *Statement of Work.* All services to be performed by Consultant under this Agreement (“Services”) will be set forth in a written statement of work (“Statement of Work”) signed by representatives of both parties. Each Statement of Work will set forth the description of the Services to be done and the hourly, daily or other fees for the Services to be performed, and other matters as the parties may agree upon.

1.2 *Provision of Services.* Consultant agrees to use commercially reasonable efforts to provide the Services to Customer in accordance with the terms and conditions of this Agreement and the applicable Statements of Work.

1.3 *Support Not Included.* Unless expressly included in a particular Statement of Work or otherwise agreed in writing, Consultant is not obligated to provide any support or maintenance services for any deliverables provided pursuant to this Agreement.

1.4 *Estimated Times.* The parties agree that, unless otherwise expressly stated in a particular Statement of Work, where a time or amount of Services required for a particular task or deliverable is described in a Statement of Work, it is an estimate only.

### **Article II THIRD PARTY PRODUCTS AND SERVICES**

2.1 *Customer Responsibility.* Unless otherwise stated in a particular Statement of Work, Customer will arrange for third party products and services required for implementation of the Statement of Work, including third party software and tools. In any case, CONSULTANT MAKES NO WARRANTY REGARDING THIRD PARTY PRODUCTS AND SERVICES.

2.2 *Third Party Products and Services Obtained for Customer.* Without waiver of any provision of Section 2.1, Consultant may as a convenience to Customer arrange for third party products and services required for implementation of a Statement of Work. In any such case, however, the terms and conditions

of the third party from which any such product or service is obtained shall exclusively apply to use by Customer of the product or service. While the cost of any such third party product or service will be invoiced to Customer as an expense of Consultant and Consultant may make reasonable charge for services rendered in connection with making the arrangement, it is understood by all parties that Consultant's sole liability in connection with a third party product or service obtained for the convenience of Customer is that which may flow from the limited service of making the arrangement and in no case shall any such third party product or service be subject to subsection 9.1.1(b) or subsection 9.2.1(a).

2.3 *Consultant as "Reseller" of Third Party Products and Services.* From time to time, Consultant has entered into and/or will during the course of the Agreement enter into reseller relationships with third party providers of products and/or services. In the event that any third party product or service for which Consultant maintains such a reseller relationship is to be provided by Consultant to Customer, such third party product or service will be identified on the relevant Statement of Work as being provided under a separate reseller agreement. The provision by or through Consultant to Customer of any third party product or service for which Consultant is a third party authorized reseller shall be governed exclusively by the terms and conditions of the separate agreement of the parties to be negotiated in compliance with Consultant's obligations as an authorized reseller and in no case shall any such third party product or service be subject to subsection 9.1.1(b) or subsection 9.2.1(a).

### **Article III**

#### **PERFORMANCE OF SERVICES; CHANGES**

3.1 *Performance of Services.* Consultant will determine the details and means of performing the Services to be performed for Customer under Customer's general guidance and direction. Services will be performed at such times and at such places set out in the Statements of Work or as the parties may otherwise agree in writing. Consultant will perform the Services by means of the services of suitably experienced staff and/or may delegate its obligations hereunder by commercially reasonable use of one or more subcontractor individuals or firms (herein, collectively, "Personnel"), provided that, in any case, Consultant will remain responsible for provision of Services as required by this Agreement.

3.2 *Changes to Specified Services.* Changes to any Statement of Work can be made only by written change order signed by both parties or by an additional Statement of Work. Any change to a Statement of Work which is agreed to by the parties will specify the changes ordered, any increase or decrease in the estimated charges for performance, timing issues, and any changes to other matters as may be affected.

### **Article IV**

#### **PAYMENT**

4.1 *Rates.* Customer will pay Consultant at the fee rates specified in the Statements of Work. If rates are not specified in the relevant Statement of Work, Services performed by Consultant on behalf of Customer will be undertaken on a time and materials basis at Consultant's applicable standard rates.

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4.2 *Expenses.* Customer will reimburse Consultant for reasonable out-of-pocket expenses incurred in the provision of Services, including, without limitation, travel, accommodation, meal and like expenses for Services performed at a Customer or Customer client location and fonts, media, hardware and additional software required in connection with the performance of a Service or provision of a deliverable under a Statement of Work.

4.3 *Invoices.* Consultant will render invoices to Customer indicating the Services for which the invoice is rendered, the period of time it covers, the fees due and any other additions, expenses, taxes or other detail reasonably required for Customer to verify the amount invoiced. All invoices submitted under this Agreement will refer to the applicable Statement of Work.

4.4 *Time for Payment.* Customer will pay all invoices within thirty (30) days of receipt. In the event that Customer wishes to dispute an item or items on an invoice, Customer will notify Consultant in writing within fourteen days of receipt of that invoice, setting out its reasons in reasonable detail. If no notice of dispute is received by Consultant fourteen days after receipt of an invoice by Customer, the invoice will be deemed accepted, and Customer will be obliged to pay the invoice in accordance with its terms. In case of a dispute regarding billing, Customer must pay all undisputed charges and items.

4.5 *Taxes.* Customer is responsible for all taxes resulting from the Services, including any sales taxes, but excluding taxes on Consultant's net income. Consultant may bill for such taxes and pay them to the relevant tax authorities.

4.6 *Failure to Make Timely Payment.* If Customer fails to pay any undisputed amount payable by it under this Agreement within thirty (30) days of receipt of an invoice and such amount remains unpaid ten (10) days following written notice to Customer of such delinquency, Consultant will be entitled to suspend performance of any additional Service and/or withhold any additional deliverable under this Agreement.

## **Article V OWNERSHIP OF SOFTWARE**

5.1 *Definitions.* From time to time, Consultant has created software tools and code and/or will during the course of the Agreement create and/or improve software tools and software code that are reusable or are useful for one or more other products, tasks and projects. Such tools and code provided to Customer under this Agreement are termed "Consultant Reusable Software." Software created and delivered under this Agreement other than Consultant Reusable Software, and which is also specifically identified as such in the particular Statement of Work under which it is created and delivered, is "Customer Specific Software."

5.2 *Customer Specific Software.* Upon payment of amounts due to Consultant with regard to each Statement of Work, Customer Specific Software under such Statement of Work will belong to Customer and will be, to the fullest extent permitted under the U.S. copyright laws, a work-made-for-hire for Customer. To the extent that any such Customer Specific Software is not a work-made-for-hire, such

Customer Specific Software (including, as applicable, the binary code and source code) is hereby assigned to Customer.

5.3 *Consultant Reusable Software.* Customer agrees that all Consultant Reusable Software is or will be the exclusive property of Consultant. Except as otherwise expressly provided in one or more relevant Statements of Work, upon payment of amounts due to Consultant with regard to each Statement of Work, Consultant will be deemed to grant to Customer a non-exclusive, worldwide, perpetual, irrevocable and fully paid up license to use, modify, adapt and otherwise exploit such Consultant Reusable Software solely for use with the deliverables under such Statement of Work and derivatives of such deliverables. Under no circumstance, however, may Customer sublicense to any third party any right in such Consultant Reusable Software.

5.4 *Facilitation.* Each party agrees to provide, at the other party's expense, any documents reasonably necessary or useful to vest in each party its respective intellectual property under this Article V.

5.5 *No Other Rights.* Except as expressly stated in this Agreement, each party retains its own rights. No rights are created or transferred by implication.

## **Article VI COMPLIANCE WITH LAWS**

6.1 *General Compliance.* Each party shall comply with all applicable federal, state, county and local laws, ordinances, regulations and codes including, but not limited to, each party's obligations as employers with regard to the health, safety and payment of its employees and each party's obligations for identification and procurement of any permits, certificates, approvals and inspections required in the performance of this Agreement.

6.2 *Export Controls.* Customer alone shall be responsible for ensuring that its actions with respect to any deliverable provided by Consultant under this Agreement are in compliance with the export control laws and regulations of the United States and, unless otherwise provided in the relevant Statement of Work, CONSULTANT MAKES NO WARRANTY REGARDING THE APPLICABILITY TO ANY DELIVERABLE PROVIDED BY CONSULTANT UNDER THIS AGREEMENT OF ANY EXPORT CONTROL LAW OR REGULATION. Notwithstanding but without waiver of the foregoing, however, Consultant agrees to provide reasonable cooperation to Customer and access to any information that Customer may reasonably require to ensure its compliance.

6.3 *Changes in Law or Regulation.* Should any change in law, ordinance, regulation, code or similar authority render impracticable Consultant's performance under a Statement of Work, the affected Statement of Work shall be subject to change as reasonably necessary to accommodate increased time and/or cost for compliance with such change in law, ordinance, regulation, code or similar authority. The parties shall negotiate in good faith to promptly determine and execute an equitable change order. If, however, the parties are in good faith unable to reach agreement on the terms for such a change order

or Customer, in its sole discretion, determines that the affected Statement of Work should not continue under the change in law, ordinance, regulation, code or similar authority, the affected Statement of Work shall be subject to cancellation without penalty to either party, but in either case Customer shall remain liable for payment for all Services performed and expenses incurred prior to cancellation. For purposes of this Section 6.3, any change in law, ordinance, regulation, code or similar authority that for any Statement of Work would result in a 10% or greater increase in future cost to Consultant is deemed to render that Statement of Work impracticable.

**Article VII**  
**COMMUNICATIONS BETWEEN PARTIES AND WITH OTHERS**

7.1 Confidentiality

7.1.1 *Definition.* For purposes of this Section 7.1, “Confidential Information” means nonpublic information, data or know-how that is furnished, directly or indirectly, by a “Disclosing Party” to a “Receiving Party” and that is:

- (a) marked or otherwise indicated by the Disclosing Party as being confidential, proprietary or of similar import;
- (b) of a nature that the Receiving Party should reasonably know it to be confidential, proprietary or of similar import to the Disclosing Party, of which nature the following categories of information are in absence of evidence to the contrary presumed: product designs; technical processes and formulas; software; source code; product and business plans; business projections; unpublished sales, cost and other financial information; advertising revenues, usage rates and relationships; and marketing data; or
- (c) derived, in whole or in part, from Confidential Information.

7.1.2 *Exceptions.* Notwithstanding subsection 7.1.1, Confidential Information does not include information that:

- (a) is known to the Receiving Party and not subject to a confidentiality obligation to the Disclosing Party;
- (b) is independently developed by the Receiving Party;
- (c) is rightfully received by the Receiving Party from a third party having the right to disclose such information to others;
- (d) is publicly available through no wrongful act of the Receiving Party;
- (e) is approved for release by written authorization of the Disclosing Party; or

(f) is required by law, regulation, court order or similar authority to be disclosed.

7.1.3 *Use and Preservation of Confidential Information.*

- (a) *Limited Use.* Confidential Information, which is and shall remain the exclusive property of the Disclosing Party, shall not be used by the Receiving Party except as reasonably required for performance under this Agreement.
- (b) *Maintenance of Confidentiality.* The Receiving Party shall not disclose Confidential Information, in whole or in part, to any third party. The Receiving Party shall (1) use at least the same degree of care in safeguarding Confidential Information as the Receiving Party uses for its own proprietary information of like importance, but in no case less care than is reasonably calculated to prevent inadvertent disclosure and (2) inform its personnel who have access to Confidential Information of the Receiving Party's obligations under this Section 7.1 and take reasonable measures to ensure that its personnel who have access to Confidential Information comply with the Receiving Party's obligations under this Section 7.1.
- (c) *Disclosure to Legal Representatives.* Notwithstanding any provision to the contrary, the Receiving Party may disclose Confidential Information to its attorneys, provided that (1) any such disclosure shall be for the sole purpose of obtaining legal counsel and limited to the extent necessary to obtain such legal counsel and (2) the confidentiality of the Confidential Information is otherwise preserved.
- (d) *Unauthorized Use or Disclosure.* The Receiving Party shall give prompt notice to the Disclosing Party of any unauthorized use or disclosure of Confidential Information and shall assist the Disclosing Party in remedying each unauthorized use or disclosure. Neither assistance provided nor assistance accepted shall constitute a waiver of any breach of this Section 7.1.
- (e) *Receipt of Process.* In the event that the Receiving Party receives legal process that demands or requires disclosure of Confidential Information, such Receiving Party shall, if able and legally permissible, give prompt notice to the Disclosing Party to enable the Disclosing Party to challenge such demand or requirement.

7.1.4 *Injunctive Relief.* The Receiving Party acknowledges and agrees that because (a) an award of money damages is inadequate for any breach of this Section 7.1 by the Receiving Party or any of its personnel or other representatives and (b) any breach causes the Disclosing Party irreparable harm, if there is a breach or threatened breach of this Section 7.1 by the Receiving Party or any of its personnel or other representatives, the Disclosing Party is entitled to equitable

relief, including injunctive relief and specific performance, without the posting of a bond or other security and without proof of actual damages.

7.1.5 *Right to Maintain File Copy.* Subject only to continued compliance with the terms of this Section 7.1, the Receiving Party may retain a permanent file copy of any Confidential Information notwithstanding termination of this Agreement or any demand of the Disclosing Party for return or destruction of the Confidential Information.

## 7.2 Announcements and Other Public Communications

7.2.1 *General Prohibition.* Except as otherwise permitted under this Agreement, neither party may use the name of the other party in any manner that indicates origin, sponsorship or approval by the other party of any good or service of the using party. Neither party may use the name of the other party in any manner that falsely suggests any affiliation, connection or association between the parties.

7.2.2 *Permitted Acts.* Notwithstanding subsection 7.2.1, but in any case subject to Section 7.1,

- (a) Consultant may refer to Customer in any presentation of Consultant's services to Consultant's peers, clients or prospective clients, which presentation may include a description of services provided and/or summary of features implemented by Consultant; and
- (b) either party may:
  - (1) make any disclosure required by law; and
  - (2) use the name of the other party in any manner to which the other party consents in writing.

## **Article VIII**

### **COOPERATION OF THE PARTIES**

8.1 *Cooperation.* Customer agrees to provide reasonable cooperation to Consultant and access to information that Consultant reasonably requires to perform its obligations under this Agreement.

## 8.2 Non-Solicitation

8.2.1 *Solicitation Prohibited.* Customer agrees not to solicit to hire, hire, or otherwise obtain the services of, or to assist any third party to solicit to hire, hire, or obtain the services of any Consultant employee or other person assigned by Consultant to work under any Statement of Work for the duration of Services under such Statement of Work and for one year thereafter. Consultant agrees not to solicit to hire, hire, or otherwise obtain the services of, or to assist any

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third party to solicit to hire, hire, or obtain the services of any Customer employee for the duration of employment by Customer of such employee and for one year thereafter.

8.2.2 *Liquidated Damages.* Because it is impossible to fix with certainty the damage to an aggrieved party for breach of this Section 8.2, the parties agree that the breaching party will pay, for each breach of this Section 8.2, as liquidated damages and not as a penalty, an amount equal to one hundred percent (100%) of the affected employee's average monthly compensation over the most recent six full months multiplied by twelve. Such amount will be due and payable by the breaching party within ten (10) days of receipt of an invoice from the aggrieved party.

### 8.3 Dispute Resolution

8.3.1 *Negotiation.* The parties shall attempt in good faith to resolve promptly any dispute arising out of or relating to this Agreement by negotiation between executives who have authority to settle the dispute. The executives must be at a higher level of management than the persons with direct responsibility for administration of this Agreement. If, however, in the case of a particular party no such higher level person exists, then, for that party, an executive with direct responsibility for administration of this Agreement may conduct the prescribed negotiation.

8.3.2 *Non-Judicial Measures Prohibited.* Consultant shall not remove, alter or interfere with software provided to Customer under this Agreement for purposes of preventing Customer from using the software, or otherwise intentionally render such software inoperable, as the result of any dispute arising out of or relating to this Agreement unless (a) such measure is judicially approved or conducted pursuant to a negotiated settlement between the parties or (b) continued access to or use by Customer of the affected software is expressly conditioned upon prior payment or other performance of Customer.

## **Article IX WARRANTY AND INDEMNITY**

### 9.1 Warranties

9.1.1 *Consultant's Warranties.* Consultant warrants:

- (a) that it has all required corporate authority to execute and perform this Agreement; and
- (b) that any deliverable provided or to be provided under this Agreement does not and will not infringe or violate any valid third party patent right, trademark or service mark right, right of likeness or publicity, right of privacy, copyright or trade secret right in the United States.

9.1.2 *Customer's Warranties.* Customer warrants:

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- (a) that it has all required corporate authority to execute and perform this Agreement; and
- (b) that any material and/or content furnished or to be furnished under this Agreement, including, without limitation, any third party product or service required for implementation of a Statement of Work, does not and will not infringe or violate any valid third party patent right, trademark or service mark right, right of likeness or publicity, right of privacy, copyright or trade secret right in the United States.

9.1.3 *Warranty Exclusion.* EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT, CONSULTANT DISCLAIMS ALL EXPRESS AND IMPLIED WARRANTIES, INCLUDING IMPLIED WARRANTIES OF NON-INFRINGEMENT, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

## 9.2 Indemnification

9.2.1 *Indemnification of Customer.* Subject to the conditions set forth in subsection 9.2.3 and the limitations set forth in subsection 9.2.4(c) and Section 10.2, Consultant shall indemnify Customer at all times after the effective date of this Agreement against any liability, loss, damages (including punitive damages), claim, settlement payment, cost and expense, interest, award, judgment, diminution in value, fine, fee, penalty or other charge, including reasonable legal fees and the cost of enforcing this indemnity, arising out of or relating to any one or more of the following:

- (a) breach by Consultant of any warranty set forth in this Agreement; or
- (b) fraud or willful misconduct of Consultant.

9.2.2 *Indemnification of Consultant.* Subject to the conditions set forth in subsection 9.2.3 and the limitations set forth in subsection 9.2.4(c) and Section 10.2, Customer shall indemnify Consultant at all times after the effective date of this Agreement against any liability, loss, damages (including punitive damages), claim, settlement payment, cost and expense, interest, award, judgment, diminution in value, fine, fee, penalty or other charge, including reasonable legal fees and the cost of enforcing this indemnity, arising out of or relating to any one or more of the following:

- (a) breach by Customer of any warranty set forth in this Agreement;
- (b) fraud or willful misconduct of Customer; or
- (c) any claim, action, suit or proceeding made or brought by a third party based in whole or in part upon, or arising out of or relating to, any arrangement for a third party product or service undertaken by Consultant under Section 2.2.

9.2.3 *Conditions Precedent.*

- (a) *Indemnitee to Give Notice.* Any party that makes a claim for indemnification under this Section 9.2 (“Indemnitee”) shall provide the party against which the claim is made (“Indemnitor”) prompt notice in writing of the relevant claim.
- (b) *Content of Notice.* In the notice delivered pursuant to subsection 9.2.3(a), an Indemnitee shall include the following:
  - (1) in any case where a third party makes any claim or brings any action, suit or proceeding against an Indemnitee (a “Third Party Claim”) with respect to which an Indemnitor may have liability, a copy of the claim, process, and all legal pleadings with respect to the Third Party Claim; and
  - (2) in the case of any claim or portion of a claim that does not involve a Third Party Claim, a description of any claim, event or fact known to the Indemnitee that gives rise or may give rise to a claim by the Indemnitee against an Indemnitor based on this Agreement, including the nature and basis of the claim, event or fact and the amount to the extent known.
- (c) *Failure to Deliver Timely Notice.* It is a condition precedent to an Indemnitor’s obligation to indemnify an Indemnitee with respect to a claim that the Indemnitee perform its obligations under subsections 9.2.3(a) and 9.2.3(b). However, failure to satisfy this condition precedent relieves an Indemnitor of its obligation to indemnify with respect to the claim only to the extent that the Indemnitor actually has been prejudiced by the Indemnitee’s failure to give notice as required.

9.2.4 *Defense and Settlement of Third Party Claims.*

- (a) *Indemnitor’s Assumption of Defense.* If an Indemnitor wishes to assume the defense of a Third Party Claim, it shall do so by sending notice of the assumption to the Indemnitee. The Indemnitor’s assumption of the defense acknowledges its obligation to indemnify. After sending the notice, the Indemnitor shall promptly choose and employ legal counsel and Indemnitee shall cooperate with Indemnitor and the chosen legal counsel to provide reasonable assistance in defending the Third Party Claim. After sending the notice, the Indemnitor is entitled to contest, pay, settle or compromise the Third Party Claim as it determines, subject to the provisions of subsection 9.2.4(d).
- (b) *Indemnitee’s Right to Undertake Defense.* Notwithstanding the provisions of subsection 9.2.4(a), an Indemnitee is entitled

- (1) to participate in the defense of a Third Party Claim; and
  - (2) to defend a Third Party Claim with counsel of its own choosing and without the participation of the Indemnitor if (i) Indemnitor fails or refuses to defend the Third Party Claim on or before the 5th business day after the Indemnitee has given written notice to the Indemnitor of the Third Party Claim or (ii) representation of the Indemnitor and the Indemnitee by the same counsel would, in the opinion of that counsel, constitute a conflict of interest.
- (c) *Litigation Expenses.* The Indemnitor shall pay the litigation expenses incurred by the Indemnitee to and including the date the Indemnitor assumes the defense of the Third Party Claim. Upon the Indemnitor's assumption of the defense of the Third Party Claim, the Indemnitor's obligation ceases for any litigation expenses the Indemnitee subsequently incurs in connection with the defense of the Third Party Claim. Notwithstanding the previous sentence, the Indemnitor is liable for the Indemnitee's litigation expenses, if
- (1) the Indemnitee has employed counsel in accordance with the provisions of subsection 9.2.4(b)(2); or
  - (2) the Indemnitor has authorized in writing the employment of counsel and stated in that authorization the dollar amount of litigation expenses for which the Indemnitor is obligated.
- (d) *Compromise and Settlement of Third Party Claims.*
- (1) *General Rule.* If an Indemnitor assumes the defense of a Third Party Claim, it may not effect any compromise or settlement of the Third Party Claim without the consent of the Indemnitee, and the Indemnitee has no liability with respect to any compromise or settlement of a Third Party Claim effected without its consent.
  - (2) *Exceptions.* Notwithstanding the provisions of subsection 9.2.4(d)(1), an Indemnitor may effect a compromise or settlement of a Third Party Claim without an Indemnitee's consent if the following three conditions are met:
    - (i) there is no finding or admission of any violation of law or any violation of the rights of any person and no effect on any other claim that may be made against the Indemnitee;

- (ii) the sole relief provided is monetary damages that are paid in full by the Indemnitor; and
- (iii) the compromise or settlement includes, as an unconditional term, the claimant's or the plaintiff's release of the Indemnitee, in form and substance satisfactory to the Indemnitee, from all liability in respect of the Third Party Claim.

9.2.5 *Exclusive Remedy.* The rights and remedies set forth in this Section 9.2 constitute the exclusive rights and remedies of the parties with respect to the matters indemnified under subsections 9.2.1 and 9.2.2.

## **Article X**

### **DISCLAIMER OF DAMAGES AND LIMITATIONS OF LIABILITY**

10.1 *Damage Disclaimer.* Except as otherwise expressly provided by this Agreement, NEITHER PARTY IS LIABLE TO THE OTHER PARTY FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, INCIDENTAL, PUNITIVE OR EXEMPLARY DAMAGES, INCLUDING, WITHOUT LIMITATION, DAMAGES FOR COST OF PROCUREMENT OF SUBSTITUTE GOODS, TECHNOLOGY OR SERVICES; CONSEQUENTIAL LOSS OF BUSINESS PROFITS; BUSINESS INTERRUPTIONS AND LOSS OF INFORMATION, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF ANY SUCH DAMAGE.

#### 10.2 Limitations of Liability

10.2.1 *Negligence of Other Party.* Neither party is liable in any amount to the other party for any claim arising out of any negligent act or omission of the other party.

10.2.2 *Original Creations.* In the event that any original creation of Consultant infringes any valid third party patent right, trademark or service mark right, right of likeness or publicity, right of privacy, copyright, trade secret right or any other intellectual property right, Consultant is not liable to Customer in any amount greater than the cost of recreating the content to cure the infringement.

10.2.3 *Stale Claims for Quality of Work.* Consultant is not liable in any amount for any claim by Customer based upon, or arising out of or relating to, any objection by Customer to the quality of any Service performed or deliverable provided by Consultant unless written notice of the objection is provided by Customer to Consultant within thirty (30) days following the date of performance or delivery.

10.2.4 *Maximum Liability.* IN NO CASE IS CONSULTANT LIABLE TO CUSTOMER FOR ANY AMOUNT IN EXCESS OF THE TOTAL FEES UNDER THE STATEMENT OF WORK RELEVANT TO THE LIABILITY THAT WERE PAID BY CUSTOMER TO CONSULTANT DURING THE SIX (6) MONTH PERIOD PRIOR TO THE FIRST DATE OF OCCURRENCE GIVING RISE TO THE LIABILITY. THIS LIMITATION APPLIES IN THE

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AGGREGATE TO ALL CAUSES OF ACTION ARISING FROM THE OCCURRENCE, INCLUDING, WITHOUT LIMITATION, BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, MISREPRESENTATIONS, INTELLECTUAL PROPERTY CLAIMS AND OTHER TORTS.

#### **Article XI**

#### **TERM AND TERMINATION; SURVIVAL OF CERTAIN PROVISIONS**

11.1 *Term.* This Agreement shall continue in full force unless (a) terminated by written agreement of the parties, (b) terminated for cause under Section 11.2 or (c) terminated at the option of a party under Section 11.3.

11.2 *Termination for Cause.* Either party may terminate this Agreement for cause in the event of:

- (a) a material breach or default by the other party of an obligation under this Agreement which is not remedied within thirty (30) days after written notice thereof;
- (b) the other party's filing for bankruptcy or becoming an involuntary participant in a bankruptcy, reorganization, receivership, dissolution or other insolvency proceeding, if such involuntary proceeding is not dismissed with sixty (60) days after commencement;
- (c) the other party's making of an assignment for the benefit of creditors or becoming unable to pay its debts as they mature in the ordinary course of business;
- (d) acquisition or change in control of the other party; or
- (e) inability of the other party to perform due to the existence of a force majeure event continuing for more than thirty (30) days.

11.3 *Termination at Option of a Party.* If at any time there passes thirty (30) consecutive days during which no Statement of Work under this Agreement is in effect, either party may, at its option and without cause, terminate this Agreement by giving written notice of termination to the other party, provided that such notice is received by the other party prior to execution by the parties of any additional Statement of Work under this Agreement.

11.4 *Works in Progress.* Upon termination of this Agreement,

- (a) each Statement of Work under this Agreement will simultaneously terminate and any Services being provided under any such Statement of Work will cease;
- (b) Consultant will issue, and Customer will pay, an invoice for all Services provided and expenses incurred prior to termination; and
- (c) upon receipt of payment for all amounts due, Consultant will deliver to Customer all uncompleted works in progress, which uncompleted works shall be delivered by

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Consultant and accepted by Customer “AS IS” and “WITHOUT WARRANTY,” but otherwise subject to the terms and conditions of this Agreement.

11.5 *Survival.* The following provisions survive any termination of this Agreement: Article II, Article IV, Article V, Section 6.2, Article VII, Section 8.2, Section 8.3, Article IX, Article X, Section 11.4, this Section 11.5, Section 12.1, Section 12.2, subsection 12.3.4, Section 12.5 and Section 12.6.

## **Article XII GENERAL PROVISIONS**

### **12.1 Independent Contractor**

12.1.1 *No Employment or Agency Established.* The parties agree that Consultant is acting, in performance of this Agreement, as an independent contractor. The parties agree that the personnel supplied by Consultant hereunder are not Customer’s employees or agents.

12.1.2 *Consultant’s Employees.* Consultant will be solely responsible for the payment of compensation and any benefits to the Personnel employed by Consultant, and such Personnel will not be entitled to the provision of any Customer employee benefits.

12.1.3 *Non-exclusivity.* This Agreement is mutually non-exclusive. Customer retains the right to have services of the same, similar or different kind performed by its own personnel or other consultants, and Consultant retains the right to provide the same, similar or different services to others.

### **12.2 Construction**

12.2.1 *Amendments.* The parties may amend this Agreement only by a written agreement of the parties that identifies itself as an amendment to this Agreement.

12.2.2 *Waivers.*

- (a) *No Oral Waivers.* The parties may waive any provision in this Agreement only by a writing executed by the party or parties against whom the waiver is sought to be enforced.
- (b) *Effect of Failure, Delay or Course of Dealing.* No failure or delay (1) in exercising any right or remedy under this Agreement or (2) in requiring the satisfaction of any condition under this Agreement and no act, omission or course of dealing between the parties operates as a waiver or estoppel of any right, remedy or condition.

- (c) *Each Waiver for a Specific Purpose.* A waiver made on one occasion is effective only in that instance and only for the purpose stated in the required writing. A waiver once given is not to be construed as a waiver on any future occasion.

12.2.3 *Severability.* If any provision of this Agreement is determined to be invalid, illegal or unenforceable, the remaining provisions of this Agreement remain in full force, if the essential terms and conditions of this Agreement for each party remain valid, binding and enforceable.

12.2.4 *Merger.* This Agreement constitutes the final agreement between the parties. It is the complete and exclusive expression of the parties' agreement on the matters contained in this Agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained in this Agreement are expressly merged into and superseded by this Agreement. The provisions of this Agreement may not be explained, supplemented or qualified through evidence of trade usage or a prior course of dealings. In entering into this Agreement, neither party has relied upon any statement, representation, warranty or agreement of the other party except for those expressly contained in this Agreement. There is no condition precedent to the effectiveness of this Agreement, other than as expressly stated in this Agreement.

12.2.5 *Conflicting Documents.* In the event of a conflict between the provisions of this Agreement exclusive of any Statement of Work under this Agreement and the provisions of a Statement of Work under this Agreement, the provisions of this Agreement exclusive of the conflicting Statement of Work govern the relationship between the parties, provided, however, that in no case shall any term or condition or agreement pursuant to Section 2.2 or Section 2.3 be considered in conflict with any provision of this Agreement.

12.2.6 *Captions.* The descriptive headings of the Articles, Sections and subsections of this Agreement are for convenience only, do not constitute a part of this Agreement and do not affect this Agreement's construction or interpretation.

12.2.7 *Counterparts.* The parties may execute this Agreement in multiple counterparts, each of which constitutes an original, and all of which, collectively, constitute only one agreement. The signatures of all of the parties need not appear on the same counterpart, and delivery of an executed counterpart signature page by facsimile or other electronic means is as effective as executing and delivering this Agreement in the presence of the other party to this Agreement. This Agreement is effective upon delivery of one executed counterpart from each party to the other party. In proving this Agreement, a party must produce or account only for the executed counterpart of the party to be charged.

## 12.3 Force Majeure

12.3.1 *Definitions.* For purposes of this Section 12.3,

- (a) “Force Majeure Event” means any act or event, whether foreseen or unforeseen, that meets all three of the following tests:
- (1) the act or event prevents a party (the “Nonperforming Party”), in whole or in part, from (i) performing its obligations under this Agreement or (ii) satisfying any conditions to the obligations of the other party (the “Performing Party”) under this Agreement;
  - (2) the act or event is beyond the reasonable control of and not the fault of the Nonperforming Party; and
  - (3) the Nonperforming Party has been unable to avoid or overcome the act or event by the exercise of due diligence.

Notwithstanding the preceding definition of a Force Majeure Event, a Force Majeure Event excludes economic hardship, changes in market conditions and insufficiency of funds.

- (b) “Nonperforming Party” has the meaning assigned in the definition of Force Majeure Event.
- (c) “Performing Party” has the meaning assigned in the definition of Force Majeure Event.

12.3.2 *Suspension of Performance.* If a Force Majeure Event occurs, the Nonperforming Party is excused from (a) whatever performance is prevented by the Force Majeure Event to the extent prevented and (b) satisfying whatever conditions precedent to the Performing Party’s obligations that cannot be satisfied, to the extent they cannot be satisfied. Notwithstanding the preceding sentence, a Force Majeure Event does not excuse any obligation by either the Performing Party or the Nonperforming Party to make any payment required under this Agreement.

12.3.3 *Resumption of Performance.* When the Nonperforming Party is able to (a) resume performance of its obligations under this Agreement or (b) satisfy the conditions precedent to the Performing Party’s obligations, it shall immediately give the Performing Party written notice to that effect and shall resume performance under this Agreement no later than two working days after the notice is delivered.

12.3.4 *Exclusive Remedy.* The relief offered by this Section 12.3 is the exclusive remedy available to the Nonperforming Party with respect to a Force Majeure Event.

#### 12.4. Notices

12.4.1 *Requirement of a Writing; Permitted Methods of Delivery.* Each party giving or making any notice, request, demand or other communication (each, a “Notice”) pursuant to this Agreement



shall give the Notice in writing and use one of the following methods of delivery: personal delivery, Registered or Certified Mail (in each case, return receipt requested and postage prepaid), nationally recognized overnight courier (with all fees prepaid), facsimile or e-mail.

12.4.2 *Addressees and Addresses.* Any party giving a Notice shall address the Notice to the appropriate person at the receiving party (the “Addressee”) at the address listed below or to another Addressee or another address as designated by a party in a Notice pursuant to this Section 12.4:

(a) for Consultant:

(1) if by personal delivery, mail or courier service, to:

GrayWebGraphics.com LLC  
816 Camaron Street, Suite 1.11  
San Antonio, Texas 78212

(2) if by electronic mail, to: [billing@graydigitalgroup.com](mailto:billing@graydigitalgroup.com)

Consultant will notify Customer in writing of any changes to the business mailing or e-mail address for correspondence.

(b) for Customer:

(1) if by personal delivery, mail or courier service, to: Customer business address listed on most recent Statement of Work. It is Customer’s responsibility to notify Consultant in writing of any changes to mailing address.

(2) if by electronic mail, to: the business e-mail address listed on the most current Statement of Work. It is the Customer’s responsibility to notify Consultant in writing of any changes to the business e-mail address.

12.4.3 *Effectiveness of a Notice.* A Notice is effective only if the party giving the Notice has complied with subsections 12.4.1 and 12.4.2 and if the Addressee has received the Notice. A Notice is deemed to have been received as follows:

(a) *Personal Delivery, Mail, and Courier.* If a Notice is delivered in person or sent by Registered or Certified Mail or nationally recognized overnight courier, the Notice is deemed to have been received upon receipt as indicated by the date on the signed receipt.

- (b) *E-mail.* If a Notice is sent by e-mail, the Notice is deemed to have been received upon written acknowledgment, whether by return e-mail or otherwise, by the Addressee.
- (c) *Refusal to Accept Notice.* If the Addressee rejects or otherwise refuses to accept the Notice, or if the Notice cannot be delivered because of a change in address for which no Notice was given, then the Notice is deemed to have been received upon the rejection, refusal or inability to deliver the Notice.

12.4.4 *Electronic Mail.* For purposes of this Agreement, any communication transmitted by electronic mail:

- (a) is a writing; and
- (b) if transmitted from the business e-mail address of a representative of a party, is deemed to be signed by that representative, provided, however, that any attachment to such a communication is not in and of itself deemed under this provision to be signed.

## 12.5 Parties, Assignees and Third Party Beneficiaries

12.5.1 *Definitions.* For purposes of this Section 12.5,

- (a) “assignment” means any assignment, whether voluntary or involuntary or by merger, consolidation, dissolution, operation of law or any other manner;
- (b) “assignee” means any successor or assign of the assignor;
- (c) a “change of control” is deemed an assignment of rights; and
- (d) “merger” refers to any merger in which a party participates, regardless of whether it is the surviving or disappearing corporation.

12.5.2 *Assignment and Delegation.*

- (a) *No Assignments.* No party may assign any of its rights under this Agreement, except with the prior written consent of the other party. That party may withhold consent for any or no reason in its sole and absolute discretion. All assignments of rights are prohibited under this subsection 12.5.2.
- (b) *No Delegations.* No party may delegate any performance under this Agreement.
- (c) *Ramifications of Purported Assignment or Delegation.* Any purported assignment of rights or delegation of performance in violation of this subsection 12.5.2 is void.

### 12.5.3 *Successors and Assigns.*

- (a) *Nonassigning Party's Performance Obligations.* If there is a permitted assignment of rights, the nonassigning party is deemed to have agreed to perform in favor of the assignee.
- (b) *Assignee's Performance Obligations.* If there is a permitted assignment of rights, (1) a contemporaneous delegation is deemed to have occurred and (2) the assignee is deemed to have assumed the assignor's performance obligations in favor of the nonassigning party, except if in either instance there is evidence to the contrary.
- (c) *Assignability of Rights and Delegability of Performance.* This subsection 12.5.3 does not address, directly or indirectly, whether (1) rights under this Agreement are assignable or (2) performance under this Agreement is delegable. Subsection 12.5.2 addresses these matters.

12.5.4 *Third Party Beneficiaries.* This Agreement does not and is not intended to confer any rights or remedies upon any person other than the signatories.

## 12.6 Judicial and Other Remedies

12.6.1 *Governing Law.* The laws of the State of Texas (without giving effect to its conflict of laws principles) and, as applicable, the laws of the United States govern all matters arising out of or relating to this Agreement and the transactions it contemplates, including, without limitation, its interpretation, construction, performance and enforcement.

### 12.6.2 *Forum Selection.*

- (a) *Designation of Forum.* Any party bringing a legal action or proceeding arising out of or relating to this Agreement against any other party shall bring the legal action or proceeding in either the San Antonio Division of the United States District Court for the Western District of Texas or in any court of the State of Texas sitting in San Antonio, Texas.
- (b) *Waiver of Right to Contest Jurisdiction.* Each party waives, to the fullest extent permitted by law, (1) any objection that it may now or later have to the laying of venue of any legal action or proceeding arising out of or relating to this Agreement brought in the San Antonio Division of the United States District Court for the Western District of Texas or in any court of the State of Texas sitting in San Antonio, Texas and (2) any claim that any action or proceeding brought in any court specified in subsection 12.6.2(b)(1) has been brought in an inconvenient forum.

- (c) *Submission to Jurisdiction.* Each party to this Agreement consents to the exclusive jurisdiction of (1) the San Antonio Division of the United States District Court for the Western District of Texas and its appellate courts and (2) any court of the State of Texas sitting in San Antonio, Texas and its appellate courts, for the purposes of all legal actions and proceedings arising out of or relating to this Agreement.
- (d) *Enforcement of Judgments.* Each party agrees that the exclusive choice of forum set forth in this subsection 12.6.2 does not prohibit the enforcement of any judgment obtained in that forum or any other appropriate forum.

12.6.3 *Rights and Remedies Cumulative.* Except as set forth in subsections 9.2.5 and 12.3.4,

- (a) any enumeration of a party's rights and remedies set forth in this Agreement is not intended to be exhaustive;
- (b) a party's exercise of any right or remedy under this Agreement does not preclude the exercise of any other right or remedy; and
- (c) all of a party's rights and remedies are cumulative and are in addition to (1) any other right or remedy set forth in this Agreement, (2) any other right or remedy set forth any other agreement between the parties or (3) any other right or remedy which may now or subsequently exist at law or in equity, by statute or otherwise.