



# **Terms and Conditions Agreement**

This Terms and Conditions Agreement (this "Agreement") is binding upon Elevated Tech L.L.C. d/b/a Elevated Technologies, a Texas limited liability company ("ET"), and the Person designated as "Client" in the Service Level Agreement between such ET and such Person ("Client").

**Section 1**      **Definitions** As used throughout this Agreement, the following definitions apply unless otherwise specifically stated:

1.1      "Action" means any claim, action, cause of action, demand, lawsuit, arbitration, inquiry, audit, notice of violation, proceeding, litigation, citation, summons, subpoena, or investigation of any nature, civil, criminal, administrative, regulatory, or other, whether at law, in equity, or otherwise.

1.2      "Covered Data" means all computer files, unless excluded pursuant to Section 13.2, which Client has saved in Client's partition, directory, or portion of ET's servers during the Term.

1.3      "Data Loss" means an intentional or unintentional loss, destruction or compromise of Covered Data leading to the permanent loss, destruction or compromise of such Covered Data.

1.4      "Effective Date" means the date upon which the later of ET and Client has signed the Service Level Agreement.

1.5      "Emergency Support" means Work in response to the failure of a critical system or systems which, if not serviced, will cause immediate and substantial harm to Client.

1.6      "Excluded Services" means any effort, service, task, or assistance provided or supplied by ET, including, without limitation, any design, delivery, support, engineering, installation, repair, maintenance, technical, consulting, or professional services, excluding Included Services.

1.7      "Facility Survey" is a comprehensive review to compare the proposed Service Ticket to Client's actual requirements.

1.8      "Included Services" mean any service performed or provided as part of a Service Plan.

1.9      "Person" means an individual, corporation, partnership, joint venture, limited liability entity, governmental authority, unincorporated organization, trust, association, or other entity.

1.10     "Service Level Agreement" means one or more certain Service Level Agreements that Client and ET may enter into from time to time and that specify(ies), among other things, prices, the applicable Service Plan(s) and the Term(s) of such Service Plan(s).

1.11     "Service Plan" means an ongoing and as-needed technology support plan, as described more particularly in the Service Level Agreement, conducted on either on a month-to-month or annual basis.

1.12     "Service Ticket" refers to any service requested of ET by Client via email, phone or online submission.

1.13     "Term" means the term of the applicable Service Plan, which begins on the Effective Date and ends one (1) year thereafter, subject to automatic one (1)-year renew thereafter (and after each such one (1)-year renewal period) unless either party notifies the other party in writing at least thirty (30) days before the end of any such year-long period that it is terminating the Service Plan as of the end of the year-long period during which such notice is delivered.

1.14     "Work" means an Included Service, an Excluded Service, or both.

**Section 2**      **Included Services and Excluded Services**

2.1      Subject to Section 3, to request any Work, Client shall deliver a Service Ticket to ET. If the Service Ticket is for an Excluded Service, ET may, at its sole option, accept the Service Ticket and perform the Work. Prior to the commencement of any Excluded Service, ET may perform a Facility Survey at Client's sole cost and expense. ET may perform Work for Client by any means ET deems satisfactory, including, but not limited to, telephone, electronic mail, remote, or on-site means.

2.2      ET may enter into license agreements on Client's behalf for the use of hardware and/or software in conjunction with the Work, and Client agrees to be bound by the terms of all such license agreements, regardless of whether Client actually reviews or executes such license agreements. Client shall at all times comply with any and all applicable copyright, patent and intellectual property laws, codes, rules and regulations. Client acknowledges that, unless otherwise specified therein, all such license agreements to which it is bound are non-exclusive and Client shall not reverse engineer, copy, share, transmit, or modify any licensed intellectual property or otherwise infringe or violate any such copyrights or licenses.

2.3      If any computers, servers, parts, cables, equipment, materials or other items (collectively, "Materials") are requested or required for ET's performance of the Work and such Materials are not expressly listed as being

loaned or leased by ET (in which case such Materials are governed as provided below), Client shall pay, or reimburse ET for, all fee, costs and expenses (including, but not limited to, Material purchase costs, shipping charges and taxes) related to the purchase of such Materials. ET may require pre-payment from Client for such Materials and may require that Client be billed directly from the vendor.

2.4 ET and Client understand that this Agreement is ongoing, and, to the extent Client requests the performance of any Excluded Services and ET agrees to perform such Excluded Services, this Agreement will govern the performance of those Excluded Services.

2.5 Client shall deliver to ET all documentation on servers, computer systems, peripherals, cabling, phone lines and any other information related to any systems, equipment or materials not installed by ET.

2.6 Upon Client's written acceptance of the Service Level Agreement, ET shall provide all of the Included Services for Client during the Term. In consideration therefor, Client shall pay to ET those fees set forth in the Service Level Agreement, plus applicable taxes, on a monthly basis in advance on the first day of each month.

2.7 Upon receiving a Service Ticket requiring Emergency Support, ET shall determine whether the failure can be resolved by phone or remote access or whether the failure mandates on-site support. Client may not send Service Tickets requesting Emergency Support by email. ET cannot guarantee the availability of Emergency Support at all times. Whether a Service Ticket for Emergency Support is an Included Service or an Excluded Service, and the fees to be paid for the performance of such Emergency Support, are determined pursuant to and in accordance with the terms of the applicable Service Level Agreement.

2.8 In the event any hardware or equipment (including any Materials) fails, such failed hardware or equipment may be tendered to the original equipment manufacturer ("OEM") therefor, the OEM's designated repair facilities, or other competent repair technicians for repair. If repair is not reasonable or practical, and the OEM has not provided a replacement, Client may be required to purchase new hardware or equipment at its sole cost and expense. Client acknowledges that repair or replacement may be a time-consuming process, that such repair or replacement is an Excluded Service, and that Client shall be responsible for all damages, losses, fees, costs, expenses and liabilities resulting from or arising out of such repair or replacement.

2.9 If the Service Level Agreement sets forth a Term that is longer than one month, Client may terminate the Service Plan at any time by written notice to ET, but upon such notice, Client shall pay to ET an amount equal to 80% of all of the fee payments remaining to be paid to ET for the remainder of the Term.

2.10 ET will perform the Work using personnel of commercially reasonable skill, experience, and qualifications and in a professional and workmanlike manner in accordance with generally recognized industry standards for similar services and will devote adequate resources to meet its obligations under this Agreement and all applicable Service Level Agreements. Notwithstanding the foregoing, or anything otherwise set forth in this Agreement or any Service Level Agreement, in no event will ET be liable or responsible to Client, or be deemed to have defaulted under or breached its obligations under this Agreement or any Service Level Agreement, for any failure or delay in fulfilling or performing any of its obligations of this Agreement or any such Service Level Agreement, when and to the extent such failure or delay is caused by any circumstances beyond ET's reasonable control (each, a "Force Majeure Event"), including, without limitation, (i) acts of God, (ii) flood, fire, earthquake, other natural disaster or catastrophe, epidemic or explosion, (iii) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest, (iv) government order, law, or actions, (v) embargoes or blockades in effect on or after the date of this Agreement, (vi) national or regional emergency and (vii) shortage of adequate power, utility or transportation facilities. In the event of any failure or delay caused by a Force Majeure Event, ET shall give prompt written notice to Client stating the period of time the occurrence is expected to continue and use commercially reasonable efforts to end the failure or delay and minimize the effects of such Force Majeure Event.

2.11 Client shall provide ET and its personnel with all such cooperation and assistance as they may reasonably request, or otherwise may reasonably be required, to enable ET to perform its obligations (including the provision of the Work), and exercise its rights, under and in accordance with the terms and conditions of this Agreement, including (a) reasonable, uninterrupted access, both physical and virtual, to Client's premises, systems, networks, and facilities, (b) a safe working environment, (c) reasonable access to the appropriate Client personnel, including network, systems, operations, and applications personnel, and (d) all necessary authorizations and consents, whether from third parties or otherwise, in connection with any of the foregoing.

### **Section 3 Help Desk and Support**

3.1 ET shall provide Remote Helpdesk and Vendor Management of Client's IT networks as provided for and described in the applicable Service Level Agreement to Client through remote means from 8:00 am – 5:00 pm Monday through Friday, excluding public holidays. Network Monitoring Services shall be provided 24/7/365.

Whether such Work will constitute Included Services or Excluded Services shall be determined by the terms of the Service Level Agreement. Client agrees to provide ET with access to Client's IT networks, systems and computers to install and use remote access software as may be necessary for ET to provide Remote Helpdesk and Vendor Management services.

3.2 ET will use commercially reasonable efforts to respond to Client's Service within designated business hours or, if urgent, after designated business hours and on holidays. Each Service Ticket will be assigned a number for tracking.

3.3 Client grants ET authorization to view any data within the regular routine of the repair or system improvement. Client also authorizes ET to reasonably delete, change, or rewrite any necessary information to complete the system repair or improvement that is consistent with customary standards and practices in the industry in which ET operates.

3.4 Client acknowledges that:

3.4.1 the Network Monitoring Services may not protect against all threats to its computers, servers, equipment and systems;

3.4.2 the quality of the Network Monitoring Services is dependent on the quality of the hardware and software in use by Client; and

3.4.3 certain errors, problems or defects in the hardware, software, equipment, processes or systems cannot be determined through the provision of the Network Monitoring Services.

#### **Section 4 Leased or Loaned Equipment Agreement**

4.1 Client agrees that all equipment and other tangible personal property listed as being leased or loaned to Client by ET pursuant to a Service Level Agreement shall remain, as between Client and ET, the sole and exclusive property of ET. Client will not attempt to sell, lease, encumber, resale, tamper, troubleshoot, repair, move, or add to such equipment or other tangible personal property without the prior written permission of ET.

4.2 Upon termination of this Agreement, Client shall return all such leased or loaned equipment and other tangible personal property to ET within five (5) business days after the effective termination date of this Agreement. ET may retake possession of such equipment and other tangible personal property after such five (5) business days, and Client shall compensate ET for all reasonable costs and expenses incurred by ET in connection with such recovery.

4.3 Client shall not attempt, or cause to be attempted, any maintenance on any equipment or other tangible personal property of ET. Any tampering, repair, or service, except by ET, on such equipment other tangible personal property constitutes a breach by Client of its obligations under this Agreement.

4.4 Client shall take all commercially reasonable efforts to keep all equipment and other tangible personal property of ET safe, secure and protected while in its possession or control. Client shall keep current insurance on all equipment and other tangible personal property of ET while in Client's possession or control and list ET as an additional insured/loss payee. Client shall provide proof of such insurance coverage to ET upon request and shall provide a current copy of its insurance declaration sheet showing ET as an additional insured/loss payee specifically for mobile equipment/tangible personal property coverage. Client shall pay all costs and expenses for the repair or replacement of any ET-supplied equipment or other tangible personal property while in Client's possession or control.

4.5 Should Client breach its obligations under this Agreement, ET may enter Client's premises at any time and remove therefrom all of ET's hardware, equipment or other tangible personal property, and such entry will be deemed consented to by Client and not a trespass by ET. Client and its representatives shall fully cooperate with ET's representatives, and shall not interfere in any way, with such removal. Client shall take all commercially reasonable efforts to not disturb the peace during such removal.

#### **Section 5 Excluded Services**

5.1 Although not an exclusive or exhaustive list of Excluded Services, and without limiting the generality of the definition of "Excluded Services", a Service Plan shall not include the following:

5.1.1 parts, equipment or software for Client's telecommunications systems which are not covered by ET warranty or support;

5.1.2 the cost of any software, licenses, renewals, or upgrade fees of any kind unless specified in the Service Level Agreement;

5.1.3 the cost of any OEM, vendor, or manufacturer support or incident fees of any kind;

5.1.4 the cost to bring Client's technology up to minimum standards required for Services;

5.1.5 failure due to acts of God, terrorism, telecommunications failures, fire, casualty, flood, building modifications, power failures or other adverse environmental conditions or factors;

- 5.1.6 service and repair made necessary by the alteration or modification of equipment other than that authorized by ET, including alterations, software installations or modifications of equipment made by Client's employees or anyone other than ET and/or its representatives;
- 5.1.7 maintenance of applications and software packages, whether acquired from ET or any other source, unless as specified in the Service Level Agreement;
- 5.1.8 programming (modification of software code) and software maintenance unless as specified in the Service Level Agreement;
- 5.1.9 training and instruction of any kind;
- 5.1.10 replacement of parts on printers, screens or peripherals, PDAs, point of sale systems, scanners, cameras, cell phones, smart phones nor any other specialized accessory; or
- 5.1.11 consumables or items designed to be expended or wear out (such as printer maintenance kits, toner, ink, batteries, and paper).

5.2 Client shall pay ET for all Excluded Services at the cost or rate which ET may charge and communicate to Client from time to time. **Client understands that Excluded Services may be quoted and billed separately from the Included Services.** ET is not obligated to provide a quote for such Excluded Services prior to performance or billing but may do so as a courtesy to Client.

## **Section 6 Limitations of Liability**

6.1 Client acknowledges that absolute security against all information or computer related threats is not realistically achievable. ET is not responsible for any breaches of security, or resulting loss, damage or liability, incurred or suffered by Client.

6.2 In the event that any Work is carried out on Client's hardware, software, equipment, processes and systems for any reason (whether planned, accidental or caused by unknown or malicious means), ET shall not be held liable for any loss, damage or liability incurred or suffered by Client resulting therefrom.

6.3 **UNLESS, AND EXCEPT AS, OTHERWISE EXPLICITLY STATED IN THIS AGREEMENT, (A) ALL WORK AND THE MATERIALS ARE PROVIDED BY ET TO CLIENT "AS IS", AND (B) ET HEREBY DISCLAIMS ALL WARRANTIES PROVIDED AT LAW OR IN EQUITY, WHETHER, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE (INCLUDING ALL WARRANTIES ARISING FROM COURSE OF DEALING, USAGE, OR TRADE PRACTICE), AND SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF SUITABILITY, MERCHANTABILITY, GOOD AND WORKMANLIKE QUALITY AND FITNESS FOR A PARTICULAR PURPOSE. NO WARRANTY EXISTS AS TO ANY OF THE WORK, THE MATERIALS, LABOR, HARDWARE, SOFTWARE, EQUIPMENT, PROCESSES, OR SYSTEMS PROVIDED UNDER THIS AGREEMENT.**

6.4 Without limiting any other provision of this Section, Client acknowledges that any addition, alteration or reconfiguration of any hardware or software previously installed by ET is at Client's own risk and that ET has advised Client to seek competent assistance in any such addition, alteration or reconfiguration. If Client possesses, requests, or accepts any administrative privileges to any of the equipment, Client is solely responsible for such equipment, and ET may place such equipment outside of the Service Plan as a result. Client acknowledges that, with such administrative privileges, ET no longer has sole control of such equipment, and may not be able to identify who has operated such equipment, or what such persons have done to such equipment. All repairs or replacements of such equipment shall be at Client's sole cost and expense and will not be an Included Service.

6.5 Client understands that any proposal, term sheet, letter of intent, or similar document is not binding on ET and that ET disclaims any representations, promises, warranties, or guarantees made thereunder. Client represents that (a) it has not relied upon any such proposal, term sheet, letter of intent, or other similar document in entering into this Agreement and the Service Level Agreement, (b) it has not relied upon any written or oral representation, warranty, promise, or guaranty made by or on behalf of ET not contained in this Agreement or the Service Level Agreement, and (c) it has made its own investigation into its technology requirements in entering into the Service Level Agreement and, in connection therewith, being bound by this Agreement.

6.6 **NOTWITHSTANDING ANYTHING OTHERWISE SET FORTH IN THIS AGREEMENT TO THE CONTRARY, IN NO EVENT WILL ET, OR ANY OF ITS LICENSORS, ET PERSONNEL, SUBCONTRACTORS, OR SUPPLIERS BE LIABLE UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ITS SUBJECT MATTER UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, AND OTHERWISE, FOR ANY (A) LOSS OF USE, DATA, BUSINESS, REVENUE, PROFIT, GOODWILL, OR REPUTATION, (B) BUSINESS INTERRUPTION, INCREASED COSTS, OR DIMINUTION IN VALUE, OR (C) CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, ENHANCED, OR PUNITIVE DAMAGES, IN EACH CASE REGARDLESS OF WHETHER SUCH PERSONS WERE ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES OR SUCH LOSSES OR DAMAGES WERE OTHERWISE FORESEEABLE, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR**

OTHER REMEDY OF ITS ESSENTIAL PURPOSE.

6.7 NOTWITHSTANDING ANYTHING OTHERWISE SET FORTH IN THIS AGREEMENT TO THE CONTRARY, IN NO EVENT WILL THE COLLECTIVE AGGREGATE LIABILITY OF ET AND ITS LICENSORS, ET PERSONNEL, SUBCONTRACTORS, AND SUPPLIERS ARISING OUT OF OR RELATED TO THIS AGREEMENT UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, AND OTHERWISE, EXCEED THE LESSER OF (I) THE AGGREGATE AMOUNTS RECEIVED BY ET FOR THE PERFORMANCE OF WORK PURSUANT TO THE APPLICABLE SERVICE LEVEL AGREEMENT(S) IN THE THREE (3)-MONTH PERIOD PRECEDING THE EVENT GIVING RISE TO THE CLAIM OR (II) \$25,000.00. THE FOREGOING LIMITATIONS SHALL APPLY EVEN IF CLIENT'S REMEDIES UNDER THIS AGREEMENT FAIL OF THEIR ESSENTIAL PURPOSE

## **Section 7 Payment**

7.1 Client shall pay to ET all amounts owed within thirty (30) days of receipt of an invoice from ET. All payments must be made in United States Dollars. In addition to any other remedies provided for under this Agreement, ET may charge Client interest on any amounts owed and not paid within thirty (30) days of receipt of an invoice from ET at a rate equal to the lesser of (i) eighteen percent (18%) per annum, compounded daily, or (ii) the maximum rate of interest allowed by applicable law. Client agrees to pay to ET the sum of \$45.00 for all returned checks.

7.2 If Client increases the amount of the Included Services (whether through an increase in the number of its users, changes to its equipment, or otherwise), ET may increase the fees set forth in Service Level Agreement or require that Client execute a new Service Level Agreement and may suspend performance of its services (in addition to any other remedy to which it may be entitled) if Client fails to pay the increased fees.

7.3 ET reserves the right to require Client to deliver a deposit to ET prior to the initiation or acceptance of any Work. Such deposit may be kept commingled with ET's other funds (or funds of other clients) and will bear no interest for Client.

## **Section 8 Representations and Warranties**

8.1 Client makes the following representations and warranties: (i) if Client is not a natural person, Client is in good standing to transact business in the State of Texas; (ii) Client has the requisite authority to enter into this Agreement; (iii) if applicable, the person signing this Agreement on behalf of Client is duly authorized to enter into this Agreement on behalf of Client; (iv) to the best of Client's knowledge, this Agreement, and any covenants, warranties or representations made by Client pursuant hereto, will not cause Client to violate any applicable law, code, ordinance or court order; (v) nothing on Client's premises will prevent, restrict, or interfere with ET's performance of the Work, or will damage or injure ET, ET's employees and subcontractors, or ET's equipment (including, but not limited to, construction defects, insect infestation, environmental hazards, fire code violations, mold, structural problems, or the existence of anything or anyone whatsoever that violates any law of the State of Texas or the United States); (vi) this Agreement will not violate any other agreement to which Client is a party that would affect ET's rights or remedies under this Agreement; (vii) this Agreement will not result in the termination of any license, franchise, lease, permit or consent held by Client; (viii) this Agreement will not conflict with or result in a breach of Client's formation or governance documents or any agreement or instrument to which Client is party or by which it or its property is bound; and (ix) Client has not encumbered or otherwise granted a lien or security interest against any of the Collateral (as defined below) to any other Person.

## **Section 9 Default and Remedies**

9.1 ET will be in breach and default of this Agreement (an "Event of ET Default") if ET fails to substantially perform the Work that it agrees to perform for Client. Upon the occurrence of an Event of ET Default, Client shall promptly send ET written notice of such Event of ET Default and ET shall have fifteen (15) days following its receipt of such notice to correct or cure such Event of ET Default. If ET fails to correct or cure such Event of ET Default prior to the expiration of such fifteen (15)-day period, Client may exercise any of the following remedies: (i) terminate this Agreement; (ii) receive a refund for sums prepaid for the Work which forms the basis of the Event of ET Default; or (iii) enforce any rights or remedies available to it under this Agreement or at law. Each Service Ticket constitutes a separate agreement between Client and ET, and under no circumstance may Client withhold payment for Work which has been performed in a satisfactory manner because an Event of ET Default may exist with respect to performance under a separate Service Ticket.

9.2 Client will be in breach and default of this Agreement (an "Event of Client Default") if any of the following has occurred: (a) Client fails to perform each and every term, condition, and covenant under this Agreement to be performed by it; (b) any of the warranties and representations made in this Agreement by Client are become false; or (c) Client prohibits or prevents ET from completing any Work or causes ET to fail to complete

such Work. Client shall promptly notify ET of any Event of Client Default. Upon the occurrence of an Event of Client Default, ET shall promptly send Client written notice of such Event of Client Default and Client shall have ten (10) days following its receipt of such notice to correct or cure such default. If Client fails to correct or cure such Event of Client Default prior to the expiration of such ten (10)-day period, ET may exercise any of the following remedies: (i) terminate this Agreement; (ii) cease performance of any of the Work; (iii) enforce its contractual security agreement hereunder; or (iv) enforce any rights or remedies available to it under this Agreement, at law or in equity. These remedies are cumulative, and any exercise of such remedies does not constitute an election of remedies. If this Agreement is placed in the hands of an attorney for the purposes of collection or enforcement, Client shall pay to ET, or reimburse ET for, any such attorney's fees and expenses. Client acknowledges that by ceasing performance of the Service Plan, Client's spam filter will be turned off, which in turn will turn off Client's e-mail system. Client agrees that Client will be solely responsible for any damages, losses, liabilities, or other costs or expenses incurred or suffered by Client which may arise from, or relate to, ET's ceasing performance of the Service Plan as a result of an Event of Client Default.

9.3 To secure all sums owed by Client to ET under this Agreement, all Service Level Agreements or any other agreement entered into between, or binding upon, ET and Client whatsoever, whether heretofore, now, or hereafter existing, Client hereby irrevocably assigns, transfers, pledges and grants to ET a security interest ("Security Interest") in and to all of the following, whether presently owned or hereafter acquired, and all proceeds thereof, that have been delivered, installed, repaired, modified, sold by ET (collectively, "Collateral"): (i) fixtures; (ii) equipment; (iii) inventory; and (iv) consumer goods. To the extent any sums owed by Client were for the purchase of any Collateral, Client acknowledges that ET has a purchase money security interest in such Collateral, and ET may exercise its rights hereunder against such purchase money security interest Collateral after all other Collateral has been exhausted. Upon the occurrence of an Event of Client Default, ET may enter upon Client's property and take possession of all Collateral, without liability for trespass or conversion, and keep, or sell at public or private sale, the same in accordance with Article 9 of the Texas Business and Commerce Code. ET waives all rights to notice of default, notice of intent to accelerate, notice of acceleration, notice of sale, or any other notice whatsoever. The proceeds from any such sale, less any and all expenses connected with the taking of possession, holding and selling of the Collateral (including attorney's fees and expenses), will be credited against the indebtedness secured by the Security Interest. Any surplus will be paid to Client or as otherwise required by law, and Client shall promptly pay any deficiencies. This Agreement constitutes a security agreement under the Uniform Commercial Code. ET may file this Agreement, a Uniform Commercial Code Financing Statement, and a fixture filing, as necessary, to perfect the Security Interest.

9.4 If any dispute arises out of this Agreement, Client and ET agree that, prior to the filing of any suit, Client and ET shall promptly mediate, or attempt to mediate, the dispute in a good faith effort. The mediation will be conducted by a mediator agreed upon by ET and Client, but if both Client and ET cannot agree upon a mediator, either Client or ET may petition a court of competent jurisdiction for appointment of a mediator. Both Client and ET shall pay one-half (1/2) of the mediator's fees and expenses.

## **Section 10 Indemnity**

10.1 Client shall indemnify, defend and hold harmless ET and its personnel and subcontractors (collectively, the "ET Indemnitees") from and against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind (including, but not limited to, (x) consequential, incidental, indirect, exemplary, special, enhanced, punitive, or other losses and (y) reasonable attorney's fees) (collectively, "Losses"), incurred by the ET Indemnitee(s) in connection with, arising from or related to:

- 10.1.1 facts that, if true, would constitute a breach or default by Client of any representation, warranty, covenant, or obligation of Client under a Service Level Agreement or this Agreement (including an Event of Client Default);
- 10.1.2 the negligence, abuse, misapplication, misuse, or more culpable act or omission (including recklessness or willful misconduct) by or on behalf of Client or any of its representatives with respect to the Work, the Materials, or otherwise in connection with a Service Level Agreement or this Agreement; or
- 10.1.3 any Action instituted by a third party to the extent that such Losses arise from any allegation in such Action that any intellectual property right or other right of any Person, or any applicable law, is or will be infringed, misappropriated, or otherwise violated by any (a) modification of or to the Work or any Materials (or other deliverables provided by ET to Client) by Client other than (x) by ET personnel in connection with this Agreement or (y) with ET's express written authorization and

in strict accordance with ET's written directions and specifications, (b) good, service, technology, or other matter whatsoever (including any software, hardware, firmware, system, or network) directly or indirectly provided by Client or directed by Client to be installed, combined, integrated, or used with, as part of, or in connection with the Work or any Materials (or other deliverables provided by ET to Client), (c) use of the Work or any Materials (or other deliverables provided by ET to Client) by Client after ET's notice to Client of such activity's alleged or actual infringement, misappropriation, or other violation of a third party's rights, or (d) failure by Client to timely implement any modification, update, or replacement of the Work or any Materials (or other deliverables provided by ET to Client) made available to Client by or on behalf of ET.

10.2 The provisions of this Paragraph shall survive the termination of this Agreement.

## **Section 11 Server Hosting/Co-Location**

11.1 If Client requests that ET host Client's data or Client requests the use of ET's server, the following provisions shall apply:

11.1.1 UNLESS, AND EXCEPT AS, OTHERWISE EXPLICITLY STATED IN THIS AGREEMENT, ET MAKES NO REPRESENTATION OR WARRANTY WHATSOEVER AND EXPRESSLY DISCLAIMS ALL REPRESENTATIONS AND WARRANTIES WHATSOEVER, WHETHER EXPRESS OR IMPLIED. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, ET MAKES NO REPRESENTATION OR WARRANTY REGARDING THE SECURITY, AVAILABILITY, UP TIME, ACCESSIBILITY, OR USABILITY OF ANY SERVER. CLIENT AGREES THAT ET HAS MADE NO REPRESENTATIONS, WARRANTIES, PROMISES, OR COVENANTS NOT CONTAINED IN THIS AGREEMENT AND THAT CLIENT HAS NOT RELIED ON ANY REPRESENTATION, WARRANTY, PROMISE, OR COVENANT NOT CONTAINED IN THIS AGREEMENT IN CHOOSING TO EXECUTE THIS AGREEMENT.

11.1.2 ET may use a third party server provider to provide hosting and server use services.

11.1.3 ET may limit Client's use of storage space, bandwidth, processor and memory usage in its sole and complete discretion, and it may change such limits from time to time and at any time.

11.1.4 Client acknowledges that, from time to time, servers and their component parts fail, that data may be lost or become inaccessible as a result of such failure, that ET is not responsible for any loss resulting from such failure, and that Client has been advised to additionally use a back-up server in a separate location from ET's server (but such back-up server is not included in the Service Plan).

11.1.5 Client shall pay all fees shown on a Service Level Agreement related to such hosting or server use. ET may terminate the hosting and server use services at any time by giving Client ten days written notice of such termination.

## **Section 12 Miscellaneous**

12.1 If Client so chooses, it may appoint an authorized representative in writing to communicate and otherwise interact with ET in connection ET's performance of the Work or matters pertaining to this Agreement or a Service Level Agreement (a "Client Authorized Representative"). Client's employees who request changes outside of the original agreed scope of work must direct these to the Client Authorized Representative. If Client has appointed a Client Authorized Representative, no direction for such tasks to be conducted will be accepted from Client's employees by ET personnel unless the Client Authorized Representative signs an additional formal Service Ticket.

12.2 ET may terminate any Service Ticket immediately upon written notice to Client and Client is responsible for charges for those services performed or material delivered prior to cancellation date and any charges arising out of or relating to a new service provider.

12.3 Client shall use all software in compliance with applicable U.S. copyright laws. ET reserves the right to refuse to install unlicensed copies of any software. Client represents and warrants that all software it uses, and all uses thereof, are in compliance with all relevant intellectual property laws.

12.4 Client hereby acknowledges and agrees that, from time to time, some or all of the Work may be done by independent subcontractors of ET.

12.5 Time is of the essence as to all matters contained in this Agreement.

12.6 The waiver by a party of a breach or violation of this Agreement by the other party is not a waiver of any subsequent breach hereof by such other party.

12.7 Any and all notices required to be given under this Agreement are void and of no effect unless such notice is in writing and is delivered to the party to whom such notice is directed, either in person or deposited in the United States mail, certified and return receipt requested, postage prepaid, and delivered to such party at that party's address set forth in the Service Level Agreement. Any address may be changed by delivery of notice in

accordance with these notice provisions.

12.8 This Agreement shall be interpreted, construed and governed according to the laws of the State of Texas. Venue hereof will be in Harris County, Texas for all purposes. The paragraph headings contained in this Agreement are for convenience only and are not a part of this Agreement.

12.9 If any of the provisions in this Agreement are held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability will not affect any other provision thereof, and this Agreement will be construed as if such provision had never been contained herein. Whenever the context requires, the gender of all words used in this Agreement include the masculine, feminine, and neuter. This Agreement is binding upon and inures to the benefit of Client and ET and their respective successors and permitted assigns. Client has no right to assign this Agreement. There are no third-party beneficiaries of this Agreement.

12.10 This Agreement (together with all applicable Service Level Agreement and all Service Tickets) constitutes the sole and only agreement of Client and ET regarding the subject matter hereof and thereof and supersedes any and all other understandings of written or oral agreements between Client and ET respecting such subject matter. The Service Level Agreements and all Service Tickets are hereby incorporated by reference.

12.11 The relationship between ET and Client is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture, or other form of joint enterprise, employment, or fiduciary relationship between ET and Client, and neither ET nor Client shall have authority to contract for or bind the other party in any manner whatsoever.

### **Section 13 Limited Warranty.**

13.1 Subject to the terms and limitations contained in this Agreement, ET warrants that the Covered Data will not suffer a Data Loss during the Term (the "Warranty"). If Client experiences a Data Loss, ET will pay Client the lesser of (a) the cost to recreate such Covered Data, (b) the fair market value of such Covered Data, and (c) \$1,000,000.00. For the Warranty to apply, Client must notify ET of a Data Loss within thirty (30) days following the occurrence of such Data Loss.

13.2 The Warranty does not cover or include files, drivers, programs, software, or data (whether or not it is Covered Data) that is (a) pirated, or otherwise infringes on the copyright of a third party, (b) inaccessible due to compatibility issues, (c) inaccessible due to power or connection failures, (d) not stored on ET's servers, (e) in excess of Client's storage allotment, or in violation of any reasonable protocols which ET may establish for server usage and configuration, (f) recoverable, whether on ET's computers and servers, Client's computers and servers, or a third party's computers and servers, or (g) deleted by Client.

13.3 The Warranty does not cover any Data Loss that (a) is due to Client's or any third party's negligence or intentional misconduct, (b) is due to the failure or corruption of Client's hardware, (c) is due to hurricane, typhoon, earthquake, nuclear risk or disaster, radiation, war or similar hostilities, acts of foreign enemies, civil war, civil commotion, terrorism, or the actions of any government or public legal authority, (d) occurs when Client is in default under any agreement between Client and ET, (e) is due to Client's deletion of such data, (f) is due to errors in transmitting, copying, or storing such data onto ET's servers, (g) occurs following the termination of this Agreement, or (h) occurs for any reason other than ET's negligence or intentional misconduct.

13.4 The Warranty is void and shall be of no force or effect if any of the following occur: (a) Client is in breach or default under this Agreement; (b) Client has failed to make any payment to ET when due; (c) Client has not notify ET of a Data Loss within thirty (30) days of the occurrence of such Data Loss; (d) this Agreement is terminated; (e) Client violates any reasonable protocols or limits on storage space, bandwidth, processor and memory usage as ET has set forth; or (f) Client or any third party has modified, disabled, reinstalled, added, or tampered with any equipment, software, settings, drivers, programs, servers, connections, or processes related to the operation, backup, communication, or recovery of ET's servers, computers, communications systems, or backup systems.