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**[INSERT NAME OF DEVELOPER]**

**AND**

**[INSERT NAME OF CLIENT]**

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## **SOFTWARE DEVELOPMENT AGREEMENT**

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THIS AGREEMENT is dated

20[xx]

**BETWEEN** [name of developer] [A.C.N./A.B.N./Company Number] of [address of developer] (“Developer”)

**AND** [name of client] [A.C.N./A.B.N./Company Number] of [address of client] (“Client”)

## RECITALS

- A. The Developer provides and has experience in the business of software development. The Client wishes to engage the Developer to develop Software as well as other Products and Services. The parties have agreed that the terms and conditions set out in this Agreement will govern that relationship.

## OPERATIVE PART

### 1. Definition and Interpretation

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#### 1.1 Definitions

**Agreement** means this agreement.

**Business Day** means a day that is not a Saturday, Sunday or public holiday in the state or territory in which this Agreement is executed by the Developer.

**Charges** means those charges payable by the Client to the Developer for the provision of the Services and the development of the Software.

**Commencement Date** means the date on which this Agreement becomes legally binding between the parties having been executed by a duly authorised person or persons on behalf of each party.

**Daily Scrum** means a fifteen (15) minute time boxed event for the Development Team that takes place each day during a Sprint.

**Development Team** means those professionals who do the work of delivering a potentially releasable Increment of Done Product at the end of each Sprint.

**Done** is the shared understanding of expectations that the Increment must satisfy in order to be in useable condition. It is an agreed list of criteria that the Software will meet for each Product Backlog item. Achieving this level of completeness requires the Development Team to perform a list of tasks. When all tasks are completed, the Product Backlog item is done. These tasks may include (amongst others): all acceptance criteria of the user story are met; no known defects; peer reviewed and meeting development standards; code commented, checked in and run against version in source control; code meets general coding standards; code

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is committed in version control system; functionality tests are performed; code review is conducted; integration tests of the affected area are conducted and passed; all unit tests, automated acceptance tests have passed successfully; regression testing has been performed; deployed to system test environment and passed system tests; and passed user acceptance testing and signed off as meeting requirements.

**Increment** means the sum of all the Product Backlog items completed during a Sprint and the value of the increments of all previous Sprints. At the end of a Sprint, the new Increment must be Done.

**Intellectual Property Rights (IPR)** means any patent, copyright, database right, design right, community design right, semiconductor topography right, registered design, rights in confidential information and know-how, or any similar right in any part of the world and shall include any applications for the registration of any such rights capable of registration in any part of the world.

**Key Personnel** means those persons fulfilling key roles in the Project.

**Milestone** means the agreed point(s) at which the Development Team stops and checks progress against expectations, and possibly adjust.

**Personnel** means the Developer's officers, directors, employees, owners or shareholders or any other party acting on behalf of the Developer.

**Products** mean the products provided or to be provided by the Developer to the Client under this Agreement as agreed between the parties from time to time.

**Product Backlog** is the ordered list of everything that is known to be needed in the Product as agreed between the parties during the Sprint Planning Meeting. It is the single source of requirements for any changes to be made to the Product and lists all features, functions requirements, enhancements and fixes that constitute the changes to be made to the Product in future releases.

**Project** means the Client's project that requires the development of a solution.

**Scrum Methodology** means a method of software development that encourages communication, learning and collaboration; functioning software; and the flexibility to adapt to the changing realities of business and deliver faster results.

**Services** means the services provided or to be provided by the Developer to the Client under this Agreement as agreed between the parties from time to time.

**Software** means the software program(s) provided or to be provided by the Developer to the Client under this Agreement as agreed between the parties from time to time.

**Sprint** means the basic unit of development in Scrum. The Sprint is a timeboxed effort of two (2) weeks, or as otherwise agreed between the parties. Each Sprint starts with a sprint planning event and ends with a sprint review and sprint retrospective.

**Sprint Planning Meeting** refers to the meeting held with the Development Team (including the Scrum Master and Product Owner) at the beginning of a Sprint and agree the next stage of development in respect of the Services.

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**Sprint Review Meeting** refers to the meeting held with the Development Team (including the Scrum Master and Product Owner) during a Sprint to discuss progress of the Sprint.

**Termination Payment** means [the amount that is 15% of the remaining Charges due by the Client to the Developer under this Agreement].

## 1.2 Interpretation

In the interpretation of this Agreement:

- (a) References to legislation or provisions of legislation include changes or re-enactments of the legislation and statutory instruments and regulations issued under the legislation;
- (b) Words denoting the singular include the plural and vice versa, words denoting individuals or persons include bodies corporate and vice versa, references to documents or agreements also mean those documents or agreements as changed, novated or replaced, and words denoting one gender include all genders;
- (c) Grammatical forms of defined words or phrases have corresponding meanings;
- (d) Parties must perform their obligations on the dates and times fixed by reference to the capital city of the state or territory in which this agreement is executed by the Supplier;
- (e) Reference to an amount of money is a reference to the amount in the lawful currency of the Commonwealth of Australia;
- (f) If the day on or by which anything is to be done is a Saturday, a Sunday or a public holiday in the place in which it is to be done, then it must be done on the next business day;
- (g) References to a party are intended to bind their executors, administrators and permitted transferees; and
- (h) Obligations under this agreement affecting more than one party bind them jointly and each of them severally.

## 2. Scrum Methodology

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The parties agree collaborate in good faith and comply with the terms of this Agreement as well as the principles of the Scrum Methodology to provide the Software, Products and Services.

## 3. Term

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This Agreement shall commence on the Commencement Date and will continue until completion of the Project ("**Term**"), or as otherwise terminated in accordance

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with the terms of this Agreement. The parties may agree to extend the Term of this Agreement.

#### **4. Services**

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The Developer shall:

- (a) exercise all due care, skill and attention in providing the Services;
- (b) do all things necessary to ensure that the Services are provided to the reasonably satisfaction of the Client;
- (c) ensure that the Services are rendered in compliance with any relevant codes, standards and regulations;
- (d) ensure that all staff are appropriately qualified, trained and experienced in agile software development with Scrum to provide the Services; and
- (e) comply with all legal requirements as may from time to time apply to the provision of the Services.

#### **5. Instructions**

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- (a) The Client must ensure that all instructions given to the Developer are clear and accurate.
- (b) The Developer is not responsible for any delay(s) caused by the Client's failure to provide the Developer with adequate instructions in a timely manner.
- (c) If, at any time during the provision of the Services, the Client has grounds to believe that the Developer may be proceeding on the basis of any incorrect, or out of date content, information, data or assumption that may cause the Developer to fail to fulfil any material provision of the Agreement, the Client must promptly notify the Developer in writing.

#### **6. Scrum Master and Product Owner**

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- (a) The Developer shall appoint a Scrum Master and the Client shall appoint a Product Owner for the duration of this Agreement. These persons will have

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the authority to act on behalf of their respective party on the matters set out in, or in connection, with this Agreement.

- (b) The initial Scrum Master and Product Owner are those persons named in the Schedule. Any change to these persons shall be notified to the other party in writing as soon as practicable.
- (c) The Scrum Master is responsible for those items of work referred to in the Schedule.
- (d) The Product Owner is responsible for those items of work referred to in the Schedule.

## **7. Personnel**

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### 7.1 The Developer shall:

- (a) ensure that all Personnel are appropriately qualified, trained and experienced to provide the Services with all reasonable skill, care and diligence in accordance with the Scrum Methodology;
- (b) take reasonable steps to minimise the number of changes to its Personnel assigned to the Project;
- (c) where any of its Personnel is not available for any reason, then replace that Personnel as soon as practicable;
- (d) if its Personnel is required to attend the premises of the Client, ensure that its Personnel at all times when providing the Services comply with all reasonable instructions and directions of the Client; and
- (e) other than short term sickness or leave of two (2) weeks or less, promptly notify the Client of the absence of any Key Personnel;
- (f) make sure that the role of any Key Personnel is not left vacant for any longer than ten (10) Business Days;
- (g) other than in the case of death, unexpected illness or termination for gross misconduct of Key Personnel, give seven (7) days' notice of its intention to remove or replace any Key Personnel; and
- (h) make arrangements for the adequate transfer of knowledge relating to the Project without cost to the Client when planning any changes in Key Personnel.

### 7.2 The Client may, on reasonable grounds, object to the participation or continued participation of any member of the Personnel. If this happens, the Client may refuse to allow that member access to its premises and the Developer must take

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reasonable steps to replace that member with an alternative who has the appropriate qualifications, training and experience.

## **8. Workflow**

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### 8.1 Sprint Planning Meeting

- (a) At the beginning of a Sprint, the Development Team shall hold a Sprint Planning Meeting to:
  - (i) mutually discuss and agree on the scope of work that is intended to be done during the Sprint;
  - (ii) agree Product Backlog items to be completed in the Sprint;
  - (iii) identify the work (tasks) required to complete the Product Backlog items; and
  - (iii) agree the Sprint goal.

### 8.2 Daily Scrum

- (a) Each day during the Sprint, the Development Team will hold a Daily Scrum to plan for the next 24 hours. All members of the Development Team must come to the Daily Scrum prepared to participate. The Daily Scrum will start on time, regardless of whether some Development Team Personnel are not present, and should happen at the same time and place each day. Typically, the Development Team will consider the following during the Daily Scrum:
  - (i) What did we achieve yesterday that contributed to the Development Team meeting the Sprint goal?
  - (ii) What will we do today to help meet the Sprint goal?
  - (iii) Are there any impediments that prevent the Development Team from meeting the Sprint goal?

### 8.3 Sprint Review

- (a) At the end of a Sprint, a Sprint Review Meeting will be held to inspect the Increment and adapt the Product Backlog, if required. At the Sprint Review Meeting, the Development Team will review the work that has been completed and the planned work that was not completed; demonstrate the completed work to the stakeholders and collaborate with the stakeholders on

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what needs to be done next. This is at most a two (2) hour meeting per each Sprint.

#### 8.4 Sprint Retrospective

(a) At the sprint retrospective meeting, the Development Team shall focus on the part Sprint and identify and agree on continuous process improvement actions.

### 9. Payment and invoicing

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- (a) In consideration of the Developer meeting its obligations under this Agreement, the Client shall pay the Developer the Charges set out in Schedule.
- (b) The Developer may submit invoices for the Services [following completion of each milestone][in accordance with the payment plan set out in Schedule], or as otherwise agreed between the parties.
- (c) The Client must pay any request for payment, by electronic funds transfer, within thirty (30) days of the date of the request, without any set-off, counterclaim or deduction.
- (d) Except for a bona fide dispute, if the Client does not pay any amount owing under this Agreement by its due date, then the Developer may charge the Client interest on the overdue amount. This will be calculated, from the due date up to the date of payment, at the rate of [X]% per annum.
- (e) The Client will promptly, but in no event later than seven (7) days from the date of invoice, notify the Developer in writing of any disputed invoice, together with all information relevant to the dispute, and an explanation of the amount disputed and the reasons. The Client must pay all undisputed amounts unless the disputed amount is less than 5% of the total invoice amount in which case the total invoice amount shall be due and payable by the due date. Disputes shall be resolved promptly in accordance with the dispute resolution process set out at clause 17 of this Agreement and the resolved amount, if any, payable within fourteen (14) days after resolution.

### 10. Insurance

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The Developer must obtain and maintain adequate insurance with a reputable insurer to cover its liabilities arising under or in connection with this Agreement. Within seven (7) days of any request by the Client, the Developer must provide to the Client satisfactory evidence of currency of the insurance(s).

### 11. Confidentiality

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**Confidential Information** means all documentation, technical information, software, know how, business information or other materials (whether written, oral

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or in electronic form) concerning the business of a party that are disclosed in confidence by the party to the other party during the term of this Agreement.

- (a) Each party shall keep in confidence all Confidential Information obtained from the other party under or in connection with this Agreement and will not disclose it to any party other than in confidence to their employees or professional advisors.
- (b) This clause does not apply to information that is:
  - (i) in the public domain other than in breach of this Agreement;
  - (ii) in the possession of the receiving party before such divulgence has taken place;
  - (iii) obtained from a third party who is free to divulge the same; or
  - (iv) developed by the receiving party independently of and without access to Confidential Information obtained under this Agreement.
- (c) If either party receives a demand from a lawful authority, regulatory authority or court to disclose any Confidential Information provided to it by the other, it may comply with such demand if it has:
  - (i) satisfied itself that the demand is lawful;
  - (ii) where possible, given the other party the maximum written notice permissible under the demand in which to make representations; and
  - (iii) marked the required information as the Confidential Information of the other party.
- (d) The receiving party must, for a period of three (3) years following the termination of this Agreement, comply with this clause with respect to Confidential Information it receives under this Agreement.
- (e) The receiving party shall return or destroy any Confidential Information upon the request of the disclosing party.
- (f) The parties acknowledge that a violation of this clause may cause irreparable harm to the disclosing party, for which monetary damages would be inadequate, and injunctive relief may be sought for a breach of this clause.
- (g) This clause 11 shall survive termination of this Agreement.

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## 12. Warranties

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- (a) Each party warrants and represents that it has full capacity to execute and perform its obligations under this Agreement and the Agreement is executed by the duly authored representative of that party.
- (b) Except as set out in this Agreement, all other warranties and conditions whether express or implied by statute, common law or otherwise are hereby excluded to the fullest extent permitted by law.

## 13. Intellectual Property Rights (“IPR”)

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*User’s Note: It is likely that some new intellectual property will be created during the course of the project and, due to the collaborative nature of the Scrum Methodology, it may not be possible to determine who created such material. Whilst parties may own intellectual property jointly, this may create problems for the use and exploitation of that material. So as to avoid this problem, it is generally considered better for one party to own such new intellectual property and to give the other party licence rights over it. However, users should consult their lawyer to ensure that this approach is appropriate to their situation.*

- (a) Neither party shall have any right, title or interest in or to the IPR of the other.
- (b) Except as otherwise agreed in writing between the parties, any IPR jointly created in the course of developing the solution shall be owned by the Developer.
- (c) Subject to the Client’s compliance with this Agreement, the Developer grants the Client a royalty free, irrevocable, non-transferable and non-exclusive licence to use the Developer’s IPR solely for the purpose of and to the extent necessary for the receipt and use by the Client of the Services during the Term and enjoyment of the Software, and Products and Services, following expiry or termination of this Agreement.
- (d) The Client grants the Developer a royalty free, non-exclusive and non-transferable licence to use the Client’s IPR solely to the extent necessary for performing the Services in accordance with this Agreement.
- (e) The Developer shall not use the Client’s IPR for any other purpose, or for the benefit of any person other than the Client, without the Client’s prior written consent.

## 14. IPR Indemnity

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- (a) The Developer will indemnify the Client against all third party claims and proceedings arising from infringement of any third party’s IPR by the Client’s receipt of the Services only to the extent that the Client promptly notifies the Developer in writing of any such claim, that the Developer is given immediate and complete control of such claim, that the Client does not make any public statements related to the claim or in any way prejudices the Developer’s defence of such claim, and that the Client gives the Developer all reasonable

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assistance with such claim. All costs incurred or recovered in such negotiations, litigation and settlements shall be for the Developer's account.

- (b) The indemnity set out in clause 14(a) shall not apply to claims or proceedings arising from:
  - (i) use of the Software, and Products and Services, with other equipment or software or any other service not supplied by the Developer;
  - (ii) any unauthorised alteration or modification of the Software, and Products and Services;
  - (iii) content, designs or specifications supplied by or on behalf of the Client; or
  - (iv) use of the Software, and Products and Services, other than in accordance with this Agreement.
- (c) The Client will indemnify and hold the Developer harmless against all such claims, losses, costs and liabilities arising from the matters set out in clause 14(b) above that are attributable to the Client and will, immediately upon notification of any such claim by the Developer, cease any activity that gave rise to the claim.
- (d) If any Software and/or Products and Services become, or the Developer believes are likely to become, the subject of a claim of infringement of any IPR as referred to in clause 14(a), the Developer, at its option and expense, may:
  - (i) secure for the Client a right of continued use; or
  - (ii) modify or replace the Software and/or Products and Services so that they are no longer infringing, provided that such modification or replacement shall not materially affect the performance of the Software and/or Products and Services.
- (e) The indemnity in clause 14(a) sets out the Client's sole and exclusive remedy for claims of infringement of IPR.

## **15. Data**

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- (a) The parties acknowledge that the Client may need to provide, and the Developer may need to process, personal data during the Term. The parties will comply with their respective obligations under data protection and privacy legislation including the National Privacy Principles in respect of any personal information processed or handled under or in connection with this Agreement. If a party is an organisation not bound by the Privacy Act 1988 (Cth), it must comply with this clause 15 as if it was so bound.
- (b) The Client shall provide sufficient notice to, and obtain sufficient consent and authorisation, under applicable laws, from the individuals concerned to permit the processing of their personal information by the parties as contemplated by this Agreement.

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- (c) The Client agrees that, to the extent permitted by law, the Developer will not be liable for any complaint, claim or action brought by an individual concerned arising from any action or omission by the Developer to the extent that such action or omission resulted from any failure by the Client to comply with this clause. The Client shall indemnify, hold harmless and defend the Developer from and against any claims or actions brought against the Developer arising out of such failure.

## **16. Termination**

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### **16.1 Termination for cause**

Without prejudice to any other rights and remedies that may be available to a party, either party may terminate this Agreement by written notice to the other party if

- (a) the other party is in breach of this Agreement and they fail to remedy the breach within fourteen (14) Business Days after having received notice in writing of the breach; or
- (b) the other party goes into bankruptcy or liquidation.

### **16.2 Termination for convenience**

Either party may immediately terminate this Agreement at the end of a Milestone.

### **16.3 Consequences of termination**

Upon termination of this Agreement:

- (a) the Client must pay to the Developer all Charges owing pursuant to this Agreement, up to and including the date of termination;
- (b) the rights of the parties accrued up to the date of such termination shall remain unaffected;
- (c) if this Agreement is terminated other than in accordance with clause 16.2, the Developer is entitled to the Termination Payment from the Client, such compensation being payable within fourteen (14) Business Days from the date of termination; and
- (d) each party must immediately destroy or, at the request of the other party, return all information and materials belonging to the other party then in its custody or control, including all Confidential Information of the other party.

## **17. Dispute Resolution**

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If a dispute arises between the parties, the complainant must not commence any court or arbitration proceedings, except where that party seeks urgent interlocutory relief, unless it has first complied with this clause:

- (a) **Notification**

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The complainant must inform the respondent in writing of the following:

- (i) The nature of the dispute;
- (ii) The outcome the complainant desires, and
- (iii) The action the complainant believes will settle the dispute.

(b) **Endeavour to resolve dispute**

On receipt of the complaint by the respondent, both parties will make every effort to resolve the dispute by mutual negotiation within 14 business days.

(c) **Mediation**

Any unresolved dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to the alternative dispute resolution service of [details of the mediation or dispute resolution provider].

(d) **Survival of this clause**

This clause survives termination of this Agreement.

## **18. Liability**

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- (a) Neither party excludes or restricts in any way its liability for death or personal injury resulting from its own negligence or the negligence of its employees or agents acting in the course of their employment or agency or for fraudulent misrepresentation.
- (b) Subject to clause 18(a), the total liability of either party to the other for all claims, losses or damages, whether arising from tort (including negligence),

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breach of contract or otherwise in connection with any breach of this Agreement shall in no event exceed [X]% of the total value of the Charges.

- (c) Subject to clause 18(a), neither party shall be liable to the other, whether in contract, tort, under statute or otherwise howsoever arising under or in connection with this Agreement (including in each case negligence):
  - (i) any loss of profits, business, contracts, anticipated savings, reputation, opportunity, goodwill (including pecuniary losses arising from loss of goodwill), or revenue;
  - (ii) any loss incurred as a result of business interruption, expenditure of time by personnel or wasted expenditure; or
  - (iii) any special, indirect or consequential loss or damage whatsoever.

## **19. Notices**

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A notice or other communication required to be given under this Agreement to a party must be in writing and delivered to that party in one of the following ways:

- (a) Delivered personally, in which case it will be deemed to have been received on the date of delivery if delivered by 5pm on a Business Day and otherwise at 9am on the next Business Day; or
- (b) Posted to their address by express post-delivery when it will be treated as having been received on the second Business Day after posting; or
- (c) Sent by email to their email address, in which case it will be deemed to have been received on the date of delivery if sent by 5pm on a Business Day and otherwise at 9am on the next Business Day.

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**20. Amendment**

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An amendment or variation to this Agreement is not effective unless it is in writing and signed by all the parties.

**21. Assignment**

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Neither party may assign or otherwise deal in any other way with this Agreement or any of its rights and obligations under or arising out of this Agreement without the prior written consent of the other party.

**22. Subcontracting**

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The Developer may [not] subcontract all or any party of the Services hereunder [without prior express consent of the Client].

**23. Entire agreement**

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This Agreement is the entire agreement and understanding between the parties on everything connected with the subject matter of this Agreement, and supersedes any prior understanding, arrangement, representation or agreements between the parties as to the subject matter contained in this Agreement.

**24. Relationship of the parties**

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Nothing contained or implied in this Agreement will be deemed or construed to create the relationship of partnership or of principal and agent or of joint venture between the parties.

**25. Non-solicitation**

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Neither part will directly or indirectly solicit or entice away from the employment of the other party any person employed or engaged by the other party during the Term or for a period of six (6) months after the expiry or termination of this Agreement.

**26. Waiver**

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No failure or delay on the part of a party to exercise any power or right under this Agreement will operate as a waiver of that power or right. Nor will any single or

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partial exercise of any power or right under this Agreement preclude any other or further exercise of that power or right.

## **27. Severance**

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If any provision of this Agreement is or at any time becomes void or unenforceable the remaining provisions will continue in full force and effect. Any void or unenforceable provision will be replaced as soon as practicable through commercial discussions conducted in good faith between the parties.

## **28. Events beyond control**

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Neither party shall be liable to the other party for any loss caused by any failure to observe the terms and conditions of this Agreement, where such failure is occasioned by causes beyond its reasonable control including but not limited to by fire, flood, riot, strike, war, restrictions and prohibitions or any other actions by any government or semi government authorities. In such circumstances, the affected party shall be entitled to a reasonable extension of the time for performing such obligations, provided that if the period of delay or non-performance continues for sixty (60) Business Days, the other party may terminate this Agreement by giving not less than sixty (60) Business Days written notice to the affected party.

## **29. Counterparts**

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This Agreement may be executed in any number of counterparts each of which will be an original but such counterparts together will constitute one and the same instrument and the date of the Agreement will be the date on which it is executed by the last party.

## **30. Further assurance**

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Each party must at its own expense do any further act and execute any further documents which may be necessary to give full effect to this agreement.

## **31. Law and jurisdiction**

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This Agreement will be construed in accordance with the law of the state or territory in which it is executed by the Developer and the law of such state or territory will be the proper law of the contract. The parties submit to the non-exclusive jurisdiction of that state or territory and any courts which may hear appeals from there.

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**Execution page**

**SIGNED AS AN AGREEMENT**

**SIGNED** for an on behalf of the Developer: Signature:.....

Name:.....

Position:.....

Date:.....

**SIGNED** for an on behalf of the Client: Signature:.....

Name:.....

Position:.....

Date:.....

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## **SCHEDULE**

### **Initial Scrum Master**

[insert]

### **Initial Product Owner**

[insert]

### **Work to be done by the Scrum Master**

[insert]

### **Work to be done by the Product Owner**

[insert]

### **Charges**

[insert]

### **Payment Plan**

[insert]