



CONSULTING AND PROFESSIONAL SERVICES AGREEMENT

IMPORTANT – READ THIS CONSULTING AND PROFESSIONAL SERVICES AGREEMENT (THIS “**AGREEMENT**”) CAREFULLY. THIS AGREEMENT IS INCORPORATED BY REFERENCE INTO EVERY ORDERING DOCUMENT (THE “**PURCHASE AGREEMENT**”) BETWEEN EASTBAY I.T. CONSULTING INC. (“**EASTBAY**”) AND THE CLIENT SPECIFIED IN THE PURCHASE AGREEMENT (“**CLIENT**”). CLIENT’S EXECUTION OF A PURCHASE AGREEMENT REFERENCING THIS AGREEMENT SHALL BE DEEMED CLIENT’S AGREEMENT TO THE TERMS AND CONDITIONS OF THIS AGREEMENT.

1. Services; Invoicing and Payment

- (1) **Services.** During the term of this Agreement, the Client agrees to retain the Eastbay’s consulting and professional services (the “**Services**”) from time to time on the basis set forth in this Agreement and Eastbay agrees to render the Services to the Client in accordance with the terms and conditions of this Agreement. The Services to be rendered by the Eastbay to the Client under this Agreement shall be initiated by the Client requesting an order for the Services in the manner set forth below.
- (2) **Ordering Procedure.** The following procedures shall be followed by the parties to this Agreement in order to initiate an order under this Agreement:
 - (i) The Client shall submit a request in writing to Eastbay containing a full description of the Services and related activities to be performed by Eastbay, including the required delivery or performance schedule in respect thereto (the “**Work Request**”).
 - (ii) Upon receipt of a Work Request from the Client, Eastbay will prepare an ordering document for the Services to be performed (the “**Purchase Agreement**”) under the Work Request and submit the Purchase Agreement, together with all related attachments and schedules, to the Client for authorization.
- (3) **Acceptance.** Prior to delivery or performance of any Services in the Purchase Agreement by Eastbay, the following shall apply:
 - (i) Eastbay shall, before proceeding with a Purchase Agreement, first obtain the Client’s written authorization to proceed with it.
 - (ii) No liability for any Services rendered or for any costs, whether direct or indirect, arising from or in respect to a Purchase Agreement shall be incurred or suffered by either party unless and until the Purchase Agreement is authorized in writing by the Client.

CLIENT_7455745.1

(iii) Eastbay has the right to accept or reject, at its discretion, any Work Request, or any part thereof, received by it from the Client.

- (4) **Fees.** Fees for the Services provided hereunder shall be payable when invoiced and shall be deemed overdue if they remain unpaid for thirty (30) days. Client is responsible for goods and services tax, harmonized sales tax, value added tax, sales tax, and all other taxes associated with the Services, however designated. Interest on any late payments shall accrue at the rate of (2.5%) per month or the highest rate permitted by applicable law, whichever is less, from the date such amount is due until finally paid. Client shall reimburse Eastbay for all reasonable costs incurred (including solicitor's fees) in collecting past due amounts.
- (5) **Change Order.** The Client may, from time to time, request changes in the scope of the Services to be performed under a Purchase Agreement previously authorized by the Client and these changes, to be effective must be in writing and agreed to by Eastbay.

2. CLIENT'S OBLIGATIONS

Client shall make available all information, data, facilities and personnel support reasonably requested by Eastbay. Any delay in the provision of such support that increases costs or efforts of Eastbay hereunder, as a result of Client's failure to perform its obligations, shall result in commensurably increased costs to Client. In addition, any delay in the provision of Services due to the delay of Client to perform its obligations shall extend the time required by Eastbay to perform the Services by the amount of such Client delay. Client will designate a project manager to be Client's primary contact for all aspects of the Services to be performed hereunder.

3. RELATIONSHIP

Eastbay shall be and act as an independent contractor hereunder and no employee of either party shall be deemed to be an employee of the other for any purpose whatsoever.

4. OWNERSHIP

Eastbay retains all rights, title and interest in and to all software, programming documentation, technical ideas, concepts, know-how, databases, inventions, discoveries, improvements, techniques and all related intellectual property rights, created, conceived and developed by Eastbay prior to the commencement of this Agreement (the "**Prior Technology**"). All right, title, and interest in and to all derivative works, enhancements, extensions and modifications of or related to the Prior Technology or other products developed in whole or in part by Eastbay, including without limitation all intellectual property rights therein (the "**Developed Technology**") shall be the sole property of Eastbay whether developed by Eastbay or any other party in performing the Services or otherwise unless the parties have agreed on a Purchase Agreement specifying ownership rights. All ideas, know-how, techniques or other intellectual property rights originated, developed or owned by Client prior to the commencement of this Agreement and ideas, know-how, techniques or other intellectual property, excluding the Developed Technology, developed solely by Client during the term of this Agreement shall be the sole property of Client.

5. CONFIDENTIAL INFORMATION

- (1) **Definition.** The term “**Confidential Information**” shall mean: (a) any and all information which is disclosed by either party (“**Owner**”) to the other (“**Recipient**”) verbally, electronically, visually, or in a written or other tangible form which is either identified or should be reasonably understood to be confidential or proprietary; and (b) the terms, including without limitation, the pricing of the the Services and any proposals or other documents that preceded this Agreement. Confidential Information may include, but not be limited to, trade secrets, computer programs, software, documentation, formulas, data, inventions, techniques, marketing plans, strategies, forecasts, client lists, employee information, financial information, confidential information concerning any of Owner's past, current or possible future programs, and confidential information concerning Owner's business or organization, as Owner has conducted it or as Owner may conduct it in the future. In addition, Confidential Information may include information concerning any of Owner's past, current, or possible future products or methods, including information about Owner's research, development, engineering, purchasing, manufacturing, accounting, marketing, selling, leasing and/or software (including third party software).
- (2) **Treatment of Confidential Information.** Owner's Confidential Information shall be treated as strictly confidential by Recipient and shall not be disclosed by Recipient to any third party, except as authorized by the Owner. This Agreement imposes no obligation upon the parties with respect to Confidential Information which either party can establish by legally sufficient evidence: (a) was in the possession of, or was rightfully known by the Recipient without an obligation to maintain its confidentiality prior to receipt from Owner; (b) is or becomes generally known to the public without violation of this Agreement; (c) is obtained by Recipient in good faith from a third party having the right to disclose it without an obligation of confidentiality; (d) is independently developed by Recipient without the participation of individuals who have had access to the Confidential Information; or (e) is required to be disclosed by court order or applicable law, provided notice is promptly given to the Owner and provided further that diligent efforts are undertaken to limit disclosure.
- (3) **Rights and Duties.** The Recipient shall not obtain, by virtue of this Agreement, any rights, title or interest in any Confidential Information of the Owner. Within fifteen (15) days after termination of this Agreement, each party shall certify in writing to the other that all copies of Confidential Information in any form, including partial copies, have been destroyed, returned or used solely as the Owner so directs.
- (4) **Survival.** The terms of this Section 5 shall survive termination of this Agreement. If the parties have executed a separate agreement that contains confidentiality terms prior to or contemporaneously with entering into the Purchase Agreement (and thereby, this Agreement), those separate confidentiality terms shall remain in full force to the extent they do not conflict with this Agreement.

6. NON-SOLICITATION

- (1) **Non-Solicitation by Eastbay.** During the term of this Agreement and for a period of one (1) year after its termination, Eastbay shall not, without the Client's prior written consent (which consent may be unreasonably withheld), to solicit for employment any of the Client's employees.

- (2) **Non-Solicitation by Client.** The Client also agrees that during the term of this agreement and for a period of one (1) year after its termination, Client shall not, without Eastbay's prior written consent (which consent may be unreasonably withheld), solicit for employment any of Eastbay's employees.

7. TERM AND TERMINATION

- (1) This Agreement shall commence on the date of written acceptance of the Purchase Agreement by the Client and shall continue in effect until the Services have been provided by Eastbay under the Purchase Agreement and the Client has paid all amounts due and owing to Eastbay unless terminated earlier as set forth below.
- (2) In the event that either party materially breaches any term or condition of this Agreement or any Purchase Agreement, and such breach continues for a period of thirty (30) days after notice from the other party (except for a breach regarding failure to pay amounts due, in which case the period to cure shall be ten (10) days), the other party may terminate this Agreement.
- (3) In the event of termination of this Agreement, any amounts owed to Eastbay under this Agreement before such termination will be immediately due and payable.
- (4) Termination of this Agreement shall not limit either party from pursuing any other remedies available to it, including injunctive relief, nor shall such termination relieve Client's obligation to pay all fees that accrued prior to such termination. Sections 1(4), 4, 6, 8, 9 and 10 shall survive termination of the Agreement.

8. WARRANTIES; REMEDIES

- (1) **Mutual Warranties.** Each party warrants that: (a) it has the right and power to enter into this Agreement; and (b) it will comply with any applicable laws and regulations pertaining to this Agreement.
- (2) **Eastbay Limited Warranty.** Eastbay warrants that the Services shall be provided by qualified professionals and performed in a professional and workmanlike manner in accordance with recognized industry standards.
- (3) **Remedies.** In the event of a breach of the warranty in Section 8(1), written notice thereof shall be given to Eastbay promptly, but not later than sixty (60) days from the date on which such the Services were performed. Such notice shall describe the breach in detail, and Eastbay's entire liability and Client's exclusive remedy for any breach of the warranty in Section 8(1) shall be Eastbay repeating the Services performed Eastbay.
- (4) **Disclaimers.** EXCEPT AS PROVIDED IN THIS SECTION 8, THE SERVICES HEREUNDER ARE PROVIDED "AS IS" WITHOUT ANY WARRANTY WHATSOEVER. CLIENT RECOGNIZES THAT THE "AS IS" CLAUSE OF THIS AGREEMENT IS AN IMPORTANT PART OF THE BASIS OF THIS AGREEMENT, WITHOUT WHICH EASTBAY WOULD NOT HAVE AGREED TO ENTER INTO THIS AGREEMENT. EASTBAY DOES NOT AND CANNOT WARRANT THE PERFORMANCE OR RESULTS OBTAINED BY CLIENT IN USING THE SERVICES, OR THAT

THE SERVICES WILL MEET CLIENT'S REQUIREMENTS OR THAT THE DELIVERY OF THE SERVICES WILL BE UNINTERRUPTED OR ERROR FREE. EASTBAY EXPRESSLY DISCLAIMS ALL OTHER REPRESENTATIONS, WARRANTIES, WHETHER EXPRESS, IMPLIED OR STATUTORY, REGARDING THE SERVICES, INCLUDING ANY WARRANTIES OF MERCHANTABILITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE AND INFRINGEMENT. NO REPRESENTATION OR OTHER AFFIRMATION OF FACT, REGARDING THE SERVICES SHALL BE DEEMED A WARRANTY FOR ANY PURPOSE OR GIVE RISE TO ANY LIABILITY OF EASTBAY WHATSOEVER. CLIENT ACKNOWLEDGES THAT IT HAS RELIED ON NO WARRANTIES OTHER THAN THE EXPRESS WARRANTY IN THIS AGREEMENT.

9. INDEMNITY

Each party ("**Indemnifying Party**") shall indemnify and hold the other party ("**Indemnified Party**") harmless against any third party claim, including costs and reasonable lawyer's fees, in which the Indemnified Party is named as a result of the negligent or the intentional acts or omissions by the Indemnifying Party, its employees or agents, while performing its obligations under this Agreement. This indemnification obligation is contingent upon the Indemnified Party providing the Indemnifying Party with prompt written notice of such claim, information, all reasonable assistance in the defence of such action, and sole authority to defend or settle such claim.

10. LIMITATION OF LIABILITY

EXCEPT FOR THE INDEMNIFICATION FOR THIRD PARTY CLAIMS PROVIDED IN SECTION 9, EASTBAY'S MAXIMUM LIABILITY FOR ANY ACTION ARISING UNDER THIS AGREEMENT, REGARDLESS OF THE FORM OF ACTION AND WHETHER IN TORT, CONTRACT OR OTHER FORM OF LIABILITY, SHALL IN NO EVENT EXCEED THE FEES PAID BY CLIENT DURING THE ONE-YEAR PERIOD PRECEDING NOTICE TO EASTBAY OF CLIENT'S LOSS. IN NO EVENT SHALL EASTBAY BE LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND, INCLUDING WITHOUT LIMITATION, LOST DATA, LOST PROFITS, OPPORTUNITIES OR CONTRIBUTIONS, LOSS OF USE, GOODWILL, BUSINESS INTERRUPTION, OR OTHER PECUNIARY OR NON-PECUNIARY LOSS, HOWEVER ARISING, EVEN IF EASTBAY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE PARTIES AGREE TO THE ALLOCATION OF RISK SET FORTH HEREIN. CLIENT ACKNOWLEDGES THAT THE FEES PAID BY IT REFLECT THE ALLOCATION OF RISK SET FORTH IN THIS AGREEMENT AND THAT EASTBAY WOULD NOT ENTER INTO THIS AGREEMENT WITHOUT THESE LIMITATIONS ON ITS LIABILITY.

11. GENERAL

- (1) **Notices.** Any notice or other communication required or permitted to be given in this Agreement shall be in writing and shall be delivered in person, transmitted by electronic mail or sent by registered mail, charges prepaid, to the addresses contained in the Purchase Agreement. Any such notice or other communication shall be deemed to have been given and received on the day on which it was delivered or transmitted or, if mailed, on the third business Day following the date of mailing; provided, however, that if at the time of mailing or within three business days thereafter there is or occurs a labour dispute or other event that might reasonably be expected to disrupt the delivery of documents by mail, any notice or other communication hereunder shall be delivered or transmitted by means of electronic mail as described. Any party may at any time change its address for service from time to time by giving notice to the other parties in accordance with this Section 11(1).

- (2) **Assignment.** Neither party shall assign this Agreement without the prior written consent of the other party, which consent will may be unreasonably withheld. Any purported assignment in contravention of this Section 11(2) is null and void. Subject to the foregoing, this Agreement will bind and enure to the benefit of any permitted successors or assigns.

- (3) **Entire Agreement.** This Agreement together with the Purchase Agreement (including any reference to such other agreements, documents, and/or policies incorporated therein) constitutes the entire agreement between the parties with respect to all of the matters herein and that this Agreement supersedes all prior agreement or contemporaneous agreements or representations, written or oral, regarding such matters.

- (4) **Amendments.** Except as expressly provided in this Agreement, no amendment, supplement, restatement, replacement or termination of any provision of this Agreement is binding unless it is in writing and signed the parties.

- (5) **Waiver.** No waiver of any provision of this Agreement is binding unless it is in writing and signed by all the parties to this Agreement entitled to grant the waiver. No failure to exercise and no delay in exercising, any right or remedy, under this Agreement will be deemed to be a waiver of that right or remedy. No waiver of any breach of any provision of this Agreement will be deemed to be a waiver of any subsequent breach of that provision.

- (6) **Severability.** If any Section or any portion of any Section of this Agreement is determined to be unenforceable or invalid for any reason whatsoever that unenforceability or invalidity shall not affect the enforceability or validity of the remaining portions of this Agreement and such unenforceable or invalid Section or portion thereof shall be severed from the remainder of this Agreement.

- (7) **Governing Law.** All questions concerning the validity, interpretation and performance of this Agreement and each of the documents contemplated by or delivered under or in connection with this Agreement shall be governed by and decided in accordance with the laws of the Province of Ontario, as such laws are applied to contracts between Ontario residents that are entered into and performed entirely within the Province of Ontario.

- (8) **Jurisdiction and Venue.** The parties hereby submit and consent to the exclusive jurisdiction of any court located within the Province of Ontario and irrevocably agree that all actions or proceedings relating to this Agreement, shall be litigated in such courts, and each of the parties waives any objection which it may have based on improper venue or *forum non conveniens* to the conduct of any such action or proceeding in such court.

- (9) **Headings for Convenience Only.** The division of this Agreement into sections, subsections, paragraphs, subparagraphs and clauses and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

- (10) **Number and Gender.** Unless otherwise specified, words importing the singular include the plural and vice versa and words importing gender include all genders.