

SERVICE AGREEMENT

THIS SERVICE AGREEMENT (“**Agreement**”), by and between **3ZZZ.net** (“**3ZZZ**”), and _____ (“**Customer**”) made _____, 2002, is effective as of _____, 2002 (“**Effective Date**”).

1. INCORPORATED DOCUMENTS

The Customer Order Form(s) relating to this Agreement, as may be amended, are made part of this Agreement. In the event of any conflict or inconsistency between the provisions of the incorporated documents and any of the provisions of this Agreement, the provisions of this Agreement shall govern in all respects.

2. 3ZZZ SERVICES

2.1 General. 3ZZZ shall provide Hosting Services to Customer in accordance with the provisions of this Agreement.

2.2 Term(s)/Service Fees. The Term(s) of this Agreement and Service Fees are as set forth in the Customer Order Form(s). The Term(s) may be extended as agreed to by 3ZZZ and Customer before the Termination Date(s). If the Parties fail to execute a new Customer Order Form(s), this Agreement shall remain in effect on a month-to-month basis and 3ZZZ may, in its sole discretion, increase the Service Fees or terminate this Agreement upon ten (30) days prior written notice.

2.3 Payment. 3ZZZ shall invoice all Service Fees, monthly in advance, and Customer shall pay all amounts due upon receipt of invoice. Any amount due but not received by 3ZZZ will accrue interest from thirty (30) days after the date of invoice to the date of payment, at the rate specified in the Customer Order Form(s). All payments to 3ZZZ are exclusive of all applicable taxes, fees or levies whatsoever, now or in the future imposed on the transaction or the delivery of 3ZZZ Services all of which Customer shall pay in full as invoiced by 3ZZZ.

3. INTELLECTUAL PROPERTY

Customer is and shall remain exclusively entitled to all right, title and interest in and to all Customer Technology and its Confidential Information, and 3ZZZ is and shall remain exclusively entitled to all right, title and interest in and to all 3ZZZ Technology and its Confidential Information. Neither Party shall, directly or indirectly, reverse engineer, decompile, disassemble or otherwise attempt to derive source code or other trade secrets from the property of the other Party.

4. NO LEASE; SUBORDINATE TO 3ZZZ LEASE

This Agreement is a services agreement and does not constitute a lease or sublease of real property. Customer acknowledges and agrees that it has been granted only a limited, and non-exclusive license to use the 3ZZZ server space and network in accordance with this Agreement.

5. NO THIRD PARTY BENEFICIARIES/INDEMNIFICATION

3ZZZ and Customer agree that there shall be no third party beneficiaries to this Agreement, including, but not limited to, the insurance providers for either Party. Customer will indemnify, defend and hold 3ZZZ, its officers, directors, principals, and employees harmless from and against any and all costs, liabilities, losses, and expenses (including, but not limited to, reasonable attorneys’ fees) resulting from any claim, suit, action, or proceeding brought by any third party against 3ZZZ, its officers, directors, principals, and/or employees alleging (i) the infringement or misappropriation of any intellectual property right or other unlawful or illegal wrongdoing by Customer relating to the delivery or use of 3ZZZ Services by Customer, its officers, directors, principals,

employees, agents, and sublicensees; (ii) personal injury or property damage caused by the negligence or willful misconduct of Customer, its officers, directors, principals, employees, agents, and sublicensees; (iii) any violation of or failure to comply with 3ZZZ Policies; and (iv) any damages arising out of the destruction or damage to Customer Equipment, except as caused by 3ZZZ’s gross negligence or willful misconduct. The provisions of this Section 5 shall survive termination of this Agreement insofar as claims filed prior to, or within six (6) years of the expiration or termination of the Agreement.

6. LIMITATIONS OF LIABILITY

6.1 Waiver of Certain Damages. Notwithstanding anything to the contrary contained in this Agreement, 3ZZZ shall not, under any circumstances, be liable for any claim for any consequential, incidental, indirect, punitive, exemplary or special damages of any nature whatsoever, or for any damages arising out of or in connection with any malfunctions, delays, loss of data, lost revenues, lost profits, interruption of service or loss of business or anticipatory profits, regardless of the form of action, whether in contract, tort (including negligence), strict liability or otherwise, even if advised of the possibility of such damages.

6.2 Warranty Limitation. 3ZZZ does not make any express and/or implied warranties of any kind whatsoever, including, but not limited to, warranties of fitness for a particular purpose, merchantability, noninfringement of intellectual property rights and title, and any warranties arising from a course of dealing, usage, or trade practice.

7. TERMINATION

7.1 Termination for Breach. Either Party may terminate this Agreement upon written notice of termination to the other if (i) the other Party breaches any material term or condition of this Agreement and, if such breach is capable of remedy, the Party in breach fails to cure such breach within seven (7) days after receipt of written notice of breach from the other Party; (ii) the other Party files a voluntary petition in bankruptcy or commences any voluntary proceeding relating to insolvency, receivership, liquidation, or composition for the benefit of its creditors; or (iii) the other Party becomes the subject of an involuntary petition, in bankruptcy or any involuntary proceeding relating to insolvency, receivership, liquidation or composition for the benefit of creditors if such petition or proceeding is not dismissed within sixty (60) days of filing.

7.2 Termination by 3ZZZ. Notwithstanding the provisions of Section 7.1, if payment of any amount hereunder is not received by 3ZZZ within thirty (30) days after the date of invoice, 3ZZZ at any time thereafter has the right to deny Customer access to the 3ZZZ servers, may suspend and terminate the provision of 3ZZZ Services and may terminate this Agreement. In addition to all other remedies, upon termination of this Agreement 3ZZZ reserves the right to disconnect power to Customer Equipment, and otherwise discontinue 3ZZZ Services.

8. DEFAULT PROVISIONS

8.1 Customer’s Remedies. Except as limited by the provisions of Section 6.2, if Customer terminates this Agreement because of any reasons set forth in Section 7.1, Customer shall have the right to claim damages for breach of contract; provided however, 3ZZZ’s liability arising out of or relating to this Agreement, including

without limitation on account of performance or nonperformance of obligations hereunder, regardless of the form of the cause of action, whether in contract, tort (including without limitation negligence), statute or otherwise, shall in no event exceed the amounts paid by Customer to 3ZZZ for the 3ZZZ Services which are the subject matter of the claim or, if it does not relate to specific Services, to fifty percent (50%) of all amounts paid by Customer to 3ZZZ.

- 8.2 **3ZZZ's Remedies.** If 3ZZZ terminates this Agreement because of any reasons set forth in Section 7.1, or if Customer terminates this Agreement without just cause, Customer agrees to pay to 3ZZZ, within ten (10) days of such termination: (i) an amount equal to the total of any and all discounts given Customer from the Service Fees as reflected on the Customer Order Form(s) up to the date of termination, and (ii) since the contract damages suffered by 3ZZZ would be extremely difficult, if not impossible, to determine, Customer agrees to pay 3ZZZ an amount equal to fifty percent (50%) of the Service Fees payable for all of the months remaining on the Term(s) of this Agreement, as liquidated damages and not as a penalty.

9. DEFINITIONS

The terms with initial capitalization which are not otherwise defined in this Agreement or the Customer Order Form(s) shall have the meanings set forth below.

"Confidential Information" means any information disclosed by either Party to the other Party, directly or indirectly, in writing, orally or by inspection of tangible objects that is designated as "Confidential", "Proprietary" or some other similar designation, including information disclosed to a disclosing party by third parties.

"Customer Order Form(s)" means the form(s) so entitled, as may be amended, signed by Customer and 3ZZZ setting out matters including without limitation 3ZZZ Services and Service Fees.

"Customer Technology" means Customer's proprietary technology, including without limitation, all text, pictures, sound, video, and log files, computer software programs and other digital data and website content that Customer stores on the Customer Equipment, Customer's content, software tools, hardware designs, algorithms, software (in source and object forms), user interface designs, architecture, class libraries, objects and documentation (both printed and electronic), know-how, and any related intellectual property rights throughout the world (whether owned by Customer or licensed to Customer from a third party) and also including any derivatives, improvements, enhancements or extensions of Customer Technology conceived, reduced to practice, or developed by Customer during the Term(s).

"Force Majeure Event" is any cause beyond a Party's reasonable control, including, without limitation, acts of war, acts of God, earthquake, hurricanes, flood, fire or other similar casualty, embargo, riot, sabotage, labor shortage or dispute, governmental act, insurrections, epidemics, quarantines, inability to procure materials or transportation facilities, failure of power, restrictive governmental laws or regulations, condemnation, failure of the Internet or other reason of a like nature not resulting from the actions or inactions of a Party.

"IX Services" is the provision of Internet exchange services to permit Customer to interconnect and exchange routing information with other Internet service providers.

"Party(ies)" means the party and parties signing this Agreement.

"3ZZZ Data Center" means the co-location facility operated by 3ZZZ and located at the address set out in the Customer Order Form(s).

"3ZZZ Service Level Agreement(s)" means the form(s) so entitled and applicable to the 3ZZZ Data Center specified in the Customer Order Form(s), as may be amended.

"3ZZZ Services" means all services set forth in the Customer Order Form(s), including without limitation (i) Co-Location Services, (ii) IX Services, and (iii) Storage Services, if requested on the Customer Order Form(s).

"3ZZZ Technology" means 3ZZZ's proprietary technology, including 3ZZZ Services, software tools, hardware designs, algorithms, software (in source and object forms), user interface designs, architecture, class libraries, objects and documentation (both printed and electronic), network designs, know-how, business methods, and any related intellectual property rights throughout the world (whether owned by 3ZZZ or licensed to 3ZZZ from a third party) and also including any derivatives, improvements, enhancements or extensions of 3ZZZ Technology conceived, reduced to practice, or developed by 3ZZZ or a related party during the Term(s).

"Service Commencement Date" means the date 3ZZZ will begin providing 3ZZZ Services to Customer, as indicated on the relevant Customer Order Form(s).

"Services Fees" means charges for 3ZZZ Services as identified in the Customer Order Form(s).

"Storage Services" means the provision of data storage services as set forth in a Customer Order Form(s), including without limitation, (i) storage area network data storage, (ii) network attached service data storage, and (iii) backup and restore service data storage, if requested on the Customer Order Form(s).

"Term(s)" or **"Term(s) of this Agreement"** means the period(s) of time, as set forth in the Customer Order Form(s), during which 3ZZZ and Customer are obligated to perform under this Agreement.

"Termination Date" means the date on which 3ZZZ shall cease to provide 3ZZZ Services as indicated on the applicable Customer Order Form(s), or such earlier date which may be determined in accordance with Agreement.

10. MISCELLANEOUS PROVISIONS

- 10.1 **Destruction of Data Center.** In the event the 3ZZZ Data Center is wholly or partially damaged by fire, windstorm, tornado, flood or by similar causes to such an extent as to render it unsuitable for the contemplated uses hereunder, then either Party may elect, within thirty (30) days after such damage, to terminate this Agreement by giving the other written notice of termination. If either Party shall so elect, both Parties shall be released from further liability under the terms hereof. If the 3ZZZ Data Center shall suffer only minor damage and shall not be rendered wholly unsuitable for the contemplated uses hereunder, or is damaged and the option to terminate is not exercised by either party, 3ZZZ covenants and agrees to proceed promptly to repair the damage. 3ZZZ shall have a reasonable time within which to rebuild or make any repairs.

- 10.2 **Force Majeure/Court Order/Cancellation.** Neither Party will be liable for any failure or delay in its performance under this Agreement (other than its obligation to make a payment of money under this Agreement) due to a Force Majeure Event, provided that the non-performing Party: (a) gives the other Party prompt written notice of such cause, and (b) takes all reasonable steps to promptly correct such failure or delay in performance. 3ZZZ shall not be liable for its failure or delay in its performance under this Agreement if such failure or delay is in compliance with and pursuant to an order issued by a court (or other tribunal) of competent jurisdiction. If 3ZZZ is unable to provide 3ZZZ Services for a period in excess of thirty (30) consecutive days for

any reason set forth in this section either Party may cancel this Agreement upon written notice to the other Party, and both Parties shall be released from all liability under this Agreement.

[Customer]

By: _____

10.3 Governing Law; Dispute Resolution. This Agreement shall be governed by the laws of the State of California, without reference to its conflict of law provisions. The Parties agree to use best efforts to resolve all disputes by negotiation. Any such dispute not so settled within thirty (30) days from the receipt of notice of the dispute will be settled by arbitration conducted in the city in which the 3ZZZ Data Center is located and in accordance with the rules of the American Arbitration Association. Responsibility for costs of the arbitration and related attorney's fees and expenses of the Parties will be as specified in the arbitration award, and the arbitrator(s) is hereby authorized and directed to take into account the relative merits of the positions of the respective Parties in allocating such fees, costs, and expenses. The arbitration award will be final and binding upon the Parties hereto. In the event a Party applies for a judgment to be entered on an arbitrator's award, or in the event of any litigation between the parties, then and in such event the Courts of the jurisdiction (state or country) in which the 3ZZZ Data Center is located will have exclusive jurisdiction over the parties and subject matter.

Its:

3ZZZ.net

By: _____

Its:

10.4 Severability; Waiver. In the event any provision of this Agreement is held by a tribunal of competent jurisdiction to be contrary to any law or regulation, the remaining provisions of this Agreement will remain in full force and effect. The Parties shall not be deemed to waive any of their rights or remedies under this Agreement unless such waiver is in writing and signed by the Party to be bound. The waiver of any breach or default of this Agreement will not constitute a waiver of any subsequent breach or default.

10.5 Assignment. Customer may assign this Agreement as part of a corporate reorganization, consolidation, merger, or sale of substantially all of its assets without obtaining 3ZZZ's consent. Except for the foregoing, Customer may not assign this Agreement without first obtaining 3ZZZ's written consent. 3ZZZ agrees not to unreasonably or arbitrarily withhold its consent. 3ZZZ may assign this Agreement without obtaining the consent of Customer.

10.6 Notice. Any notice or communication required or permitted to be given under this Agreement may be delivered by hand, sent by overnight courier, sent by email or confirmed facsimile, at the addresses set forth in the Customer Order Form(s) or at such other address as may hereafter be furnished. Such notice will be deemed to have been given as of the date it is delivered, emailed, or faxed as applicable.

10.7 Relationship of Parties. 3ZZZ and Customer are independent contractors and this Agreement will not establish any relationship of partnership, joint venture, employment, franchise or agency between 3ZZZ and Customer.

10.8 Entire Agreement; Counterparts. This Agreement constitutes the complete and exclusive agreement between the Parties with respect to the subject matter hereof, and supersedes and replaces any and all prior or contemporaneous discussions, negotiations, understandings and agreements, written and oral, regarding such subject matter. This Agreement may be executed in counterparts.

10.9 Language. If this Agreement is translated into another language, the translation is for the convenience of the Customer and the provisions of the version of this Agreement set forth in English shall prevail for all purposes.

10.10 Headings. Headings used in this Agreement are for reference only.

10.11 Binding Effect. This Agreement will bind and inure to the benefit of each Party and each Party's successors and permitted assigns.