

## **CUSTOM SOFTWARE DEVELOPMENT AGREEMENT**

This Custom Software Development Agreement is a legal agreement ("CSDA") between Carvajal Consultants, Inc. d/b/a Webborne Xolutions, a Florida corporation ("Developer"), having its principal place of business at 7265 SW 138 Ave., Miami, Florida 33183; and the customer "(Client)" which is a signatory of the Development Order Form, and shall be effective as the date of signature indicated in the Development Order Form ("Effective Date").

### **RECITALS**

WHEREAS, Developer is engaged in the business of computer application development, including technical consulting services, software development and maintenance,

WHEREAS, Client wishes to utilize the services of Developer in connection with the development and implementation of certain software to be used as a tool in his business (the "Software").

NOW, THEREFORE, Developer and Client agree as follows:

#### **1. Scope of Services**

Developer will perform the services described in the Statement of Work ("Developer's Work" or the "Work"), attached to the signed Development Order Form, in order to develop and implement the Software according to the specifications and completion times set forth therein. Client will cooperate with Developer's reasonable requests for information and data necessary for the completion of the Work.

#### **2. Price and Payment Terms**

Client will pay Developer for the Work at the price and on the terms set forth in the Development Order Form and/or Statement of Work. The price set forth in this CSDA does not include taxes. If Developer is required to pay any federal, state or local taxes based on the services provided under this CSDA, these will be separately billed to client. Developer will not be liable for any interest or penalties incurred due to late payment or nonpayment of these taxes by Client, but instead Client will be fully responsible for payment of said interest and penalties.

#### **3. Term and Termination**

Unless terminated as provided herein, this CSDA will extend to and terminate upon completion of Developer's Work as provided herein. Client may terminate this CSDA without cause upon thirty (30) days written notice. In the event of termination without cause, Client agrees to pay Developer for all of Developer's Work performed up to the date of termination. Either party may terminate this CSDA for material breach, provided, however, that the terminating party has given the other party at least twenty-one (21) days written notice of and the opportunity to cure the breach. Termination for breach will not alter or affect the terminating party's right to exercise any other remedy for breach.

#### **4. Ownership of Intellectual Property**

Developer will retain ownership of all proprietary rights to the Software developed pursuant to this CSDA, including certain rights, if any, that Developer has pursuant to a license from another party. Upon full payment of the fees set forth in this CSDA, Developer will grant to Client a license to install and use the Software in its own business in accordance with Exhibit A (Software License Agreement).

## **5. Confidential Information**

A. All information relating to Client that is known to be confidential or proprietary, or which is clearly marked as such, will be held in confidence by Developer and will not be disclosed or used by Developer except to the extent that such disclosure or use is reasonably necessary to the performance of Developer's Work.

B. All information relating to Developer that is known to be confidential or proprietary, or which is clearly marked as such, will be held in confidence by Client and will not be disclosed or used by Client except to the extent that such disclosure or use is reasonably necessary to the performance of Client's duties and obligations under this CSDA.

C. These obligations of confidentiality will extend for a period of three (3) years after the termination of this CSDA, but will not apply with respect to information that is independently developed by the parties, lawfully becomes a part of the public domain, or of which the parties gained knowledge or possession free of any confidentiality obligation.

## **6. Warranty and Disclaimer**

Developer warrants the Work will be performed in a workmanlike manner, and in conformity with generally prevailing industry standards. Client must report any material deficiencies in Developer's Work to Developer in writing within sixty (60) days of Client's receipt of the Work. Client's exclusive remedy for the breach of the above warranty will be the re-performance of Developer's Work within a commercially reasonable time. THIS WARRANTY IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND ANY ORAL OR WRITTEN REPRESENTATIONS, PROPOSALS OR STATEMENTS MADE ON OR PRIOR TO THE EFFECTIVE DATE OF THIS CSDA. DEVELOPER EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES.

## **7. Limitation of Liability, Indemnification**

Neither party will be liable to the other for special, indirect or consequential damages incurred or suffered by the other arising as a result of or related to the performance of Developer's Work, whether in contract, tort or otherwise, even if the other has been advised of the possibility of such loss or damages. Client will indemnify and hold Developer harmless against any claims incurred by Developer arising out of or in conjunction with Client's breach of this CSDA, as well as all reasonable costs, expenses and attorneys' fees incurred therein. Developer's total liability under this CSDA with respect to the Work, regardless of cause or theory of recovery, will not exceed the total amount of fees paid by Client to Developer.

## **8. Relation of Parties**

The performance by Developer of its duties and obligations under this CSDA will be that of an independent contractor, and nothing in this CSDA will create or imply an agency relationship between Developer and Client, nor will this CSDA be deemed to constitute a joint venture or partnership between the parties.

#### **9. Employee Solicitation/Hiring**

During the period of this CSDA and for twelve (12) months thereafter, neither party will directly or indirectly solicit or offer employment to or hire any employee, former employee, subcontractor or former subcontractor of the other. The terms "former employee" and "former subcontractor" will include only those employees or subcontractors of either party who were employed or utilized by that party within six (6) months immediately prior to the alleged violation.

#### **10. Non-assignment**

Neither party will assign this CSDA, in whole or in part, without the prior written consent of the other party. If Client sells its business to another person or firm, such consent will not be unreasonably withheld. This CSDA will inure to the benefit of, and be binding upon the parties hereto, together with their respective legal representatives, successors and assigns, as permitted herein.

#### **11. Arbitration**

Any dispute arising under this CSDA will be subject to binding arbitration by a single Arbitrator with the American Arbitration Association (AAA), in accordance with its relevant industry rules, if any. The parties agree that this CSDA will be governed by and construed and interpreted in accordance with the laws of the State of Florida. The arbitration will be held in Florida. The Arbitrator will have the authority to grant injunctive relief and specific performance to enforce the terms of this CSDA. Judgment on any award rendered by the Arbitrator may be entered in any Court of competent jurisdiction.

#### **12. Attorneys' Fees**

If any litigation or arbitration is necessary to enforce the terms of this CSDA, the prevailing party will be entitled to reasonable attorneys' fees and costs.

#### **13. Severability**

If any term of this CSDA is found to be unenforceable or contrary to law, it will be modified to the least extent necessary to make it enforceable, and the remaining portions of this CSDA will remain in full force and effect.

#### **14. Force Majeure**

Neither party will be held responsible for any delay or failure in performance of any part of this CSDA to the extent that such delay is caused by events or circumstances beyond the delayed party's reasonable control.

#### **15. Waiver and Modification**

The waiver by any party of any breach of covenant will not be construed to be a waiver of any succeeding breach or any other covenant. All waivers must be in writing,

and signed by the party waiving its rights. This CSDA may be modified only by a written instrument executed by authorized representatives of the parties hereto.

#### **16. Entire Agreement**

This CSDA, together with any attachments referred to herein, constitutes the entire agreement between the parties with respect to its subject matter, and supersedes all prior agreements, proposals, negotiations, representations or communications relating to the subject matter. Both parties acknowledge that they have not been induced to enter into this CSDA by any representations or promises not specifically stated herein.

## **EXHIBIT A: SOFTWARE LICENSE AGREEMENT**

### **PREAMBLE**

This Software License Agreement ("SLA") accompanies an CSDA that has been agreed by the parties. All statements of fact contained in this SLA are subject to the terms and conditions set forth in such CSDA. The terms and conditions set forth in the CSDA control in the event of any inconsistency between such terms and conditions and the matters set forth in this SLA.

### **RECITALS**

WHEREAS, Licensors owns certain software identified in the CSDA,

WHEREAS, Licensors desires to convey, and Licensee desires to receive, certain limited rights in said software pursuant to the terms and conditions contained in this SLA.

NOW THEREFORE, Licensors and Licensee agree as follows:

#### **1. Definitions**

A. "Software" means the computer programs and documentation described in the CSDA that has been agreed by the parties and is attached to this SLA, as well as any archival copies of such computer programs and documentation permitted by this SLA.

B. "Install" means placing the Software on a computer's hard disk, CD-ROM or other secondary storage device.

C. "Use" means (i) executing or loading the Software into computer RAM or other primary memory, or (ii) copying the Software for archival or emergency restart purposes.

#### **2. Grant of License**

Licensors grants to Licensee a non-exclusive license to install and use the Software for UNLIMITED users (the "License"). Licensee may make one (1) archival copy of the Software per authorized user in non-printed, machine readable form, in whole or in part, provided that such copy is for Licensee's own use and that no more than that single copy is in use at any time. Licensee will make no other copies of the Software except as authorized herein. Title to the Software will remain vested in Licensors, and nothing in this SLA will give or convey any right, title or interest therein to Licensee except as a licensee under the terms of this SLA.

#### **3. Term and Termination**

A. The License commences as of the Effective Date of the CSDA, and remains in force until Licensee stops using the Software or until Licensors terminates this License pursuant to the terms herein. Upon termination of this SLA, Licensee will (i) return all copies of the Software to Licensors without demand or notice, or (ii) permanently delete or destroy all copies of the Software in its possession and submit to Licensors a sworn affidavit signed by Licensee attesting to such destruction.

B. Except as set forth in the provisions of this SLA that provide for automatic termination in the event of breach of confidentiality or unauthorized transfer, if Licensee breaches any other provision of this SLA, Licensor may terminate this SLA, provided, however, that Licensor has given Licensee at least fourteen (14) days written notice of and the opportunity to cure the breach. Termination for breach shall not alter or affect Licensor's right to exercise any other remedies for breach.

#### **4. License Fee**

There is no license fee required for the grant of the License herein.

#### **5. Limitations on Use**

A. Licensee agrees that it will use the Software only in its own business, and not directly or indirectly for the use or benefit of anyone other than Licensee, and only pursuant to the scope of the grant of the License set forth herein.

B. Licensee will not decode, alter, decompile, reverse engineer, perform reverse analysis on or disassemble the Software.

#### **6. Limitations on Transfer**

This License is personal to Licensee and may not be conveyed in any way without the prior written consent of Licensor. Any purported sale, assignment, transfer or sublicense without such consent will be null and void ab initio, and will automatically terminate this SLA.

#### **7. Confidentiality**

Licensee agrees to observe complete confidentiality with respect to the Software, and will not copy, reproduce, publicize or otherwise disseminate it to third parties. Any breach of confidentiality by Licensee will automatically terminate this SLA. Licensee agrees that Licensor's remedies at law for breach of confidentiality are inadequate and that Licensor will be entitled to equitable relief, including without limitation, injunctive relief, specific performance and/or other remedies in addition to remedies provided at law.

#### **8. Licensee's Obligation to Notify of Infringement**

Licensee will immediately notify Licensor of any infringement or attempted infringement of Licensor's rights in the Software of which it becomes aware. Licensee will affirmatively cooperate with Licensor in any legal or equitable action that Licensor may undertake to protect any of its rights in connection with the Software.

#### **9. Warranty of Title**

Licensor warrants that it is the lawful owner of the Software and/or that it has the authority to grant the License specified herein.

#### **10. Software Warranty and Disclaimer**

Licensor warrants that the Software has been developed in a workmanlike manner, and in conformity with generally prevailing industry standards. Licensee must report any material deficiencies in the Software to Licensor in writing within ninety (90) days

of the Effective Date of this SLA. Licensee's exclusive remedy for the breach of the above warranties will be the correction of the material deficiency within a commercially reasonable time. THIS WARRANTY IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND ANY ORAL OR WRITTEN REPRESENTATIONS, PROPOSALS OR STATEMENTS MADE ON OR PRIOR TO THE EFFECTIVE DATE OF THIS SLA. PROVIDER EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES.

#### **11. Limitation of Liability, Indemnification**

A. Neither party will be liable to the other for special, indirect or consequential damages incurred or suffered by the other arising as a result of or related to the use of the Software, whether in contract, tort or otherwise, even if the other has been advised of the possibility of such loss or damages. Licensor's total liability under this SLA with respect to the Software, regardless of cause or theory of recovery, will not exceed the total amount of fees paid by Licensee under this SLA.

B. Licensee will indemnify and hold Licensor harmless against any claims incurred by Licensor arising out of or in conjunction with Licensee's use of the Software, as well as all reasonable costs, expenses and attorneys' fees incurred therein.

#### **12. Maintenance**

No software maintenance is included under the terms of this SLA. Licensor's obligations with respect to maintenance and support, including upgrades, if any, will be set forth in a separate written agreement between the parties.

#### **13. Relation of Parties**

Nothing in this SLA will create or imply an agency relationship between Licensor and Licensee, nor will this SLA be deemed to constitute a joint venture or partnership between the parties.

#### **14. Arbitration**

Any dispute arising under this SLA will be subject to binding arbitration by a single Arbitrator with the American Arbitration Association (AAA), in accordance with its relevant industry rules, if any. The parties agree that this SLA will be governed by and construed and interpreted in accordance with the laws of the State of Florida. The arbitration will be held in Florida. The Arbitrator will have the authority to grant injunctive relief and specific performance to enforce the terms of this SLA. Judgment on any award rendered by the Arbitrator may be entered in any Court of competent jurisdiction.

#### **15. Attorneys' Fees**

If any litigation or arbitration is necessary to enforce the terms of this SLA, the prevailing party will be entitled to reasonable attorneys' fees and costs.

#### **16. Severability**

If any term of this SLA is found to be unenforceable or contrary to law, it will be modified to the least extent necessary to make it enforceable, and the remaining portions of this SLA will remain in full force and effect.

**17. Force Majeure**

Neither party will be held responsible for any delay or failure in performance of any part of this SLA to the extent that such delay is caused by events or circumstances beyond the delayed party's reasonable control.

**18. No Waiver**

The waiver by any party of any breach of covenant will not be construed to be a waiver of any succeeding breach or any other covenant. All waivers must be in writing, and signed by the party waiving its rights. This SLA may be modified only by a written instrument executed by authorized representatives of the parties hereto.

**19. Entire Agreement**

This SLA, together with any attachments referred to herein, constitutes the entire agreement between the parties with respect to its subject matter, and supersedes all prior agreements, proposals, negotiations, representations or communications relating to the subject matter. Both parties acknowledge that they have not been induced to enter into this SLA by any representations or promises not specifically stated herein.