

# Master Services Agreement

Provider is engaged in the business of providing information technology services and functions. Client desires to retain Provider to perform information technology services and functions.

In consideration of the mutual promises, covenants and agreements contained herein, the Parties have agreed as follows:

## Agreement

1. **Defined Terms.** Unless otherwise specified in this Agreement, all terms are to be defined, interpreted, or construed in accordance with its ordinary, everyday meaning as of the Effective Date.
2. **Contracted Services.** This Agreement shall apply to and govern the delivery of information technology services, support, and functions as further described in the Statements of Work ("SOW") and/or Sales Agreement ("SA") as agreed by the Parties. The SOW and/or SA shall be attached to this Agreement as Exhibit "A." The SOW and/or SA shall be incorporated to this Agreement. If the Parties amend, expand, revise, or modify any SOW and/or SA, the Parties shall execute an amended SOW and/or SA to be incorporated by reference and attached as Exhibit "A1." Absent an executed SOW and/or SA, this Agreement by itself, does not represent a commitment by Client to receive any consulting, services, support or other work ("Services") from Provider or pay Provider any fees.
3. **Term.**
  - a. This Agreement shall commence on the Effective Date and will continue until terminated either by agreement of the Parties or as provided in this Section.
  - b. If the SOW or SA provides a specific term, the term in the SOW or SA shall only apply to that specific SOW or SA. Termination of the SOW and/or SA shall apply only to that SOW and/or SA unless otherwise agreed to by the Parties in writing.
  - c. This Agreement may be terminated by either party, without cause, by providing the other party sixty (60) days written notice of its intent to terminate.
  - d. If there is a need for Services after the termination of this Agreement, Client may request, in writing, the continuation of Services. Such request will renew this Agreement for the period of time it takes to complete such Services.
  - e. This Agreement may be terminated for cause, as defined in paragraph 16 herein, at any time, provided the defaulting party is provided an opportunity to cure such default in the manner set forth in paragraph 16.
4. **Fees and Payment.**
  - a. In exchange for Services from Provider as set forth in the SOW and/or SA, Client agrees to pay the rates identified in the fee schedule on the SOW and/or SA. Such rates are exclusive

of any federal, state, or local sales or use taxes, or any other taxes or fees assessed on, or in connection with any Services rendered herein. Client agrees to pay all undisputed invoices within thirty (30) days of the invoice or completion of the SOW and/or SA.

- b. Client agrees to pay any actual out-of-pocket expenses reasonably incurred by Provider in connection with the performance of Services and completion of SOW and/or SA. This includes, but is not limited to shipping charges, travel expenses, taxes, fees, interest, penalties, and or other costs associated with the performance of Services and completion of SOW and/or SA.
  - c. Client agrees to pay any subscription fees owed to Provider or any other third-party for Services or other fees associated with Services. Subscription fees are due on a monthly basis.
  - d. A penalty of one and one-half percent (1.5%) per month, or any other rate permitted by law, whichever is higher, shall apply to any unpaid balances after thirty (30) days of completion of the SOW and/or SA.
  - e. Provider may cease or suspend any Services if Client fails to pay any amount due under the SOW and/or SA. Services will continue when all amounts owed under the SOW and/or SA are paid in full, including any penalties.
  - f. Provider will retain a security interest in all tangible Services to ensure payment and Client shall authorize Provider to file a financing statement reflecting its security interest when necessary.
  - g. Client shall be responsible for any costs incurred by Provider in the collection of unpaid invoices including, but not limited to, collection and filing costs and reasonable attorneys' fees.
5. **Change Orders or Out of Scope Services.** If Client requests or requires additional Services that exceed the SOW and/or SA incorporated herein, Provider will charge an additional fee for such additional Services or out of scope work. Fees for such additional Services will be specified in a Change Authorization Order (CAO). The CAO will also describe any additional Services requested. A CAO will not be effective until signed by both Parties and shall be incorporated into this Agreement and have the same legal effect as the SOW and/or SA previously incorporated.
6. **Ownership of Materials Related to Services.** The Parties agree that any materials prepared and delivered by Provider in the course of performing Services are owned by Provider with Client having non-exclusive rights of usage during the term of this Agreement unless otherwise provided for in the SOW and/or SA. All rights, title, and interests of such materials shall be and are assigned to Client for its use during the term of this Agreement. Notwithstanding the foregoing, the Parties recognize that the Provider may be required to employ skills of the Provider and, therefore, Provider shall retain the right to use without fee and for any purpose, such "know-how", ideas, techniques, and concepts used or developed by Provider in the course of performance of Services under this Agreement. Any derivative use, knowledge, techniques,

ideas, "know-how", designs, concepts, or other protectable intellectual property by the Client shall be licensed under the terms of this paragraph. Client acknowledges that such derivative works are the property of the Provider.

- a. **Subscriptions.** Client agrees and acknowledges that, unless specifically stated otherwise in the SOW and/or SA, Services and/or products purchased are provided on a monthly subscription basis subject to user limitations as stated in the SOW and/or SA. Subscriptions may be terminated without termination of this Agreement with thirty (30) days written notice to the Provider. Any termination not made in writing or without thirty (30) day notice shall be a breach of this Agreement.
  - b. **No Contingencies.** Client expressly acknowledges and agrees that its obligations under this Agreement are not contingent on any future functionality or any oral or written representations, comments, or statements made by Provider regarding future functionality.
  - c. **Limited License.** Client agrees that any Services provided pursuant to this Agreement and/or SOW and/or SA are non-transferable, non-exclusive, royalty-free licenses to any inventions, methods, models, designs, Data, calculations, or other intellectual property ("Works").
7. **Independent Contractor.** The Parties enter this Agreement as independent contractors and nothing in this Agreement shall be construed to create a joint venture, partnership, agency, or other employment relationship between the Parties. All Provider's employees, agents, or assigns who are tasked to perform Services at any Client owned, leased, or controlled facility or property shall be considered to be an employee of Provider only and will not be considered an agent or employee of Client for any purpose. Provider shall be solely responsible for payment of all compensation owed to its employees, including all applicable federal, state, and local employment taxes and will make deductions for all taxes and withholdings required by law. In no event shall any Provider employee be eligible for or entitled to any benefits of Client.
8. **Confidential Information.** Client understands and acknowledges that Provider may, from time to time, disclose "Confidential Information" to Client. For the purpose of this Agreement, "Confidential Information" shall include, but not be limited to any nonpublic and/or proprietary information or materials relating to Provider's promotional and/or marketing strategy and activity, Provider's pricing information (including but not limited to rates, margins, and budgets), Provider's financial and budget information, Provider's customer lists, information about the education, background, experience, and/or skills possessed by Provider's employees, Provider employee compensation information, Provider's service and/or sales concepts, Provider's service and/or sales methodology, Provider's service and/or sales techniques, Provider's customer satisfaction data or sales information, or any information which Provider marks or identifies as "confidential" at the time of disclosure or confirms in writing as confidential within a reasonable time (not to exceed thirty (30) days) after disclosure.
- a. Client will not disclose Provider's Confidential Information to any third-party at any time without the prior written consent of Provider and shall take reasonable measures to prevent any unauthorized disclosure by its employees, agents, contractors, or consultants. Further, Provider's Confidential Information shall include the terms set forth in this Agreement, all of

which shall remain the property of Provider and shall in no event be transferred, conveyed, or assigned to Client as the result of the services provided pursuant to this Agreement. The foregoing duty shall survive any termination or expiration of this Agreement.

- b. Provider also understands and acknowledges that Client may, from time to time, disclose to Provider proprietary ideas, concepts, expertise, and technologies developed by Client relating to computer application programming, installation, and operation (collectively "Client's Confidential Information"). Client may further provide to Provider documentation, reports, memoranda, notes, drawings, plans, papers, recordings, data, designs, materials, or other forms of records or information relating to Client's business operations (collectively "Confidential Trade Information"). Provider agrees (i) not to use any Client Confidential Information or Confidential Trade Information for its own use or for any purpose other than the specific purpose of completing Services; (ii) not to voluntarily disclose any Client Confidential Information or Confidential Trade Information to any other person or entity; and (iii) to take all reasonable measures to protect the secrecy of, and avoid disclosure or use of, Client Confidential Information and/or Confidential Trade Information in order to prevent it from falling into the public domain or the possession of persons other than those persons authorized hereunder to have such Client Confidential Information and/or Confidential Trade Information. The foregoing duty shall survive any termination or expiration of this Agreement.
- c. In no event shall Client use Provider's Confidential Information to reverse engineer or otherwise develop products or services functionally equivalent to the products or services of the Owner.
- d. The following shall not be considered Confidential Information for purposes of this Agreement:
  - 1. Information which is or becomes in the public domain through no fault or act of the receiving party;
  - 2. Information which was independently developed by the receiving party without the use of or reliance on the disclosing party's Confidential Information;
  - 3. Information which was provided to the receiving party by a third-party under no duty of confidentiality to the disclosing party; or
  - 4. Information which is required to be disclosed by law with no further obligation of confidentiality, provided, however, prompt prior notice thereof shall be given to the party whose Confidential Information is involved.
- e. The Parties agree that the disclosure of any of the foregoing Confidential Information by either party shall give rise to irreparable injury to the owner of the Confidential Information, inadequately compensable in monetary damages. Accordingly, the nondisclosing party may seek and obtain injunctive relief against the breach or threatened breach of the foregoing undertakings, in addition to any other legal remedies which may be available.

9. **Nonsolicitation of Employees.** Client will not, either directly or indirectly (except through Provider) solicit, hire, or contract with any Provider employee during the term of this Agreement and for a one (1) year period following termination thereof (hereafter the "Nonsolicitation Term"). In the event that Client desires to directly hire the employee during the Nonsolicitation Term, Client must first seek Provider's consent to directly hire the employee and speak with the Provider's employee about the employment opportunity. In the event that Provider grants Client the option to directly hire a Provider employee, and the Provider employee accepts an offer of employment from Client, the Parties shall discuss issues related to the employee's transition to Client. The employee's start date will be mutually agreed upon by Client and Provider in writing. Provided the Parties agree to the Provider employee's transition terms, Client shall pay Provider a placement fee of no less than 20% of offered salary prior to the Provider employee commencing work as an employee of Client. Unless the Parties agree otherwise, Client shall not directly hire more than two Provider employees during the Nonsolicitation Term. If Client hires a Provider employee without first obtaining the consent of Pacxa, Client shall pay Provider a liquidated damage equal to 100% of the employee's fair market salary, as determined by Provider in its sole discretion. This provision is considered a material term that allows for accelerated termination rights under paragraph 16 of this Agreement.
10. **Provider Obligations.** Provider represents that it shall provide Client the following in addition to all Services specified in the SOW and/or SA:
- a. **Support.** Reasonable support for Services under this Agreement and any additional support shall be provided under amendments or modifications made in accordance with paragraph 5 of this Agreement;
  - b. **Notice.** Provider shall notify Client of any delay in delivery or performance of a third-party beyond Provider's control, to the extent reasonably foreseeable, including but not limited to:
    1. Product unavailability;
    2. Carrier delay;
    3. Failure of third-party performance; or
    4. Delay due to fire, severe weather, act of God, war, terrorism, embargo, or act of any government or affiliated agency.
  - c. **Data Protection.** Provider will use commercially reasonable efforts to protect Client's electronic information or data ("Data") from damage, disclosure, corruption, or other harm. Provider further covenants not to modify, disclose or otherwise share Client's Data unless required by law or authorized by Client in writing. If Provider is required to modify or disclose Client's Data by law, Provider will notify Client prior to the modification or disclosure. Provider will also assist Client, at Client's expense, in any protest to modification or disclosure.

- d. **Third-party Services.** Provider has no responsibility or obligation to provide support, information, technology or any other assistance to Client for any Services, SOW and/or SA provided by a third-party unless otherwise specified in the SOW and/or SA.
11. **Client Obligations.** In addition to any obligations and responsibilities described in the SOW and/or SA elsewhere in this Agreement, Client shall have responsibility regarding the following:
- a. To ensure that Client's employees, representatives, assigns, and agents will prevent unauthorized use or access to any Service and shall immediately notify Provider of any attempted unauthorized use or access;
  - b. Use Services in compliance with all applicable laws, regulations, terms of service, and other rules;
  - c. Not to sell, rent, lease, or otherwise make available Services to other third parties not included in the SOW and/or SA;
  - d. Not use Services in any unlawful or tortious manner;
  - e. Not use Services to infringe on the rights, responsibilities, or obligations of any third-party;
  - f. Not use Services to transmit, store, create, or transmit harmful or damaging material, data, information, electronic signals, code, files, scripts, agents, or programs;
  - g. Not attempt to gain access to or use of Services, related systems or networks; and
  - h. Client agrees to abide by and comply with all restrictions, terms and conditions, and rules under any license agreements from software or hardware providers.
12. **Default.** A party may be found in breach of this Agreement upon any of the following:
- a. **Nonpayment of fees or costs.** If Client fails to pay any amount owed under this Agreement, whether for Services, subscription, or reimbursement of costs. Client agrees that if it fails to make any payments owed under this Agreement for more than thirty (30) days, Provider may accelerate all unpaid obligations. Such unpaid obligations shall be immediately due upon written demand and Provider may suspend Services until all payments are made in full. Acceleration of amounts owed does not limit any other remedies available to Provider by law or under this Agreement.
  - b. **Failure to Comply.** Any party who fails to comply with any obligation specified in this Agreement or the SOW and/or SA shall be deemed in default. Client agrees to indemnify and hold Provider harmless for any claims arising from or related to any third-party Services or Works.
  - c. **Confidential Information.** Any party who discloses, or shares without written authorization, or uses Confidential Information from the other party to its benefit shall be in default of this Agreement. Failure to take commercially reasonable measures to protect Confidential Information will also be deemed a default of this Agreement. Commercial reasonableness shall be determined by the standards in similar industries at the Effective Date.

13. **Warranty of Services.** Any warranty offered by Provider for Services provided herein shall be set forth in the SOW and/or SA. In the absence of any warranty language in the SOW and/or SA, Provider warrants that all Services performed pursuant to this Agreement will be performed in accordance with the general standards and practices of the information technology industry in existence at the time the Services are being performed. Client agrees that its obligations are not contingent upon any future functionality, features, written or oral comments whether public or private by Provider, its employees, representatives, officers, successors, or assigns. IN THE EVENT THERE IS NO WARRANTY SET FORTH IN THE SOW AND/OR SALES, THE FOREGOING EXPRESS LIMITED WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES AND CONDITIONS EXPRESSED OR IMPLIED, ORAL OR WRITTEN, CONTRACTUAL OR STATUTORY, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE TO THE EXTENT APPLICABLE.
- a. **Returns.** Client may return any item on the SOW and/or SA only if in compliance with the policies and terms and conditions of the product's manufacturer. Materials or items not in its original, unopened condition may not be returned. Software or other intangible items may not be returned if downloaded, used, distributed, shared or otherwise utilized.
  - b. **Subscriptions.** Monthly or other subscriptions shall automatically renew for additional minimum subscription periods unless the Client or Provider provides thirty (30) day written notice. Written notice must be delivered at least thirty (30) days prior to the renewal of such subscriptions.
14. **Limitation of Liability.** Client agrees that Provider shall not be liable to Client, or any third-party, for: (1) any liability claims, loss, damages or expense of any kind arising directly or indirectly out of services provided herein for (2) any incidental or consequential damages, however caused, and Client agrees to indemnify and hold Provider harmless against such liabilities, claims, losses, damages (consequential or otherwise) or expenses, or actions in respect thereof, asserted or brought against Provider by or in right of third parties or for (3) any punitive damages. For purposes of this Agreement, incidental or consequential damages shall include, but not be limited to, loss of anticipated revenues, income, profits or savings; loss of or damage to business reputation or good will; loss of customers; loss of business or financial opportunity; or any other indirect or special damages of any kind categorized as consequential or incidental damages under the law of the State of Hawai'i and shall in no event exceed twenty-five thousand dollars (\$25,000). Provider's liability for any damages hereunder shall in no event exceed the amount of fees paid by Client to Provider as of the date the alleged damages were incurred.
- a. **Risk of Loss.** Client agrees that it bears the risk of loss due to the use of its own carrier or other delivery service to complete the SOW and/or SA. This risk includes, but is not limited to damage, loss, or delay by any third-party not under Provider's control.
  - b. **Third-party Services.** Client agrees and acknowledges that Provider will not be responsible or liable for any damages, loss, delay, or other harm arising from or related to the Services of any third-party not under the control of Provider. Provider shall also not be responsible



for any warranties, express or implied, representations, conditions, or covenants of a third-party.

15. **Indemnification.** Each party shall indemnify, defend and hold harmless the other, its employees, principals (partners, shareholders or holders of an ownership interest, as the case may be) and agents, from and against any third-party claims, demands, loss, damage or expense relating to bodily injury or death of any person or damage to real and/or tangible personal property directly caused solely by the negligence or willful conduct of the indemnifying party, its personnel or agents in connection with the performance of Services hereunder. To the extent that such claim arises from the concurrent conduct of Client, Provider and/or any third-party, it is expressly agreed that Provider's liability shall be limited by the terms and provisions of paragraph 14 herein and that, with respect to any remaining obligations to pay any third-party claims, demands, losses, damages or expenses that are not limited by the terms and provisions of paragraph 14 herein, each party's obligations of indemnity under this paragraph shall be effective only to the extent of each party's pro rata share of liability. To receive the foregoing indemnities, the party seeking indemnification must promptly notify the other in writing of a claim or suit and provide reasonable cooperation (at the indemnifying party's expense) and full authority to defend or settle the claim or suit. The indemnifying party shall have no obligation to indemnify the indemnified party under any settlement made without the indemnifying party's written consent.
16. **Termination.** This Agreement may be terminated in the following manner:
  - a. **Termination for Cause.** If either party breaches any provision of this Agreement (including any Exhibits or Amendments hereto), then that party may provide written thirty (30) day notice to the other party's management representative describing the alleged default in reasonable detail. If the default relates to a failure to pay any amount due and owing under this Agreement or if Client makes an unauthorized solicitation of a Provider employee, as prohibited under paragraph 8 of this Agreement, the defaulting party shall have ten (10) business days after written notice of the breach to cure. If the defaulting party fails to cure the breach within ten (10) business days of written notice, the non-defaulting party may immediately terminate this Agreement, in whole or in part, for cause, by providing written notice to the management representative of the defaulting party. With respect to other breaches of this Agreement, if the defaulting party does not, within thirty (30) days after receiving written notice of the breach, either cure the breach or if the breach cannot reasonably be cured within thirty (30) days, the non-breaching party may terminate this Agreement, in whole or in part, for cause, by providing written notice to the management representative of the breaching party.
  - b. **Termination Due to Bankruptcy.** Either party may immediately terminate this Agreement in the event that:
    1. Any party becomes insolvent;
    2. Enters into receivership;
    3. Is the subject of voluntary or involuntary bankruptcy;



4. Makes an assignment for the benefit of creditors; or
  5. A substantial part of the other party's property becomes subject to any levy, seizure, assignment or sale for or by any creditor or government agency.
- c. **Payments Due.** Termination of this Agreement shall not release either party from its obligation to make payments owed herein or in any SOW and/or Sales.
- d. **Permitted Delays.** The Parties are excused from performance under this Agreement to the extent and period that it is prevented from performance in whole or in part, as the result of delays caused by the other party or an act of God, or other cause beyond its reasonable control and which could not have been prevented by reasonable precautions, including failures or fluctuations in electrical power, heat, light, air conditioning or telecommunication equipment, and such nonperformance shall not be considered a default or grounds for termination.
1. Provider's time for performance shall be delayed to the extent reasonably necessary, in the event:
    - i. Client fails to submit information, instructions, approvals, or any required element in the prescribed form or in accordance with the agreed upon schedules;
    - ii. A special request by Client or any governmental agency authorized to regulate, supervise, or impact Provider's normal processing schedule; or
    - iii. Client fails to provide any equipment, software, premises or performance called for by this agreement, and the same is necessary for Provider's performance hereunder. Provider will notify Client of the estimated impact on its processing schedule, if any.
- e. **Continuation of Services.** Provider will continue to perform Services unless there is a Permitted Delay as described in paragraph 13(d) or mutually agreed upon by the Parties in writing. In the event Client provides Provider notice of termination and directs Provider not to perform the Services, Client agrees to pay Provider an amount equal to the amount normally due to Provider under this Agreement.
- f. **Data Return.** Upon written request, Provider will provide Client's Data in a commercially reasonable format no longer than thirty (30) days after receipt of the request.
17. **Disputes.** The Parties agree that any dispute arising from or related to the terms of this Agreement shall be submitted to non-binding arbitration prior to any court action. Each party shall bear its own attorneys' fees and costs and shall pay fifty (50) percent of the arbitration costs.
18. **Non-Restrictive Relationship.** Provider may provide the same or similar services to other clients and Client may utilize other information technology service providers that are competitive with Provider.

19. **Successors and Third-party Beneficiaries.** This Agreement shall inure to the benefit of Provider and Client and any successors or assigns of Provider and Client. No third-party shall have any rights hereunder.
20. **Waiver.** No provision of this Agreement may be modified, waived, or discharged unless the modification, waiver, or discharge is agreed to in writing. Failure of any party to require performance of any obligation under this Agreement, or the waiver by any party of any breach of this Agreement, shall not prevent any subsequent breach.
21. **Force Majeure.** Neither party will be liable to the other for failure to perform its obligations under this Agreement to the extent that such failure results from circumstances beyond its control, including but not limited to: strikes, lockouts, or other industrial disturbances; civil disturbances; fires; acts of God; acts of a public enemy; compliance with any regulations, order, or requirement of any governmental body or agency; or inability to obtain transportation or necessary materials in the open market.
22. **Severability.** If any provision or term under this Agreement is held unenforceable or contrary to any rule, regulation or law, the remaining provisions shall remain in full force and effect.
23. **Captions.** The headings in this Agreement are intended solely for convenience and reference and shall not be controlling or have any effect on the construction or interpretation of this Agreement.
24. **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties and supersedes any prior or contemporaneous communications, representations, or agreements between the Parties, whether oral or written. Any collateral agreements signed by the Parties that supersede any of the terms of this Agreement shall be attached as an exhibit by written agreement of the Parties.
25. **Amendments or Modifications.** This Agreement and any Exhibits may only be amended if made in writing and executed by the Parties. Any written work order submitted by Client shall not amend the terms of this Agreement and will only be considered:
  - a. a statement of the work performed;
  - b. set forth any deadlines or schedules; and
  - c. the additional fees to be charged, if any, for any Services not originally agreed to by the Parties.
26. **Governing Law.** This Agreement is made under and will be interpreted in accordance with the laws of the State of Hawai'i.