

# Master Services Agreement

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## Agreement

This Master Services Agreement is entered into by and between **NetGain Information Systems Company**, an Ohio corporation, with offices at 484 East Miami Street P.O. Box 400, De Graff, Ohio 43318-0400 (“NetGain”) and Client (as defined in a Service Attachment), as of the earliest Effective Date of the Service Attachment between NetGain and Client. (“Effective Date”). In consideration of the mutual promises and agreements made herein and intending to be legally bound, NetGain and Client agree that NetGain shall provide Services and Products to Client upon the following terms and conditions:

### 1. Services, Products and Expenses Overview

**a. Service Attachments.**

Except for Supplemental Services, unless otherwise agreed to in writing by both parties, all Services, Products, Fees and Expenses to be delivered by NetGain to Client are limited to those described in a Service Attachment, and any amendments thereto. In the event of any conflict between the provisions of a Service Attachment and this Master Services Agreement, the specific provisions contained in the Service Attachment shall control.

**b. Supplemental Services and Products.**

From time to time, NetGain, with Client’s prior approval, may provide Client with Supplemental Services and Products, at NetGain’s current customary rates.

**c. New Opportunities.**

Client agrees to notify NetGain of all new opportunities to provide Services and Products to Client and to include such Services and Products within the scope of this Agreement by adding new Service Attachments in situations that are mutually beneficial to Client and NetGain.

### 2. Change Requests

If Client desires a change in Services or Products delivered under a Service Attachment, Client shall deliver to NetGain a Change Request. Upon receipt of a Change Request, NetGain shall, within ten (10) business days of receipt, review and return the Change Request to Client along with a Service Attachment amendment setting forth the revised deliverables and Fees, including the cost of the change and the impact of the change upon the Services delivery schedule, if any.

Client shall, within five (5) business days thereafter, review NetGain’s comments, and return to NetGain an original, properly executed Service Attachment amendment, along with any Fees due as a result of the amendment.

Upon a complete and timely acceptance by Client, NetGain shall implement the changes per the amended Service Attachment. No changes shall be effective until an amended Service Attachment is properly executed by Client and NetGain, and Client agrees to pay any Fees due as a result of the amendment.

If Client does not timely accept the NetGain’s proposed Service Attachment amendment, the Change Request shall be deemed rejected and withdrawn by Client. All then-existing Service Attachments shall remain in full force and effect until their natural expiration, or earlier termination in accordance with their terms and the terms of this Agreement.

### 3. Client Responsibilities

Client's use of the Services (including all content transmitted via the Services) shall comply with all applicable laws and regulations, the terms of this Agreement, and any Terms of Use, which are incorporated here by reference.

Client shall maintain the Equipment and Devices free and clear of all liens and encumbrances and shall be responsible for insuring loss or damage to the Covered Devices while at the Client's Site.

As between the parties, Client is solely responsible for (a) all use (whether or not authorized) of the Service, which use shall be deemed Client's use for purposes of this Agreement; and (b) all content that is stored or transmitted via the Service. Client shall not upload, post, transmit or otherwise make available on or via the Service any material (including any message or series of messages) that violates or infringes in any way upon the rights of others, that is unlawful, threatening, abusive, obstructive, harassing, libelous, invasive of privacy or publicity rights, that in the circumstances would be obscene or indecent, that constitutes hate speech, that is otherwise offensive or objectionable, or that encourages conduct that would constitute a criminal offense, give rise to civil liability or otherwise violate any law or regulation. NetGain may remove, or demand the removal of, content that in its judgment violates these standards.

Client agrees to: (a) conform its Equipment and Software to NetGain's then-current Network specifications and system requirements for the Services; (b) allow NetGain, at its sole option and in its sole discretion, to monitor traffic and content on its Network, in its sole discretion, including through the use of automatic content filters (including without limitation spam, virus and adult language sniffers and filters). NetGain shall have the right but not the obligation, to upgrade, modify and enhance the Equipment (including related firmware) and the Services and take any action that NetGain deems appropriate to protect the Services and its facilities; (c) provide Client staff to act as NetGain's "smart hands" to perform simple On-Site tasks; and (d) participate in NetGain's annual Client satisfaction survey.

### 4. Acceptable Use Policy

The Service may only be used for lawful and appropriate purposes. Client and its Users may not transmit, retransmit, redirect, or store material in violation of federal or state laws or regulations or industry or community standards, including, but not limited to, obscenity, indecency, defamatory or material infringing trademarks or copyrights. Client and its Users may not abuse or fraudulently use the Service or Equipment, nor allow such use by others. The following illustrate some, but not all, uses that are prohibited under this Acceptable Use Policy:

- (1) **Child Pornography:** It is illegal under federal and state child exploitation statutes to possess, produce, receive, transport or distribute by any means, including computer, visual depictions of "sexual intercourse" and/or "sexually explicit conduct" involving persons under the age of 18.
- (2) **Inappropriate Content:** Using the services to transmit, distribute, redirect, or store material that, as reasonably determined by NetGain, is inappropriate, obscene, defamatory, libelous, threatening, abusive, hateful or which contains or incites violence.
- (3) **Denial of Service:** Engaging in activity that may or will interfere with the Service of another user, host or network on the Internet. Users are also prohibited from activity considered a precursor to attempted security violations including, but not limited to, any form of scanning, probing, or other testing or information gathering activity, without prior express written consent from NetGain.
- (4) **Distribution of Viruses:** Distribution of software, programs or messages that may cause

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damage or annoyance to persons, data, and/or computer systems. Hosts not timely secured or removed by Client may be blocked by NetGain from accessing the Network.

- (5) **Forging Headers:** Forging or misrepresenting a message header of an electronic transmission originating or passing through NetGain's Network.
- (6) **E-mail Spamming [or Mail-bombing]:** The transmitting of unsolicited e-mail to multiple recipients, sending large amounts of e-mail repeatedly that annoys, harasses or threatens another person or entity, or attempts to use NetGain servers as a mail drop or name server for SPAM. Sending unsolicited bulk e-mail from another Internet service provider's network advertising or implicating any Service hosted or provided by NetGain, including without limitation e-mail, web hosting, and FTP and DNS services. The sending of e-mail with added words/characters in an attempt to bypass Bayesian filters is prohibited. For bulk e-mailers on the NetGain Network - removal of complainants is required, as is the creation of a master no-send list. Bulk e-mailers may also be required to provide the complete confirmed opt-in information for each complainant within 24 hours of the request. Bulk e-mailers will also be required to demonstrate a definitive prior business relationship between the sender and the recipient. Utilizing a Client affiliate program to generate leads makes Client responsible for the actions of its Affiliates. This control includes, but is not limited to, blocking Affiliate links and sending the affiliate traffic to a 404 error type page.
- (7) **Fraudulent Activities:** Fraudulent activities include, but are not limited to, intentional misrepresentations or misleading statements, writings or activities made with the intent that the person receiving it will act upon it; obtaining services with the intent to avoid payment; and hosting of phishing websites.
- (8) **Unauthorized Access:** Unauthorized access includes, but is not limited to, the illegal or unauthorized access to other computers, accounts, or networks; accessing or attempting to access computer resources belonging to another party; attempting to penetrate security measures of other systems; using NetGain Services not included in Client's contract; devising ways to circumvent security in order to access unsubscribed Services; using the Services in a manner that encumbers disk space, processors or other system resources beyond amounts allowed by the specific type of Service; and/or interfering with a Service, overloading a Service or attempting to disable a host not assigned to Client.
- (9) **Network Sabotage:** Use of NetGain Equipment and Services in a manner that interferes with others' use of the Internet or NetGain's Network.
- (10) **Pyramid Schemes:** Use of a fraudulent system of achieving financial gain, which requires an endless stream of recruits for success.
- (11) **Unlawful Acts:** Use of NetGain Equipment and Services to violate the law or to aid any unlawful act.
- (12) **Non-e-mail Based Spamming:** Posting of messages to newsgroups/blogs/services that are irrelevant, blanket posting of messages to multiple newsgroups/blogs/services, and the posting of annoying, harassing and/or threatening messages. Violation of any rules, policies or charters posted online by any search engine, subscription web service, chat area, bulletin board, webpage, or any other service accessed via the NetGain Network is prohibited.
- (13) **Facilitating a Violation of this AUP:** Advertising, transmitting, or otherwise making available any software, program, Product, or Service that is designed to allow a user to violate this AUP. This includes, but is not limited to, the facilitation of the means to spam, initiation of pingging, flooding, mail bombing, denial of service attacks, and piracy of software.
- (14) **Blacklisting:** Behavior by a Client that causes or could cause blacklisting must be remedied

within 48 hours of written, electronic or telephonic notice from NetGain. Activities that result in re-listing are prohibited and must be stopped immediately. Known spammers, previously unidentified, will be removed from the network once identified.

**VIOLATIONS AND ENFORCEMENT.** At NetGain's sole and reasonable discretion, violations of any element of this AUP may result in a warning to the offender followed by suspension or termination of the Service if Client does not cease the violation. NetGain may immediately suspend or terminate Service with or without notice if NetGain reasonably determines that a violation of the AUP has occurred. NetGain will enforce this AUP according to the severity of the offense and violator's history of prior AUP infringements. Severe and/or repeated offenses will result in immediate termination of Service. NetGain is not liable for damages of any nature suffered by any Client, end-user, or any Third-Party resulting in whole or in part from NetGain exercising its rights under this AUP. NetGain has no practical ability to monitor all conduct, communications, or content that might violate this AUP prior to its transmission over the NetGain Network but, where possible and necessary, may do so at its discretion. Therefore, NetGain does not assume liability for others' violations of the AUP or failures to terminate those violations. NetGain reserves the right to assess time and materials charges to resolve Client issues that are not resolved by the Client in a timely manner.

Because NetGain acts only as a conduit for transmission of data it is not subject to the Health Insurance Portability and Accountability Act (as per 65 FR 82476), or Gramm-Leach-Bliley Act (as per 16 C.F.R. §314.2(d)); Client is solely responsible for complying with all such statutes, rules and regulations.

NetGain reserves the right to modify this AUP at any time without prior notification to Client.

**TO REPORT A VIOLATION OF THIS AUP OR AN ABUSE OF NETGAIN'S SERVICES, PLEASE  
E-MAIL: ABUSE@NETGAINIS.COM**

## **5. Master Services Agreement Term**

The Term of this Master Services Agreement shall begin on the Effective Date and continue in full force and effect until: (a) the Terms of all Service Attachments expire; or (b) this Master Services Agreement is otherwise terminated in accordance with the terms set forth in Section 4, whichever is later.

## **6. Master Services Agreement Termination**

If: (i) all Service Attachments are inactive due to expiration or termination upon their terms, whichever occurs earlier; and (ii) Client will not require future Services or Products from NetGain, then either party may terminate this Agreement, by delivering prior written notice to the other party at least thirty (30) days prior to the desired termination date. Otherwise this Agreement shall remain in full force and effect until conditions (i) and (ii) above are met and proper notice has been given.

## **7. Service Attachment Term and Termination**

Unless a Service Attachment contains a longer Term, each Service Attachment shall be effective for one (1) year from the Service Commencement Date. Unless terminated as provided herein, each Service Agreement shall automatically renew on an annual basis for successive one (1) year terms; with a five per cent (5%) per year increase in monthly Fees for each Service provided under such Service Attachment.

Either party may terminate a Service Attachment at the expiration of its Term by giving the other party written notice of such intent at least ninety (90) days prior to the expiration of the then current Term of such Service Attachment.

A Service Attachment may be terminated prior to the expiration of its Term, without liability, except for Service Fees owed to NetGain through the date of termination, upon any of the following bases:

1. A Service Attachment may be terminated by the written agreement of NetGain and Client.
2. Either party may terminate a Service Attachment upon thirty (30) days written notice of the other party's material breach of a Service Attachment, provided that such material breach is not cured within thirty (30) days following one party notifying the other party of such breach.
3. In addition to its other remedies, NetGain shall have the right to immediately terminate, without notice to Client, a Service Attachment after: (i) any Event of Default by Client; or (ii) Client's default of its obligations under this Agreement or a Service Attachment.

At NetGain's sole discretion, upon the termination or expiration of a Service Attachment: (a) NetGain's obligations shall cease; (b) Client immediately shall pay all amounts due and owing to NetGain for Services and/or Products delivered prior to the date of termination or expiration, plus any applicable Equipment removal Fees; (c) NetGain shall disable access to all NetGain Equipment; and (d) Client shall return to NetGain, or permit NetGain to remove, in NetGain's sole discretion, the Equipment in the same condition as when received, ordinary wear and tear expected. Client shall be responsible for reimbursing NetGain for the repair or replacement, at NetGain's discretion, of any Equipment not returned timely and in good condition.

The foregoing shall be in addition to any other rights and remedies that NetGain may have under this Agreement or at law or equity.

## 8. Effect of an Event of Default

If an Event of Default shall occur, Client agrees that it shall have the following obligations under this Agreement and that NetGain shall have the following rights, from the time of the occurrence of the first Event of Default, until such time as all Events of Default have been cured (the "**Default Period**"):

1. **Annual Financial Statements.** Client shall immediately furnish to NetGain all audited annual financial statements of Client, and each of its Affiliates, for the three (3) years prior to the Event of Default;
2. **Interim Financial Statements.** Client shall furnish to NetGain interim monthly Financial Statements of Client, and each of its Affiliates, for each month from the date of the last Annual Financial Statement provided in sub-section 1 above to the present time and continuing forward, within ten (10) business days following the end of each month.
3. **Security Interest.** Client grants to NetGain a security interest in, and a right to perfect a lien against, all Real Property and Personal Property, wherever situated, in which Client, or and any of its Affiliates, has an interest.
4. **Data Access.** Client grants to NetGain the right to retain all Data (excluding any Data legally protected or privileged by federal, state, local or tribal laws, statutes, codes or regulations) residing on a Covered Device, or on NetGain Equipment. Client further agrees that NetGain shall have no duty to provide Client access to the Data during the Default Period. Client further agrees that NetGain has no duty to protect or preserve the Data during the Default Period.

5. **Covered Devices.** Client agrees that Client and its Affiliates shall neither move, add, change, replace or substitute any Covered Device or any NetGain Equipment; nor permit any Person or Entity to move, add, change, replace or substitute any Covered Device or NetGain Equipment.
6. **Administrative Access Restricted.** Client agrees that NetGain alone shall have administrative privileges to all of Client's Data on Covered Devices.
7. **Insolvency Termination.** In the event that Client becomes a voluntary or involuntary debtor in any action for bankruptcy protection, reorganization, receivership, trusteeship, or liquidation, NetGain shall have the option, in its sole discretion, to terminate any or all Service Attachments or other agreements between the parties, seven calendar after providing notice to Client.
8. **Elective Termination.** NetGain shall have the right, but not obligation, at its sole option and discretion, to terminate, without notice to Client, one or more Service Attachments until every Event of Default is cured

The foregoing shall be in addition to any other rights and remedies that NetGain may have under this Agreement or at law or equity.

## 9. Fees and Expenses, Invoicing, Payment, Damages and Suspension

### a. Fees and Expenses.

Except for Supplemental Services, all Fees and Expenses will be stated on a Service Attachment, or an addendum thereto. Fees and Expenses for Supplemental Services, or other Services performed outside the Service Attachments, will be charged to Client at NetGain's then-current rates, unless otherwise mutually agreed to in writing by the parties.

### b. Invoicing.

NetGain will invoice Client for Management Services, in advance, on the first day of each month. NetGain will invoice Client for Supplemental Services immediately after delivery. NetGain will invoice Client in a timely manner for all other Services or Products.

### c. Payment Terms.

Unless otherwise stated in a Service Attachment, Client shall pay by method satisfactory to NetGain all invoiced Fees and Expenses in full within fifteen (15) days of the invoice date.

### d. Invoice Dispute.

Should Client dispute in good faith any portion of an invoice, Client shall notify NetGain, in writing and prior to the due date of the invoice, of the disputed amount, the nature and basis of the dispute. Each party shall use its best efforts to resolve the dispute prior to the invoice due date. However, if the parties are unable to resolve the dispute prior to the invoice due date, Client shall pay the full invoice amount, including the disputed portion, to NetGain on or before the due date.

### e. Late Payments and Default.

If Client defaults by not timely paying within its terms, or disputing per Section 9(d) above, a NetGain invoice, NetGain will charge Client interest at an annual rate of fifteen per cent (15%) on all past due invoice amounts; and such interest shall accrue on the unpaid balance from the day after an invoice becomes due until the invoice is fully paid.

### f. Damages.

Upon early termination of a Service Attachment by Client, for any reason other than a material breach by NetGain, Client shall promptly pay NetGain - in addition to any claims or damages for

indemnification, attorneys' fees, court costs, or exemplary damages, which are more easily determinable - a termination fee as calculated and set forth in this Section (f):

- (i) If the Service Attachment involved is for Services based upon an hourly or lump-sum fee for Services, the termination fee shall be equal to the Service Fees for all Services either delivered to Client, or for which NetGain is liable to deliver under the Service Attachment, up to and including the date of termination;
- (ii) If the Service Attachment involved is for Goods, the termination fee shall be equal to the fees for all Goods either delivered to Client, or for which NetGain is liable to deliver under the Service Attachment, up to and including the date of termination, and shall include any re-stocking or return fees; and
- (iii) In all other Service Attachments, because the actual damages that NetGain would sustain if Client breached such a Service Attachment are difficult to ascertain accurately, the parties agree in good faith that the sum of the Service Fees due under the remaining term of the Service Attachment, less: (a) a discount equal to prime rate, as set forth in the Wall Street Journal on the day of such breach event; and (b) a further discount of thirty-five per cent (35%) due to NetGain's ability to mitigate its future expenses, would be reasonable and just compensation to NetGain for the harm caused by an early termination of a Service Attachment. Therefore, Client promises to pay, and NetGain agrees to accept, such sum as liquidated damages, and not as a penalty, in the event of a breach of such obligation.

**g. Suspension of Services.**

In the event that Client fails to comply with: (i) any applicable law or regulation; (ii) the terms of this Agreement or any Service Attachment; (iii) any Terms of Use; or (iv) if Client fails to pay NetGain all invoiced amounts when due, Client agrees that, without prior written notice to Client, NetGain may, in addition to any other remedies available at law or in equity, suspend delivery of Services and/or Products, in whole or in part, under this Agreement and all Service Attachments without notice to Client. NetGain's right to suspend Services under this Section is in addition to NetGain's right to terminate as provided elsewhere in this Agreement.

## 10. Taxes

All Fees and Expenses to be paid by Client are exclusive of any applicable sales, use, excise, or services taxes, ("Taxes") which may be assessed. NetGain will invoice Client, and Client will pay directly or reimburse NetGain for such Taxes. NetGain will remit all collected Taxes to the appropriate governmental authorities. The parties will cooperate with each other in determining the extent to which any tax is due and owing under the circumstances, and shall provide and make available to each other all resale certificates, exemption certificates, information regarding out-of-state use of materials, services or sale, and other information reasonably requested by either party.

## 11. WARRANTY & WARRANTY DISCLAIMERS

NetGain warrants that all Services and Supplemental Services provided by NetGain to Client shall be performed in a good and workmanlike manner, in accordance with accepted industry standards.

THE SERVICES, PRODUCTS, AND RELATED EQUIPMENT USED OR PROVIDED IN CONNECTION WITH THIS AGREEMENT OR ANY SERVICE ATTACHMENT ARE NOT COVERED BY ANY OTHER NETGAIN WARRANTIES OF ANY KIND; AND NETGAIN DISCLAIMS ANY WARRANTIES NOT EXPRESSLY STATED HEREIN, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF TITLE, NONINFRINGEMENT, SYSTEM INTEGRATION, DATA ACCURACY, QUIET ENJOYMENT, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR ARISING OUT OF A COURSE OF DEALING, USAGE OR TRADE PRACTICE. NO ADVICE OR INFORMATION GIVEN BY NETGAIN, ITS AFFILIATES OR ITS CONTRACTORS OR THEIR RESPECTIVE EMPLOYEES SHALL CREATE ANY WARRANTY.

CLIENT ASSUMES ALL RISK AND RESPONSIBILITY FOR USE OF ALL SERVICES INCLUDED THAT INVOLVE THE USE OF THE INTERNET. NETGAIN HAS NO CONTROL OVER CONTENT APPLICABLE OR ACTIONS OCCURRING THROUGH ANY SERVICE; AND NETGAIN DISCLAIMS ALL RESPONSIBILITY FOR SUCH CONTENT AND ACTIONS. NETGAIN DOES NOT WARRANT THAT ANY SERVICE WILL BE UNINTERRUPTED, ERROR-FREE, SECURE OR MEET CLIENT'S REQUIREMENTS. IN ADDITION, CLIENT ACKNOWLEDGES AND AGREES THAT NETGAIN'S THIRD-PARTY SERVICE PROVIDERS DO NOT MAKE ANY WARRANTIES TO CLIENT UNDER THIS SERVICE ATTACHMENT, AND NETGAIN DOES NOT MAKE ANY WARRANTIES ON BEHALF OF SUCH SERVICE PROVIDERS UNDER THIS AGREEMENT, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, SYSTEM INTEGRATION, DATA ACCURACY OR QUIET ENJOYMENT.

## 12. Limitations of Liability

NETGAIN SHALL NOT BE LIABLE FOR ANY INCIDENTAL, INDIRECT, CONSEQUENTIAL, SPECIAL, OR PUNITIVE DAMAGES ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY SERVICE ATTACHMENT, REGARDLESS OF WHETHER OR NOT NETGAIN HAD BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE AGGREGATE LIABILITY OF NETGAIN FOR ANY AND ALL REASONS AND FOR ALL CAUSES OF ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT AND ALL SERVICE ATTACHMENTS SHALL BE LIMITED TO THE LESSER OF: (1) THE FEES PAID TO NETGAIN UNDER THIS AGREEMENT OR THE APPLICABLE SERVICE ATTACHMENT(S) IN THE TWO (2) MONTHS PRECEDING THE DATE THAT THE CLAIM OR CAUSE OF ACTION AROSE; OR (2) NETGAIN'S LIMITS OF LIABILITY INSURANCE. IN NO EVENT SHALL NETGAIN'S AFFILIATES, CONTRACTORS OR THIRD-PARTY SERVICE PROVIDERS OR SUPPLIERS HAVE ANY LIABILITY UNDER THIS AGREEMENT OR ANY SERVICE ATTACHMENT.

## 13. Independent Contractor

NetGain and its Affiliates, contractors and sub-contractors shall perform all Services as independent contractors - and not as employees, agents or representatives of Client. NetGain shall not be entitled to any privileges or benefits that the Client may provide to its employees. NetGain may subcontract any or all of the Services hereunder; provided that the use of any such subcontractor shall not relieve NetGain of any of its obligations hereunder. Neither party nor their respective Affiliates, employees or agents shall be authorized to act or appear to act as a representative of the other party, whether in performing Services or otherwise.

## 14. Covenants

Client covenants that:

- a. Client is a corporation or limited liability company, as appropriate, organized, validly existing and in good standing under the laws of the state of its incorporation or legal formation.
- b. Client has full power and authority to execute, deliver and perform this Agreement and all Service Attachments and will have taken as of the date of this Agreement and of each Service Attachment all action required by law, to authorize the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby. This Agreement and each Service Attachment will have been duly and validly authorized, executed and delivered by, and will be the valid and binding obligation of Client, enforceable against Client in accordance with its terms. The person signing this Agreement and each Service Attachment on Client's behalf is authorized to do so and may bind the Client to all of the terms and conditions contained therein, and represents and warrants that such person acting within the scope of his or her authority as an officer, director, or duly authorized agent or employee of Client.
- c. Client knows of no required filing, registration, authorization, consent, approval or order of any governmental or regulatory authority that is required for the execution and delivery of this Agreement or any Service Attachment and consummation of the transactions contemplated hereby by Client.
- d. Client will provide NetGain necessary access to its personnel, appropriate documentation, records and facilities in order for NetGain to timely perform its obligations under this Agreement and all Service Attachments.

NetGain covenants that:

- a. NetGain is a corporation, organized, validly existing and in good standing under the laws of the State of Ohio.
- b. NetGain has full power and authority to execute, deliver and perform this Agreement and all Service Attachments and will have taken as of the date of this Agreement and of each Service Attachment all action required by law, to authorize the execution and delivery of this Agreement and each Service Attachment and the consummation of the transactions contemplated hereby. This Agreement will have been duly and validly authorized, executed and delivered by, and will be the valid and binding obligation of NetGain, enforceable against NetGain in accordance with its terms. The person signing this Agreement and each Service Attachment on NetGain's behalf is authorized to do so and may bind the NetGain to all of the terms and conditions contained therein, and represents and warrants that such person acting within the scope of his or her authority as an officer, director, or duly authorized agent or employee of NetGain.
- c. NetGain knows of no required filing, registration, authorization, consent, approval or order of any governmental or regulatory authority that is required for the execution and delivery of this Agreement and consummation of the transactions contemplated hereby by NetGain.
- d. If Client is a governmental entity, NetGain certifies to Client, under the penalty of perjury and/or falsification that NetGain is in compliance with Section 3517.13 of the Ohio Revised Code, as amended.

## 15. Insurance

Each party shall, at its own expense, secure and maintain in force, throughout the term of this Agreement, broad form general liability insurance, with competent and qualified issuing insurance companies, with minimum limits of not less than \$1,000,000 US per occurrence for personal injuries, wrongful death, survival, loss of consortium, and/or loss or damage to property. Such insurance may be provided in primary and excess, including umbrella or catastrophe, policy forms. Each party shall also carry such insurance as will protect it from all claims under any Worker's Compensation laws in

effect that may be applicable to it. Upon request, each party shall provide the other party with evidence of the necessary insurance policies required under this section.

## 16. Non-Disclosure and Confidentiality

Each party acknowledges that it and its employees or agents may, in the course of this Agreement, be exposed to or acquire Confidential Information belonging or relating to the other party.

At all times during this Agreement, and at all times following the expiration or termination of this Agreement, neither party nor its Affiliates shall, without the other party's prior written consent: (1) obtain or attempt to obtain, possession of or access to any Confidential Information belonging to the other party or its Affiliates; (2) convert or attempt to convert to its own use, its Affiliates' use, or the use of any Entity or Person any Confidential Information belonging to the other party or the other party's Affiliates; (3) disclose or attempt to disclose to any Third-Party any Confidential Information belonging to the other party or the other party's Affiliates; (4) disparage, defame, slander or make or publish derogatory statements about the other party or the other party's Affiliates; regardless of the veracity of such statements; or (5) otherwise interfere with the contracts and relationships of the other party or the other party's Affiliates.

Each party and its Affiliates shall use Confidential Information solely for the purpose of carrying out its obligations under this Agreement and all Service Attachments; and shall take all necessary steps to protect all Confidential Information from disclosure, using the same degree of care with respect to Confidential Information belonging to the other party or the other party's Affiliates as it would use to protect its own Confidential Information.

The parties acknowledge that the provisions of this paragraph shall not apply to: (a) Confidential Information which at the time of disclosure is, without fault of the recipient, available to the public by publication or otherwise; (b) Confidential Information which a party can show was in its possession at the time of disclosure and was not acquired, directly or indirectly, from the other party or the other party's Affiliates; (c) Confidential Information received from a Third-Party which had the right to transmit the Confidential Information without violating: any secrecy agreement with the other party or the other party's Affiliate; federal law; state law; or regulations promulgated to enforce them, as appropriate; and (d) Confidential Information which is required to be disclosed pursuant to an order by a court of competent jurisdiction or otherwise by law.

## 17. Non-Competition

Throughout the Term, and for a period of two (2) years after the termination or expiration of, this Agreement, Client and NetGain agree not to compete against each other, as set forth in this Section.

Client and Client Affiliates shall not, directly or indirectly, compete with NetGain or the NetGain Affiliates: which includes without limitation engaging in the Competing Activities, as defined herein, within the geographical territories of the state of Ohio.

NetGain and the NetGain Affiliates shall not, directly or indirectly, compete with Client and the Client Affiliates: which includes without limitation engaging in the Competing Activities, as defined in Section 29, inclusive, within the geographical territories of the state of Ohio.

Notwithstanding any other provisions to the contrary, this Agreement shall in no way restrict: (1) NetGain or its Affiliates from providing Services, Products or other Information Technology solutions to another client engaged in the same business as Client or its Affiliates; or (2) Client or its Affiliates from entering into a replacement agreement with another provider in the event that this Agreement expires or is terminated within its terms.

## 18. Property Rights

### a. Ownership.

All NetGain Property shall remain the sole and exclusive property of NetGain and/or its suppliers. Client shall acquire no interest in the NetGain Property by virtue of the payments provided for herein.

### b. Use.

If applicable, Client may use NetGain Property intended by NetGain to be provided in conjunction with its delivery of Services. Client may not reproduce, modify or distribute NetGain Property, nor use it for the benefit of any Third-Party. All rights in the NetGain Property not expressly granted to Client are reserved to NetGain. Client will not open, alter, misuse, tamper with or remove any Equipment. All Equipment shall remain as-is and where-is installed by NetGain, and Client will not remove any markings or labels from the Equipment indicating NetGain (or its Third-Party suppliers) ownership or serial numbers.

### c. License Granted.

If Software is provided to Client hereunder, NetGain grants Client a limited, non-exclusive and non-transferable license to use such Software, in object code form only, solely in conjunction with the related Services delivered by NetGain.

## 19. Waiver

A party's delay or failure to enforce any provision of this Agreement or of any Service Attachment shall not be deemed a waiver of that party's rights with respect to that provision or any other provision of this Agreement or the Service Attachment. A party's waiver of any of its rights under this Agreement or a Service Attachment is not a waiver of any of its rights with respect to a prior, contemporaneous or future occurrence, whether similar in nature or not.

## 20. Force Majeure

Except for the obligations to make payments hereunder, either party shall be relieved of its obligations under this Agreement and any Service Attachment to the extent that its performance is delayed or prevented by a Force Majeure event.

Upon the occurrence of a Force Majeure event, the party whose performance is affected shall give written notice to the other party describing the affected performance; and the parties shall confer within two (2) business days, in good faith, to agree upon equitable, reasonable action to minimize the impact on both parties, including without limitation implementing disaster recovery services.

The party whose performance is affected shall use commercially reasonable efforts to minimize the delay caused by the Force Majeure event and to re-commence its performance as if no Force Majeure event had occurred.

## 21. Notices

- a. All notices and communications concerning this Agreement or any Service Attachment shall be made in writing and addressed as follows:

**If to NetGain:**

CEO  
NetGain Information Systems Company

**If to Client:**

President or CEO or other appropriate  
Person, per a Service Attachment or

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220 Reynolds Avenue  
P.O. Box 500  
Bellefontaine, OH 43311-0500  
Fax: 937-593-4282

public record

- b. Unless otherwise provided herein, notices shall be sent by certified U.S. Mail, return receipt requested, or by commercial overnight delivery service, or by facsimile, and shall be deemed delivered when actually received by the other party. (the "Notice Date")
- c. The address to which such notices and communications are to be given may be changed by written notice given by a party to the other party pursuant to this Section.

## **22. Alternative Dispute Resolution Process**

### **a. Good Faith Negotiation.**

Before resorting to any formal dispute resolution process concerning any dispute arising out of or relating to this Agreement or any Service Attachment, except in disputes relating to breaches of Sections 3 through 4 herein, inclusive, NetGain, in its sole discretion, may elect to request that the parties' respective executive management will first attempt to engage in good faith in negotiations in an attempt to preserve their respective and mutual interests, including their continuing business and professional relationship.

### **b. Mediation.** In the event the dispute between the parties is not resolved by good faith negotiation as set forth above, NetGain, in its sole discretion, may elect to participate in non-binding mediation; in which case, NetGain shall send a Section 21 Notice to Client.

- a. Within five (5) business days after the receipt of the Section 21 Notice, a mediator will be selected by having counsel for each party agree on a single person to act as mediator. In the event the parties and counsel are unable to agree upon a mediator within the five (5) business day timeframe, either or both parties may elect to forego mediation and proceed to other remedies available to them.
- b. If mediation is scheduled, the parties' counsel, as well as officers of each party, and not more than two other participants from each party will appear before the mediator at a time and place determined by the mediator, but not more than sixty (60) days after the end of the good faith negotiating period.
- c. The fees of the mediator and other costs of mediation will be shared equally by the parties.

### **c. Continued Services.**

Unless Client's has failed to timely pay invoices for Fees or Expenses not otherwise in dispute, NetGain shall continue to provide Services under this Agreement and any Service Attachments, and Client shall continue to make payments to NetGain, in accordance with this Agreement and any Service Attachment, during this alternative dispute resolution process. If negotiations under this Section do not resolve the dispute, the parties are free to proceed to litigation or agree in writing to submit the dispute to another alternative dispute resolution forum.

## 23. Limitation of Actions

All claims under this Agreement or any Service Attachment must be initiated not later than one year after the date of the act or omission that forms the basis of the dispute. The failure to perfect a claim within this one (1) year limitation period shall forever bar the claim and cause of action.

## 24. Governing Law and Jury Waiver

This Agreement and all Service Attachments shall be governed and construed in accordance with the laws of the State of Ohio, without reference to its conflicts of law principles. Both parties agree to submit to the jurisdiction of the courts of the state of Ohio; and further agree that jurisdiction and venue of any action between them shall be exclusively vested in the state courts located in Logan County, Ohio. Both parties specifically waive any other choice of venue.

**NETGAIN AND CLIENT HEREBY WAIVE THE RIGHT TO A JURY TRIAL IN ANY ACTION, PROCEEDING, COUNTER-CLAIM, CROSS-CLAIM OR THIRD-PARTY CLAIM BROUGHT BY EITHER NETGAIN OR CLIENT AGAINST THE OTHER PARTY.**

## 25. Indemnification

NetGain hereby releases and agrees to indemnify, defend or at its option settle, protect and hold harmless Client, from and against any and all claims, demands, liabilities, obligations, losses, damages, penalties, fines, interest, expenses and costs of all kinds, including without limitation, all reasonable attorney's fees, brought by Client under any legal theory arising out of or related to an actual or threatened breach, in whole or in part, of this Agreement or any Service Attachment by NetGain.

Client hereby releases and agrees to indemnify, defend or at its option settle, protect and hold harmless NetGain, from and against any and all claims, demands, liabilities, obligations, losses, damages, penalties, fines, interest, expenses and costs of all kinds, including without limitation, all reasonable attorney's fees, brought by NetGain under any legal theory arising out of or related to an actual or threatened breach, in whole or in part, of this Agreement or any Service Attachment, by Client.

In addition to any indemnification set forth in the Master Services Agreement, Client agrees to defend, indemnify, and hold harmless NetGain, its officers, directors, employees, agents, subsidiaries and Affiliates from and against all third party claims, liabilities, damages and expenses, including attorney's fees (collectively "Claims") arising out of or relating to: (i) Client's use of the Services provided hereunder, except to the extent that: (a) mere provision of the Services by NetGain constitutes the basis for the claim or liability; or (b) NetGain, its Affiliates, its service providers or suppliers, or their respective officers, directors, employees, or agents direct or recommend in writing that Client or its employees take such steps or actions upon which the Claim is based; (ii) any injury to person or property caused by any products sold or otherwise distributed in connection with Client's web site or data network accessible via or in connection with the Service; or (iii) any content or other materials supplied or transmitted by Client or its employees, including, but not limited to, any domain name or content provided by Client to NetGain for registration or use with Client's web site or data network, which infringes or allegedly infringes the proprietary rights of a third party.

The above indemnification terms shall be subject to the following provisions: (a) the party claiming indemnification (the "Indemnified Party") shall promptly notify the other party (the "Indemnifying Party") of any such claim; (b) the Indemnified Party allows the Indemnifying Party to have full control of any disposition or settlement of such claim; and (c) the Indemnified Party fully cooperates with the Indemnifying Party regarding such disposition or settlement. The Indemnified Party may have its own

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counsel participate in the defense of any such claim provided that the cost of such counsel shall be borne exclusively by the Indemnified Party.

## **26. Severability**

If a court of competent jurisdiction finds any portion of this Agreement or any Service Attachment is illegal, invalid or unenforceable, the offending portion shall be construed in accordance with applicable law as nearly as possible to reflect the original intentions of the parties set forth herein, and the remainder of this Agreement or any Service Attachment shall remain in full force and effect.

## **27. Equitable Relief**

The parties agree that if a party cannot reasonably or adequately be compensated in damages in an action at law for breach, or threatened breach, of any Service Attachment or this Agreement; which would cause irreparable harm and significant injury and damage to the aggrieved party,, the aggrieved party shall be entitled, in addition to any other remedies that it may have under this Agreement, any Service Attachment, or otherwise, to seek and obtain immediate interim, preliminary, and permanent injunctive relief, without requirement of posting any bond, to prevent or curtail any actual or threatened breach of such Sections.

## **28. Survival**

The provisions of Sections 7-33, inclusive, shall survive the termination or expiration of this Agreement.

## **29. Assignment and Successors**

Client may not assign this Agreement or any Service Attachment without the prior written consent of NetGain, and any assignment in violation of this Section shall be null and void. NetGain may assign, without the prior written approval of or notice to Client, its rights and obligations under this Agreement or any Service Attachment, in whole or in part, to: (a) a NetGain Affiliate; (b) an Entity that purchases all or substantially all of NetGain's business or assets, whether by merger, sale of assets, sale of stock or otherwise; or (c) another Person or Entity involved with a restructuring or reorganization of NetGain conducted by a court of competent jurisdiction.

Subject to the limitations on transfer and assignment, this Agreement and all Service Attachments shall become binding upon the parties, their successors and permitted assignees.

## **30. Confidential Agreement**

This Agreement, all Service Attachments and all information relating to this Agreement and all Service Attachments, and discussions, negotiations, terms or conditions relating to the same, shall not be disclosed to any Third-Party without the prior written consent of NetGain and Client; except in order for a party to comply with all legal, accounting or regulatory laws and requirements.

### 31. Press Release

Client agrees that during the term of this Agreement NetGain may publicly refer to Client, orally and in writing, as a Client of NetGain, and provide the publicly-releasable titles of any executed Service Attachments. Any other reference to Client by NetGain shall be made only in accordance with this Section. Neither party shall issue or cause the publication of any press release without the prior consent of the other party; except that nothing herein will prohibit either party from issuing or causing publication of any such press release to the extent that such action is required by applicable law or the rules of any national stock exchange applicable to such party or its Affiliates, in which case the party wishing to make such disclosure will notify the other party of the proposed time of issuance of such press release and consult with and allow the other party reasonable time to comment on such press release in advance of its issuance.

### 32. No Third-Party Beneficiaries

There are no Third-Party beneficiaries to this Agreement or any Service Attachment; and neither this Agreement nor any Service Attachment shall be construed to create any right enforceable by any Person or Entity, other than the parties hereto.

### 33. Definitions

As used in this Agreement and in the Service Attachments, the below terms are defined as follows:

**“Acceptable Use Policy”** or **“AUP”** shall mean the portion of specific Terms of Use relating to one or more Services, as amended.

**“Affiliate”** shall mean an Entity or Person that directly or indirectly: (i) controls; (ii) is controlled by; or (iii) is under common control with either Client or NetGain, as appropriate. For purposes of this definition, “control” means by any means including without limitation asset ownership, agreement, de facto management, or otherwise.

**“Agreement”** shall mean this Master Services Agreement or a Service Attachment, as appropriate.

**“Application”** or **“Applications”** shall mean Software that employs the capabilities of a Server or a PC directly to a task that a User wishes to perform.

**“Availability”** is achieved when a Device is present and ready for use, accessible in a usable form, or capable of responding to requests or processing, excluding minor malfunctions or errors that do not preclude the material use or function of the Device.

**“Back-Up”** shall mean a Device that archives or restores Client Software and/or Data to or from another Device.

**“Change Request”** shall mean the writing prepared by Client and submitted to NetGain in which Client seeks to modify the scope of Services being provided under one or more Service Attachments.

**“Client”** shall mean the Person or Entity identified in any Service Attachment, and its respective employees and officers.

**“Client Site”** or **“Client Sites”** shall mean the buildings and grounds occupied by Client.

**“Competing Activities”** shall mean:

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- a. As to Client and Client Affiliates; (a) being employed by; (b) acting as a representative, consultant, broker or agent for; (c) being a director, officer, or advisor to; (d) being a proprietor, principal, shareholder, creditor, investor, general partner, limited partner, member, trustee, manager or other owner of; or (e) being an officer, director, or advisor to: any Person or Entity that sells, markets, or offers for sale any goods or services sold, marketed or offered for sale by NetGain or any NetGain Affiliate; and/or
  - b. As to Client and Client Affiliates; assisting (financially or otherwise), controlling, managing, owning, investing, providing advisory or consulting or other services to any Person or Entity that sells, markets, or offers for sale any goods or services sold, marketed or offered for sale by NetGain or any NetGain Affiliate; and/or
  - c. As to Client and Client Affiliates; being interested or connected in any manner with the leadership, ownership, management, operation, promotion or control of any Person or Entity that sells, markets, or offers for sale any goods or services sold, marketed or offered for sale by NetGain or any NetGain Affiliate; and/or
  - d. As to Client and Client Affiliates; calling upon, soliciting, diverting, taking away, or attempting to call upon, solicit, divert, or take away any past, existing or potential clients, suppliers, vendors, manufacturers, partners, or accounts of NetGain or any NetGain Affiliate; and/or
  - e. As to Client and Client Affiliates; hiring, attempting to hire, contracting with, attempting to contract with or soliciting for employment or contract, any person who is an employee or independent contractor of NetGain or any NetGain Affiliate; and/or
  - f. As to Client and Client Affiliates; using the name or marks, or any derivation thereof, of NetGain or any NetGain Affiliate, in any proprietorship, partnership, corporation or any other business; and/or
  - g. As to NetGain and NetGain Affiliates; hiring, attempting to hire, contacting with, attempting to contract with or soliciting for employment or contract, any person who is an employee or independent contractor of Client or any Client Affiliate; and/or
  - h. As to NetGain and NetGain Affiliates; using the name or any Marks, or any derivation thereof, of Client or the Client Affiliates, in any proprietorship, partnership, corporation or any other business.

**“Compliant”** shall mean a Device or and/or Software that meets or exceeds the minimum criteria for specified by NetGain for each type of Device.

**“Completion Notice”** shall mean the notice provided by NetGain to Client indicating that Services Specified in a Service Attachment have been completed by NetGain.

**“Confidential Information”** shall mean information (whether oral, electronic or written, including all media on which such information is contained), whether or not created by the party disclosing the information (the “Owner”), which information is used in the Owner’s business and: (a) is proprietary to, about, or created by the Owner; (b) gives the Owner some competitive business advantage or the opportunity of obtaining such advantage; or (c) is designated as Confidential Information by the Owner; or from the circumstances surrounding disclosure, it should reasonably be assumed by the party receiving such information (the “Recipient”) that the disclosed information is the Owner’s Confidential Information.

Such Confidential Information includes, but is not limited to, the following types of information and any other information of a similar nature (regardless of whether or not reduced to writing or designated as confidential): (a) trade secrets, drawings, works of authorship, formulae, inventions, know-how, techniques, design details and specifications, software programs and software source documents,

information relating to proprietary rights prior to any public disclosure thereof; information regarding acquiring, protecting, enforcing and licensing proprietary rights (including without limitation patents, copyrights, trade names and trade secrets); (b) information regarding research, development, service offerings and products, marketing and selling plans, business plans, budgets, business methodologies, metrics, services and operational manuals, checklists, forms, scorecards, unpublished financial statements, policies, procedures or processes, licensing and distribution arrangements, prices and costs and lists of, or information about, personnel, suppliers, or goods or services sold or offered for sale; (c) all customer data including entity names and contact names, and their respective addresses, telephone numbers, facsimile numbers, e-mail addresses, and instant messaging information; (d) the existence of any business discussions, negotiations or agreements between the parties; (e) work product resulting from or related to work or projects performed or to be performed for either party or for customers of either party (including all media on which such information is contained); (f) any other non-public information belonging to an Owner; and (f) other significant business information otherwise defined as “trade secrets” under the Uniform Trade Secrets Act of the state in which the Owner has its principal place of business.

Information shall not be deemed confidential or proprietary for purposes of this Agreement, and Owner shall have no obligation with respect to any such information, which: (a) is already known to Recipient at the time of its disclosure; (b) is or becomes publicly known through no wrongful act of Recipient; or (c) is properly received by Recipient from a third party which is not subject to a duty of confidentiality to Owner with respect to such information.

As related to Confidential Information belonging to NetGain or a NetGain Affiliate, Confidential Information shall also include without limitation any Equipment and related firmware, Software, Data or information developed or provided by NetGain and any other proprietary rights inherent therein and appurtenant thereto, used by NetGain to provide any Services.

“**Coverage Period**” shall mean the period of time that a device is considered a Covered Device for purposes of a Service Level Threshold, based upon Client’s selection.

“**Covered**” shall mean, with respect to a Site, User or Device, that the Site, User or Device is entitled to Services defined in a Service Attachment.

“**Deliverable**” shall mean all documentation, whether in hard copy or electronic form, such as analyses, reports, manuals, test results, or any other item other than product provided by one party to the other pursuant to the terms of a Service Attachment.

“**Data**” shall mean a body of facts or information, in an electronic format, and sufficient for use or storage on a Device; and in the event of a Managed IP PBX Services Attachment, shall include all telephone numbers used by Client, regardless of type or function. (e.g. main number, pilot number extension number, direct-inward-dial number, emergency number, toll-free number, etc.)

“**DataForce**” shall mean the brand of Services offered by NetGain.

“**Device**” or “**Devices**” shall mean any and all hardware and related firmware, including without limitation all Network Devices, Specialty Servers, Servers, PCs, Printers, and/or IP Phones.

“**DNR Services**” shall mean domain name registration and registration transfer Services.

“**Effective Date**” shall mean the date on which this Agreement becomes effective as set forth in the introductory paragraph of page 3 of this Agreement.

“**Entity**” shall mean any general partnership, limited partnership, limited liability company, corporation, professional corporation, joint venture, trust, joint stock company, cooperative, unincorporated association, governmental entity or other political subdivision.

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**“Equipment”** shall mean all NetGain Property provided by NetGain to Client under the terms of a Service Attachment.

**“Exchange®”** shall mean Exchange Server® Software manufactured by Microsoft®.

**“Expenses”** shall mean the actual cost of the expenses incurred by NetGain in delivering Services or Products to Client; including without limitation travel expenses, lodging, meals and telecommunications expenses.

**“Event of Default”** shall mean the occurrence of one or more of the following events during the Term of this Agreement:

- (1) **Payment.** When Client fails to pay any NetGain invoice when due.
- (2) **Agreement Obligations.** When Client fails to comply with, or to perform, any other term, obligation, covenant or condition contained in: (i) this Agreement; (ii) any Service Attachment; or (iii) any other agreement between Client and NetGain.
- (3) **Default in Favor of Third-Parties.** When Client defaults on any loan, extension of credit, security agreement, mortgage, purchase or sales agreement, or any other agreement, in favor of any other creditor, Person or Entity, that may materially affect Client’s property or Client’s ability to pay NetGain; or Client’s ability to perform Client’s obligations under this Agreement or any Service Attachment.
- (4) **False Statements.** When any covenant, warranty, representation or statement made by Client, or furnished to NetGain by Client or by a Third-Party on Client’s behalf, under this Agreement or a Service Attachment is false or misleading in any material respect, regardless of when such statement becomes false or misleading.
- (5) **Insolvency.** When Client dissolves or terminates its existence as a viable on-going organization, including without limitation: (i) the insolvency of Client; (ii) the appointment of a receiver for any part of Client’s property; (iii) any assignment or transfer of any assets for the benefit of Client’s creditors; (iv) any type of creditor workout; or (v) the commencement of any proceeding under any bankruptcy or insolvency laws by or against Client.
- (6) **Creditor or Forfeiture Proceeding.** The commencement of any property foreclosure, forfeiture or repossession action, whether by judicial proceeding, self-help, repossession, or any other method, by any creditor of Client, or by any governmental agency, against any of Client’s real or personal property, including without limitation, any Covered Device.
- (7) **Change in Ownership or Transfer of Assets.** Client transfers twenty-five per-cent (25%) or more of any of the following: (i) Client’s common stock or Membership Units, if applicable; (ii) Client’s personal property, based upon book value; or (iii) Client’s real property, based upon book value.
- (8) **Adverse Financial Change.** A material adverse change occurs in Client’s financial condition, or NetGain believes in good faith that the prospect of Client’s continued performance under this Agreement or a Service Attachment is impaired.
- (9) **Insecurity.** NetGain in good faith believes itself insecure, or the prospect of Client’s continued performance under this Agreement or a Service Attachment is impaired.

**“Fees”** shall mean all fees owed by Client to NetGain as a result of delivering Services or Products to Client.

**“Financial Statements”** shall mean the statements showing the income, expenses, cost of goods sold, and net profit or loss, along with a balance sheet showing the assets and liabilities of the organization; together presenting fairly the results from operations during such periods, and the financial condition of the organization as of such dates, for the specified periods, correct and complete in all material respects, and consistent with the books and records of the organization.

**“Force Majeure”** shall mean any condition or event caused in whole or in part by something beyond a party’s reasonable control, including without limitation: acts of God, terrorism, flood, fire, explosion, earthquake, tsunami, volcanic eruption, tornado, hurricane, typhoon, other unusually severe weather conditions, acts of war, civil or military authority, government regulations, embargoes, epidemics, riots, insurrections, nuclear accidents, power blackouts, inability to secure products or services of other persons or transportation facilities, acts or omissions of transportation common carriers, and acts or omissions of public telecommunications carriers.

**“Help Desk Services”** shall mean the “live attendant” Services designed to answer a User’s call, create a Service Ticket, triage the stated issue using priority levels, and troubleshooting the problem or assign the correct resource, as appropriate in each situation.

**“Holidays”** shall mean NetGain’s recognized holidays, as amended, and which as of the Effective Date include New Year’s Eve, New Year’s Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, the day after Thanksgiving, Christmas Eve and Christmas Day.

**“ICANN”** shall mean the Internet Corporation for Assigned Names and Numbers.

**“Incident Alert”** shall mean the alert that is created by the NetGain Monitoring system when a Covered Device falls outside that Covered Device’s normal parameters as established by NetGain’s Monitoring system; automatically creating a Service Ticket, and if critical, an electronic page to NetGain’s on-call engineer.

**“Intellectual Property”** shall mean all intellectual and similar property rights including without limitation patents, patent applications, inventions, discoveries, copyrights, licenses, trademarks, trademark applications, trade secrets, service marks, service mark applications, trade dress, mask work, Confidential Information, proprietary business and technical information, know-how, software and databases and all embodiments and fixations thereof including all documentation, registrations and franchises, logos, contracts, and all books and records describing or used in connection with any of the foregoing and all additions, improvements, and accessions to any of the foregoing.

**“IP Phones”** shall mean all Internet Protocol telephones manufactured by Cisco Systems, Inc, and used by Client.

**“Maintenance Window”** shall mean the elapsed time necessary to perform scheduled preventative maintenance or emergency unscheduled maintenance, troubleshooting and/or repair of a Covered Device.

**“Management Services”** shall mean the Services and the set of control mechanisms in place to test, control and manage configuration changes and resolve problems, with any Covered Device, in an effort to meet any applicable Service Level Thresholds.

**“Master Services Agreement”** shall mean this Agreement, containing all of the general terms and conditions of the business relationship between NetGain and Client.

**“Milestone”** shall mean a specific goal, objective, or event pertaining to Services described under the terms of a Service Attachment.

**“Microsoft®”** shall mean Microsoft Corporation, One Microsoft Way, Redmond, WA 98052-6399.

**“Monitor” or “Monitoring”** shall mean the automated and systemic observation of Covered Devices and their related characteristics, as determined by NetGain in accordance with its best practices.

**“NetGain”** shall mean NetGain Information Systems Company, an Ohio corporation; its Affiliates, and their respective employees and officers.

**“Network”** shall mean all network infrastructure devices, including without limitation, Client’s UPS units attached to Network devices, network time clocks, switches, hubs, routers, IP KVM switches, wireless access points, wireless controllers, firewalls, VPN concentrators, security appliances.

**“On-Site”** shall mean those Services that require a NetGain technician or engineer to be physically at a Client Site.

**“Operating System” or “O/S”** shall mean the source and object code software installed on a Device, which is responsible for controlling the hardware in order to allow Users and Applications to make use of the Device.

**“PC” and “Personal Computer”** shall mean a personal computer, and shall include its O/S and Applications.

**“Person”** shall mean a natural person, and not an Entity.

**“Personal Property”** shall mean all rights of Client and its Affiliates in and to any and all inventory, equipment, fixtures, chattel paper, accounts, general intangibles, instruments, rents, monies, notes, payments, and accounts receivable; whether any of the foregoing is owned at the time of this Agreement or after-acquired; all accessions, additions, replacements and substitutions relating to any of the foregoing; all records of any kind relating to the foregoing; and all proceeds relating to the foregoing, including without limitation, all proceeds from the sale, destruction, loss, or other disposition of the foregoing property, and any sums due from a Third-Party relating to any disposition.

**“Printer”** shall mean a Device that prints documents and is attached to Client’s network either via a Server or a direct Network connection.

**“Product” or “Products”** shall mean goods delivered by NetGain to Client in accordance with a Service Attachment or Supplemental Services.

**“Project Plan”** shall mean a plan documenting the aspects and timeline of the Services in a Service Attachment.

**“Property”** shall mean all Intellectual Property, Devices and Software belonging to NetGain or Client, as applicable.

**“Real Property”** shall mean all right, title and interests of Client and its Affiliates in and to any and real estate, improvements, and fixtures thereon; whether any of the foregoing is owned at the time of this Agreement or after-acquired; all accessions, additions, replacements and substitutions relating to any of the foregoing; all records of any kind relating to the foregoing; and all proceeds relating to the foregoing, including without limitation, all proceeds from the sale, destruction, loss, or other disposition of the foregoing property, and any sums due from a Third-Party relating to any disposition.

**“Reactivation Fee”** shall mean the Fee for Services required to validate, inventory and return each Covered Device to NetGain’s standards, after a suspension of Services.

**“Remote”** with respect to Support or Management shall mean Services that can be performed by NetGain personnel without being physically present at a Client Site.

**“Resolution Time”** shall mean the time period beginning when a NetGain technician or engineer

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receives a Service Ticket and begins working on it and ending when the issue underlying the Service Ticket is resolved and the Service Ticket is closed. The date and time stamped records contained in the Service Ticket shall be the official record of event measurement for determining Resolution Time.

“**Response Time**” shall mean the time period beginning when a Service Ticket is originated and ending when NetGain first attempts to contact the Client, regardless of the means of contact. The date and time stamped records contained in the Service Ticket shall be the official record of event measurement for determining Response Time.

“**Routine**” shall mean ordinary and customary.

“**Server**” shall mean a combination unit of a Device and Software which is linked to Client’s Network and which provides programs or services to Users or to other Devices. A “**Specialty Server**” is a Server that runs a specific Application. Each “**Virtual Machine**” will be counted as a Specialty Server.

“**Service**” or “**Services**” shall mean, individually and collectively, any and all services provided, or to be provided, by NetGain to Client, including without limitation all services set forth in the Service Attachments, and any Supplemental Services.

“**Service Attachment**” shall mean a supplemental agreement for Services and/or Products between NetGain and Client describing the Services and/or Products to be delivered, applicable Fees, Expenses and specific terms, conditions, responsibilities and delivery schedules.

“**Service Level Categories**” shall mean the categories of Management Services. (e.g. Server Management is a Service Level Category)

“**Service Level Incident**” shall mean the duration of time that a Covered Device fails to meet a Service Level Threshold as reported by the NetGain Monitoring system. The date and time stamped records contained in the Service Ticket shall be the official record of event measurement for determining the duration of a Service Level Incident.

“**Service Level Threshold**” shall mean the Covered Device’s objective target performance level that satisfies a threshold established under a Service Attachment. (e.g. Availability of 99.5% is a Service Level Threshold)

“**Service Ticket**” shall mean the ticket created by NetGain or by its Monitoring System in response to a request for Services; including without limitation, via web browser, e-mail, telephone, facsimile, in-person conference, or an Incident Alert. The date and time stamped records contained in the Service Ticket shall be the official record of event measurement.

“**Service Ticket Escalation Process**” shall mean the process by which a Service Ticket is escalated from a lower support tier to a higher support tier until the issue is resolved.

“**Site**” shall mean a specific Client Site.

“**Site Survey**” shall mean an assessment by NetGain of the readiness of the Client Site for the implementation of the technology defined in a Service Attachment.

“**Software**” shall mean all license rights, title and interest owned by or leased to a party to this Agreement or a Service Attachment, in and to the source code, object code, and all modifications thereto, as applicable.

“**SQL**” shall mean the Structured Query Language database Server software manufactured by Microsoft®.

“**Supplemental Services**” are a type of limited Services provided by NetGain to Client on a “one-off” or emergency basis, which Services are not included within a Service Attachment.

“**Term**” shall mean the period of time that a Service Attachment shall remain in full force and effect.

“**Terms of Use**” shall mean all policies, including without limitation Acceptable Use Policies, and other terms and conditions established by this Agreement or any Service Attachment that regulates Users’ conduct.

“**Third-Party**” or “**Third-Parties**” shall mean one or more Persons or Entities other than NetGain, Client, or their respective Affiliates.

“**Service Ticket System**” shall mean the NetGain central Service Center database responsible for maintaining Service Tickets for the Covered Devices.

“**UPS**” or “**Uninterruptible Power Supply**” shall mean the battery back-up Device that automatically provides power to a Covered Device whenever the utility-provided electric power is interrupted.

“**Users**” shall mean Client’s authorized employees, agents, contractors and guests who use Client’s Network or Devices and/or receive Services under a Service Attachment.

## 34. Amendment

This Agreement and any Service Attachment may be modified or amended at any time by NetGain, without prior notice to Client and any amendments become effective as of the date and time this Agreement is posted to NetGain’s web site.

## 35. General Provisions

The headings of the Sections in this Agreement, and any Service Attachment, are not part of the Agreement, but are for the convenience of the parties.

All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, and neuter as the identity of the Person(s) or Entity or Entities referred to may require, and all words shall include the singular or plural as the context or the identity of Persons or Entities may require.

The parties hereto shall execute and deliver all documents, provide all information, and take or forbear from all actions that may be reasonably necessary or appropriate to achieve the purposes of this Agreement and all Service Attachments.

This Agreement, and any Service Attachment, may be executed in counterparts; each of which shall have the same effect as original document.

The parties agree that they shall comply with all applicable laws and regulations of governmental bodies or agencies in their performance under this Agreement and all Service Attachments.

This Agreement and the Service Attachments, constitute the entire understanding and agreement between the parties with respect to the subject matter hereof and supersede any and all prior negotiations, understandings and agreements, whether oral or written. The parties agree that the terms and conditions contained herein and in the Service Attachments shall prevail over any different terms and conditions contained in any purchase order issued by Client to NetGain, and that such purchase order’s varying terms shall have no force and effect.

### **36. Acceptance**

Client's execution of one or more Service Attachments shall constitute acceptance of the terms of this Master Services Agreement, as amended from time to time, as if NetGain and Client had both caused this Master Services Agreement to be duly executed and delivered and enforceable as of the Effective Date of each Service Attachment.