

This Managed Service Agreement (“Agreement”) is made between DYOPATH, LLC (“DYOPATH”), a Delaware limited liability company with its principal place of business at 13430 Northwest Freeway, Suite 1000, Houston, TX 77040 and the Client. All services ordered hereunder are subject to credit approval and availability and shall be provided on the terms and conditions set forth herein. If applicable, this Agreement also consists of one or more of the following documents that are provided under a separate cover.

Attachment A: Client Order Form and Service Description

Attachment B: [Service Level Agreement](#)

Attachment C: Statement of Work (SOW) if applicable

## TERMS AND CONDITIONS

### **SECTION 1 DEFINITIONS**

- 1.1 **Affiliates**: With respect to any Person, any other Person that directly or indirectly through one or more intermediaries’ controls, is controlled by, or is under common control with such first Person.
- 1.2 **Agreement**: This MSA, the Attachments hereto, and all Client Order Forms and Service Descriptions and Service Level Agreements that are hereafter executed and delivered by the Client and accepted by DYOPATH pursuant hereto and all schedules, supplements, agenda, or exhibits incorporated therein, in each case as amended or modified from time to time in accordance with the terms hereof.
- 1.3 **Attachment A**: A Client Order Form and Service Description.
- 1.4 **Attachment B**: Service Level Agreement.
- 1.5 **Availability Percentage**: The term shall have the meaning given such term in the applicable Service Level Agreement (SLA) Attachment B, Section 2.7 Limitations.
- 1.6 **Client Equipment**: Any equipment owned or leased by the Client (other than equipment, if any, leased by the Client from DYOPATH), including any such equipment which is located in the Facilities and such equipment which is located at Client Premises or other locations leased by the Client, which is being used for communications, internet access, client server applications and general business computing.
- 1.7 **Client Data**: All data and other information contained on Client Equipment and all data and other information delivered by the Client to DYOPATH for storage and/or processing at or on the Facilities.
- 1.8 **Client Order**: New or additional DYOPATH Service(s) requested by the Client and submitted on the MSA Attachment A, which includes all required information, authorization, and credit requirements.



- 1.9 Client Premise: The location or locations occupied by Client or its end users to which Service is delivered or for which Service is provided.
- 1.10 Confidential Information: any written, electronic, or oral information furnished or disclosed by Disclosing Party to Receiving Party during the term of this Agreement. Confidential Information shall include, but is not limited to: financial information, business strategies; proprietary methods and data; trade secrets; Client lists and information; pricing and business data; technical information; inventions (whether patentable or not); data tables; computer program narratives; flow charts; source and object codes; computer software; computer documentation; software listings; copyrights; patents and patentable developments; operating procedures; business plans and models; prospects; and other confidential and/or proprietary matters of any nature and regardless of the format in which it is presented, maintained or transmitted. Notwithstanding the foregoing, Confidential Information shall not include information that: (i) becomes available to the public after disclosure by the Disclosing Party, other than by a breach of this Agreement by Receiving Party; (ii) was available to the public at the time the Disclosing Party discloses its Confidential Information to Receiving Party; (iii) was already known to the Receiving Party, as evidenced by sufficient written documentation, prior to the time the Disclosing Party discloses the Confidential Information to Receiving Party; (iv) is or has become available to Receiving Party without restriction from another source that does not violate any obligation to Disclosing Party; (v) is independently developed by Receiving Party by persons having no access to Disclosing Party's Confidential Information, as evidenced by written documentation; (vi) is disclosed after two (2) years from expiration of the Agreement; or (vii) is disclosed pursuant to the provisions of a court order.
- 1.11 Connection/Disconnection Notice: Written notice from DYOPATH that the Service(s) ordered has been installed by DYOPATH pursuant to the Client Order, tested, and is functioning properly, or disconnection of a service based on the Client Order and a minimum of forty-five (45) days. The Client is responsible for payment of services up to the actual disconnection date. DYOPATH reserves the right to invoice the Client upon the five (5) business day period as stated in Section 3.1 Commencement of Billing and Usage Based Services.
- 1.12 Destructive Elements. Any materials, equipment or data (a) intentionally designed to disrupt, disable, harm or otherwise impede in any manner the operation of any materials, equipment or Client Data (e.g., "viruses" or "worms"), (b) that would disable any materials, equipment or Client Data, or impair in any way their operation (e.g., "time bombs", "time locks" or "drop dead" devices) or (c) which contains any other harmful, malicious or hidden procedures, routines or mechanisms which would cause any materials, equipment or Client Data, to cease functioning or to damage or corrupt storage media, communications, or otherwise interfere with the Client's operations.
- 1.13 Facilities: Property and other personal property, owned, leased, or operated by DYOPATH, including buildings and other real property used by DYOPATH to deliver Service and/or for the purpose of locating and co-locating communications equipment.
- 1.14 Intellectual Property: Patented and unpatented inventions mask works, copyrighted works, trade secrets, know-how, and proprietary information of either party.



1.866.609.PATH



[solutions@dyopath.com](mailto:solutions@dyopath.com)



13430 Northwest Fwy,  
Suite 1000  
Houston, TX, 77040

- 1.15 **Overtime:** Work performed in excess of eight (8) hours per day Monday through Friday (“After Hours”), on weekends, or holidays.
- 1.16 **Person:** Any individual, partnership, joint venture, corporation, trust, limited liability company, or other entity.
- 1.17 **Service:** Any service (including the availability and use of Facilities) offered by DYOPATH pursuant to a Client Order, including but not limited to supplying hosting, monitoring, outsourcing, equipment leasing, or data communications and related products or services. For the purposes hereof, Services shall mean those services identified in Client Orders, together with any Service Level Agreement executed and delivered by DYOPATH and the Client in connection therewith.
- 1.18 **Service Commencement Date:** The Service Commencement Date is the date that any Service is fully operational and a Connection Notice has been transmitted by DYOPATH to the Client for such services via email.
- 1.19 **Service Level:** The Client’s expectations and service performance levels set forth in an SLA.
- 1.20 **Service Level Agreement:** A Service Level Agreement (SLA), substantially in the form of Attachment “B” is issued unilaterally to the MSA, which identifies the Client’s expectations and service performance levels that will be provided the metrics or performance indicators by which the Service Levels are measured.
- 1.21 **Service Term:** Subject to Section 4 Termination, the duration of time (measured starting on the Service Commencement Date) for which the Services are ordered and accepted by DYOPATH, as specified in Section 3.10 below. The terms and conditions of this MSA shall continue to apply to any order for Services that have an extended term beyond the initial service terms of this MSA and described by signature Modification to the MSA including Attachment A.
- 1.22 **Usage Based Services:** Prices billed for a service or item based on the Client’s consumption or usage, rather than a fixed price for a specified service, item or period-of-time. The Client is required to pay for the services or items used.
- 1.23 **Work Product:** Any new materials and any modifications or enhancements directly related to the Client and to the extent required under a specific Client Order, or any derivatives of, or any materials that are created by DYOPATH as part of the Services or otherwise paid for by the Client, but excluding any DYOPATH materials that exist as of the Effective Date and any modifications or enhancements to, and derivatives of such DYOPATH materials.

## **SECTION 2 DELIVERY OF SERVICES**

- 2.1 **Attachment A:** To order or disconnect any Service (including new or additional services), DYOPATH will work with the Client to finalize an Attachment A. The Attachment A must include a description of all Services requested, the non-recurring and monthly-recurring charges for Services, and any proposed Service Term and/or the Revenue Commitment in accordance with DYOPATH’s then applicable rates and charges.



- 2.2 Acceptance by DYOPATH: Upon execution by both parties of an MSA including the Client Order Form and Service Description (Attachment A), DYOPATH will provide a tentative delivery date for the requested Service(s). DYOPATH will initiate delivery of the ordered Service, upon the Client's compliance with the terms established for delivery of the Service and the Client has provided all required information and any required pre-payments. DYOPATH shall use its reasonable efforts to comply with said delivery date; provided however, DYOPATH shall not be liable if said delivery date is not met, except where any such failure to meet the delivery date results from the gross negligence, or the willful acts or omissions of DYOPATH. The Client will be responsible for applicable charges from third party vendors engaged directly by the Client, if they apply, and shall promptly pay same upon receipt of an invoice for same.
- 2.3 Credit Approval and Deposits: Client will provide DYOPATH with credit information as requested and delivery of Service is subject to credit approval. Based on other financial circumstances a deposit may be required.
- 2.4 DYOPATH Premises: Except as otherwise agreed in writing by DYOPATH, title to all Facilities (but not Client Data and Client Equipment) shall remain with DYOPATH. DYOPATH will provide and maintain the Facilities in good working order subject to the terms of this MSA. The Client shall not permit others to rearrange, disconnect, remove, attempt to repair, or otherwise tamper with any Facilities, without the prior written consent of DYOPATH, of which consent may be withheld by DYOPATH in its sole discretion. The Client shall not take any action that causes the imposition of any lien or impediment on the Facilities. In no event will DYOPATH be liable to the Client or any other Person or entity for interruption of Service or for any other loss, expense, cost, or damage caused or related to improper use or maintenance of the Facilities by the Client or third parties provided access to the Facilities by the Client in violation of these terms. The Client shall indemnify and reimburse DYOPATH for any direct or indirect damages, losses or claims (including reasonable attorney's fees) incurred as a result of the improper use or maintenance of the Facilities by the Client or third parties provided access to the Facilities by the Client.
- 2.5 Client-Provided Equipment: DYOPATH may install at the Facilities with the Client's prior written consent certain Client Equipment ("Client Furnished Equipment"). Upon installation of Service, DYOPATH will not be responsible for the operation or maintenance of any Client Furnished Equipment, unless the Client specifically contracted in writing for such Service in accordance with a Client Order and subject to the limitations contained herein. The Client warrants that it has rights to all Client Equipment that will be installed at the Facilities. DYOPATH acknowledges and agrees that the Client retains all right, title, and interest in and to all Client Furnished Equipment. DYOPATH shall not place any liens or impediments on the Client Furnished Equipment. The Client shall solely insure all such Client Furnished Equipment at full replacement value and is not relying upon DYOPATH's insurance policies for replacement coverage regardless of the reason for such loss. DYOPATH shall not permit any Person or entity to, rearrange, disconnect, remove, attempt to repair, or otherwise tamper with any Client Equipment, without the prior written consent of the Client, which consent may be withheld by the Client in its sole discretion. In no event will the Client be liable to DYOPATH or any other Person or entity for any other loss, cost, or damage caused or related to improper use or maintenance of the Client Equipment by DYOPATH or third parties provided access to the Client Equipment in violation of these terms. DYOPATH shall



indemnify and reimburse the Client for any direct or indirect damages or claims incurred as a result thereof. It is expressly agreed that, in the event of default by Client in the payment of any sum due from Client to DYOPATH under the terms of this Agreement, DYOPATH shall have a lien upon all Client Furnished Equipment that is placed in, or become a part of, the Facilities as security for amounts due hereunder. Client grants to DYOPATH a security interest in all of Client's property placed in or on the Facilities for purposes of this contractual lien. In the event of a default by Client under the terms of this Agreement, DYOPATH may take possession of all of Client's property at the Facilities and sell it at public or private sale after giving Client reasonable notice of the time and place of any public sale or of the time after that any private sale is to be made, for cash or on credit, for such prices and terms as DYOPATH deems best, with or without having the property present at the sale. The proceeds of the sale shall be applied first to the necessary and proper expense of removing, storing, and selling such property, then to the payment of any amount due or to become due under this Agreement, with the balance, if any, to be paid to Client. DYOPATH shall have the right to file a UCC-1 Financing Statement to perfect such lien.

- 2.6 **Due Diligence:** As applicable to the Services outlined in the MSA Attachment A, DYOPATH may perform discovery on all systems and infrastructure to ensure thorough understanding of the entire network and established connections to outside entities. The functions necessary to complete the scope of the Due Diligence will be agreed upon by the Parties.
- 2.7 **Transition Services:** As applicable to the Services outlined in the MSA Attachment A, DYOPATH may perform all services, functions, and responsibilities necessary to accomplish the transition of operations and functions comprising the scope of the Transition Plan as agreed to by the Parties.
- 2.7.1 Transition-In Services to be performed in accordance with a Transition Plan, shall be delivered upon completion of due diligence, shall be performed in such a manner as not to disrupt or cause any unnecessary adverse impact to the Client's business or operations, except to the extent that DYOPATH has provided the Client with reasonable advance notice of such impact and the Client has agreed in writing that such impact is acceptable. DYOPATH will work closely, throughout the transition with the Client, to certify that the Services are provided without interruption.
- 2.7.2 Transition-Out Services to be performed in accordance with a Transition Plan shall be performed in such a manner as not to disrupt or cause any unnecessary adverse impact to the Client's business or operations, except to the extent that DYOPATH has provided the Client with reasonable advance notice of such impact and the Client has agreed in writing that such impact is acceptable. DYOPATH will work closely, throughout the transition with the Client, to certify that the Services are provided without interruption.
- 2.7.3 Upon a Termination Event, DYOPATH will, if applicable, prepare and submit a termination proposal to include cost impacts associated with the transition of services to a new Client IT provider. The cost associated with the transition will be invoiced on a T&M basis. DYOPATH will cooperate and assist the Client and the Client's new IT provider, if any, to provide for a smooth transition of the Services that are the subject of the Termination Event or all then-existing Service if the Agreement is being terminated in its entirety. Without limiting the foregoing, DYOPATH will perform the following:



- a) promptly deliver to the Client all Client Data hosted by DYOPATH in a format that is readily usable by the Client in the ordinary course of its business, including without limitation data stored on the network, emails, and Client Data stored on backup tapes or devices;
- b) cooperate and assist in the coordination of the transfer of Client Data from DYOPATH's disaster recovery system, if applicable;
- c) provide reports regarding the status of, provide inventories of, and meet with the Client to discuss and facilitate the transition of, all software, software licenses, and Client Equipment managed by DYOPATH and any on-going projects then being managed by DYOPATH for the Client;
- d) provide the most recent weekly and monthly reports (if not already provided) as required by the SLAs;
- e) provide a report of all open Service Desk requests, if applicable;
- f) provide reasonably detailed documentation of the network and system configuration;
- g) provide virtual server images/sessions; and
- h) otherwise cooperate with the Client in a professional manner to facilitate a smooth transition of the Services to the Client or to the Client's new IT provider.

2.8 Services outside the Scope of the Agreement: Prior written approval of the Client is required for all services performed outside the scope of the Agreement. DYOPATH will issue a Modification to the MSA Attachment A to incorporate scope increase and related price changes.

2.9 Modifications: The parties hereto may modify this MSA to include the Attachments hereto upon written agreement signed by both parties. The Client and DYOPATH agree to review the support requirements quarterly or as significant changes in the number of end users occur. If required, a MSA Modification will be prepared to revise the pricing set forth in the pricing matrix of the Applicable Client Order and will be revised to reflect any changes based on the number of users as set forth in the pricing matrix. Installation, testing, and rollout of new systems and applications will be considered a new Service and will require a MSA Modification to the Applicable Client Order and a new pricing schedule will be provided for such new Services. If a system or application is retired or discontinued, then the pricing schedule set forth in the Applicable Client Order will be revised to remove the appropriate resources by MSA Modification.

## **SECTION 3 BILLING AND PAYMENT**

### **BILLING INFORMATION**

3.1 Commencement of Billing and Usage Based Services: With the exception of orders for hardware and software as set forth in Section 3.1(b) below, DYOPATH will deliver to the Client a Connection Notice via email upon installation and testing, if applicable, of the Service ordered in any Attachment A. The Client will have five (5) business days to provide written notification via email, to the DYOPATH Program Manager, Sales Representative and/or Contract Administrator, detailing Service(s) that are not installed and functioning in accordance with the applicable Attachment A. Following the delivery to DYOPATH Program Manager of such notification, DYOPATH will work with the Client to resolve the outstanding issues. DYOPATH will bill client based upon usage-based



services and current rates. Clients on a month-to-month contract can increase or decrease the Usage Based services by any amount. Clients committed to a term contract (12, 24, or 36-month, or any number of months above a month-to-month contract) can scale up as much as necessary and can scale down by an amount equal to 10% of the current usage-based amount.

- a) Billing will occur on the applicable Service Commencement Date regardless of whether the Client has procured services from third-party vendors (i.e., equipment suppliers, software developers, telecommunication carriers, etc.) required to operate the Service and regardless of whether the Client is otherwise prepared to accept delivery of ordered Service.
- b) For hardware and software orders, the Client will be invoiced upon the Client's written approval of such hardware and software orders.

3.2 **Pre-Payment:** Subject to the terms of the Applicable Client Order, prior to installation, the Client will be required to pay the sum (the "Pre-Payment Amount") of the total Non-Recurring Charges (NRC) specified in the related final Client Order.

3.2.1 **First Invoice.** The first invoice will be sent to the Client on the fifth (5<sup>th</sup>) business day following MSA execution. This invoice will be for all Non-Recurring Charges (NRC).

3.2.2 **Payment of First Invoice.** Payment will be based on Net 30 payment terms after receipt of invoice. Payment of initial invoice will be considered late if not received within 30 days of the Client's receipt of the invoice. Past due amounts will be subject to finance charges as provided below.

3.3 **Invoicing:** Monthly Recurring Charges (MRC) will be invoiced on the 1<sup>st</sup> day of each month for that month of service (e.g. August 1-August 31 will be billed on August 1). DYOPATH will bill usage based Services in arrears as determined by DYOPATH's monitoring systems or as otherwise provided by the Attachment A. For partial months of Service, billing is prorated based on a calendar month unless otherwise agreed.

3.3.1 **Travel:** DYOPATH may be required to travel to the Client's location to render support. Client will reimburse DYOPATH for all reasonable, allowable, allocable, and pre-approved travel expenses and transportation allowances for any DYOPATH personnel or subcontractors traveling in connection with the performance of the Attachment A in accordance with Internal Revenue Regulations or Federal Travel Regulations, if applicable. Allowable expenses will include: hotel (based on per diem), transportation (economy airfare, taxi, shuttle to and from airports, bus, POV, etc.), M&IE (meals and incidentals based on per diem), and miscellaneous expenses as appropriate (taxes, gratuities as appropriate and business expenses of the SOW).

For current per diem rates: <http://www.gsa.gov/portal/category/100120>

3.3.2 **Payment of Invoices:** Payment will be based on Net 30 payment terms after receipt of invoice. All invoices become past due thirty (30) days from receipt of invoice. Past due amounts bear interest at a rate of 18% per annum, simple interest (prorated on a daily



basis) or the highest rate allowed by law, whichever is less. In the event of a late payment, DYOPATH may suspend Services hereunder as provided in Section 4.1. In the event DYOPATH is unable to deliver Service as a result of Force Majeure, the Client shall not be obligated to pay DYOPATH for the affected Service for so long as DYOPATH is unable to deliver such Service.

- 3.4 **Additional Fees:** The Client shall pay all federal, state, local taxes, telecommunication taxes, universal fund fees, charges, surcharges, or similar fees imposed on the Services and/or products that are the subject of the Agreement. DYOPATH shall have the right to recover from the Client the amount of any fees or charges arising as a result of this Agreement. Such fees or charges shall be invoiced to the Client in the form of a surcharge included on the Client's invoice. DYOPATH shall be responsible for and shall pay all taxes measured by DYOPATH's net income and all ad valorem, personal and real property taxes imposed on DYOPATH's (and not the Client's) owned or leased property. The Client is responsible for payment of all taxes based on the Client's income and all ad valorem, personal and real property. The Client shall provide DYOPATH any and all documentation substantiating a claim for exemption from taxes or fees prior to the date that Services are first provided under the Agreement. To the extent such documentation is held invalid for any reason, the Client shall reimburse DYOPATH for any tax or fee liability including without limitation related interest and penalties arising from such invalid documentation. The Client acknowledges that there may be uncertainty about the regulatory classification and/or treatment of some of the Services DYOPATH provides and, consequently, uncertainty about what fees, taxes, and surcharges are due from DYOPATH and/or its clients. The Client agrees that DYOPATH has the right to determine, in its sole discretion, what fees, taxes, and surcharges are due and to collect and remit them to the relevant governmental authorities, and/or to pay and pass them through to the Client. The Client hereby waives any claims it may have regarding DYOPATH's collection or remittance of such fees, taxes, and surcharges; provided that DYOPATH shall refund the Client for any such fees, taxes, and surcharges collected that are later determined to not be payable.
- 3.5 **Regulatory and Legal Changes:** Both the Client and DYOPATH shall comply with all federal, state, and local statutes and regulations regarding or related to the Client or DYOPATH's (as applicable) conduct of activities in connection with the provision of Services hereunder, including as described in Section 6.5 (Intellectual Property). In the event of any change in applicable law, regulation, decision, rule, or order that increases the costs or other terms of delivery of Service provided, however, that any increase in cost to DYOPATH will be a pass-through expense that will be charged to Client and same shall reflect the pro-rata portion of such increase attributable to Services to Client relative to all DYOPATH's clients.
- 3.6 **Disputed Invoices:** If the Client disputes any portion of a DYOPATH invoice, the Client must pay the undisputed portion of the invoice in accordance with the terms and conditions of this MSA and the Applicable Attachment A and submit a written claim with associated reasons to DYOPATH Accounts Receivable with a copy to [ar@DYOPATH.com](mailto:ar@DYOPATH.com), for the disputed amount. All claims must be submitted to DYOPATH within twenty (20) business days from the invoice date for those Services. The Client waives the right to dispute any charges not disputed within the time frame set forth above. In the event that the dispute is resolved against the Client in accordance with





the procedures hereunder, Client shall pay such amounts plus interest at the rate referenced above.

- 3.7 Termination Charges: In the event that, prior to the end of the Service Term, the Client terminates Service under Section 4.1 below, Client shall pay termination charges. Such termination charges shall be computed in accordance with Section 4 of this MSA.
- 3.8 Charges in connection with Services: The Client is responsible for all charges as incurred hereunder (a) by an authorized representative of the Client and (b) pursuant to the terms and conditions set forth hereunder and in the Applicable Client Order; provided that the Client shall not be liable for any charges incurred hereunder as a result of default or any non-compliance to the MSA by DYOPATH.
- 3.9 Fraudulent Use of Client Related Services by Client Personnel: Client is responsible for all charges incurred for Service by Client Personnel, even if incurred as the result of fraudulent or unauthorized use of Service.
- 3.10 Service Term: Except as otherwise set forth in the Agreement, DYOPATH shall deliver the Service(s) for the entire duration of the Service Term and Client shall pay all charges for delivery thereof through the end of the Service Term (i.e. the latter term identified on the Attachment A(s)), plus any Termination Charges as defined herein. The Service Term shall automatically renew for a like term, under the same terms and conditions contained in this Agreement, at DYOPATH then current prices and rates, unless either party gives ninety (90) day's written notice to the other, sent via certified mail, return receipt requested, of its intent to cancel this Agreement or the Service Description Attachment A.
- 3.11 Price Change: Prices are based upon the Client Order Agreement and are subject to change with thirty (30) days prior written notice to the Client.

## **SECTION 4 TERMINATION**

### **4.1 Termination for Convenience:**

Either party may terminate the Agreement upon ninety (90) days prior written notice to the other party. Upon such notification, the final month will be invoiced to client no later than 30 days prior to termination of the DYOPATH MSA and due upon receipt. Upon completion of the termination, any remaining MRCs, NRCs, third party, or time and materials, etc. charges will be invoiced and due upon receipt. No Client data or data backups will be retained beyond Client termination date. Data will be permanently deleted within 24 hours of the Client termination date. All client owned material and equipment will be released upon payment in full of final invoice(s).

In the event that, prior to the end of the Service Term, the Client terminates the Agreement pursuant to this Section 4.1, the Client shall pay a Termination Charge equal to:



<u>Termination Charge</u>
75% of the Remaining Contract Balance

In addition, Client shall pay a termination charge which equals the costs incurred on behalf of Client by DYOPATH for any service or product not covered by current Client Order Form(s) ("Attachment A").

Client agrees that they are responsible for all monthly recurring costs for any term remaining on any dedicated services or equipment procured from a third party for the sole benefit of the client; for example, MPLS or Internet circuit; which commences upon installation and acceptance of the services or equipment by the Client.

#### 4.2 Termination for Default:

4.2.1 Either party may upon thirty (30) days written notice terminate the Agreement, and in the case of the Client, without incurring a Termination Charge, for default by the other party in any of the following circumstances:

- a) An order is made or an effective resolution is passed for the dissolution or discontinuation or termination of the other party except for a merger, consolidation, or restructuring; or,
- b) Either party takes possession or a receiver is appointed over the whole or any part of the undertaking or assets of the other party impacting this Agreement; or
- c) The other party materially breaches a provision of the contract and fails to cure such breach within ten (10) business days of receipt of written notice from the other party demanding such cure.

4.2.2 The Client may terminate the Agreement prior to the end of the Service Term as outlined on the MSA Attachment A, without liability, including, without limitation, incurring a Termination Charge, by notifying DYOPATH of its election to terminate pursuant to this Section 4.2.2 and the effective date of such termination if one or more of the following occurs:

- a) DYOPATH files for bankruptcy or fails to discharge an involuntary petition within sixty (60) days of the filing of such involuntary petition;
- b) DYOPATH violates any law, rule, regulation or policy of any governmental authority related to Services and which violation (i) was not caused in whole or in part by the Client and (ii) could reasonably be expected to expose the Client to liability for such violation (provided, however, that if DYOPATH is able to cure the



effects of such violation within ten (10) business days of becoming aware of such violation, the Client may not terminate the Agreement);

- c) DYOPATH makes a material misrepresentation to the Client in connection with the Agreement or the delivery of Service (provided, however, that if DYOPATH is able to cure such misrepresentation within ten (10) business days of becoming aware of such misrepresentation, the Client may not terminate this Agreement); or
- d) A court or other governmental authority prohibits DYOPATH from furnishing Service under the Agreement.

4.2.3 DYOPATH may terminate the Agreement prior to the end of the Service Term as outlined on the MSA Attachment A, without liability, by notifying the Client of its election to terminate pursuant to this Section 4.2.3 and the effective date of such termination if one or more of the following occurs:

- a) The Client files for bankruptcy or fails to discharge an involuntary petition within sixty (60) days of the filing of such involuntary petition;
- b) Invoice amounts, not including amounts being disputed under Section 3.8, have not been paid for more than sixty (60) days past invoice receipt date and remain unpaid as of the date on which such termination notice is delivered;
- c) The Client violates any law, rule, regulation or policy of any governmental authority related to Services and which violation (i) was not caused in whole or in part by DYOPATH and (ii) could reasonably be expected to expose DYOPATH to liability for such violation (provided, however, that if the Client is able to mitigate the effects of such violation within ten (10) business days of becoming aware of such violation, DYOPATH may not terminate the Agreement or discontinue Services);
- d) The Client makes a material misrepresentation to DYOPATH in connection with the ordering or delivery of Service or SLA, which misrepresentations expose DYOPATH to materially higher costs to provide the Services to which such misrepresentations relate (provided, however, that if the Client is able to cure such misrepresentation within ten (10) business days of becoming aware of such misrepresentation, DYOPATH may not terminate the Agreement or discontinue Services); or
- e) A court or other governmental authority prohibits DYOPATH from furnishing Service under the Agreement.

4.3 After receipt of a notice of termination, DYOPATH shall immediately stop work as specified in the notice and place no further orders for materials, services, or facilities.

4.4 Notwithstanding any provisions to the contrary, in the event that, prior to the end of the Service Term, the delivery of Service(s) is terminated due to a failure of DYOPATH to comply with the terms and conditions of the Agreement, the Client shall not be obligated to pay any Termination Charges.



## SECTION 5 LIABILITIES

- 5.1 Service Interruptions and Delivery: DYOPATH provides specific remedies regarding installation of Services and availability of Services. In the event of a failure to deliver the Services, the Client's sole remedies shall be as set forth in this Section 5 and in Section 4. The Client acknowledges that DYOPATH is relying on said limitation of remedies set forth in this Section 5 and Section 4 in agreeing to provide Services to the Client.
- 5.2 Limitation on Damages: Notwithstanding any other provision hereof, neither party shall be liable for any punitive, exemplary, special, indirect, incidental, or consequential damages arising out of or relating to this Agreement, regardless of the legal theory under which such damages are sought, and even if the Parties have been advised of the possibility of such damages or loss.
- 5.3 Limitation of Liability: The Client agrees that the sole remedies for the breach of any of the warranties contained in the Agreement, including without limitations, liability for patent or copyright infringement, shall be limited to the remedies expressly stated in this MSA. THE TOTAL LIABILITY, IF ANY, OF DYOPATH (INCLUDING, AS APPLICABLE, ITS SUBSIDIARIES, PARENT AND SUBSIDIARIES OF ITS PARENT, ITS LICENSORS, EMPLOYEES, OFFICERS, DIRECTORS, MANAGERS, EQUITYHOLDERS, LENDERS AND AGENTS AND AFFILIATES THEREOF) IN THE AGGREGATE OVER THE TERM OF THIS AGREEMENT FOR ALL CLAIMS, CAUSES OF ACTION, LOSSES OR LIABILITY WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE ARISING UNDER OR IN ANY WAY RELATED TO THIS AGREEMENT AND/OR THE SERVICES PROVIDED HEREUNDER (COLLECTIVELY, "CLAIMS"), SHALL BE LIMITED TO THE LESSER OF: (A) CLIENT'S DIRECT DAMAGES, ACTUALLY INCURRED, OR (B) THE TOTAL FEES PAID BY CLIENT TO DYOPATH IN THE MOST RECENT SIX (6) MONTH PERIOD PRIOR TO THE DATE OF THE CLAIM.
- 5.4 LIMITED WARRANTY: With respect to each Service provided under the Agreement, DYOPATH warrants to the Client that, for a period of ninety (90) calendar days after the date of delivery of such Service to Client ("Client Service Warranty Period"), such Service will substantially conform to any applicable functional specifications for such Service that are described in the applicable Service Level Agreement or modification thereto. If any Service does not perform as expressly warranted in this Section 5.4, Client will notify DYOPATH in writing and DYOPATH will, at its sole option and expense: (a) replace or modify such Service with a Service that performs as expressly warranted in this Section 5.4 or (b) if DYOPATH determines that the foregoing is not commercially reasonable, refund to the Client the prices paid by the Client associated with such Service under the Agreement. The foregoing limited warranty does not cover repair or replacement of or refunds for Client Service, if the nonconformity to such limited warranty is caused, in whole or in part, by: (i) alteration, modification, or correction other than by DYOPATH or a third party engaged by DYOPATH; (ii) software, hardware, or interfacing not provided or specified in the applicable Service Level Agreement by DYOPATH or a third party engaged by DYOPATH; (iii) abuse, misuse, or improper installation other than by DYOPATH or a third party engaged by DYOPATH; or (iv) a change to the Client's computing environment that would affect the specific Service. THE FOREGOING PROVISIONS OF THIS SECTION 5.4 STATES THE ENTIRE LIABILITY AND OBLIGATIONS OF DYOPATH, AND THE EXCLUSIVE REMEDY OF THE CLIENT, WITH RESPECT TO ANY BREACH OF THE LIMITED WARRANTY IN THIS SECTION 5.4.



5.5 Disclaimer: EXCEPT FOR THE LIMITED WARRANTIES SET FORTH IN SECTION 5.4 and 5.6, DYOPATH DOES NOT MAKE ANY OTHER REPRESENTATIONS, WARRANTIES OR CONDITIONS OF ANY KIND, WHETHER ORAL OR WRITTEN, WHETHER EXPRESS, IMPLIED, OR ARISING BY STATUTE, CUSTOM, COURSE OF DEALING OR TRADE USAGE, WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT, IN CONNECTION WITH THIS AGREEMENT. DYOPATH SPECIFICALLY DISCLAIMS ANY AND ALL IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. DYOPATH DOES NOT WARRANT THAT THE CLIENT SERVICE(S) OR ANY SERVICES PROVIDED UNDER THIS AGREEMENT WILL MEET CLIENT'S REQUIREMENTS, THAT THE OPERATION OF THE CLIENT SERVICE(S) WILL BE UNINTERRUPTED OR ERROR FREE, OR THAT DEFECTS IN THE CLIENT SERVICE(S) WILL BE CORRECTED.

5.6 DYOPATH represents and warrants that:

- a) DYOPATH is duly licensed, authorized, and qualified to do business and is in good standing in every jurisdiction in which a license, authorization, or qualification is required for the ownership or leasing of its assets or the transaction of business of the character transacted by it, except where the failure to be so licensed, authorized or qualified would not have a material adverse effect on DYOPATH's ability to fulfill its obligations under or otherwise perform the Agreement;
- b) There is no outstanding litigation, arbitrated matter, or other dispute to which DYOPATH is a party which, if decided unfavorably to DYOPATH, and there are no outstanding judgments against DYOPATH, would have a material adverse effect on DYOPATH's ability to fulfill its obligations under or otherwise perform the Agreement;
- c) DYOPATH is capable of providing, and possesses the resources, capacity, expertise, and ability necessary to provide, the Services in accordance with the Agreement and the Services shall be rendered with promptness and diligence and be executed in a professional manner;
- d) DYOPATH has all rights and licenses necessary to convey to the Client the ownership (or license or usage rights, as applicable) of all materials, Work Product, and any other resources or items provided or made available by or through DYOPATH, free and clear of any and all restrictions, settlements, judgments, adverse claims, liens, and other impediments;
- e) None of the Services or any other resources or items provided or made available by or through DYOPATH, or any part of them, nor their receipt, possession or use by the Client, shall violate, infringe upon or constitute an infringement or misappropriation of any Intellectual Property or other proprietary rights of any third party; and
- f) Without limiting DYOPATH's obligations under the Agreement, DYOPATH shall ensure that no Destructive Elements are coded or introduced into the Services or Work Product by DYOPATH or DYOPATH's agents, and shall use commercially reasonable efforts to prevent from being coded or introduced into the Services, Work Product by any third party. If DYOPATH becomes aware that a Destructive Element has been introduced into the Services, or Work Product, DYOPATH shall mitigate the effects of the Destructive Element and, if the Destructive Element causes a loss of operational efficiency or loss of data, mitigate and restore such losses. With respect to any Destructive Elements that may be part of Services, or Work Product, DYOPATH shall not, nor permit any other third party to, invoke such Destructive Elements at any time, without the Client's consent.



- 5.7 **Security Procedures:** Without limiting the foregoing, the Client agrees that its employees, agents, contractors, or representatives shall not knowingly attempt, in any way, to circumvent or otherwise interfere with any security precautions, procedural controls, or any of DYOPATH's policies relating to the Services provided hereunder. Any such actions may cause a disruption in the provision of Service. Any disruption of Services which results from the violation of this Section shall be excluded from the SLA and the Client will have no right to any remedy under the SLA or otherwise with respect to such disruption; save and except where any such disruption of Services result from the negligence or willful acts or omissions of DYOPATH or a third party engaged by DYOPATH.
- 5.7.1 DYOPATH will conduct routine scheduled maintenance of its data center and data center services, as are reasonably required to maintain the facilities and service. In the event a mission critical maintenance situation arises, DYOPATH may be required to perform emergency maintenance at any time. During these scheduled and emergency maintenance periods, Client's Equipment may be unable to transmit and receive data and Client may be unable to access the Client Equipment. Client agrees to cooperate with DYOPATH during the scheduled and emergency maintenance periods. Unscheduled maintenance will not constitute an event of Default by DYOPATH.
- 5.7.2 At times, actions or inactions caused by third parties ("Third Party Actions") (e.g. denial of service attacks) can produce situations in which the Client's connections to the Internet (or portions thereof) or other portions of the Client's Service may be impaired or disrupted. DYOPATH cannot guarantee that such situations will not occur and, accordingly, DYOPATH disclaims any and all liability resulting from or related to such events (other than as set forth in this MSA). In the event that the Client's use of the Service, interaction with the internet, or use of third parties is causing harm to or threatens to cause harm to the network, its operations, or the operations of other DYOPATH clients, DYOPATH shall have the right to suspend upon 5 business days' written notice without liability the Client's Services which may be the cause of the disruption or which may be adversely impacted by the upset conditions. DYOPATH shall restore Service at such time, as it reasonably deems, that there is no further harm or threat of harm to the DYOPATH network or its operations or the operations of other DYOPATH clients.
- 5.7.3 Upon notification of the existence of an abusable resource, the Client shall immediately take all necessary steps to avoid any further abuse of such resource. Any continued abuse of an open resource that occurs after the Client has received such notification shall be considered a violation of this MSA. DYOPATH reserves the right to suspend and/or terminate a Client's Service at any time for any material failure of the Client or its Users, and such material failure was not cured within 10 business days after DYOPATH notified the Client of such material failure.

## **SECTION 6 CONFIDENTIAL INFORMATION, PUBLICITY, AND DATA PROTECTION**

- 6.1 **Confidentiality:** All Confidential Information in whatever form shall remain the property of Disclosing Party. Nothing contained in this Agreement shall be construed to grant Receiving Party



1.866.609.PATH



solutions@dyopath.com



13430 Northwest Fwy,  
Suite 1000  
Houston, TX, 77040

any license or other intellectual property rights in the Confidential Information, other than the limited right to use such Confidential Information for purposes stated in this Agreement.

- 6.2 Limitation on Disclosure: Receiving Party shall not disclose Confidential Information or permit it to be disclosed to anyone except those employees (“Representatives”) who have a need to know the Confidential Information by virtue of being actually engaged in discussions, assessments, or activities in connection with the MSA, and who have been notified of the confidential nature of the Confidential Information and have agreed to be bound by the terms and conditions of this Agreement. Receiving Party shall be responsible for any breach of this Agreement by any of its Representatives. Receiving Party shall obtain Disclosing Party’s permission in writing prior to disclosing Confidential Information to any person or party other than its permitted Representatives. Notwithstanding the foregoing, the Receiving Party may disclose Confidential Information or portions thereof in the event the Receiving Party or its Representatives become legally compelled (by any legal or similar process) to disclose any of the Confidential Information. The Receiving Party shall give prompt, prior written notice of such requirement to the Disclosing Party so that the Disclosing Party may seek a protective order or other appropriate remedy. In the event such protective order or other remedy is not sought or obtained and Receiving Party is compelled to disclose or else face a charge of contempt of court or suffer other censure or penalty, Receiving Party may disclose only such Confidential Information which is subject to such legal compulsion, only to the party required by law, and only upon using reasonable efforts to obtain written assurances that confidential treatment will be accorded such Confidential Information.
- 6.3 Publicity: Neither party hereto shall have the right to use the other party’s or its Affiliates’ trademarks, service marks or trade names or to otherwise refer to the other party in any marketing, promotional, or advertising materials or activities. Either party hereto may issue a publication or press release relating to the creation and/or operation of a business relationship between DYOPATH and the Client upon prior approval by both parties of such press release or publication, which approval shall not be unreasonably withheld.
- 6.4 Access: Client and its Affiliates shall at all times retain the right to deny, terminate, or request that DYOPATH deny or terminate access to Client’s and its’ Affiliates computer system. In addition, DYOPATH shall comply (upon receipt of written notice) with any Client request to terminate access to any Data or other Confidential Information of Client.
- 6.5 Intellectual Property: It is mutually understood and agreed that neither party shall acquire, directly or by implication, any rights in any Intellectual Property of the other party owned, controlled, acquired, developed, authored, conceived, or reduced to practice prior to the Effective Date of this MSA, including but not limited to, inventions described and claimed in applications for U.S. Letters Patent filed prior to the Effective Date of this MSA, except as expressly provided herein or in any resulting agreement between the parties. If the parties jointly make or conceive any invention or jointly create any mask work or copyrightable material (hereinafter singularly and collectively "Joint IP"), then such Joint IP shall be owned jointly by the parties unless one of the parties elects not to participate in such joint ownership; provided that any improvement or modification of any pre-existing Intellectual Property of a party shall not be considered jointly



made or conceived and any such modification shall remain the property of the party owning the Intellectual Property. Except as may otherwise be expressly provided elsewhere herein or in any resulting agreement, each owning party shall be free to use, practice and license non-exclusively such Joint IP without in any way accounting to the other owning party, except that each owning party agrees to use reasonable efforts to maintain such Joint IP as confidential and proprietary in the same manner it treats its own Intellectual Property of similar character except to the extent that the parties otherwise mutually agree in connection with seeking to obtain statutory protection such as patent protection. Procedures for seeking and maintaining statutory protection such as patents, mask work registrations, or copyrights for Joint IP shall be mutually agreed in good faith by the owning parties; provided that neither party shall unreasonably withhold its agreement to seek such protection. Any party which does not bear its proportionate share of expenses in securing and maintaining statutory protection for Joint IP in any particular country or countries shall surrender its joint ownership under any resulting patents, mask work registrations and copyright registrations in such country or countries.

6.6 Intellectual Capital: The parties acknowledge that both parties may have pre-existing professional knowledge, know how, materials, methods, and/or techniques, developed by, and/or in its possession, including those which may have been copyrighted and/or patented by such party or constitute a trade secret, prior to the Effective Date of this MSA (such party's "Intellectual Capital") which may be accessed, modified, or enhanced in the provision of Services hereunder. The parties agree that, except as specifically provided in this MSA or any agreement, the other party will not acquire title or interest to any of the other party's Intellectual Capital. Nothing in this clause shall be construed or interpreted as imposing any restriction on DYOPATH's or Client's disclosure or use of any general learning, skills, or know-how, commonly referred to as "general expertise," acquired by such party and their personnel in connection with the Services provided under this MSA, if such disclosure or use would be regarded by a person of ordinary skill in the relevant technology as not constituting a disclosure or use of the other party's confidential information.

6.7 Data Protection:

6.7.1 As between DYOPATH and Client, all Client Data is and shall remain the property of the Client. Without the prior approval of the Client, to be given or withheld in its sole discretion, Client Data shall not be (i) used by DYOPATH other than as required to provide the Services, (ii) disclosed, sold, assigned, leased, licensed or otherwise provided or made available in any manner to third parties by or through DYOPATH, or (iii) commercially or otherwise used or exploited in any form (including any derivative, individualized, anonymized, or aggregated form) by or on behalf of DYOPATH.

6.7.2 DYOPATH acknowledges that Client Data includes confidential information, including confidential information of tenants, vendors, and other third parties with whom Client directly or indirectly conducts business. As used herein, "Personal Information" includes Social Security Numbers, driver's license numbers, or state-issued identification card numbers, financial account numbers, credit or debit card numbers, with or without any required security code, access code, personal information number or password, that





would permit access to the person's financial account and any other information of a personal nature the confidentiality of which is protected by Federal or applicable state law. DYOPATH shall maintain the confidentiality of such Personal Information as required by such laws.

a) Security and Vulnerability Testing

Client must use reasonable security precautions in its use of the DYOPATH Cloud Systems, including encrypting any personally identifiable information (PII), Protected Health Information ("PHI" – as defined by the US Department of Health & Human Services), and Cardholder Data (as defined by the Payment Card Industry Data Security Standard) transmitted via, or stored on, the DYOPATH Cloud Systems and accepts all risks related thereof. Client releases DYOPATH for all related liability with respect to its use of the DYOPATH Cloud Systems. All systems must have Malware\Endpoint protect installed on all servers, and if not, client accepts all responsibility of potentially security vulnerabilities. DYOPATH will not be held liable if client does not use reasonable security precautions to secure PII, PHI, or PCI data. DYOPATH will not be held liable if PII, PHI, or PCI data is being stored on DYOPATH Cloud Systems. Client must immediately notify DYOPATH of any unauthorized use of the client account or any other breach of security involving the DYOPATH Cloud Systems and cooperate in the investigation thereof.

- 6.7.3 DYOPATH will comply, and will cause its personnel to comply, with the terms of the applicable Privacy Policy to the extent related to the Services provided by DYOPATH. Client reserves the right to update such Privacy Policy Regarding Personal Information from time to time and provide such updated Privacy Policy Regarding Personal Information to DYOPATH, and DYOPATH shall likewise comply with, and shall cause its personnel to comply with, such updated Privacy Policy Regarding Personal Information.
- 6.7.4 DYOPATH will at all times maintain a privacy policy for its company and personnel that meets the required level of privacy described above. DYOPATH shall establish, implement, maintain, and comply with a comprehensive written information security program that includes administrative, technical and physical safeguards against the disclosure, access, destruction, loss, damage and alteration of Client Data in the possession or control of DYOPATH that shall be no less rigorous than the most stringent of (i) DYOPATH's then current data security requirements for data of a similar nature, or (ii) any higher data security requirements required by Law. Without limiting the immediately preceding sentence, DYOPATH shall use commercially reasonable efforts, including through systems security measures, to guard against the unauthorized disclosure, access, destruction, loss, damage and alteration of Client Data.
- 6.7.5 Unless otherwise agreed, DYOPATH shall process and store all Personal Information in the United States of America and shall not transfer, process, or maintain Personal Information in any other jurisdiction without the prior consent of the Client.



- 6.8 Destruction and Return of Confidential Information: Upon termination of this Agreement or upon the request of the Disclosing Party, Receiving Party shall destroy or return to Disclosing Party any Confidential Information in physical or electronic form in its possession; provided that Receiving Party may maintain an archived file copy of a document or other item containing Confidential Information residing in its automatic backup systems, provided that all such copies shall remain subject to the obligations hereunder regarding confidentiality and use of Confidential Information for so long as they are retained.

## **SECTION 7 INSURANCE**

- 7.1 Coverage: The Client is responsible for the repair and maintenance (except to the extent Services include repair and maintenance services) and insurance against loss of Client Equipment. DYOPATH shall not be liable for any loss of or impairment to the Services provided hereunder or damages to any Client Equipment due to a malfunction or defect in any Client Equipment; save and except where any such loss or impairment to the Services or damages result from the negligence or willful acts or omissions of DYOPATH.
- 7.1.1 DYOPATH shall at all times during the term of this Agreement carry and maintain at its sole cost and expense the following insurance coverage with not less than the amounts enumerated below:
- a) Commercial General Liability: combined single limit bodily injury, personal injury, and property damage with a limit of not less than \$1,000,000 each occurrence, General Aggregate \$2,000,000
  - b) Workers' Compensation Insurance (or maintenance of a legally permitted and governmentally approved program of self-insurance) covering DYOPATH's employees pursuant to applicable state workers' compensation laws for work related injuries suffered by employees of DYOPATH (including DYOPATH employees working at the Client's offices);
  - c) Automobile Liability Insurance: including all owned, leased, hired and non-owned autos, combined single limit bodily injury and property damage, with limits of not less than \$1,000,000 each occurrence;
  - d) E & O Liability / Professional Liability: with limits of not less than \$5,000,000 each occurrence, General Aggregate \$5,000,000; and
  - e) Excess/Umbrella Liability: with limits of not less than \$10,000,000 each occurrence, General Aggregate \$10,000,000.
- 7.2 Certificate of Insurance: Upon request by Client, within ten (10) business days of commencement of services or conveyance of Client Service(s) under this Agreement, DYOPATH shall provide Client a certificate of insurance evidencing the coverage is in full force and effect as outlined in Section 7.
- 7.3 Policy Notice: Each policy of insurance referenced in Section 7.1 shall: (i) provide Client no less than thirty (30) days advance written notice of the expiration, termination, cancellation, or modification of such policy.



## SECTION 8 GENERAL TERMS

- 8.1 Service Level Agreement, Attachment B: Attachment B for the Services described in Attachment A applies only to clients agreeing to a term commitment of at least twelve (12) months. DYOPATH shall not amend Attachment B without the prior consent of the Client. The parties' records and data shall be the basis for all Service Level(s) calculations and determinations set forth in Attachment B.
- 8.2 Force Majeure: Neither party hereto shall be liable, nor shall any remedy be extended, for any failure of performance or equipment due to causes beyond such party's reasonable control including but not limited to acts of God, fire, acts or omissions of suppliers, flood or other catastrophe, any law, order, or regulations or request of any governmental entity, national emergency, terrorist activities, insurrections, riots, work stoppages or disruptive labor activities, global or natural disasters or other events beyond the reasonable control of a party ("Force Majeure").
- 8.3 Assignment: Neither party shall assign its rights and obligations under this Agreement without the express prior written consent of the other Party; provided that Parties may assign its' rights and obligations under this Agreement and any attachments hereto, to an Affiliate without the consent of other Party and provided further, DYOPATH may assign its' rights and obligations under this Agreement and any attachments hereto, to a purchaser of substantially all of its assets without the consent of Client. DYOPATH will not unreasonably withhold its consent to a proposed assignment provided that these terms shall apply to any permitted transferees or assignees that shall in writing fully accept all the terms and conditions contained herein. The Client shall remain liable for the payment of all charges due under each Attachment A until a fully executed assignment is received from the Client. Once all terms and conditions have been accepted by assignee and a fully executed assignment is received by DYOPATH, the Client will be released from all payment obligations hereunder.
- 8.4 Notices: All Notices, request, demands, and other communications under this Agreement must be in writing and will be deemed duly given unless otherwise expressly indicated to the contrary in this Agreement: (1) when personally delivered; (2) upon receipt of a telephone facsimile transmission with a confirmed telephonic transmission answer back; (3) three (3) days after having been deposited in the United States mail, certified or registered, return receipt requested, postage prepaid; (4) when delivered via electronic commerce (e.g. e-Mail), or (5) one (1) business day after having been dispatched by a nationally recognized overnight courier service, addressed to the addresses identified on the Attachment A Client Order Form Service Description.
- 8.5 Mutual Indemnification: Each party (as the "Indemnifying Party") shall indemnify, defend, and hold harmless the other party (as the "Indemnified Party"), their Affiliates, officers, directors, employees, agents, and other representatives from and against any and all claims, demands, losses, liabilities, damages, expenses (including reasonable attorney fees) and causes of action (hereinafter "Claims") caused by or resulting from the sole fault, negligent or reckless acts or omissions of the Indemnifying Party, its officers, employees, agents, contractors, licensees or invitees in connection with the performance of the Agreement. Any Claims that are the result of gross negligence or reckless acts or omissions of the parties, their respective officers, directors,



employees, agents, contractors, licensees, or invitees shall be apportioned on a comparative fault basis, and each party shall indemnify the other party for any liabilities and damages assessed against them in excess of their percentage of liability. This provision shall survive the termination of the Agreement.

- 8.6 **Infringement:** If one party (“Indemnitee”) promptly notifies the other party (“Indemnitor”) in writing of a third party claim against Indemnitee that any material provided to Indemnitee by Indemnitor hereunder infringes a United States patent in existence as of the date of this Agreement, a copyright or a trade secret of any third party, Indemnitor will defend such claim and control the legal proceedings of such claim at its expense and will pay any costs or damages that may be finally awarded against Indemnitee provided that Indemnitee promptly notifies Indemnitor in writing of the claim, cooperates with Indemnitor, and allows Indemnitor sole authority to control the defense and settlement of such claim. Indemnitor will not indemnify Indemnitee, however, if the claim of infringement is caused by (1) Indemnitee's misuse or modification of such material; (2) Indemnitee's failure to use corrections made available by Indemnitor; (3) Indemnitee's unauthorized distribution, marketing or use for the benefit of third parties of such material or (4) information, direction, specification or materials provided by Indemnitee or any third party. If any such material is, or in Indemnitor’s opinion is likely to be, held to be infringing, Indemnitor shall at its expense and option either (a) replace it with a non-infringing equivalent, (b) modify it to make it non-infringing or (c) direct the return of the such material. The foregoing remedies constitute Indemnitee's sole and exclusive remedies and Indemnitor's entire liability with respect to infringement.
- 8.7 **Application of Tariffs:** DYOPATH may elect or be required to file with the appropriate regulatory agency tariffs respecting the delivery of certain Service. In the event that such tariffs are filed respecting Service ordered by Client, then (to the extent such provisions are not inconsistent with the terms of an Attachment A) the terms set forth in the applicable tariff shall govern DYOPATH’s delivery of, and Client’s consumption or use of, such Service.
- 8.8 **No Waiver:** No failure by either party to enforce any rights hereunder shall constitute a waiver of such right(s).
- 8.9 **Contractors:** The Client acknowledges that certain installation, technical support, and consulting services may be provided by an unaffiliated third party contractor (“Contractor”) to DYOPATH. The Client hereby authorizes DYOPATH to provide Contractor with access to the Client’s location, equipment, and contact information necessary to provide such Services; provided that DYOPATH shall be liable for any damages caused by Contractor. All Contractors who have access to that information are required to sign a DYOPATH Confidentiality Agreement.
- 8.10 **Disputes:** DYOPATH and the Client agree to enter into negotiation to resolve any dispute. Both parties agree to negotiate in good faith to reach a mutually agreeable settlement within thirty (30) business days. Where negotiations are unresolved by management, all disputes, controversies or differences arising in connection with the validity, execution, performance, breach, non-renewal, or termination of the Agreement, shall be finally settled in Houston, Texas in an arbitration proceeding under the Rules of the American Arbitration Association by three arbitrators in accordance with the Commercial Arbitration Rules then in effect of the American



Arbitration Association. Selection of the arbitrators shall be as follows: each party shall appoint one arbitrator within twenty (20) days after the parties have agreed to go to arbitration, and those two arbitrators shall appoint a third arbitrator who shall act as chairman, within a twenty (20) day period thereafter. If the parties fail to appoint the chairman within said period, the parties will apply to the American Arbitration Association for appointment of the third arbitrator. The parties agree to be bound by the findings of the arbitration. Notwithstanding the foregoing, the courts shall have jurisdiction over injunctive or provisional relief pending arbitration. The arbitrators shall not be empowered to award punitive damages to any party. Each party is responsible for expenses of the arbitration, including reasonable attorneys' fees and other costs and expenses incurred in connection with the prosecution or defense of such arbitration.

No claim, suit, or action, regardless of form, arising from or relating to either parties' acts or omissions in the performance of the Agreement may be brought or asserted more than four (4) years after the cause of action has accrued; provided that claims, suits, or actions arising from or relating to either parties' gross negligence or reckless, willful, or intentional acts or omissions shall be excluded from this one year limitation.

- 8.11 **Reporting:** DYOPATH shall prepare and provide to the Client the reports identified in the Service Level Agreement (SLA). If ad hoc reports should be requested by clients, DYOPATH will provide associated prices for the client's approval.
- 8.12 **Independent Contractor Relationship:** Each party is an independent contractor and as such will not have any authority to bind or commit the other. Nothing herein shall be deemed or construed to create a joint venture, partnership, or agency relationship between the parties for any purpose.
- 8.13 **Non-Solicitation:** Unless agreed to in writing between the parties, during the term of this Agreement, neither Party nor any of its affiliates will, directly or indirectly, for their own account or on behalf of any other person or entity, whether as an officer, director, employee, partner, principal, joint venture, consultant, investor, shareholder, independent contractor, or otherwise, hire or employ, or attempt to hire or employ, in any fashion (whether as an employee, independent contractor, or otherwise), any employee or independent contractor of the other Party, or solicit or induce any of Party's employees, consultants, Clients, vendors, suppliers, or independent contractors to terminate their relationship with Party.
- 8.14 **Evidence, Status of Agreement, and Prior Understandings:** This Agreement and the attached and incorporated exhibits, if any, contain the entire Agreement of the parties and there are no representations, inducements, promises, agreements, arrangements, or undertakings, oral or written, between the parties to this Agreement other than those set forth in this Agreement and duly executed in writing.
- 8.15 **Corporate Authority:** If any party to this Agreement is a legal entity, including, but not limited to, an association, corporation, joint venture, limited partnership, partnership, or trust, that party represents to the other that this Agreement and the transactions contemplated in this Agreement and the execution and delivery hereof have been duly authorized by all necessary corporate,



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partnership, or trust proceedings and actions including, but not limited to, actions on the part of the directors, officers, and agents of the entity.

- 8.16 State Law and Venue Determination: This Agreement shall be subject to and governed under the laws of the State of Texas. Any and all obligations and payments are due and performable and payable in Harris County, Texas. The parties agree that venue for purposes of any and all lawsuits, causes of action, arbitrations, or other disputes shall be in Harris County, Texas.
- 8.17 Severability: If any provision of this MSA is or becomes void or unenforceable by force or operation of law, all other provisions shall remain valid and enforceable.
- 8.18 Survival: The provisions of Articles 5.2, 5.3, 5.4, 5.5, 6, 8.5, 8.6, and 8.13 shall survive termination hereof for any reason. The rights and obligations under this Agreement shall survive any merger or sale of either party and shall be binding upon the successors and permitted assigns of each party.

**[End of Managed Services Agreement]**



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solutions@dyopath.com



13430 Northwest Fwy,  
Suite 1000  
Houston, TX, 77040