Terms of Service

These Terms of Service are by and between 8bitstudio Design LLC ("8bitstudio"), with its principal place of business located at 720 Century Avenue Southwest, Suite 114, Hutchinson, Minnesota, 55350, and the client identified in the Statement of Work ("Client"), to which these Terms of Service are attached. These Terms of Service, along with a "Statement of Work" if any, and policies and agreements referenced in this herein form a complete and integrated contract between the parties (collectively our "Agreement").

1. **Explanation of Services.** Here's what we do for you.

1.1.   <u>Custom Website Development</u> consists of one or more of the following services:

    1.1.1.   "Strategy" means the initial consultation and the entire planning stage of the customized project detailed in the attached Statement(s) of Work (the "Project"). During this phase, 8bitstudio typically develops the foundation for the Project and designs how the Project could or would be implemented.

    1.1.2.   "Design" means the subsequent design of the custom website.

    1.1.3.   "Development" means the build-out, development, and implementation stage of the Project.   In Development, 8bitstudio actually executes and implements the plans developed in the Strategy and Design phases.

1.2.   "Website Subscription" means the semi-customizable website design and hosting solution offered by 8bitstudio where the Client can modify content on their own.   Another key feature of the Website Subscription is the monthly billing structure explained in more detail below and in the Statement of Work.

1.3.   "Support" means website, marketing, hosting or other technical support supplied by 8bitstudio on a project or ad-hoc basis (whether or not pursuant to a Statement of Work) which are provided subject to the terms of this Agreement.

2. **Payment.** This is how we get paid.

2.1.   <u>General Payment Terms</u>.   8bitstudio may supply Client with a Statement of Work describing the work requested, the cost associated, and other payment terms.   Additional requests by Client beyond what is explicitly stated in the Statement of Work shall be paid for by Client above and beyond the pricing stated in the Statement of Work. In no event will 8bitstudio perform services or work without payment, free services, services as favors, bartered services, or otherwise discounted services unless agreed upon in writing and signed by both parties. Client shall pay the full amount reflected on any invoice as owed to 8bitstudio upon receipt but not later than thirty (30) days following Client's receipt of that invoice. Client shall pay a late charge of one and one-half percent (1.5%) per month or the maximum lawful rate, whichever is less, for all invoiced amounts not paid within thirty (30) days following Client's receipt of that invoice (the "Payment Deadline"). 8bitstudio may invoice portions of a Statement of Work separately.   8bitstudio's work may be

charged at standard billing rates which are subject to change from time to time and or special billing rates for work requested outside of normal business hours (8:30 a.m. to 5:30 p.m., Monday through Friday) on holidays, or when emergency or unscheduled work is required. Special billing rates are calculated by multiplying the Standard Billing Rate by one and one half (1.5) times, with a one (1) hour minimum requirement. Holiday Hour Rates are calculated by multiplying the Standard Billing Rate by two (2) times, with a one (1) hour minimum requirement.

2.2. <u>Website Subscription Terms</u>. To ensure uninterrupted service, 8bitstudio will automatically bill Client for a Website Subscription from the date Client submits Client's initial payment and on the first of each month afterwards until cancellation or the twenty-fourth (24th) month following Client's initial payment for a Website Subscription, whichever is later. If Client cancels a Website Subscription after the Client's initial payment and prior to the completion of the twenty-fourth (24th) month, the remaining balance remains outstanding and Client shall pay remaining balance within thirty (30) days of cancellation. 8bitstudio reserves the right to change subscription plans or adjust pricing for service or any components thereof in any manner and at any time as it may determine in its sole and absolute discretion. Except as otherwise expressly provided for in these Terms of Service, any price changes or changes to Client's subscription plan will take effect following notice to Client.

2.3. <u>Support Payment Terms</u>. 8bitstudio may provide necessary emergency technical updates (hereinafter "Technical Updates") to Client on an ongoing basis, without any notice and/or Client's consent. In general, 8bitstudio offers two (2) support payment options, the Retainer Plan and the A-la-carte Plan (defined below):

    2.3.1. Retainer. In the "Retainer Plan," Client shall pay 8bitstudio an upfront non-refundable payment (the "Retainer") for hourly technical support. All Retainers may be comingled with other 8bitstudio funds and expire one-year from the date of invoice by 8bitstudio. 8bitstudio will deduct any billed time for technical support from the Retainer.

    2.3.2. A-la-carte. Under the "A-la-carte Plan," support hours are billed on an as-needed basis. 8bitstudio will invoice Client for this as-needed support. Upon receipt of the invoice, Client shall pay 8bitstudio any outstanding balance remaining on the Client's account.

2.4. <u>Suspension of Service</u>. If Client fails to pay all amounts owed under this Agreement when due, then upon at least ten (10) business days prior written notice, and in addition to any other remedies available to 8bitstudio, 8bitstudio may suspend services and withhold Confidential Information (defined below) under this Agreement until full payment is made. Following any suspension of service under this provision, and after Client makes full payment to 8bitstudio, 8bitstudio will restore the services after validating that Client's account is in good standing and is compliant with this Agreement. Client shall pay a "Reactivation Fee" for such restoration equal to the amount of time (rounded up to the nearest whole hour) needed to complete the restoration multiplied by the Special Billing Rate at the time of reactivation. 8bitstudio's right to suspend services under this Section is in addition to 8bitstudio's right to terminate this Agreement.

    2.4.1. Notwithstanding anything to the contrary in this Agreement, 8bitstudio may immediately suspend Client's access to any portion or all of the services if:

        A. 8bitstudio reasonably determines that

(1)   there is a threat or attack on any of 8bitstudio's products and services;

(2)   Client's use of 8bitstudio's products and services disrupts or poses a security risk to 8bitstudio's products and services or to any other customer or vendor of 8bitstudio;

(3)   Client is using 8bitstudio's products and services for fraudulent or illegal activities;

(4)   subject to applicable law, Client has ceased to continue its business in the ordinary course, made an assignment for the benefit of creditors or similar disposition of its assets, or become the subject of any bankruptcy, reorganization, liquidation, dissolution, or similar proceeding; or,

(5)   8bitstudio's provision of its products and services to Client is prohibited by applicable law;

B.   any vendor of 8bitstudio has suspended or terminated 8bitstudio's access to or use of any third-party services or products required to enable 8bitstudio's or Client's access the products and services; or

C.   8bitstudio discovers or reasonably believes that Client violated 8bitstudio's Acceptable Use Policy or any other policy referenced and incorporated herein. Unless prohibited by law, 8bitstudio will use commercially reasonable efforts to provide written notice of any service suspension to Client and to provide updates regarding resumption of access to the services following any service suspension. 8bitstudio shall use commercially reasonable efforts to resume providing access to the services as soon as reasonably possible after the event giving rise to the service suspension is cured. 8bitstudio will have no liability for any damage, liabilities, losses (including, but not limited to, any loss of data or profits), or any other consequences that Client may incur as a result of a service suspension.

2.5.   <u>Payment Collection</u>.   If Client fails to make any payment when due, without limiting 8bitstudio's other rights and remedies:

2.5.1.   8bitstudio may charge late fees and/or interest on the past due amount at the rate of one and one-half percent (1.5%) per month calculated daily and compounded monthly or, if lower, the highest rate permitted under applicable law;

2.5.2.   Client shall reimburse 8bitstudio for all costs incurred by 8bitstudio in collecting any late payments and/or interest, including attorneys' fees, court costs, and collection agency fees; and

2.5.3.   If such failure continues for ten (10) days or more, 8bitstudio may suspend Client's to any portion or all of the services until such amounts are paid in full.

2.6.   <u>Payment Dispute</u>.   If Client disputes in good faith all or any portion of the amount owed to 8bitstudio, or if Client otherwise requires any adjustment to an invoiced amount, Client must notify 8bitstudio in writing, prior to the Payment Deadline, of the nature and basis of the dispute and/or adjustment. If 8bitstudio is unable to resolve the dispute prior to the Payment Deadline, Client

nevertheless shall pay the entire invoiced amount by the Payment Deadline. If 8bitstudio ultimately determines that such amount should not have been paid, 8bitstudio will apply a credit equal to such amount against any service fees owed for the following month. If no service fees are owed the following month, the credit amount may be refunded to Client.

3. Term and Termination. If we ever need to say goodbye.

3.1. Term. This Agreement shall commence on the date the Client signs the Statement of Work (the "Execution Date"). The Agreement shall remain in effect on a month-to-month basis until either party terminates it as permitted below and subject to the terms in this Agreement. This period spanning from the Execution Date until the date the Agreement is terminated (the "Termination Date") is hereinafter referred to as the "Term."

3.2. Termination. Other than a Website Subscription which carries a minimum term, either party may terminate this Agreement for cause or for convenience upon at least sixty (60) days advance, written notice given to the other party, as measured from the date that the Client completes a Cancellation Form online via a link supplied by 8bitstudio on request, or via an email by 8bitstudio to Client. However, termination of this Agreement will not, by itself, result in the termination of any service attachments, and this Agreement will remain in effect notwithstanding any notice of termination unless and until all service attachments are terminated or expire according to their terms.

    3.2.1. Termination For Cause.

        A. Nonpayment. 8bitstudio may terminate this Agreement, effective on written notice sent to Client, if Client fails to pay any amount when due hereunder, and such failure continues more than twenty-one (21) days after 8bitstudio's delivery of written notice thereof.

        B. Material Breach. Either party may terminate this Agreement, effective on written notice to the other party, if the other party materially breaches this Agreement, and such breach:

            (1) is incapable of cure; or

            (2) being capable of cure, remains uncured sixty (60) days after the non-breaching party provides the breaching party with written notice of such breach.

    3.2.2. Termination For Convenience. Either party may terminate this Agreement, effective immediately upon receipt of written notice to the other party, if the other party:

        A. becomes insolvent or is generally unable to pay, or fails to pay, its debts as they become due;

        B. files or has filed against it, a petition for voluntary or involuntary bankruptcy or otherwise becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency law;

C. makes or seeks to make a general assignment for the benefit of its creditors; or

D. applies for or has appointed a receiver, trustee, custodian, or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business.

3.2.3. Effect of Termination. Upon Termination Date, Client shall immediately discontinue use of 8bitstudio's products and services and, without limiting Client's obligations under Section 6, Client shall delete, destroy, or return all copies of 8bitstudio's information and certify in writing to 8bitstudio that 8bitstudio's information has been deleted or destroyed. No expiration or termination will affect Client's obligation to make all owed payments that may have become due before such expiration or termination, or entitle Client to any refund. Client shall be solely responsible for retrieving all Client owned content prior to the Termination Date, and all such content shall be deleted upon the Termination Date. Nothing in this Agreement shall act as an assignment, conveyance, or license of any intellectual property from 8bitstudio to Client. Should Client request or require transition support services from 8bitstudio following termination, 8bitstudio will supply Client with a Statement of Work outlining the transition support services.   If Client wishes that 8bitstudio proceed with the transition support services contained in the Statement of Work, Client shall pay 8bitstudio the entire balance in advance and prior to 8bitstudio's commencement of any transition support services.

3.2.4. Notice. If either party believes that the other party has failed in any material respect to perform its obligations under this Agreement, then the party alleging the material breach may provide written notice to the allegedly breaching party pursuant to this notice provision.   The notice must be in writing and must describe the alleged failure in reasonable detail.

A. Significant Breach. If the alleged failure relates to a failure to pay any sum due and/or owed under this Agreement or if a violation occurs under the provisions of Sections 5, 6, 7, 9, and 11 herein, the breaching party shall have ten (10) business days after notice of such failure to cure the breach. If the breaching party fails to cure within ten (10) business days, then the non-breaching party may immediately terminate this Agreement, in whole or in part, for cause by providing written notice to the breaching party, pursuant to subsection C. of Section 3.2.4.

B. Minor Breach. With respect to all other defaults, if the breaching party does not, within thirty (30) calendar days after receiving such written notice, either

(1) cure the material failure or

(2) if the breach is not one that can reasonably be cured within thirty (30) calendar days, then the non-breaching party may terminate this Agreement, in whole or in part, for cause by providing written notice to the breaching party, pursuant to subsection C. of Section 3.2.4.

C. Notice to parties. All formal notices or other communications to be sent to 8bitstudio shall be addressed and sent by either: (i) U.S. Mail postage prepaid, or (ii) by e-mail to 8bitstudio as follows:

> Matthew Schroeder
> 8bitstudio Design, LLC
> 720 Century Avenue S.W., Suite 114
> Hutchinson, Minnesota 55350
> Info@8bitstudio.com

> With a
> COPY TO: Creig Andreasen, Esq.
> Lommen Abdo
> 1000 International Centre
> 920 Second Avenue South
> Minneapolis, MN 55402
> Creig@lommen.com

3.2.5. Notice to Client.   8bitstudio shall send all formal notices in a like manner to the last known address on file for Client. Client is solely responsible for informing 8bitstudio of address changes.

3.2.6. Exceptions. The following exceptions are not acceptable reasons for termination.

A. Permitted Delays. 8bitstudio shall be excused from performance hereunder for any period and to the extent that it is prevented from performing any services pursuant hereto in whole or in part, as a result of delays caused by Client and/or third-parties, Force Majeure (defined below), or other cause beyond 8bitstudio's reasonable control and which it could not have prevented by reasonable precautions, including failures or fluctuations in electric power, heat, light, air conditioning or telecommunication equipment, and such nonperformance shall not be a default hereunder or a ground for termination hereof. 8bitstudio's time for performance shall be enlarged, if and to the extent reasonably necessary, in the event:

> (1) that Client fails to submit information, instructions, approvals, or any other required element in the prescribed form, or in accordance with the agreed upon schedules;

> (2) of a special request by Client or any governmental agency authorized to regulate, supervise, or impact 8bitstudio's normal processing schedule; or,

> (3) that Client fails to provide any equipment, software, premises, or performance called for by this Agreement, and/or which is necessary for 8bitstudio's performance hereunder.

3.2.7. Immediate Termination. Notwithstanding anything contained in this Agreement, if a Client is deemed to be in violation of the law, subsection A. of Section 2.2.1 of this Agreement, Section 7 of this Agreement, or any of the policies and agreements published at https://8bitstudio.com/legal, 8bitstudio, at its convenience, may immediately terminate any or all of this Agreement.

4. Independent Contractor/No Employment. You hire us, so you don't have to hire employees.

Unless otherwise agreed, 8bitstudio will perform all services solely as an independent contractor and not as an employee, agent, or representative of Client. Nothing within this Agreement shall be construed to create a joint venture, partnership, or other such arrangement.

5. Intellectual Property. Who owns the parts of the website we make for you.

5.1. Client Intellectual Property. Client hereby grants to 8bitstudio a non-exclusive, royalty-free, worldwide right and license during the Term to do the following to the extent necessary in the performance of services:

5.1.1. digitize, convert, install, upload, select, order, arrange, compile, combine, synchronize, use, reproduce, store, process, retrieve, transmit, distribute, publish, publicly display, publicly perform, and hyperlink the Content (defined below); and

5.1.2. make archival or back-up copies of the Content (defined below). Except for the rights expressly granted herein, 8bitstudio does not acquire any right, title, or interest in or to the Content (defined below), all of which will remain solely with Client.

5.2. 8bitstudio's Intellectual Property. 8bitstudio's trademarks, trade names, service marks, logos, other names and marks, related product and service names, design marks, slogans, and source code are the sole and exclusive property of 8bitstudio. Client will not use any of the foregoing in any advertising, publicity, or in any other commercial manner without the prior written consent of 8bitstudio. 8bitstudio will maintain and control ownership of all internet protocol numbers and addresses that may be assigned by 8bitstudio to Client. 8bitstudio may, in its sole discretion, change or remove any and all such internet protocol numbers and addresses.

5.3. License Grant. 8bitstudio hereby grants to Client a revocable, non-exclusive, non-transferable, and royalty-free license for the Term, to use the provided technology solely for the purpose of accessing and using the services. Client may not use the provided technology for any purpose other than accessing and using the services. Client and 8bitstudio specifically agree that the work done for Client is not "work for hire" and that 8bitstudio may use the same or similar coding and other techniques for other clients. Except for the rights expressly granted herein, this Agreement does not transfer from 8bitstudio to Client any right, title, or interest in and to the provided technology, and all right, title, and interest thereto will remain solely with 8bitstudio.

5.4. License Restrictions. Client shall not, directly or indirectly,

5.4.1. reverse engineer, decompile, disassemble, or otherwise attempt to derive source code or other trade secrets from any of the provided technology;

5.4.2. modify, copy, or create derivative works based on the services or on 8Bitstudio's technology;

5.4.3. build, sell, or resell a product or service using similar ideas, features, functions, or graphics of the service and/or Project; and,

5.4.4. copy any ideas, source code, methods, methodology, features, functions, or graphics of the service and/or Project.

5.5. Improvements. Any feedback, data, answers, questions, comments, suggestions, ideas, or the like that Client sends to 8bitstudio relating to the services will be treated as being non-confidential and non-proprietary. 8bitstudio may use, disclose, and/or publish any ideas, concepts, know-how, and/or techniques contained in such information for any lawful purpose.

6. Confidentiality. Shhh…let's keep this between us.

6.1. Confidential Information. During the course of performance under this Agreement, either party may be exposed to or may acquire the other's proprietary or confidential information. The parties shall hold all such "Confidential Information" in strict confidence and shall not disclose any such information to any third-party.

6.2. Scope of Confidential Information. Confidential Information includes but is not limited to:

6.2.1. with respect to 8bitstudio, 8bitstudio's unpublished prices for services, audit and security reports, server and network configuration, designs, passwords, all business plans, technical information and/or data, product ideas, methodologies, calculation algorithms and analytical routines, and other proprietary technology; and,

6.2.2. with respect to both parties, other information that is conspicuously marked as "confidential" or if disclosed in non-tangible form, is verbally designated as "confidential" at the time of disclosure and confirmed as confidential in a written notice given within one (1) day of disclosure.

6.3. Non-Confidential Information. Notwithstanding the preceding provision, Confidential Information does not include:

6.3.1. information that at the time of disclosure is, without fault of the recipient, available to the public by publication or otherwise;

6.3.2. information that either party can show was in its possession at the time of disclosure and was not acquired, directly or indirectly, from the other;

6.3.3. information received from a third-party with the right to transmit same without violation of any secrecy agreement with the other party; and

6.3.4. information that must be disclosed pursuant to court order or by law.

6.4. Confidential Agreement. Discussions, negotiations, terms, or conditions relating to this Agreement, or any other information relating to this Agreement may not be disclosed to any third-party, except

by reason of legal, accounting, or regulatory requirements, without the prior written consent of the parties hereto.

6.5.   <u>Information Releases</u>.   Notwithstanding the preceding provisions, 8bitstudio may publicly refer to Client, orally and in writing, as a Client of 8bitstudio. Any other reference to Client by 8bitstudio may be made only pursuant to a written agreement between the parties.

7. Client Responsibilities. What you need to do.

7.1.   <u>Assistance</u>.   Client shall provide in a timely and professional manner, on an ongoing basis throughout the Term, and at no cost to 8bitstudio, assistance, cooperation, complete and accurate information and data, equipment, access to applicable computer and telecommunications facilities, networks, firewalls, servers, programs, files, source code, documentation, passwords, a suitable work environment, and other resources requested by 8bitstudio to enable it to perform the services (collectively, "Assistance"). 8bitstudio shall not be liable for any deficiency in performing the services if such deficiency results from Client's failure to fully provide Assistance as required hereunder. Assistance also includes, but is not limited to, designating a project manager or contact person to interface with 8bitstudio during the course of services.

7.2.   <u>Facilities Access</u>. Client shall supply 8bitstudio necessary access to Client's personnel, appropriate documentation and records, and facilities in order for 8bitstudio to timely perform the services. In the event that 8bitstudio deems it necessary to access Client's facilities in order to complete work or provide technical support services outside of Client's business hours, Client shall provide, or make available to 8bitstudio, physical access to Client's facilities and/or external communications capabilities into Client's facilities, at no cost to 8bitstudio.   In addition, Client shall assign an employee or representative to be physically present at the facility, at no cost to 8bitstudio, for any after hours or weekend services provided by 8bitstudio. In the event that Client declines or fails to assign an employee or representative to be present during such hours, Client waives any and all claims for any property damage or loss that occurs during such time that 8bitstudio's employee(s) is on the Client's work facility.

7.3.   <u>Third-party Obligations</u>.   8bitstudio is not responsible for any act or omissions by any third-party related to 8bitstudio. 8bitstudio does not warrant beyond any warranty of any third-party services. In the event that a claim arises from any act or omission of a third-party related to 8bitstudio, Client agrees that Client's sole remedy shall be against that third-party.

7.4.   <u>Network Security</u>.   Unless specifically otherwise agreed to in the Statement of Work, it is Client's sole responsibility to determine whatever actions deemed necessary to make Client's data and voice networks and circuits secure from unauthorized access. 8bitstudio is not responsible for the security of Client's network and circuits from third-parties, or for any damages that may result from any unauthorized access to Client's network. Client has an affirmative obligation to protect Client's network environment, and to train Client's employees, representatives, contractors, and agents, for spam, malware, virus protection, and prevention from criminal acts. 8bitstudio is not responsible for criminal acts of third-parties, including but not limited to hackers, phishers, crypto-lockers, and any network environment subject to ransom. Client agrees to pay ransom and hold 8bitstudio harmless for any activity affecting network security on Client's environment.

7.5. <u>Theft of Service</u>.   Client shall notify 8bitstudio immediately, in writing, by email, or by calling the 8bitstudio customer support line, if Client becomes aware at any time that the services are being stolen or used fraudulently. Failure to do so in a timely manner may result in the immediate termination of the services and additional charges to billed to Client. Client will be liable for all use and distribution of the stolen products and services, and any and all stolen service or fraudulent use of the services and/or products. Credits will not be issued for charges resulting from fraud that arises out of third-parties hacking into any equipment or service. This includes, but is not limited to, modem hijacking, wireless hijacking, server hijacking, service hijacking, or other fraud arising out of a failure of Client's internal/corporate procedures. 8bitstudio will not issue credit for invoiced charges for fraudulent use resulting from Client's negligent or willful acts or those of an authorized user of 8bitstudio's service.

7.6. <u>Client Representations and Warranties</u>.

Client hereby warrants to 8bitstudio, and agrees that during the term of this Agreement it will ensure that:

7.6.1. Client is the owner and/or valid licensee of all data and/or content uploaded in conjunction with the services (the "Content"), and that Client has secured all necessary licenses, consents, permissions, waivers, and releases for the use of content and each element thereof, including without limitations, all trademarks, logos, names, and likenesses contained therein, without any obligation by 8bitstudio to pay any fees, residuals, guild payments, or other compensation of any kind to any person;

7.6.2. Client's use, publication, and display of the Content does not and will not infringe any copyright, patent, trademark, trade secret, or other proprietary or intellectual property right of any person, or constitute a defamation, invasion of privacy or violation of any right of publicity, or any right of any person, including, without limitation, any contractual, statutory, or common law right or any "moral right" or similar right however denominated;

7.6.3. Client will comply with all applicable laws, rules, and regulations regarding the Content and will use the services only for lawful purposes;

7.6.4. Client has not and will not violate any terms and/or policies published or reproduced on 8bitstudio's website (available at: https://8bitstudio.com/legal), nor any local, municipal, state, national, international laws, regulations, codes, ordinances, and treaties; and,

7.6.5. Client has used its best efforts to ensure that the Content is and will at all times remain free of all computer viruses, worms, Trojan horses, and other types of malicious code and/or malware.

8. 8bitstudio Representations & Warranties. We stand behind our work.

8.1. <u>Service Warranty</u>.   8bitstudio warrants that the services will be performed in a professional and workmanlike manner and as described in the Statement of Work. All services will be deemed to be accepted unless Client notifies 8bitstudio in writing within ten (10) days after performance (the "warranty period") that the products and services did not conform to this warranty. 8bitstudio

promptly will correct any material non-conformities and will notify Client in writing that these material non-conformities have been corrected.

8.2. <u>Disclaimers of Warranty</u>.

8.2.1. Exceptions to Service Warranty.   8bitstudio does not warrant: that the services will be performed error-free or uninterrupted; that 8bitstudio will correct all services errors; that the services will meet Client's requirements or expectations; or, that the service will be completely secure. There are inherent risks in internet connectivity that could result in the temporary loss of service availability and/or Client data. 8bitstudio is not responsible for any issues related to the performance, operation, or security of the services that arise from Client's content and/or third-party content and/or services provided by third-parties. 8bitstudio shall have no obligation with respect to a warranty claim (i) if notified of such a claim after the warranty period or (ii) if the claim is the result of third-party hardware or software failures, or the actions of Client or a third-party. For any breach of warranty, Client's exclusive remedy and 8bitstudio's entire liability shall be the correction of the deficient services that caused the breach of warranty, or, if 8bitstudio cannot substantially correct the deficiency in a commercially reasonable manner, Client may end the deficient services and 8bitstudio will refund to Client the unspent fees for the terminated services that Client pre-paid to 8bitstudio for the period following the effective date of termination. To the extent not prohibited by law, Client acknowledges these warranties are exclusive and there are no other express or implied warranties or conditions by 8bitstudio or any third-party vendors including for software, hardware, systems, networks, or environments, or for merchantability, satisfactory quality, and fitness for a particular purpose, and that those third-party vendors disclaim any and all liability, whether direct, indirect, or consequential, arising from the services. 8bitstudio may link to or offer third-party services for resale. Any purchase, enabling or engagement in third-party services, including but not limited to implementation, customization, consulting services, e-mail, web hosting, server hosting, phone service, and any exchange of data between Client and any third-party service, is solely between Client and the applicable third-party service provider and is subject to the terms and conditions of such third-party provider. 8bitstudio does not warrant third-party services and is not responsible or liable for such services or any losses or issues that result as Client's use of such services. If Client purchases, enables, or engages any third-party service for use in connection with the services, Client acknowledges that those third-party services may access Client's data used in connection with the services as required for the interoperation of such third-party services with the services. Client represents and warrants that Client's use of any third-party service signifies Client's independent consent to the access and use of Client's data by the third-party service 8bitstudio, and that such consent, use, and access is outside of 8bitstudio's control. 8bitstudio will not be responsible or liable for any disclosure, modification, or deletion of data resulting from any such access by third-party service provider.

8.2.2. Third-party Criminal Activity.   8bitstudio is not responsible for criminal acts of third-parties, including but not limited to intrusions or unauthorized access of any kind, hackers, phishers, crypto-lockers, encryption tools, and any network environment subject to ransom. Client agree to pay ransom or hold 8bitstudio harmless for any activity

effecting network security on Client's environment related to third-party criminal activity. Any costs or fees to rebuild, repair, or remedy this damage are the Client's sole responsibility and such reparative services are sold separately by 8bitstudio.

8.2.3. Viruses. 8bitstudio is not responsible for any harm that may be caused by Client's access to third-party application programming interfaces, execution or transmission of malicious code, or similar occurrences, including without limitation, disabling devices, encryption tools, drop dead devices, time bombs, trap doors, Trojan horses, proxies, remote access mechanisms, worms, viruses and similar mechanisms. Any costs or fees to rebuild, repair, or remedy this damage are the Client's sole responsibility and such reparative services are sold separately by 8bitstudio.

9. Nonsolicitation of Employees. Please don't steal our employees. They're great, but we need them.

Client shall not solicit any 8bitstudio employee, agent, contractor, or the like, with whom Client had or might have had direct contact in connection with 8bitstudio for employment with Client or with any other person during the Term and for twenty-four (24) months following the Termination Date. Notwithstanding the foregoing, Client shall not be precluded from (a) hiring an employee of 8bitstudio who independently approaches Client, or (b) conducting general recruiting activities, such as participation in job fairs or publishing advertisements in publications or on web sites for general circulation. Client acknowledges that injury resulting from any breach of this provision would be significant and irreparable and that it would be extremely difficult to ascertain the actual amount of damages resulting from such breach. Therefore, in the event of a violation of this provision, in addition to any other right 8bitstudio may have at law or in equity, Client shall make a one-time payment to 8bitstudio in the amount of one-hundred and fifty percent (150%) of the affected employee's base salary for one year. The parties agree that such amount is not intended as a penalty and is reasonably calculated based upon the projected costs the injured party would incur to identify, recruit, hire, and train suitable replacements for such personnel.

10. Limit on Liability and Indemnification. We'll have your back and you'll have ours.

10.1. <u>Limitation of Liability</u>. Except as may be described in an applicable service description or in a service agreement for Project services, 8bitstudio's liability under this Agreement is limited to any actual, direct damages incurred by Client and will not exceed the lesser of

10.1.1. the proceeds of any 8bitstudio professional liability insurance maintained by 8bitstudio under its applicable insurance policies, together with any self-insured retention amounts in connection with those policies, or

10.1.2. the amounts paid by Client to 8bitstudio under this Agreement and all service descriptions during the six (6) month period immediately preceding the accrual of any such claim.

In the event of an insurance coverage dispute, 8bitstudio is not required to dispute the coverage determination and is not required to file a declaratory judgment action. In no

event is 8bitstudio to be held liable to any other party for any incidental, consequential, special, indirect, or punitive damages or claims, including but not limited to lost profits, lost savings, lost productivity, loss of data, loss from interruption of business, loss of programs or information, and the like that result from the use or inability to use the services or from mistakes, the services not meeting Client's requirements or expectations, omissions, translations, and system wordings, functionality of filters, migration issues, interruptions, deletion of files or directories, hardware failures, unavailability of backups, errors, defects, delays in operation, transmission, security breach, or third-party service failures, even if previously advised of their possibility and regardless of whether the form of action is in contract, tort, or otherwise. 8bitstudio will not be liable for any kind of unauthorized access or any harm that may be caused by Client's access to third-party application programming interfaces or the execution or transmission of malicious code or similar occurrences, including without limitation, disabling devices, drop dead devices, time bombs, trap doors, Trojan horses, worms, viruses, hackers, phishers, crypto-lockers, encryption tools, ransomware, and similar mechanisms. Client agrees that the total liability of 8bitstudio and Client's sole remedy for any claims regarding the services under this Agreement, including any schedule, or otherwise is limited to proceeds not exceeding the limits imposed under this Section 10.1 and its subsections.

10.2. <u>Client Indemnification</u>.   Client shall defend, indemnify, and hold 8bitstudio harmless against all costs and expenses, including reasonable attorneys' fees, associated with the defense or settlement of any claim that:

    10.2.1. 8bitstudio's use, access, or modifications of any software that Client has requested that 8bitstudio use, access, or modify as part of the services infringes any patent, copyright, trademark, trade secret, or other intellectual property right, or

    10.2.2. Client's use of any services in violation of any requirements or representations in this Agreement violates any law or infringes any patent, copyright, trademark, trade secret, or other intellectual property right.

    Client further shall pay any judgments or settlements based on any such claims.

10.3. <u>8bitstudio Indemnification</u>.   8bitstudio shall defend, indemnify, and hold Client harmless against all costs and expenses, including reasonable attorneys' fees, associated with the defense or settlement of any claim that any of the services or deliverables 8bitstudio provides infringe any patent, copyright, trademark, trade secret, or other intellectual property right.

11. General Provisions. Miscellaneous stuff our attorneys tell us we need.

11.1. <u>Amendments</u>.   From time-to-time this Agreement may need to be modified and/or amended.   The terms governing such amendments and modifications are set forth below:

    11.1.1. Change Orders.   To the extent that Client requires or requests additional services or services that modify the agreed upon Statement of Work, 8bitstudio will charge an additional fee for such additional services or out of scope work. Fees for such additional services or out of scope work will be set forth on a Change Authorization Order (CAO), which will also provide a description of the changed or additional service(s) being

requested. Once a CAO is agreed to by both parties, it will be incorporated into this Agreement as an amendment to the Statement of Work.

11.1.2. Some Terms Subject to Change. The terms, attachments, exhibits, Statements of Work, policies referenced and incorporated herein, and other similar documents that govern and apply to this Agreement are hereby incorporated by this reference. From time-to-time these Terms of Service posted on 8bitstudio's website or on a third-party's website may be changed and these changes are deemed accepted by Client following ten (10) days after posting of such changes and Client's continued use of the services.

11.2. No Waiver. No delay in exercising, no course of dealing with respect to, and no partial exercise of, any right or remedy hereunder will constitute a waiver of any right or remedy, or future exercise thereof.

11.3. No Assignment. Client shall not assign this Agreement, in whole or in part, or any of its rights or obligations hereunder without the prior written consent of 8bitstudio. However, 8bitstudio may assign or otherwise transfer its rights, interests and obligations under this Agreement without Client's consent and without providing notice. In addition, unless otherwise agreed, 8bitstudio may contract with third-parties to deliver some or all of the services, and no such third-party contract is to be interpreted as an assignment of this Agreement. However, 8bitstudio will attempt to use commercially reasonable efforts to ensure that any and all such third-parties abide by all of the terms of this Agreement, and, except as otherwise agreed, 8bitstudio will remain solely responsible for the fulfillment of all of 8bitstudio's obligations under this Agreement. This Agreement is binding upon the parties, their successors, and permitted assigns.

11.4. Survival.   The parties' respective duties and obligations with respect to proprietary rights, intellectual property rights, non-disclosure and confidentiality obligations, and payments shall survive and remain in effect, notwithstanding the termination of this Agreement, unless the parties otherwise mutually agree memorialized in writing.

11.5. Headings and Captions.   This Agreement contains headings and captions solely provided for Client's convenience. However, the headings and captions in this Agreement are for reference and convenience only and shall not affect the construction and/or interpretation of this Agreement.

11.6. Force Majeure. 8bitstudio will not be liable for any failure of performance of the services due to causes beyond 8bitstudio's reasonable control, including, but not limited to, fire, flood, weather, electric power interruptions, internet or network interruptions, telecommunications interruptions, national emergencies, civil disorder, acts of terrorism, riots, strikes, Acts of God, or any law, regulation, directive, or order of the United States government, or any other governmental agency, including state and local governments having jurisdiction over 8bitstudio or the services provided hereunder (the "Affected Performance"). Any party whose performance is so affected shall give written notice to the other party describing the Affected Performance. The parties shall promptly confer, in good faith, to agree upon equitable, reasonable action to minimize the impact on both parties of such condition. If the delay caused by the Force Majeure event lasts for a period of more than thirty (30) days, the parties shall attempt to negotiate an equitable modification to this Agreement or any affected Statement of Work pertaining to the Affected Performance. If the parties are unable to agree upon an equitable modification, then either party may serve sixty (60) days written notice of termination on the other party, pursuant to subsection C. of Section 3.2.4 of

this Agreement, with respect only to the portion of this Agreement or any applicable Statement of Work relating to the Affected Performance. Client shall pay 8bitstudio for that portion of the Affected Performance that was completed or that was in the process of being completed through the effective termination date of the Affected Performance.

11.7. <u>Choice of Venue and Governing Law</u>.   This Agreement is to be governed by and construed in accordance with the laws of the State of Minnesota. The parties each acknowledge and agree that the district courts in and for Hennepin County, Minnesota, shall have exclusive jurisdiction to hear and decide any dispute, controversy, or litigation which arises in connection with this Agreement, or any claimed breach thereof.

11.8. <u>Severability</u>. If any term or provision of this Agreement is declared invalid by a court of competent jurisdiction, the remaining terms and provisions will remain unimpaired, and the invalid terms or provisions are to be replaced by such valid terms and provisions that most nearly fulfill the parties' intention underlying the invalid term or provision.

11.9. <u>Entire Agreement</u>. This Agreement, the documents provided at https://8bitstudio.com/legal/, the attachments, the exhibits, any document referenced and incorporated herein, and any other attachments thereto set forth the parties entire understanding with respect to the subject matter hereof and is binding upon both parties, their successors, and their permitted assigns, in accordance with the terms of this Agreement. There are no understandings, representations, or agreements other than those set forth herein. Each party, along with its respective legal counsel, has had the opportunity to review this Agreement. Accordingly, in the event of any ambiguity, such ambiguity will not be construed in favor of, or against either party.