**EXPLANATORY COVER SHEET FOR**

**CONSULTING AGREEMENT**

This form of Consulting Agreement should be used when your company (referred to in the agreement as the “Company”) is retaining an independent contractor to provide services in the United States only. If you are entering into a Consulting Agreement with a consultant who resides outside of the U.S., the laws of one or more foreign countries may apply and you should consult with foreign counsel to make any appropriate modifications or to provide a separate form of agreement.

**Independent Contractor v. Employee**

Please note that even if your agreement provides that the individual you have retained is acting as an independent contractor, a court or government agency is free to reclassify the relationship as an employment relationship, based on a multi-factor analysis of the work actually provided by the consultant. The default is that the individual you have engaged is an employee, and it will be the Company’s burden to prove that he/she meets the criteria for contractor status.

In certain states, for example, to overcome that default and justify classifying an individual as a contractor, you must be able to show all three of the following:

(1) the individual is free from control and direction of the Company in connection with the performance of the work, both under this contract and in fact;

(2) the individual performs work outside the usual course of the Company’s business; and

(3) the individual is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

If your company engages someone as a contractor, and that person is later found to be an employee, the Company, including its officers and directors, may be liable for unpaid employment taxes (including the employee’s portion) and associated costs, penalties and benefits (such as insurance, vacation, reimbursement of business expenses and stock options) that the individual would have received if hired as an employee.

To reduce this risk, this Consulting Agreement includes provisions that demonstrate: the consultant has the right to control the way in which the Services are performed, including the right (a) to set his or her hours, (b) to decide where the Services will be performed, (c) to control the manner in which the Services are performed, and (d) if possible, to provide for payment based on milestones, commissions or by the job (not by the hour or by the week); the individual’s work is not within the course of the Company’s business; and the individual has his or her own independent business. (Indeed, if the individual has his or her own business entity, this agreement should be with that entity and not the individual.)

[DELETE THE EXPLANATORY COVER SHEET BEFORE USE]

**[COMPANY NAME]**

**CONSULTING AGREEMENT**

This Consulting Agreement (the “Agreement”) is made effective as of [[DATE]], by and between [COMPANY NAME], a [State] [corporation, LLC, LP] (the “Company”), and [CONSULTANT NAME] (“Consultant”).

1. **Consulting Relationship.**  During the term of this Agreement, Consultant will provide consulting services to the Company as described on Exhibit A hereto (the “Services”).  Consultant represents that Consultant is duly licensed (as applicable) and has the qualifications, the experience and the ability to properly perform the Services. Consultant shall use Consultant’s best efforts to perform the Services such that the results are satisfactory to the Company.  Consultant shall devote at least [% OF TIME]% of Consultant’s time/[HOURS] hours per week] to performance of the Services.
2. **Fees.**  As consideration for the Services to be provided by Consultant and other obligations, the Company shall pay to Consultant the amounts specified in Exhibit B hereto at the times specified therein.
3. **Expenses.**  Consultant shall not be authorized to incur on behalf of the Company any expenses and will be responsible for all expenses incurred while performing the Services [except as expressly specified in Exhibit C hereto] unless otherwise agreed to by the Company’s [[TITLE OF OFFICER]], which consent shall be evidenced in writing for any expenses in excess of $[EXPENSES]. As a condition to receipt of reimbursement, Consultant shall be required to submit to the Company reasonable evidence that the amount involved was both reasonable and necessary to the Services provided under this Agreement.
4. **Term and Termination.**  The initial term of this Agreement is for [\_\_\_ year/month] from the Date set forth above, unless earlier terminated as provided in this Agreement. [Thereafter, this Agreement will automatically renew on its anniversary date, for [\_\_\_ year/month] terms, unless Company provides 15 days’ written notice prior to any such anniversary date that the Agreement will not renew.]

Notwithstanding the above, either party may terminate this Agreement at any time upon [DAYS NOTICE] business days’ written notice. In the event of such termination, Consultant shall be paid for any portion of the Services that have been performed prior to the termination.

Should either party default in the performance of this Agreement or materially breach any of its obligations under this Agreement, the non-breaching party may terminate this Agreement immediately if the breaching party fails to cure the breach within [DAYS] business days after having received written notice by the non-breaching party of the breach or default.

1. **Independent Contractor.**  Consultant’s relationship with the Company will be that of an independent contractor and not that of an employee.
2. **Method of Provision of Services.**  Consultant shall be solely responsible for determining the method, details and means of performing the Services.  Consultant may, at Consultant’s own expense, employ or engage the services of such employees, subcontractors, consultants, partners or agents, as Consultant deems necessary to perform the Services (collectively, the “Assistants”).  Consultant shall have the right to disclose Confidential Information only to those Assistants who have a need to know such information for the purpose of performing Services and who have entered into a binding written agreement that is expressly for the benefit of Company and protects Company’s rights and interests in and to the Confidential Information to at least the same degree as this Agreement. Company reserves the right to refuse or limit Consultant’s use of any Assistants or to require Consultant to remove any Assistant already engaged in the performance of the Services. Company’s exercise of such right will in no way limit Consultant’s obligations under this Agreement.

	1. **No Authority to Bind Company.**  Consultant acknowledges and agrees that Consultant and its Assistants have no authority to enter into contracts that bind the Company or create obligations on the part of the Company without the prior written authorization of the Company.
	2. **No Benefits.**  Consultant acknowledges and agrees that Consultant and its Assistants shall not be eligible for any Company employee benefits and, to the extent Consultant otherwise would be eligible for any Company employee benefits but for the express terms of this Agreement, Consultant (on behalf of itself and its employees) hereby expressly declines to participate in such Company employee benefits.
	3. **Withholding; Indemnification.**  Consultant shall have full responsibility for applicable withholding taxes for all compensation paid to Consultant or its Assistants under this Agreement, and for compliance with all applicable labor and employment requirements with respect to Consultant’s self-employment, sole proprietorship or other form of business organization, and with respect to the Assistants, including state worker’s compensation insurance coverage requirements and any U.S. immigration visa requirements. Consultant agrees to indemnify, defend and hold the Company harmless from any liability for, or assessment of, any claims or penalties with respect to such withholding taxes, labor or employment requirements, including any liability for, or assessment of, withholding taxes imposed on the Company by the relevant taxing authorities with respect to any compensation paid to Consultant or its Assistants.
3. **Supervision of Consultant’s Services.**  All of the services to be performed by Consultant, including but not limited to the Services, will be as agreed between Consultant and the Company’s [[SUPERVISOR’S TITLE]]. Consultant will be required to report to the [[SUPERVISOR’S TITLE]] concerning the Services performed under this Agreement. The nature and frequency of these reports will be left to the discretion of the [[SUPERVISOR’S TITLE]].
4. **Consulting or Other Services for Competitors.** Consultant represents and warrants that Consultant does not presently perform or intend to perform, during the term of the Agreement, consulting or other services for, or engage in or intend to engage in an employment relationship with, companies who businesses or proposed businesses in any way involve products or services which would be competitive with the Company’s products or services, or those products or services proposed or in development by the Company during the term of the Agreement (except for those companies, if any, listed on Exhibit D hereto). If, however, Consultant decides to do so, Consultant agrees that, in advance of accepting such work, Consultant will promptly notify the Company in writing, specifying the organization with which Consultant proposes to consult, provide services, or become employed by and to provide information sufficient to allow the Company to determine if such work would conflict with the terms of this Agreement, including the terms of the Confidentiality Agreement, the interests of the Company or further services which the Company might request of Consultant. If the Company determines that such work conflicts with the terms of this Agreement, the Company reserves the right to terminate this Agreement immediately. In no event shall any of the Services be performed for the Company at the facilities of a third party or using the resources of a third party.
5. **Confidentiality.**  During the term of this Agreement and thereafter Consultant (i) will not use or permit the use of Company’s Confidential Information in any manner or for any purpose not expressly set forth in this Agreement, (ii) will hold such Confidential Information in confidence and protect it from unauthorized use and disclosure, and (iii) will not disclose such Confidential Information to any third parties except as set forth in this section and in Section 6. Consultant will protect Company’s Confidential Information from unauthorized use, access or disclosure in the same manner as Consultant protects its own confidential information of a similar nature, but in no event will it exercise less than reasonable care. Notwithstanding the foregoing or anything to the contrary in this Agreement or any other agreement between Company and Consultant, nothing in this Agreement shall limit Consultant’s right to report possible violations of law or regulation with any federal, state, or local government agency. “Confidential Information” as used in this Agreement means all information disclosed by Company to Consultant, whether during or before the term of this Agreement, that is not generally known in the Company’s trade or industry and will include, without limitation: (a) concepts and ideas relating to the development and distribution of content in any medium or to the current, future and proposed products or services of Company or its subsidiaries or affiliates; (b) trade secrets, drawings, inventions, know-how, software programs, and software source documents; (c) information regarding plans for research, development, new service offerings or products, marketing and selling, business plans, business forecasts, budgets and unpublished financial statements, licenses and distribution arrangements, prices and costs, suppliers and customers; (d) existence of any business discussions, negotiations or agreements between the parties; and (e) any information regarding the skills and compensation of employees, contractors or other agents of Company or its subsidiaries or affiliates. Confidential Information also includes proprietary or confidential information of any third party who may disclose such information to Company or Consultant in the course of Company’s business. Confidential Information does not include information that (x) is or becomes a part of the public domain through no act or omission of Consultant, (y) is disclosed to Consultant by a third party without restrictions on disclosure, or (z) was in Consultant’s lawful possession without obligation of confidentiality prior to the disclosure and was not obtained by Consultant either directly or indirectly from Company. In addition, this section will not be construed to prohibit disclosure of Confidential Information to the extent that such disclosure is required by law or valid order of a court or other governmental authority; provided, however, that Consultant will first have given notice to Company and will have made a reasonable effort to obtain a protective order requiring that the Confidential Information so disclosed be used only for the purposes for which the order was issued. All Confidential Information furnished to Consultant by Company is the sole and exclusive property of Company or its suppliers or customers. Upon request by Company, Consultant agrees to promptly deliver to Company the original and any copies of the Confidential Information. Notwithstanding the foregoing nondisclosure obligations, pursuant to 18 U.S.C. Section 1833(b), Consultant will not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made: (1) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney, and solely for the purpose of reporting or investigating a suspected violation of law; or (2) in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

1. **Conflicts with this Agreement.**  Consultant represents and warrants that neither Consultant nor any of the Assistants is under any pre-existing obligation in conflict or in any way inconsistent with the provisions of this Agreement. Consultant represents and warrants that Consultant’s performance of all the terms of this Agreement will not breach any agreement to keep in confidence proprietary information acquired by Consultant in confidence or in trust prior to commencement of this Agreement. Consultant warrants that Consultant has the right to disclose and/or or use all ideas, processes, techniques and other information, if any, which Consultant has gained from third parties, and which Consultant discloses to the Company or uses in the course of performance of this Agreement, without liability to such third parties. Notwithstanding the foregoing, Consultant agrees that Consultant shall not bundle with or incorporate into any deliveries provided to the Company herewith any third party products, ideas, processes, or other techniques, without the express, written prior approval of the Company. Consultant represents and warrants that Consultant has not granted and will not grant any rights or licenses to any intellectual property or technology that would conflict with Consultant’s obligations under this Agreement. Consultant will not knowingly infringe upon any copyright, patent, trade secret or other property right of any former client, employer or third party in the performance of the Services.
2. **Miscellaneous.**
	1. **Amendments and Waivers.**  Any term of this Agreement may be amended or waived only with the written consent of the Company.
	2. **Sole Agreement.**  This Agreement, including the Exhibits hereto, constitutes the sole agreement of the parties and supersedes all oral negotiations and prior writings with respect to the subject matter hereof.
	3. **Notices.**  Any notice required or permitted by this Agreement shall be in writing and shall be deemed sufficient upon delivery, when delivered personally or by overnight courier or sent by email or fax (upon customary confirmation of receipt), or forty-eight (48) hours after being deposited in the U.S. mail as certified or registered mail with postage prepaid, addressed to the party to be notified at such party’s address or fax number as set forth on the signature page or as subsequently modified by written notice.
	4. **Choice of Law.**  The validity, interpretation, construction and performance of this Agreement shall be governed by the laws of the State of [State], without giving effect to the principles of conflict of laws.
	5. **Severability.**  If one or more provisions of this Agreement are held to be unenforceable under applicable law, the parties agree to renegotiate such provision in good faith.  In the event that the parties cannot reach a mutually agreeable and enforceable replacement for such provision, then (i) such provision shall be excluded from this Agreement, (ii) the balance of the Agreement shall be interpreted as if such provision were so excluded and (iii) the balance of the Agreement shall be enforceable in accordance with its terms.
	6. **Counterparts.**  This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together will constitute one and the same instrument.
	7. **Advice of Counsel.**  EACH PARTY ACKNOWLEDGES THAT, IN EXECUTING THIS AGREEMENT, SUCH PARTY HAS HAD THE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT LEGAL COUNSEL, AND HAS READ AND UNDERSTOOD ALL OF THE TERMS AND PROVISIONS OF THIS AGREEMENT.  THIS AGREEMENT SHALL NOT BE CONSTRUED AGAINST ANY PARTY BY REASON OF THE DRAFTING OR PREPARATION HEREOF.

The parties have executed this Agreement as of the date first written above.

**THE COMPANY:**

[[COMPANY NAME]]

By:

Name: [[COMPANY CONTACT NAME]]

Title: [[COMPANY CONTACT TITLE]]

Address:
[[ADDRESS]]

Attn: [CHIEF EXECUTIVE OFFICER]
email:  [[EMAIL]]

**CONSULTANT:**

[[CONSULTANT NAME]]

Address:
[[CONSULTANT ADDRESS]]

email: [[CONSULTANT EMAIL]]

**EXHIBIT A**

**DESCRIPTION OF CONSULTING SERVICES**

|  |  |  |
| --- | --- | --- |
|   | Description of Services | Schedule/Deadline |
| 1. |  [SERVICES 1] |  [SCHEDULE 1] |
| 2. |  [SERVICES 2] |  [SCHEDULE 2] |

**EXHIBIT B**

**COMPENSATION**

Check applicable payment terms:

* [\_]For Services rendered by Consultant under this Agreement, the Company shall pay Consultant at the rate of $[RATE] per hour, payable [WEEKLY/BI-WEEKLY/MONTHLY].  Unless otherwise agreed upon in writing by Company, Company’s maximum liability for all Services performed during the term of this Agreement shall not exceed $[MAX].
* [\_]Consultant shall be paid $[INITIAL PAYMENT] upon the execution of this Agreement and $[END PAYMENT] upon completion of the Services specified on Exhibit A to this Agreement.
* [\_]The Company will recommend that the Board grant a non-qualified option to purchase [NUMBER OF SHARES AUTHORIZED] shares of the Company’s Common Stock, at an exercise price equal to the fair market value (as determined by the Company’s Board of Directors) on the date of grant, and which will vest and become exercisable as follows:

[VESTING AND EXERCISE SCHEDULE]
* [\_]Consultant is authorized to incur the following expenses:

[AUTHORIZED EXPENSES]
* [\_]Other:

[OTHER]

**EXHIBIT C**

**ALLOWABLE Expenses**

[ALLOWABLE EXPENSES]

**EXHIBIT D**

**LIST OF COMPANIES**

**EXCLUDED UNDER SECTION 7**

[LIST OF COMPANIES EXCLUDED]

\_ No conflicts

\_ Additional Sheets Attached