

STATE OF TEXAS                   §  
                                           §  
 COUNTY OF FORT BEND       §

**AMENDMENT TO XIOTECH  
MAINTENANCE RENEWAL**

THIS AMENDMENT is entered into by and between Fort Bend County, a body corporate and politic, and The Harding Group, Inc., a company authorized to conduct business in the State of Texas.

THAT, WHEREAS, the parties have executed and accepted that certain Xiotech Maintenance Renewal Agreement, (hereinafter the "Agreement"), attached hereto as Exhibit "A" and incorporated by reference; and

WHEREAS, the following changes are incorporated as if a part of the Agreement:

1. Payment shall be made by Fort Bend County within thirty (30) days of receipt of invoice without incurring late charges.
2. This Agreement shall be construed under and in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Fort Bend County, Texas. Venue shall lie in Fort Bend County, Texas, for any suit regarding this agreement.
3. The parties agree that under the Constitution and laws of the State of Texas, Fort Bend County cannot enter into an agreement whereby Fort Bend County agrees to indemnify or hold harmless another party; therefore, all references of any kind to defending, indemnifying, holding or saving harmless for any reason are hereby deleted. The penalties and remedies provided by agreement do not limit common law remedies of tort, contract, or equity, including a suit for damages, injunction, or mandamus.
4. Fort Bend County does not agree to submit disputes arising out of the Agreement to binding arbitration. Therefore, any references to binding arbitration or the waiver of a right to litigate a dispute are hereby deleted.
5. Fort Bend County, Texas, is a body corporate and politic under the laws of the State of Texas and claims exemption from sales and use taxes. A copy of a tax-exempt certificate will be furnished upon request.

THE HARDING GROUP, INC.

By: \_\_\_\_\_

*Ron Verner*

Authorized Agent – Signature

*RON VERNER*

Authorized Agent – Printed Name

Title: \_\_\_\_\_

*President*

Date: 5/20/2010

FORT BEND COUNTY

By: Robert E. Hebert  
Robert E. Hebert, County Judge

Date: 5-25-2010

ATTEST:

Dianne Wilson  
Dianne Wilson, County Clerk

**AUDITOR'S CERTIFICATE**

I hereby certify that funds in the amount of \$ 21,000.<sup>00</sup> are available to pay the obligation of Fort Bend County within the foregoing Agreement.

Robert Ed Sturdivant  
Robert Ed Sturdivant, County Auditor

# EXHIBIT A

# THE HARDING GROUP

ENTER YOUR QUOTE HERE

March 9, 2010

Fort Bend County  
Kenneth Ford  
300 Liberty Road  
Richmond, TX 77469

## Xiotech Maintenance Renewal

The Harding Group, Inc. is pleased to present the following product price quote to Fort Bend County

SSN 11908

Service Contract Term 05/01/2010 – 04/30/2011

Description	Qty	List Each	Cost Each	Cost Total
Magnitude 3D 4000e Hardware Maintenance Uplift to 24x7x4 hour (1 Month)	12	\$163.00	\$82.00	\$984.00
Magnitude 3D 4000e Next Business Day Hardware Maintenance Extension (1 Month)	12	\$245.00	\$123.00	\$1,476.00
Magnitude 3D 4000e Software Maintenance Extension (1 Month)	12	\$936.00	\$468.00	\$5,616.00
<b>Subtotal</b>				<b>\$8,076.00</b>

SSN 11909

Service Contract Term 05/01/2010 – 04/30/2011

Description	Qty	List Each	Cost Each	Cost Total
Magnitude 3D 4000e Hardware Maintenance Uplift to 24x7x4 hour (1 Month)	12	\$163.00	\$82.00	\$984.00
Magnitude 3D 4000e Next Business Day Hardware Maintenance Extension (1 Month)	12	\$245.00	\$123.00	\$1,476.00
Magnitude 3D 4000e Software Maintenance Extension (1 Month)	12	\$936.00	\$468.00	\$5,616.00
<b>Subtotal</b>				<b>\$8,076.00</b>

Config ID #'s – CISCO\_01913, CISCO\_01914, CISCO\_01915, CISCO\_01916, CISCO\_01917, QLOGIC\_00025 & QLOGIC\_00026

Service Contract Date 05/01/2010 – 04/30/2011

Description	Qty	Cost Each	Cost Total
Cisco SMARTnet Onsite 24x7x4hrs MDS 9124 - 1 Month	36	\$27.00	\$972.00
Cisco SMARTnet 9124 On Demand Port Activation License - increments of 8 ports Monthly	24	\$5.00	\$120.00
Qlogic - iSR6142 Router Support, 7x24 RTS, 4-hour OS & Spares Response, 1 month	24	\$133.00	\$3,192.00
<b>Subtotal</b>			<b>\$4,284.00</b>

Prices quoted are subject to change due to manufacturer's price and/or availability. Sales tax and shipping, if applicable, will be charged. Client agrees that it shall timely pay such taxes or reimburse HGI for its payment thereof.

Client Purchase Order must be received prior to The Harding Group proceeding with any purchase on behalf of Customer. Any order cancellation must be submitted in writing within 24 hours and must be authorized by The Harding Group. Cancellations are subject to a 15% cancellation fee. Returns may be restricted to factory sealed product.

Thank you for your continued interest in The Harding Group, Inc.  
Stephen Hourney, Account Executive  
[st.hourney@harding-group.com](mailto:st.hourney@harding-group.com)

Reference # 300110083A

Fort Bend County Representative

Date

This Agreement (the "Agreement") is made and entered into between Xiotech Corporation (hereinafter "Xiotech"), and the company identified on the face of this quotation and/or the signature block below (hereinafter "Customer") and is effective upon acceptance by Xiotech of Customer's purchase order referencing this quotation or as of the date signed by Xiotech, whichever is earlier (the "Effective Date"). Xiotech and Customer agree as follows:

1. **PURPOSE.** This Agreement states the rights and obligations of the parties regarding products ("Products") and support services ("Services") to be provided by Xiotech as described in [the Quotation and Order Acknowledgment or Statement of Work]. Products sold by Xiotech under this Agreement will be used for the purchaser's internal business purposes only, and may not be distributed or resold. Products sold by Xiotech under this Agreement do not include any software installed on a Product ("Software"). Customer's right and obligations with respect to Software will be governed by a separate End User License Agreement.

2. **ORDERS AND ACCEPTANCE.** Customer's purchase order is deemed an acceptance of the terms of the Quotation and the terms of this Master Terms Agreement, both of which Customer acknowledges receipt of prior to Customer's delivery of its purchase order to Xiotech. All purchase orders submitted by Customer may be accepted or rejected by Xiotech, in its sole discretion, and shall be subject to this Agreement. Xiotech's acceptance shall only occur upon delivery of its written acknowledgment ("Order Acknowledgment") to Customer. This Agreement supersedes all communications or agreements between the parties relating to the subject matter herein, whether or oral or written, including, but not limited to, Customer's purchase orders.

### 3. SHIPMENT, RETURNS.

(a) **Shipping, Duties and Taxes.** Shipment within the continental United States will be F.O.B. shipping point and international shipments will be EXW shipping point (Incoterms 2000), at which time (the "Shipment Date") title and risk of loss for the shipped Products will pass to Customer. All duties, import and export licenses and permits, custom charges and duty fees, taxes, excises, freight, insurances and other shipping expenses will be paid by Customer. All delivery dates are estimated in good faith with no liability incurred by Xiotech for late delivery or performance under this Agreement. Subject to the return policy stated in Subsection 3(b) below, Products will be deemed to be accepted by Customer on the Shipment Date.

(b) **Returns.** Shipped Product(s) may be returned in undamaged condition to Xiotech, at Customer's expense, within thirty (30) days after the Shipment Date if: (i) the quantity or type of Product(s) received fail to conform to the purchase order and (ii) written approval is given by Xiotech (which approval will not be unreasonably withheld). Customer must enclose with the returned Product(s) (i) proof of purchase, and (ii) a written description of the reason for return of the Product(s). Upon proper return of the Product(s) as required above, Xiotech will refund the purchase price paid by Customer for the returned Product(s).

4. **PRICE.** Xiotech will invoice Customer for amounts payable under this Agreement, and Customer agrees to pay the full invoiced amount within thirty (30) days after the invoice date. Any late payments will bear interest at the lesser of 1.5% per month or the maximum rate permitted by law. All prices and payments shall be in U.S. dollars. Xiotech shall retain a security interest in any and all Product until Customer has paid for the Products in full.

### 5. WARRANTY.

(a) **Standard Limited Warranty.** The limited warranties described below are subject to Xiotech's current standard limited warranty as set forth in Xiotech's current published Product warranty document ("Datasheet"), incorporated by this reference. The warranty period commences on the Shipment Date and ends on the date described in the Datasheet. Xiotech warrants that Product bearing the Xiotech name will substantially conform to Xiotech's published specifications in effect as of the date of shipment and will be free from substantial defects in material and workmanship, as more fully set forth in the Datasheet. Xiotech further warrants that all Services performed by Xiotech for Customer will be provided in a workmanlike manner. These limited warranties are subject to the limitations set forth in Section 5(b) and 5(c) below. These limited warranties are contingent upon proper use of the Product for the purpose intended, without modification, movement or attempted movement of the Product from its initial installation position except as directed or performed by Xiotech. Customer shall have no claim to Product that was replaced or the components therein which were replaced. If Xiotech provides any replacement parts on a cross ship or exchange basis and Customer fails to return to Xiotech the part for which Xiotech has provided a replacement within thirty (30) calendar days of Xiotech shipping such replacement part to Customer, Xiotech will invoice Customer and Customer agrees to pay for such non-returned part at Xiotech's then current part cost plus any shipping costs incurred by Xiotech for the replacement part.

(b) **No Other Warranty.** EXCEPT FOR THE EXPRESS LIMITED WARRANTY STATED ABOVE, XIOTECH GRANTS NO OTHER WARRANTIES, EXPRESS OR IMPLIED, BY STATUTE OR OTHERWISE, REGARDING THE PRODUCTS OR SERVICES, THEIR FITNESS FOR ANY PURPOSE, THEIR QUALITY, THEIR MERCHANTABILITY, OR OTHERWISE. ALL OTHER WARRANTIES ARE DISCLAIMED AND EXCLUDED BY XIOTECH.

(c) **Limitation of Liability under Warranty; Exclusive Remedy.** XIOTECH'S LIABILITY UNDER THE WARRANTY IN CONNECTION WITH PROBLEMS ARISING FROM A UNIT OF PRODUCT OR PERFORMANCE OF SERVICES SHALL BE LIMITED TO, IN XIOTECH'S SOLE DISCRETION, REPAIRING OR REPLACING PRODUCT WITH A CONFORMING PRODUCT, OR IN THE CASE OF SERVICES, REPERFORMANCE OF SUCH SERVICES. ALTERNATIVELY, XIOTECH MAY, IN XIOTECH'S SOLE DISCRETION, REFUND THE SALES PRICE TO CUSTOMER FOR SUCH UNIT OF PRODUCT. ALL EQUIPMENT, PARTS AND SOFTWARE NOT BEARING THE XIOTECH'S NAME, IS SUPPLIED "AS IS" AND CUSTOMER WILL LOOK SOLELY TO THE WARRANTIES AND REMEDIES, IF ANY, PROVIDED BY THE EQUIPMENT/PARTS/SOFTWARE MANUFACTURER. IN NO EVENT SHALL XIOTECH BE LIABLE FOR THE COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES BY ANY PERSON OR ENTITY, INCLUDING BUT NOT LIMITED TO CUSTOMER, OR FOR ANY SPECIAL, CONSEQUENTIAL OR INCIDENTAL DAMAGES FOR BREACH OF WARRANTY.

6. **LIMITATION OF LIABILITY.** XIOTECH'S TOTAL (AGGREGATE) LIABILITY ARISING IN ANY WAY OUT OF THIS AGREEMENT SHALL BE LIMITED TO THE TOTAL AMOUNT PAID BY CUSTOMER HEREUNDER FOR PRODUCTS OR SERVICES. IN NO EVENT SHALL XIOTECH BE LIABLE FOR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES. IN NO EVENT SHALL XIOTECH BE LIABLE TO ANY PERSON OR ENTITY, INCLUDING BUT NOT LIMITED TO CUSTOMER, FOR ANY SPECIAL, CONSEQUENTIAL, INCIDENTAL, INDIRECT OR SIMILAR DAMAGES, HOWEVER CAUSED, OR ALLEGED TO HAVE BEEN CAUSED, ON ANY LEGAL OR EQUITABLE THEORY OF LIABILITY INCLUDING, WITHOUT LIMITATION, CONTRACT, TORT (INCLUDING NEGLIGENCE), AND STRICT PRODUCT LIABILITY, EVEN IF SUCH LOSSES OR DAMAGES ARE FORESEEABLE AND EVEN IF XIOTECH HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES. IN NO EVENT SHALL XIOTECH HAVE ANY LIABILITY FOR PRODUCTS OR SERVICES FOR WHICH XIOTECH HAS NOT BEEN PAID IN FULL.

### 7. PROPERTY RIGHTS AND CONFIDENTIALITY.

(a) **Property Rights.** Nothing in this Agreement grants to Customer any right, title, or interest in the product lines that include the Products or Software, nor in any of Xiotech's intellectual property ("IP") including, but not limited to, patents, trademarks, trade names, logos, inventions, copyrights, know-how, or trade secrets in any way relating to the design, manufacture, operation, use or service of the Products or Software. Use by Customer of Xiotech's IP is authorized only for the purposes expressly stated in this Agreement. The right of any person or entity to use Software will be determined only by an End User License Agreement with Xiotech.

(b) **Sale Conveys No Right to Copy.** At no time will Customer have any access to or right in the source codes of any Software. At no time will Customer have any right to copy, reproduce, modify, reverse engineer, de-compile or disassemble any Software, Products or part thereof.

(c) **Confidentiality.** Both parties agree to keep confidential any and all information received including information that is marked Confidential or information that should reasonably have been understood by either party, because of legends or other markings, the circumstances of disclosure, or the nature of the information itself, to be proprietary and confidential to the other party ("Confidential Information") including, but not limited to, the terms of this Agreement. Neither party will use or disclose the other's Confidential Information for any purpose, except to employees on a "need to know" basis, who have been informed of their obligations under this Agreement. Each party hereto shall remain liable to the other party for the use or disclosure of Confidential Information by any of its employees or agents in a manner inconsistent with this paragraph. All Confidential Information, and any notes, documents or recordings containing Confidential Information, will be returned to the appropriate party immediately upon termination of this Agreement. If Customer is a government entity subject to public records laws, each of us agree that any Xiotech technology made available to you under this Agreement constitutes Xiotech trade secret information or similarly-designated information exempt from disclosure to the maximum extent permitted under public records law.

(d) **Prohibition Against Impairment of IP Interests.** Customer will not alter or remove any trademark, service mark, trade name, logo or other IP applied to a Product, Software or its packaging by Xiotech. Customer will not, whether acting alone, with or through others, in any way harm, use or impair, or attempt to harm, use or impair, any right, title or interest of Xiotech in any or all of the IP, or their registration. This prohibition includes, but is not limited to, any attempt to register or use any trademark, service mark, trade name, patent, copyright or other intellectual property which may in any way be confusingly similar to any IP. Nothing in this provision limits Customer's right and ability to protect its own intellectual property rights, title and interests already in existence when this Agreement becomes effective. This prohibition survives termination of this Agreement.

### 8. INDEMNIFICATION AND HOLD HARMLESS FOR INFRINGEMENT BY XIOTECH.

(a) **Indemnification.** Subject to the limitations stated below, Xiotech will defend, indemnify and hold harmless Customer from any claim, suit, or proceeding to the extent made against Customer for infringement of any United States patent,

copyright, trademark, or trade secret by the Products sold to Customer under this Agreement. Xiotech will have sole control of any such claim, suit or proceeding including, in its sole discretion and at its own expense, the right to settle. Xiotech will be relieved of any or all of its obligations under this provision, in its sole discretion, if Customer fails to: (i) promptly send notice to Xiotech of any such claim, suit or proceeding; or (ii) give Xiotech all information, authority and assistance reasonably necessary to settle and/or defend any such claim, suit, or proceeding.

**(b) Limitation.** Notwithstanding Subsection 8(a) above, Xiotech assumes no liability for any claim, suit or proceeding for infringement arising or alleged to arise from use of a Product or Software as part of any completed equipment or software not supplied by Xiotech, or as part of any assembly, circuit, combination, method or process not supplied by Xiotech. Xiotech assumes no liability for any claim, suit or proceeding arising or alleged to arise from: (i) any marking or branding applied to a Product or Software by a party other than Xiotech; (ii) any marking or branding applied to a Product or Software by Xiotech at the request of Customer; (iii) modification or servicing of all or part of a Product by any party other than Xiotech (except as expressly authorized by Xiotech in writing); (iv) modification of Software by any party other than Xiotech; or (v) modification of all or part of a Product or Software by Xiotech at Customer's request.

**(c) Entire Liability.** This Section 8 states the entire liability and obligations of Xiotech, and the exclusive remedy of Customer, with respect to any alleged infringements of any United States patent, copyright, trademark and/or other intellectual property right by the Products or Software or any part thereof.

**9. SOFTWARE LICENSING.** Upon Customer's purchase of a Product, Xiotech will grant to Customer a nonexclusive license to use the Software, using and subject to the terms of Xiotech's End User License Agreement.

**10. SERVICES.** Services shall be provided as specified in Xiotech's most current Datasheet available at the time Customer purchases such Services. Customer understands Xiotech has relied on Customer's commitment for the length and scope of Services set forth in the Datasheet in determining the fee payable by Customer for any Services purchased. Based on that reliance, a non-renewal or termination charge may apply to any early termination of Services by Customer. Xiotech may charge Customer an inspection or re-certification fee for reinstatement of a lapsed or terminated Support Period. Fees will be based on then current time and Products charges. Xiotech may refuse to perform Services in its sole discretion if Customer fails to use the Product consistent with the Product manual, is moved from its initial install position, attempts any modification or repairs of the Product without Xiotech approval or fails to perform under any provision of this Agreement.

**11. RESPONSIBILITIES OF CUSTOMER.** To the extent Customer purchases Services, including but not limited to installation, from Xiotech, Customer agrees to:

- a) maintain operating conditions within the common environmental range of all Products and Software covered under this Agreement in accordance with manufacturers' or Xiotech's specifications;
- b) notify Xiotech immediately of any Product and/or Software failures or defects;
- c) provide at least sixty (60) calendar days written notice to Xiotech of its intent to relocate or remove a Product or Software from Customer's premises (No such removal may occur without Xiotech's prior written consent);
- d) pay all amounts payable under this Agreement when due;
- e) assist and cooperate with Xiotech by making personnel available for consultation and to provide other information and data required for performance under this Agreement, whenever such assistance, personnel, information and data are reasonably requested by Xiotech;
- f) be solely responsible for preparation of the site, at which Xiotech will perform the Services, to the specifications and in accordance with the time schedule stated in the applicable Xiotech quotation or support option and use best efforts to make certain the site is safe;
- g) fully comply, without exception, with all applicable laws (federal, state and local), governmental orders and pay all maintain and pay for all registrations required under such laws, orders or ordinances necessary for performance under this Agreement and ultimately the purchase and use or receive the benefit of Xiotech Products. Customer will maintain all registrations with governmental agencies, commercial registries, chambers of commerce, or other offices which may be required under law in order to properly conduct commercial business; and
- h) prior to the date specified in the Quotation and/or Statement of Work for the performance of Service, (i) obtain and pay for all governmental or third party consents, permits, approvals, licenses and public and private easements necessary for Xiotech's unrestricted access to any site or location needed for performance of the Services and delivery of the Product(s), and (ii) will notify Xiotech in advance of any requirements including all local laws, regulations, ordinances and the like to which Xiotech is or will be required to comply in the rendering of Services and in the supplying of Products hereunder.

## **12. GENERAL PROVISIONS.**

**(a) Governing Law and Jurisdiction.** This Agreement will be governed by and construed under the laws of the State of Minnesota without respect to the conflicts of laws provisions. Any dispute arising or alleged to arise from this Agreement will be subject to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association in accordance with said Rules. Notwithstanding the foregoing, either party may seek interim injunctive relief. For any international sale other than Canada this agreement shall be enforced without regard to the United Nations Convention on the International Sale of Goods.

**(b) Entire Agreement.** This Agreement sets forth the entire agreement and understanding of the parties regarding its subject matter, and merges all prior discussions between them. Modifications of or amendments to this Agreement must be written and signed by both parties to have effect.

**(c) Notices.** To be effective, all notices required by this Agreement must be written and must be sent by mail or courier for delivery within no more than three (3) days, return receipt requested. Notices must be addressed and sent to the respective addresses shown above, or as may be designated in writing by a party from time to time. Notice periods begin to run on the date notice is received.

**(d) Force Majeure.** Nonperformance of either party (other than failure to pay amounts due hereunder) will be excused only to the extent performance is rendered impossible by strike, fire, flood, governmental acts or orders or restrictions, failure of suppliers, or any other reason where failure to perform is beyond the reasonable control of and is not caused by the negligence of the non-performing party.

**(e) Nonassignability.** Customer may not assign all or any part of this Agreement or move or transfer the Product without the prior written consent of Xiotech. Xiotech may assign all or any of its rights and obligations hereunder by giving written notice thereof to Customer.

**(f) Legal Expenses.** The prevailing party in any legal action brought by one party against the other arising from this Agreement shall be entitled, in addition to any other rights and remedies it may have, to reimbursement for its reasonable expenses, including court costs and reasonable attorneys' fees.

**(g) Counterparts.** This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but which together shall constitute one contract or document.

**(h) Import and Export Controls.** Customer understands and acknowledges that Xiotech is subject to regulation by agencies of the U.S. government which prohibit export or diversion of certain products and technology to certain countries. Customer shall not export, re-export or transship, directly or indirectly, any copies of the Products, except in compliance with the Export Administrative Regulations and applicable law.

**(i) Survival of Certain Terms and Obligations.** Termination will not relieve either party of obligations incurred prior to termination. All payment obligations of Customer and the terms and provisions of Sections 5, 6, 7, 8 and 12 will survive any termination of this Agreement.

**(j) Government License Rights.** The Product and Software is a "commercial item" as that term is defined at 48 C.F.R. 2.101, consisting of "commercial computer software" and "commercial computer software documentation" as such terms are used in 48 C.F.R. 12.212. Consistent with 48 C.F.R. 12.212 and 48 C.F.R. 227.7202-1 through 227.7202-4. All U.S. Government licensees and end users acquire the Product and Software with only those commercial rights and subject to the use, duplication and disclosure restrictions set forth herein.

**(k) Pass Through Provisions.** In the event Customer transfers use or title of the Products or Services procured under this Agreement to a "Third Party" Customer agrees to obtain, prior to such transfer, the Third Party's agreement to abide by obligations no less restrictive than Sections 5, 6, 7, 8, 9, 10, 11, and 12 along with their applicable subsections of this Agreement in unaltered form. If Third Party does not agree to obligations presented in this clause Customer will not transfer use or title of such Products or Services unless otherwise permitted by Xiotech in writing.



## END USER LICENSE AGREEMENT

**NOTICE TO USER:** This is a legal agreement between you, the end user ("You"), and Xitech Corporation (including its affiliates) ("Xitech") regarding the use of Xitech software (including firmware) ("Xitech Software") and/or third-party software ("Third-Party Software") provided to You by Xitech either separately or as incorporated into Xitech or third-party hardware (hereinafter referred to collectively as "Software Product"), and the use of Related Documentation provided therewith. By reviewing, installing and/or using the Software Product and/or Related Documentation accompanying this document (referred to as "EULA" or "End-User License Agreement"), You agree to be bound by all of the terms and conditions set forth herein. If You do not agree to all of the terms of this EULA, Xitech is unwilling to license the Software Product to You. In such event, You may not use or copy the Software Product, and You should promptly return this EULA along with the Software Product, Related Documentation, product packaging and any other accompanying items to Xitech or the location where You obtained them in accordance with the applicable return policy.

Xitech grants to You a nonexclusive, nontransferable, nonsub licensable, limited license to use, without modification, the Software Product and Related Documentation, provided that You agree to the following:

1. **Software.** You agree to use the Software Product only on the specified Xitech product (identified by the Xitech system serial number as provided on the certification card enclosed with such Software/Xitech product(s) ("Specified Xitech Product")) and only in accordance with the Related Documentation and applicable specifications. You are permitted to make one copy of the Software Product to maintain as a replacement copy in the event that the original copy fails or becomes unusable. In the event the Software Product fails or becomes unusable, You shall promptly return the failed or unusable Software Product to Xitech for replacement.

2. **Related Documentation.** You agree to use the operating manuals, charts, tables, written descriptions and handbooks in any medium related to the Software Product ("Related Documentation") only in conjunction with the Specified Xitech Product. You are not permitted to make additional copies of the Related Documentation without the express written consent of Xitech. In the event the Related Documentation is lost or destroyed, upon Your request, Xitech will provide a replacement copy of the Related Documentation at its then current standard fee.

3. **License Fee.** In consideration of the license granted to You herein, You agree to pay the license fee for the Software Product as set forth in documentation between You and Xitech related to the purchase of the Specified Xitech Product, within the terms of such documentation.

4. **Term and Termination.** Subject to termination for breach as set forth in the following sentence, the term of the license granted by this EULA shall extend for as long as You own the Specified Xitech Product; and, upon termination of Your ownership of the Specified Xitech Product, Your license to use the Software Product and Related Documentation shall automatically terminate. Without prejudice to any other rights, Xitech may terminate this EULA and Your license and rights to the Software Product and Related Documentation with no prior notice if You fail to comply with each of the terms and conditions as stated herein. Upon termination of this EULA for any reason, You shall immediately destroy or return all originals and all copies of the Software Product, Related Documentation, Permitted Results and all of their component parts as directed by Xitech. These terms and conditions take precedence over any terms and conditions of any other agreement between Xitech and You regarding the Software Product. The provisions contained in this EULA that protect the interests of Xitech in the Software Product and/or Related Documentation shall survive the termination of this EULA.

5. **Ownership.** All right, title and interest in and to and the Software Product (including but not limited to any images, photographs, animations, video, audio, music, text, and "applets" incorporated into the Software Product), Related Documentation, Permitted Results and all copies thereof, including without limitation the copyrights, patent rights, trade secrets and other proprietary rights, are, and shall continue to be, owned by Xitech or its licensors, applicable, regardless of the form or media in or on which the original and other copies may exist. The parties agree that nothing herein is, or shall be deemed to be, a sale or assignment of the Software Product, Related Documentation, Permitted Results or any portion or copy of any of the foregoing.

6. **Copyright.** United States copyright laws and international treaty provisions protect the Software Product and the Related Documentation. Unauthorized use or copying of the Software Product, including Software Product that has been modified, merged, or included with other software, or of the Related Documentation is expressly

forbidden. Any copies that You are permitted to make pursuant to this EULA must contain the same copyright and other proprietary notices as they appear on or in the Software Product and Related Documentation.

7. **Trade Secrets.** The Software Product, Related Documentation and Specified Xitech Product contain trade secret information of Xitech. You agree to keep such trade secret information confidential and not to use or disclose any of it except as needed to use the Specified Xitech Product in accordance with the Related Documentation and in accordance with applicable specifications. You also agree not to modify, prepare derivative works, reverse engineer, decompile, disassemble or otherwise attempt to discover the source code of the Software Product or any Related Documentation, except and only to the extent that such activity is expressly permitted by applicable law notwithstanding this limitation. In the event that and solely to the extent that applicable law permits any of the foregoing, You agree that (i) the results of any such activity ("Permitted Results") shall be confidential trade secret information of Xitech; (ii) any Permitted Results shall be used only for the express purposes permitted by applicable law and (iii) the Permitted Results shall not be disclosed to any other party.

8. **Transfer.** Under no circumstances may You distribute, transfer, rent, sell, offer to sell, lend, lease, sublease, assign, in whole or in part, any of Your rights and/or obligations under this EULA and/or any portion of the Software Product, Related Documentation or Permitted Results to a third party, whether by assignment, merger, transfer of assets, sale of stock, operation of law or otherwise, and any attempt to do so shall be deemed void.

9. **Confidentiality.** You shall maintain the confidentiality of the terms of this EULA, the Software Product, Related Documentation and Permitted Results and any other confidential information provided to You by Xitech, by taking those precautions in protecting the Software Product and Related Documentation You employ to protect Your own confidential information which shall in no case be less than a reasonable amount of care. You shall insure that the Software Product, Related Documentation and Permitted Results are not made available by You or by any of Your employees, agents, clients or customers to any other person, firm or corporation. You shall notify Xitech promptly, in writing, of the circumstances of any event of unauthorized possession, use or knowledge of the Software Product, Related Documentation or Permitted Results. You agree that any unauthorized distribution, transfer, sale, offer for sale, reproduction, or use of the Software Product, Related Documentation and/or Permitted Results will cause irreparable harm to Xitech for which money damages would not be an adequate remedy. You shall inform Your employees having access to the Software Product and/or Related Documentation of the limitations and obligations of You regarding non-disclosure and copying of the Software Product, Related Documentation and Permitted Results. This section shall survive termination of this Agreement.

10. **Upgrades.** You agree that any and all upgrades, modifications, patches and the like supplied You for the Software Product or Related Documentation shall be used only in accordance with this EULA, and that the terms and conditions of this EULA shall apply to such upgrade(s), modifications, patches, etc., to the same extent as they apply to the Software Product and Related Documentation.

11. **Warranty.** Xitech warrants to You that the Xitech Software will perform substantially in accordance with the Related Documentation for a period of ninety (90) calendar days ("Warranty Period") from the date of shipment from Xitech ("Limited Warranty").

12. **Limitation of Warranty.** A. Xitech does not warrant that the operation of Xitech Software or the media on which it is contained will be uninterrupted or error-free. Xitech furthermore states that not all errors in Xitech Software or its media can be corrected or need correction, nor does Xitech warrant that all defects in Xitech Software or its media will be corrected. Xitech has no control over the conditions under which You use the Xitech Software or media and does not and cannot warrant the results obtained by such use. Xitech does not warrant that the functions contained in the Xitech Software will meet Your requirements or that Xitech Software or its media will operate in combination with other software or hardware selected by You for use by You.

B. Any Third-Party Software delivered by Xitech, is supplied "AS IS." In the case of Third-Party Software and/or third party hardware, You will look solely to the warranties and remedies, if any, provided by the Third-Party Software and/or hardware manufacturer. You understand and agree that Third-Party Software may be subject to additional terms and conditions imposed by the applicable licensor of such Third-Party Software.



## END USER LICENSE AGREEMENT

C. Xitech is not responsible for problems caused by changes in or modifications to the operating characteristics of any computer or operating systems for which the Software Product is being licensed, nor is Xitech responsible for problems which occur as a result of the use of Software Product in conjunction with any software supplied not supplied by Xitech or with a computer which is incompatible with the Software Product or the operating system for which the Software Product is being licensed or any use not in accordance with the Related Documentation and applicable specifications.

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16. **Governing Law/Venue.** These terms and conditions shall be construed, interpreted and applied in accordance with the Internal laws of the State of Minnesota (not including its law of conflicts) and the United

States, including U.S. copyright laws. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods shall not apply to any transaction between the parties.

17. **Dispute Resolution.** A. The parties desire to resolve, whenever possible, any controversy, claim or dispute arising out of or relating to this EULA or the breach or making thereof, including claims of fraud in the Inducement, without litigation.

B. A party which believes that a dispute, controversy or claim has arisen under or relates to this EULA will notify the other party regarding the dispute, controversy or claim and attempt to negotiate a resolution between the parties. If such dispute, controversy or claim is not resolved within thirty (30) calendar days after the commencement of such negotiations, it shall be submitted to final and binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association subject to subsection (C) below.

C. The arbitration sessions will be conducted in English and will take place in Minneapolis, Minnesota, USA. Such sessions may be conducted in person or, if permitted by the arbitrator, by telephone conference call or videoconference. The arbitrator will resolve the dispute within thirty (30) calendar days after selection. The losing party shall bear its own costs and expenses of such arbitration and the fees and expenses of the arbitrator. The arbitrator will award to the prevailing party, if any, its reasonable attorney's fees and expenses incurred in connection with the dispute and its resolution, in addition to any other damages, however, the arbitrator may not assess punitive or exemplary damages. Judgment upon the award rendered by such arbitrator may be entered in any court of competent jurisdiction.

D. Nothing contained herein will preclude Xitech from seeking injunctive relief from a court of competent jurisdiction pending the resolution of any dispute.

18. **Severability.** If any provision or any part of a provision of these terms and conditions are held by a court, government agency or other legal authority of competent jurisdiction to be invalid, illegal or unenforceable, such invalidity, illegality or unenforceability shall not invalidate, void or render unenforceable any other portion of these terms and conditions but rather the entire EULA shall be construed as if it did not contain the particular invalid, illegal or unenforceable provision or provisions, and the rights and obligations of each party shall be construed and enforced accordingly.

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20. **Entire Agreement.** These terms and conditions represent the entire agreement and understanding of the parties with respect to the subject matter hereof and supersede and replace any and all prior representations, and negotiations whether written or oral. No modifications or waiver of these terms and conditions hereof will be binding upon Xitech unless approved in writing by an authorized representative of Xitech.

21. **Governing Language.** The parties hereto hereby confirm that they have agreed that all written agreements between them be prepared in the English language only and such language shall be the governing language. Les parties aux présentes confirment qu'elles ont agréé que tous les documents entre eux par écrit soit rédigé dans la langue anglaise seulement, et telle langue sera la langue de contrôle.

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