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Congratulations! You've made the decision to lease a domain name, either as the registrant who is the lessor, or as the party wishing to use and potentially purchase the domain name, who is the lessee. Now it is time to put the deal to paper. Often the best way of embarking on this process is to outline the key terms to each other via email. This is sometimes referred to as "deal points" or a "term sheet".

Domain name lease agreements have become a popular way for domain name owners to earn revenue from their domain name, short of selling it outright. Often domain name leases occur when the party wishing to acquire the domain name cannot afford the upfront cash purchase price. Rather than sending the prospective purchaser on their way, sometimes the domain name owner can structure a lease transaction that enables the domain name owner to use the domain name immediately, and only pay more modest monthly payments to use the domain name, sometimes culminating in a purchase or in an option to purchase.

Your domain name lease transaction should be documented and accepted by both parties to ensure the lease terms and conditions are clear and that the rights and duties of the respective parties are clearly delineated, thereby helping to avoid potential issues in the future.

To help you better understand some of the common types of provisions which you may encounter, below is an "annotated" domain name lease agreement. You will find commentary throughout the agreement to assist you in understanding the mechanics and considerations in domain name leasing.

This document is not intended to be used without obtaining legal advice from a qualified domain name lawyer who can assist you in structuring and drafting an appropriate domain name lease customized for your specific requirements.

# ANNOTATED DOMAIN NAME LEASE AGREEMENT WITH OPTION TO PURCHASE v.1 [DOMAIN NAME]

There are many different kinds of “lease” structures, and accordingly this particular lease structure may not be the right one for you or may not be the one that the parties agree upon. This particular lease structure provides for lease payments for the use of the domain name and for an additional “purchase price” to be paid in order to buy the domain name. As an incentive to the lessee to buy the name sooner rather than later, all lease payments come to an end once the purchase price is paid and the purchase price may be paid earlier than at the end of the lease term.

Examples of different types of leases include but are not limited to the following;

- a) straight up payment of “rent” for use of the domain name for a period of time with no option or commitment to buy or to sell the domain name;
- b) payment of lease fees which at the end of the term have added up to the purchase price and would be equivalent to an “installment purchase”;
- c) payment of lease fees over a period of time, but which at the end of the lease term do not add up to the purchase price for the domain name, thereby requiring a “bubble” payment at the end in order to purchase the domain name;
- d) hybrid agreements, where only a portion of the monthly lease fee is payable towards the purchase price and the other portion is paid in respect of the use of the domain name;
- e) escalating agreements where the lease fees and/or the purchase price escalates over time, perhaps to better match expected cash flows available to a start-up or to provide an incentive to the buyer to pay the entire purchase price sooner rather than later.

Accordingly, domain name lease agreements are ‘not one size fits all’. Your requirements and those of the other party will determine the best deal structure. A qualified domain name lawyer can advise you as to the benefits and pitfalls of the various structures.

**THIS LEASE AGREEMENT** (the or this “Agreement”) dated, \_\_\_\_\_, 20\_\_ (the “Effective Date”) is between **[Lessor/Registrant]** with an address of [address], the party being the registrant and owner (“Lessor”) of the Internet domain name, [Domain Name] (the “Domain Name”), and **[Lessee]** a [state/jurisdiction where entity is registered and type of entity or individual], the party wishing to lease the [Domain Name] domain name, with an address of [address] (“Lessee”).

Here is an example of how this section would read with the details filled out:

**THIS LEASE AGREEMENT** (the or this “Agreement”) dated, January 1 2021 (the “Effective Date”) is between **Jane Smith** with an address of 123 Main Street, Anytown, Missouri, the party being the registrant and owner (“Lessor”) of the Internet domain name, **ABC.COM** (the “Domain Name”), and **Acme Incorporated**, a Delaware corporation, the party wishing to lease **ABC.COM** domain name, with an address of 567 High Street, Beverly Hills, California 92010 (“Lessee”).

Do you know who you are contracting with? If it is a company, it may be advisable to conduct a company search to confirm its existence, exact name, address, and officials and to also confirm that the company's

representative has authority to represent the company. If it is an individual, consider asking for photo identification such as a driver's license. If an issue were to arise, these preliminary steps can help avoid a situation where you have a contract with an entity that does not exist or an individual who hasn't provided his or her real name. Consider also whether the other party is in a country that is subject to sanctions or may be involved in money laundering.

It can be difficult to remember which party is referred to as the "lessor" and which party is referred to as the "lessee". You may find it helpful to equate the "lessor" with the domain name "ownOR" in order to help you remember which is which.

## RECITALS

- A. The Lessee wishes to exclusively use the Domain Name and further wishes to have an exclusive option to purchase the Domain Name, for the period of time and on the terms and conditions, set out herein;
- B. The Lessor wishes to allow the Lessee to exclusively use the Domain Name and further wishes to provide the Lessee with an exclusive option to purchase the Domain Name, for the period of time and on the terms and conditions, set out herein;

This section contains "Recitals" which may sound like an odd term, but it can be helpful in setting out the general background of the transaction and intentions of the parties. Here you can include any helpful information that generally describes the transaction and what the parties are agreeing to in broad terms.

**LESSOR AND LESSEE HEREBY AGREE** as follows:

### 1. Lease

Lessor shall lease to Lessee and Lessee shall lease from Lessor, the usage of the Internet domain name, [DOMAIN NAME] (the "Domain Name") on the terms and conditions contained in this Agreement (the "Lease" or "Agreement") and upon payment of the Purchase Price as set out below, the Domain Name will be transferred to Lessee as described herein.

You will note that this particular lease provides for a purchase price to be paid, which as you will see is in addition to lease payments for the interim usage of the domain name.

### 2. Lease Term

The term of the Lease (the "Lease Term" or the "Term") shall be for a period of three (3) years commencing on \_\_\_\_\_, 20\_\_ (the "Lease Commencement Date") and expiring on \_\_\_\_\_, 20\_\_ (the "Expiry Date").

The "lease term" refers to how long the duration of the lease is. There is no requirement for it to be any particular length. It is what the parties decide upon. Sometimes lease terms are a year, sometimes several

years. From a lessor's perspective, a long lease term can be good or bad. If the monthly payments are lucrative enough, perhaps there is no urgency to ultimately receive the purchase price. On the other hand, generally the longer a deal takes to complete the more exposure it has to risk of something going wrong, such as the lessee running out of money, going out of business, or misusing the domain name. The lessor also often has to consider whether a long lease term with a fixed purchase price works against the lessor if domain name prices are rising. From the lessee's perspective, a longer lease term is generally more attractive if it involves low monthly payments, but less attractive if at the end of the day the lessee pays a lot more in lease payments than it otherwise would have if the lease term was shorter.

### 3. Lease Payments and Purchase Option

Lessee shall pay to Lessor the payments set out at **Schedule "A"** (the "Payment Schedule") in respect of Lessee's use of the Domain Name (the "Lease Payment(s)") throughout the Lease Term.

It is often helpful to spell out the date and the amount of each lease payment in a sheet attached to the Agreement, that is referred to here as Schedule "A". This helps both parties know exactly when each payment is due. The lease payments are often in fixed monthly amounts but can sometimes change over time or even be paid at irregular intervals. It depends on what the parties negotiate.

Subject to Lessee's obligations under this Agreement not being in Default (as defined below) and subject to the terms and conditions set out in this Section 3, Lessee shall have the exclusive option to purchase the Domain Name throughout the Lease Term (the "Purchase Option") for the "Purchase Price" of **USD \$[AMOUNT]** as set out herein.

The purchase price is of course a matter for negotiation between the parties. Sometimes the purchase price is what the lessor originally wanted to sell the domain name for to the lessee, but the lessee wasn't able to afford the purchase price as a lump sum so the parties arranged for the lease instead. Sometimes the purchase price is more than what the originally desired purchase price was because the lessor doesn't get a lump sum of cash up front and therefore wants to be compensated more, especially in a rising market. Sometimes however, the purchase price is lowered to take into account the additional compensation that the lessor will receive due to the lease payments. A purchase price can even change over time. For example, a purchase price can rise the longer it takes for the lessee to exercise the purchase option, thereby incentivizing the lessee to make the purchase sooner rather than later.

- (a) At any time between the Lease Commencement Date and ninety (90) days prior to the Expiry Date, Lessee may, at its option, deliver written notice to Lessor as provided for herein that Lessee intends to exercise the Purchase Option (the "Purchase Option Notice") by paying the Purchase Price in full by way of a single lump sum payment of the Purchase Price no later than thirty (30) days from the date of the Purchase Option Notice.

It is important to have a very clear procedure about when and how the option to purchase may be exercised. In this particular lease, the option must be exercised no later than 90 days before the expiry of the lease term so that the lessor can plan accordingly and is not left in the dark until the last minute.

- (b) Upon payment of the Purchase Price in full as aforesaid, the Domain Name shall be transferred to Lessee by Escrow Provider, as defined below, together with all right, title, and interest in same, and this Agreement shall thereafter be immediately terminated. The indemnification provisions arising out of Lessor and Lessee's use of the Domain Name as set out at Section 9, below, shall survive the termination of this Agreement for three (3) years subsequent to such termination (the "Sale Transfer"). Upon request following the Sale Transfer, Lessor shall provide Lessee with a Bill of Sale in a form reasonably satisfactory to Lessee.

Even though the lease will be terminated at that point, the parties will still want the security of knowing that if one of them used the domain name in a way that harms the other party, that the party that caused the harm will still be responsible for 3 years under the "indemnity provisions" which are included below at Section 8. When the deal closes after the purchase price is paid, often a purchaser will want a "Bill of Sale" confirming the purchase. This is usually a simple document that can be easily prepared.

- (b) There will be no further Lease Payments otherwise payable herein as of the date of receipt of the Purchase Price by Escrow Provider.

The transaction is structured so that it is only when the purchase price is paid in full, the lease payments automatically terminate, assuming that there are any still outstanding. This is potentially a substantial incentive to the lessee to purchase the domain name early, as when it does, the lessee no longer has to pay any lease payments.

All payments to be made under this Agreement shall be made without any deduction or set-off without deduction of any kind, including but not limited to deductions on account of any taxes, levies, imports, duties, charges, fees and withholdings of any nature now or hereafter imposed by any governmental, fiscal or other authority save as required by law.

A provision like this is often included to avoid a situation where the lessee wants to deduct something from its lease payments, for example because dissatisfaction with some aspect of the domain name and its usability, or perhaps because of taxes applicable in certain countries that the lessee must pay,

#### **4. Early Payment/Prepayment of Lease Payments**

Subject to Lessee not being in Default under the Agreement (as defined below), at any time during the Lease Term, Lessee may prepay any or all Lease Payments then outstanding on this Lease, without penalty or bonus ("Prepayment(s)") however the payment or prepayment of such Lease Payments shall not affect the Purchase Price payable in the event that the Purchase Option is exercised.

Sometimes for convenience, a lessee may wish to prepay the lease payments, but in this particular lease, there is no incentive to do so. In other lease structures, by prepaying the outstanding lease payments earlier, an incentive is provided to the lessee by lowering the purchase price or reducing the amount of the lease payments. Another way of approaching this is to require the lessee to pay a significant “down payment” at the beginning of the lease, and then not require any lease payments for a corresponding period of time.

## **5. Place and Means of Payment of Lease Payments**

All Lease Payments including any Prepayment(s) as defined below, are to be made by wire transfer via [Escrow Provider] in accordance with Section 6, below.

In some situations, the parties will agree to not use an escrow service even though such services generally can provide additional security to both parties. In such cases, the lessee just pays the lessor directly via wire or another means of payment, such as Paypal, and the lessee must ask the lessor to change DNS settings for the domain name as the lessor will remain in control of the domain name throughout the lease. The potential issues with this approach are obvious. From the lessee's perspective, the lessee has no security that the domain name will continue to be available for use and sale, while the domain name is within the lessor's exclusive control.

## **6. Escrow**

- (a) Lessor and Lessee agree that [ESCROW Provider] shall be used by the parties for the escrow and holding of the Domain Name throughout the Lease Term and for receipt and disbursement of all Lease Payments due hereunder and for any Prepayment(s) as applicable, unless otherwise agreed in writing by Lessee and Lessor.

There are very few escrow services that specialize in domain names. When selecting an escrow service, particular attention should be given to whether the escrow service is appropriately licensed and insured, the escrow service's track record and reputation, the ease of use in setting up and administering the escrow service, and the escrow service's fees and expenses. Using an escrow service is usually crucial in a domain name lease as it provides additional security, particularly for the lessee who could otherwise be at risk for not receiving the use of the domain name and/or for not receiving the domain name transfer upon payment of the purchase price, if the domain name is not being held by an independent third party. Using an escrow service also has the benefit of having all payments facilitated and tracked by an independent third party. Escrow services can be companies or lawyers.

- (b) Lessor and Lessee acknowledge and agree to electronically execute [Escrow Provider]'s agreement for a Buyer-managed DNS Domain Name Holding Lease and Purchase (the “[Escrow provider's] Agreement”), a copy of which is attached hereto as Exhibit A and incorporated herein by this reference.

The escrow service provider will generally require that the parties additionally enter into an escrow agreement directly with the escrow service provider, which will also form part of this lease agreement. This agreement should also be reviewed, particularly for any inconsistencies with the domain name lease agreement.

- (c) Lessee and Lessor agree that Lessee shall be solely responsible for all [Escrow Provider]'s fees payable pursuant to the [Escrow Provider]'s Agreement, including domain name holding fees, escrow fees, and any applicable payment processing charges or banking fees, which Lessee shall pay in a timely manner in accordance with the [Escrow Provider]'s Agreement.

It is up to the parties to negotiate who pays the escrow fees. Sometimes it one or the other, and sometimes they are split. In this particular lease agreement, it is the lessee which responsible for paying the escrow fees.

- (d) The [Escrow Provider]'s Agreement shall provide for the holding of the Domain Name in escrow by [Escrow Provider]'s ("Escrow"), for the duration of the Lease Term provided that this Agreement is not earlier terminated in accordance with the terms herein.

It is crucial to review the escrow agreement and determine what the escrow provider's procedure is for restoring the domain name to the lessor in the event of default by the lessee. It is also advisable to determine whether the escrow provider will hold the domain name under privacy protection or openly under its own name in trust, which registrar will be used, and who is responsible for paying renewal fees for the domain name.

- (e) The [Escrow Provider]'s Agreement shall also provide for [Escrow Provider]'s receiving and disbursing all monies payable hereunder, including the Purchase Price (if mutually agreed by the Parties), Lease Payments and any applicable Prepayment(s) on behalf of Lessor and of Lessee.

The parties should familiarize themselves with how funds may be sent to and disbursed by the escrow provider, and what fees or charges are applicable. Also, escrow providers may require identification and verification before receiving and/or disbursing funds so the parties should familiarize themselves with this as well.

- (f) Pursuant to the [Escrow Provider]'s Agreement, Lessor and Lessee agree that upon receipt by [Escrow Provider]'s of the First Month's Payment in accordance with the Payment Schedule, Lessor shall with 72 hours of [Escrow Provider]'s confirmation of same, cause the Domain Name to be transferred to a domain name escrow account exclusively controlled by [Escrow Provider]'s as directed by [Escrow Provider]'s.

Often, the escrow procedure requires that the first payment, including escrow fees be paid up front, prior to the domain name being transferred to the escrow service provider. This helps ensure that the domain name is only transferred into escrow where there is at least some money being paid by the lessee, rather than transferring into escrow and finding out that the lessee hasn't and won't make a payment.

- (g) [Escrow Provider] shall disburse all Lease Payments to Lessor forthwith, as and when received, subject to the transfer of the Domain Name by [Escrow Provider]

to Lessee upon payment of the Purchase Price in full, which shall occur upon a Sale Transfer. Lessee shall not be liable or responsible for any defaults or breach by [Escrow Provider] and such breach shall not constitute a Default under this Agreement.

This provision makes clear that the escrow provider is not to hold onto the funds until the end of the transaction but rather, is supposed to disburse them to the lessor immediately once received.

- (h) In the event of any conflict between the terms of the [Escrow Provider] Agreement and this Lease Agreement, the terms of the Lease Agreement shall take precedence over the terms of the [Escrow Provider]'s Agreement as it applies to the Lessor and the Lessee and to the extent permitted by the Escrow Agreement. The [Escrow Provider]'s Agreement shall be interpreted in accordance with the terms of this Lease Agreement.

Any potential conflicts and inconsistencies between this Lease Agreement and the Escrow Agreement should be avoided. For example, notice and grace periods in the event of Default should be aligned between the respective agreements. Conflicts between the respective agreements can also sometimes occur in relation to dispute resolution provisions. For example, the Escrow Agreement may require arbitration between the parties in certain circumstances and may require that actions involving the Escrow Agent be brought in the jurisdiction of the Escrow Agent. It is therefore sometimes advisable to specifically address any differing dispute resolution provisions as between the two respective agreements by delineating which kinds of disputes are subject to the Escrow Agreement's dispute resolution provisions and which are subject to the Lease Agreement's dispute resolution provisions. There are further provisions regarding jurisdiction below, at Section 18.11.

## **7. Ownership of Domain Name and Lessee's Use of the Domain Name**

- (a) Throughout the Lease Term and unless and until the Purchase Price is paid in full and the Domain Name is transferred to Lessor in accordance with this Agreement, Lessor retains full title and ownership in and to the Domain Name and to all goodwill and common law trademark rights associated therewith, and subject to Section 10 below to any associated trademark rights arising from or in connection with the Domain Name or the use thereof, notwithstanding the Lease of the Domain Name notwithstanding the escrow of same by [Escrow Provider], subject only to Lessee's permission to use the Domain Name throughout the Lease Term in accordance with the terms and conditions of this Agreement. To the extent that any goodwill or common law trademark rights in or to the Domain Name is acquired by Lessee throughout the Term, all such goodwill is hereby assigned to Lessor and Licensee hereby quitclaims any rights to any such acquired goodwill, save and except if the Purchase Option is successfully exercised in accordance with this Agreement and the Domain Name thereby transferred to Lessee.

Registration of trademarks by Lessor is addressed in Section 10, but what about unregistered or “common law” trademark rights which may arise through Lessee’s use during the Term? What would happen if Lessee claimed common law trademark rights over the domain name? This could negatively affect the marketability and value of the Domain Name if Lessee didn’t end up exercising the Purchase Option. This provision therefore prevents Lessee from acquiring any goodwill that it could possibly use to assert trademark rights against Lessor or against someone who ends up purchasing or leasing the Domain Name from Lessor.

- (b) Lessee acknowledges that during the Lease Term and regardless of whether Lessee shall use or not use the Domain Name during the Lease Term, Lessee shall neither have, nor develop or accrue to any extent, any right, title, or interest of any kind, to the Domain Name, unless the Purchase Price is paid in full and the Domain Name is transferred at Sale Transfer in accordance with the Agreement.

This provision makes it clear that it is always the lessor who owns the domain name up until the domain name is actually purchased.

- (c) Throughout the Lease Term, Lessee shall have exclusive control of the Domain Name’s name servers via the [Escrow Provider]’s Buyer-controlled DNS control panel in accordance with the [Escrow Provider]’s Agreement, provided that Lessee’s obligations hereunder are not in Default, as defined below.

Escrow providers may employ different systems for enabling a lessee to change the name server settings for the leased domain name during the term. Such systems can be software based where the lessee logs in and changes a name servers itself or may be manual where the lessee must request via email that the escrow provider change the name servers for the lessee.

## **8. Lessee’s Compliance**

- (a) Subject to Lessee’s obligations under this Agreement not being in Default as defined below, throughout the Lease Term, Lessee shall be entitled to use the Domain Name for any lawful purpose and shall comply with all applicable laws and regulations whether state, provincial, federal, national or international, which apply to the use by Lessee of the Domain Name. Without limiting the generality of the foregoing, Lessee shall be prohibited from using the Domain Name for the purpose of, or in conjunction with, any of the following:

One of the risks of leasing a domain name rather than selling it outright, is that during the lease term the lessee generally gets to use the domain name and the lessee’s use could potentially negatively affect the lessor in several ways. For example, the lessee could use the domain name in a trademark infringing

manner, or use it for a copyright infringing website, or cause the domain name to be blacklisted by search engines. In order to mitigate such risks, it is often prudent for a lessor to investigate the lessee's background and understand how the lessee intends use the domain name to during the lease term. The lessor may also want to regularly monitor the lessee's use during the term. Beyond taking these prudent steps, it is often advisable to include specific prohibitions on the use of the domain name, such as the ones included below.

- (i) Casino, gambling, gaming, betting, wagering and/or sports betting activities, and the offering of products or services that relate to any of these, where there is exchanged real monies or currency (other than the mere advertising of a third party(s) services or products, so long as the actual fulfillment of any such advertised services or products, occur on and/or from the third party(s) website or webpage(s), and not from any website or webpage(s) operated by Lessee in conjunction with its direct or indirect use of the Domain Name); and/or
- (ii) Pornography, indecency, or any lewd, nude, or obscene content, products, or services; and/or
- (iii) Displaying or posting of any content or engaging in any use that is either confusingly similar to, or otherwise infringes upon the intellectual property rights, privacy, or other rights of any third party, including but not limited to, those of any registered or common law trademark or copyright holder; and/or
- (iv) Any use that causes, or is reasonably likely to cause, irreparable damage, harm or injury to the Domain Name or to the rights of Lessor as the legal owner and registrant of the Domain Name; and/or
- (v) Any use that is contrary to any rule, guideline, or instruction governing the acceptable use of domain names, as such rule(s), guideline(s), or instruction(s) have been established, approved, mandated, codified or implemented by ICANN (Internet Corporation for Assigned Names and Numbers) and mandated or otherwise adopted by and through ICANN approved domain name registrars, including but not limited to, the registrar of the Domain Name; and/or
- (vi) Any use that is likely to result in a penalty imposed against the Domain Name by any major internet search engine provider (including but not limited to Google, Bing and Yahoo), for violation of its published webmaster rules and/or guidelines, however actions of third parties that

result in links that are penalized by search engines and for which Lessee was not responsible for either directly or indirectly, shall not be considered a breach of this provision;

- (vii) Distribution of software or content that contains any virus, Trojan horse, worm, backdoor, or shutdown mechanism; and/or
  - (viii) Email distribution which violates any applicable national anti-spam laws or regulations, including but not limited to the U.S.'s CAN-SPAM Act or Canada's Anti-Spam Law, or any use in violation of the EU's General Data Protection Regulation (GDPR).
  - (ix) any multi-level marketing or any pyramid scheme, any marketing or sales of securities or any financial services, or any other use which is subject to regulatory oversight.
- (b) Lessee shall promptly notify Lessor of any claim, demand, threat, or legal proceeding, arising from or in any way related to Lessee's use of the Domain Name or Lessor's registration of the Domain Name that Lessee becomes aware of throughout the Term.
  - (c) Lessee is solely responsible for ensuring that Lessee does not infringe any third-party trademark rights worldwide in its use of the Domain Name.
  - (d) Lessee is solely responsible for ensuring that it has obtained all required licenses and permits to offer its products and services wherever its products and services are offered and/or sold.

## **9. Indemnity and Lessor's Disclaimer**

- (a) Mutual Indemnification. Lessee shall indemnify and hold harmless Lessor, Lessor's affiliates and their respective shareholders, directors, officers, and employees against all claims, damages, losses, costs, or liabilities which may arise in respect of Lessee's use and operation of the Domain Names throughout the Lease Term from the time that the name servers are set as directed by Lessee. Lessor shall indemnify and hold harmless Lessee, Lessee's affiliates and their respective shareholders, directors, officers, and employees against all claims, damages, losses, costs, or liabilities which may arise in respect of Lessor's use and operation of the Domain Names from the period prior to the configuration of the

Domain Name with the name servers designated by Lessee in accordance with this Agreement. The indemnity provided for in this Section 9(a) shall survive the termination or expiry of this Agreement for a period of three (3) years.

This provision makes the lessee responsible for its use of the domain name (i.e. after it updates the name servers), and makes the lessor responsible for its use of the domain name (i.e. before the lessee updates the name servers).

- (b) Traffic and Performance. Lessee acknowledges that no representations, promises, assurances, or inducements of any kind have been made to it, either expressed or implied, with regard to: (i) the number of page impressions, unique visitors, or other traffic or performance data of any kind or value, including but not limited to, type, quality, or origin which may be realized or which may have existed in connection with the Domain Name; and (ii) advertising revenue, any other revenue, receipts, profits, or earnings received, not received, or receivable, in connection with the Domain Name, or to any website operated either directly or indirectly in connection with the Domain Name, or as a result of any use of the Domain Name on the Internet by Lessor or by anyone else.
- (c) Merchantability and Fitness for Particular Purpose. Lessee acknowledges that the Domain Name is being leased “AS IS”, and if applicable, the Domain Name is subject to sale “AS IS”. THERE IS NO WARRANTY OF MERCHANTABILITY NOR ANY WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, nor any other warranty, either express or implied by this Agreement, except as may otherwise be expressly provided by Lessor’s warranties and representations herein. Without limiting the generality of the foregoing, Lessor has made no representation or warranty of any kind that the Domain Name does not infringe the trademark rights of any third party.

These provisions state that it is up to the lessee to ensure that it is satisfied with the domain name because the lessor is only providing its use and possible sale, on an “as is” basis, with no promises. In some transactions however, a lessee may request or insist upon certain promises, such as the number of unique visitors that it has historically received, or the domain name has not been blacklisted in the past.

## 10. Lessee Restrictions

During the Term and except as permitted by this Agreement, Lessee agrees that the Lessee shall not, directly or indirectly:

- (a) directly or indirectly file a trademark application anywhere in the world that includes the [Domain Name] or any mark confusingly similar thereto with or without a design element, in its own name except with Lessor’s prior written authorization, provided that the Lessee may without the Lessor’s authorization prepare and file a trademark application for the

word or words corresponding to the Domain Name without the TLD suffix;  
or

- (b) take any action either directly or indirectly, or assist any other person in taking any action, which may adversely affect the validity of Lessor's ownership of the Domain Name or interfere with or hamper Lessor's ownership of the Domain Name; or
- (c) challenge, dispute, or contest, directly or indirectly, the ownership, validity or enforceability of Lessor's ownership of the Domain Name.

Notwithstanding Section 10(a), above, in the event that Lessee wishes to apply for or obtain a trademark registration that includes or references the [Domain Name] or any mark confusingly similar thereto during the Term, then at Lessee's expense, Lessor shall apply for same in its own name, and provide a license to Lessee for same, provided however that; a) upon Sale Transfer, all such trademark rights shall be assigned to Lessee at Lessee's expense; and b) upon expiry or termination, the license agreement shall also expire or be terminated and Lessee shall have no further or continuing rights in any mark that is the subject of the license agreement.

The issue of trademarks is often complex in domain name leasing. Beyond a lessee and even a lessor for that matter, ensuring that the lessee's use of the domain name does not infringe third party trademark rights, the issue of trademarks can also come up in a different context. If a lessee is leasing a domain name with the intention of making a long-term investment in the domain name and the associated business, the lessee will often want to immediately file trademark applications for the domain name once the lease is executed. Filing trademark applications and ultimately obtaining trademark registrations is often a prudent step for a business to undertake to protect their brand. But where as here, the lessee doesn't actually own the domain name until the lessee pays the purchase price – which may be months or years down the road – should the lessee still be allowed to trademark the domain name? From the lessor's perspective, allowing such trademark rights to be obtained by a lessee while the lessor still owns the domain name, could turn into a problem if the lessee never ends up buying the domain name since the lessor would end up with a domain name that could be subject to restricted use as a result of the lessee's trademark rights. Solving this issue in a manner that satisfies both parties can be complex and this version of a domain name lease agreement provides one particular approach, but there are other approaches that should be discussed with a qualified domain name and trademark lawyer.

The above provision generally favors the Lessee's interests, however it is not the only approach to dealing with acquisition of trademark rights during the Lease Term. Another of several possible approaches, which is more favorable to the Lessee, is to allow the Lessee to apply for and/or obtain trademark rights, but require that they be assigned or cancelled in the event that the Lessee never completes the purchase. The difficulty with that approach for the Lessor, is that sometimes it may be difficult to get the Lessee's cooperation in effecting such an assignment or cancellation after the transaction has been effectively aborted.

## **11. Exclusivity During Term**

Provided that Lessee's obligations under the Agreement are not in Default, as defined below, Lessor shall not sell, lease, option, encumber or otherwise deal with (or attempt to do any of the foregoing) the Domain Name to or with any third party during the Lease Term.

It is important for the lessee to be comfortable that if it is paying a potentially considerable sum to lease the domain name and possibly purchase it via the purchase option, that in the interim, the lessor won't tie up the domain name by contracting with a third party.

## **12. Cessation of Use.**

Except in the case of the Domain Name being transferred to Lessor pursuant to a Sale Transfer, upon termination of this Agreement, Lessee shall cease any and all use of any mark, trademark, business name, corporate name, or other moniker, that corresponds to or incorporates the Domain Name.

This provision prevents Lessee from continuing to use the Domain Name as a corporate name, business name, etc. once the lease is over unless the Lessee buys the Domain Name. This can be important if for example, the Lessee's corporate name corresponds to the Domain Name, such as "DomainName.com Ltd."

## **13. Website Content.**

Upon termination or expiry of this Agreement or upon the Domain Name being transferred to Lessor pursuant to a Sale Transfer, subject to Section 7(a) and 10 respectively, Lessor shall have no claim or ownership interest in any original content which Lessor published on any website associated with the Domain Name.

Normally, the Lessee's website content will belong to the Lessee when the lease is over. However on occasion a Lessor may negotiate to acquire the content upon expiry or termination of the Lease Agreement.

## **14. Default and Termination**

- a) Lessor and Lessee agree that each of the following events amounts to a default by Lessee under this Lease ("Default"):
  - (i) If Lessee fails to make any payment due under this Agreement within five (5) business days and fails to cure the default of payment within ten (10) business days of the due date;
  - (ii) Lessee fails to perform or observe any of the covenants or provisions of this Lease on the part of Lessee to be performed or observed and fails to cure after ten (10) business days prior written notice as set out below;
  - (iii) If a writ of execution is issued against Lessee's property under a judgment in any court of competent jurisdiction;
  - (iv) If Lessee becomes bankrupt or if Lessee makes an assignment or composition with Lessee's creditors or if Lessee is a body corporate and a resolution is passed or a petition filed for the winding up of Lessee other

than for the purposes of reconstruction or amalgamation or if Lessee becomes subject to the appointment of a receiver.

- b) In the event Default occurs, Lessor retains the right to terminate Lessee's use of the Domain Name by instructing [Escrow Provider] to change the name servers associated with the Domain Name, and/or terminate the Agreement, upon five (5) business days' written notice, subject to Lessee's right to; a) cure any Default if such Default is curable; or b) exercise the Purchase Option; provided that the foregoing (a) and (b) occur during the aforementioned five (5) business day curative period. Notwithstanding the foregoing however, the indemnity provisions provided at Paragraph 9(a), above, shall continue to apply notwithstanding any curing of a Default or termination of the Agreement.

What constitutes a default should be as precise as possible and should also be consistent with the escrow agreement. From the lessor's perspective, it should be as broad as possible and account for not just failure to pay lease payments when due but also failure to adhere to the restrictions and conditions contained in the lease. From the lessee's perspective, the grace periods should be reasonable and allow for delays and banking errors to occur on occasion, and crucially, there should be a right for the lessee to cure defaults so that the lessee doesn't lose out on its investment due to a mere oversight or error that can be corrected.

- c) All Lease Payments are non-refundable.

Although this may be obvious to many people, making it clear is desirable.

- d) Lessee may at any time terminate the Lease Agreement upon five (5) days' written notice to Lessor for convenience (the "Termination Notice Period"), and in such event Lessee's sole liability for Lease Payments shall be in respect of those due or remaining due at the time of such termination and those Lease Payments that become due throughout the Termination Notice Period.

This particular version of a lease agreement allows the lessee to simply walk away from the lease at any time during the Term upon 5 days' notice, without having to make any more lease payments, let alone exercise the purchase option. Of course, the parties may negotiate a shorter or longer notice period depending on their circumstances and requirements. A longer notice period may actually disadvantage the lessor rather than be a benefit, in some cases. For example, a short notice provision in favor of the lessee could end up being shorter than the curative period in the event of a breach for non-payment of the lease payments, meaning that the lessor can more quickly retake possession of the domain name. On the other hand, a longer notice period can in some circumstances be beneficial so that the lessor can plan accordingly for the cessation of lease payments putting the domain name back on the market. A longer notice period may also be of benefit to a lessor where extending it beyond the date of the next upcoming payment results in one final payment before the lessee is permitted to walk away. But practically, even if such a longer termination provision is included, a lessee might just use an empty shell company to enter into the agreement in the first place, or it may not be feasible to sue for a single month's lease payment, so that the lessor wouldn't be able to recover the last month's lease payment in any event.

## **15. Representations, Warranties and Covenants of the Lessor**

- (a) Lessor represents and warrants to, and covenants with, Lessee that:
  - (i) Lessor has the sole authority to lease and/or sell all rights, title and interest to the Domain Name; and
  - (ii) Lessor has the full power and authority to enter into this Agreement and will be bound by and perform its obligations under this Agreement; and
  - (iii) This Agreement, when signed and delivered by Lessor, will be duly and validly executed and delivered and will be the valid and binding obligation of Lessee, enforceable against Lessee, in accordance with its term; and
  - (iv) the Domain Name's registration is in good standing and there are no disputes or claims currently existing or which have previously existed in respect thereof, that are known to Lessor; and
  - (v) the Domain Name is free and clear of any encumbrances or other rights of third parties granted in respect of the Domain Name; and
  - (vi) the performance by Lessor of its obligations set out in this Agreement shall not violate the known rights of any third parties or the terms of any agreements between Lessor and third parties; and
  - (vii) Lessor shall ensure if applicable, that it shall maintain its corporate status in good standing throughout the Term.

These representations and warranties are like promises to the lessee. The lessee will want it confirmed by a provision like this, that the lessor has the right to lease and/or sell the domain name, free and clear. The representation and warranty that "there are no disputes or claims currently existing or which have previously existed in respect thereof, that are known to Lessor", is often a crucial provision to include for the lessee's benefit, as it would be very unfortunate to lease and even purchase a domain name only to find out that there has been an ongoing third-party claim to the domain name or even a lawsuit pending in the background.

## **16. Representations and Warranties of the Lessee**

- (a) Lessee represents and warrants that:
  - (i) Lessee has the full power and authority to enter into this Agreement and will be bound by and perform its obligations under this Agreement; and

- (ii) This Agreement, when signed and delivered by Lessee, will be duly and validly executed and delivered and will be the valid and binding obligation of Lessee, enforceable against Lessee, in accordance with its terms; and
  - (iii) Lessee shall ensure, if applicable, that it shall maintain its corporate status in good standing throughout the Term.
- (b) Lessee has or shall, prior to its adoption of the Domain Name for use, perform all commercially reasonable trademark clearances, including but not limited to USPTO searches, prior to using the Domain Name.

Although this provision obligates the lessee to conduct trademark searches to ensure that the lessee's use of the domain name does not infringe third party trademarks, it is often advisable for the lessor to conduct its own searches as well, to be more certain that the intended use of the domain name will not infringe a third party's trademark rights.

## **17. Invalidity or Severability**

If any Article, Section, Paragraph or provision of this Agreement is determined to be void or unenforceable in whole or in part, it shall not affect or impair the validity or enforcement of any other provision of this Agreement. Any provisions of this Agreement which are or may be rendered invalid, unenforceable or illegal, shall be ineffective only to the extent of such invalidity, unenforceability or illegality, without affecting the validity, enforceability or legality of the remaining provisions of this Agreement, it being the intent and purpose that this Agreement should survive and be valid to the maximum extent permitted by applicable law. For greater certainty, this Agreement shall be read as if the invalid, unenforceable or illegal provision had never formed part hereof, and a "provision" for these purposes shall include the smallest severable portion of sections, paragraphs or clauses, or sentences contained therein, and not, unless the context absolutely requires, the whole thereof.

This is a fairly standard provision in many types of agreements that states that if there is an issue with the legality of one provision in the agreement, that the remainder of the agreement will remain valid.

## **18. Waiver**

No party to this Agreement shall be deemed to have waived any of its rights, powers or remedies under this Agreement unless such waiver is expressly set forth in writing. No consent or waiver, express or implied, by a party of any breach or default by the other party in the performance of such other party of its obligations shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such other party of the same or any other obligations under this

Agreement of such other party. Failure on the part of a party to complain of any act or failure to act of another party or to declare another party in default, irrespective of how long such failure continues, shall not constitute a waiver by the first mentioned party of its rights under this Agreement.

This is a fairly standard provision in many types of agreements that states *inter alia*, that a party to the agreement will not be deemed to have waived its rights unless it expressly says so.

## **19. Notices**

- (a) All notices required or permitted to be given pursuant to this Agreement shall be delivered by hand to the party for which it is intended, or sent by electronic email or sent by prepaid courier directly to such party at the following addresses, respectively;

If to Lessor:

[INSERT Name and Address]

If to Lessee:

[INSERT Name and Address]

or at such other address as either party may stipulate by notice to the other. Any notice delivered by hand or prepaid courier or sent by facsimile or electronic mail shall be deemed to be received on the date of actual delivery thereof as confirmed in writing via a receipt of the recipient.

If an issue occurs and one party needs to notify the other, for example in the event that the lessee defaults, a clear and effective means of notification is desirable. Issues with notice can arise and this particular provision requires a receipt to be obtained, which sometimes can be difficult to obtain with uncooperative party.

- (b) Each party agrees to provide written notice forthwith to the other party promptly after becoming aware of any dispute relating to any registration or use of the Domain Names. In the event that any demand, claim, proceeding, or dispute of any kind relating to the Domain Name is brought against the Domain Name, Lessee or Lessor (a "Dispute") during the Lease Term, Lessor shall at its option, have sole control over same in consultation with Lessee, and shall indemnify, defend and hold Lessee harmless from all liability from same, except as provided for in Section 17(c) below, and Lessee shall fully cooperate and coordinate its efforts with Lessor in connection with a Dispute.

Hopefully a domain name dispute doesn't occur during the lease term, but if it does, this provision gives the lessor – who remains the domain name owner unless the purchase option is exercised – control the defense of the domain name. Furthermore, it is will be the lessor who will be responsible for paying for the defense and possibly paying damages, unless the problem arose as a result of the lessee's breach of the agreement.

- (c) In the event that any Dispute is brought against the Domain Name or the Lessor, including but not limited to by way of a claim for indemnity against Lessor, and which is due to Lessee's use of the Domain Name and/or or Lessee's breach of this Agreement, Lessee shall fully indemnify and hold harmless Lessor from and against all costs, expenses, attorney fees, and/or damages incurred or to be incurred by Lessor in connection with the Dispute.
- (d) In the event the Domain Name is lost, seized, or transferred to a third party without any fault of the Lessor, because of actions or inactions taken by Lessee during the Term which are in breach of this Agreement or are otherwise unlawful, including but not limited to, the unauthorized use or display of third-party trademarks, copyright or other intellectual property on a website used in connection with the Domain Name, Lessee shall be obligated to pay Lessor damages equal to the actual damages incurred by Lessor, not to exceed the Purchase Price.

In the event that the lessee's breach of the agreement results in the lessor's loss of the domain name, this provision requires the lessee to pay damages to the lessor. The damages are capped at the purchase price, since that is often a good measure of the maximum damage that a lessor could sustain as result of the loss of the domain name.

- (e) In the event that during the Term, the Domain Name is lost, seized, or transferred to a third party for any reason without any fault of Lessor, such that Lessor is unable to continue to provide Lessee with the use of the Domain Name for the duration of the Term and is unable to convey the Domain Name, the Agreement will become null and void immediately and Lessor shall be obligated to pay Lessee damages equal to the actual damages incurred as a result of Lessee's inability to use the Domain Name, not to exceed the total of all Lease Payments received by Lessor.

Legal agreements often try to anticipate problems even though they may not happen often. This provision contemplates the situation where something happens to the domain name mid-lease term that is not the fault of the lessor or even of the lessee, such as for example, the domain name is stolen or transferred away by an errant registrar. In such an event the lessor will have to compensate the lessee since the lessee was relying upon the use of the domain name, but the damages are capped at whatever amount the lessor received from the lessee in lease payments.

## **20. MISCELLANEOUS**

20.1 Recitals. The Recitals form part of this Agreement.

20.2 Attorney and Tax Advisor Review. Lessee acknowledges that it has had the opportunity to consult with independent legal and tax counsel of its choice throughout all negotiations which preceded the execution of this Agreement.

Domain name lease transactions often involve tax issues and each party should consider obtaining tax advice in addition to legal advice, before entering into an agreement.

20.3 Brokers. The parties hereto acknowledge and agree that no broker has been engaged in connection with the transactions contemplated hereby and that no commission is owed to any party in respect of the transactions contemplated in this Agreement.

Although this particular provision states that no broker was involved, often a broker will be involved and in such an event the agreement may specify the broker, the broker's fee, and which party is responsible for paying it. A broker's agreement is often executed between a party and a broker, separately from the domain name lease agreement.

20.4 Expenses. Each party shall bear their own legal and other costs and expenses in connection with the negotiation, preparation, execution, and/or implementation of this Agreement (except as may otherwise be expressed or authorized herein).

Sometimes the parties negotiate that one party will contribute to the other party's legal expense where that party is the one that has taken on the expense of having an attorney prepare a draft lease agreement.

20.5 Costs of Litigation. In the event of litigation or alternative dispute resolutions between the parties concerning this Agreement, and in addition to any monetary award as may be ordered by a court or arbitrator, the losing party shall pay: (i) the reasonable attorney's fees; and (ii) the reasonable costs of litigation, incurred by the successful party.

20.6 Entire Agreement. This Agreement constitutes the entire agreement and understanding between the parties with respect to all matters which are referred to in it, and supersedes all previous understandings or agreements between the parties, whether oral, or otherwise.

Although it shouldn't need to be said, if a provision isn't included in the agreement, then it doesn't count. That means that whatever term or condition you want included must be written into the actual agreement, even if it is in an email communication, for example.

20.7 Lessor and Lessee shall hold in confidence the terms and existence of this Agreement, including but not limited to the amount of the Purchase Price, except where

disclosure is required by Lessee or Lessor pursuant to law, and except as may be disclosed in confidence to a party's professional advisors.

Confidentiality and the degree thereof are matters for the parties to negotiate and determine. If one party wishes to announce or promote the sale or acquisition, then that should be agreed upon in advance and provided for in the agreement.

20.8 Enforcement. Failure by a party to enforce any provisions of this Agreement at any time, shall in no manner affect the right of that party at a later time to enforce any provision of this Agreement, subject to any applicable statute of limitations, or other legal bar or preclusion.

20.9 In the event that any word, phrase, clause, sentence or other provision herein shall violate any applicable statute, ordinance or rule of law in any jurisdiction which governs this Agreement, such provisions shall be effective to the extent of such violation, without invalidating any other provision herein.

20.10 No Assignment. This Agreement is personal to the parties involved, and the parties shall not assign or otherwise transfer any of its rights or obligations under this Agreement to any third party without the prior expressed written consent of the other party; provided, however, that Lessee may assign or transfer its right or obligations to a wholly owned affiliate with the consent of Lessor, such consent to not be unreasonably withheld or delayed, and notwithstanding same, Lessee and such assignee shall remain jointly and severally bound to the terms and conditions of this Agreement. Furthermore, Lessee may not license, authorize, sublease, rent, or otherwise permit any non-Affiliat(ed) third party to use the Domain Name during the Lease Term (with "Affiliate" meaning an entity wholly owned by Lessor).

Although tucked at the end of the agreement, this provision can often be very important depending on the circumstances. Not only does this provision contain a common prohibition on not assigning the contract to a third party, but it also prohibits the lessee from letting a third party use the domain name under its lease. From a lessor's perspective, the lessor may be comfortable with the lessee but a third party may be entirely unknown and pose additional risks to the lessor in terms of use of the domain name.

20.11 Jurisdiction. This Agreement shall be governed by and construed in accordance with the laws of the [Jurisdiction] without giving effect to any choice or conflict of law provision or rule (whether of the State of [Jurisdiction] or any other jurisdiction). Each party irrevocably submits to the exclusive jurisdiction and venue of the courts located in [Jurisdiction], for any legal suit, action, or proceeding arising out of or based upon this Agreement. Notwithstanding the foregoing, for any dispute subject to the dispute resolution of the Escrow Agreement and requires the participation of the Escrow Agent, the Escrow Agreement's dispute resolution provisions shall apply.

It is up to the parties to negotiate where disputes will be resolved and under what law. Generally each party will want their own home jurisdiction. Attention should also be given to the dispute resolution provisions of the escrow agreement.

20.12 Counterparts. This Agreement may be executed in counterparts, including by electronic signature and/or PDF/facsimile transmission and each such counterpart shall be deemed to be an original and which together shall constitute one and the same Agreement.

20.13 Reserved Rights. All rights not specifically and expressly granted to Lessee by this Agreement, are reserved to Lessor.

20.14 Headings. All headings contained in this Agreement are for reference purposes only. They are not to be incorporated into this Agreement and shall not be deemed to be any indication of the meaning of the sections and sub-sections to which they relate.

20.15 Contact Updates. Throughout the Lease Term, each party agrees to provide the other party with its current up-to-date contact information, including postal address, telephone number(s), and email address, and to advise of any changes in contact information at such time any said changes occur.

20.16 Relationship of the Parties. The parties acknowledge that the relationship between Lessor and Lessee is that of a lessor and lessee, and nothing herein shall make the parties partners or joint ventures, and neither party may act as an agent for the other or make any representation or incur any obligation on behalf of the other to any third party.

20.17 Force Majeure. In the event that any party shall be delayed or hindered or prevented from performing any of its obligations hereunder by reason of any ICANN/registrar technical issues, strike, lock-out, labor trouble, epidemic, pandemic, emergency order, shortage of materials or failure of power beyond that party's control, restrictive governmental laws or regulations, riots, insurrection, war, act of God or for any other reason beyond the reasonable control of the party (and without limiting the generality of the foregoing other than lack of funds), then performance of such obligations shall be excused for the period of all such delays and the period for the performance of any such obligation shall be extended for a period equivalent to the period of all such delays. Notwithstanding the foregoing, the provisions of this Section 20.17 shall not relieve Lessee of making any payments required under this Lease nor permit Lessee any delay in making any payment payable by Lessee under this Lease.

20.18 Currency. All amounts of currency referenced herein are in United States dollars.

**IN WITNESS WHEREOF** the parties hereto have executed this Agreement on the date first above written.

**[INSERT NAME]**

**[INSERT NAME]**

**I have authority to bind the company.**

**I have authority to bind the company.**

**Per:** \_\_\_\_\_

**Title:**

**Per:** \_\_\_\_\_

**Title:**

## **SCHEDULE "A"**

### **LEASE PAYMENT SCHEDULE**

#### **Lease Payment Schedule:**

Payments are due on the 1<sup>st</sup> of each month or next business day (should the 1<sup>st</sup> of the month land on a weekend or bank holiday as observed in [Jurisdiction]).

[INSERT SCHEDULE of PAYMENTS]

Where the lease payments are monthly, ideally they would be made on the first of every month for easier record keeping, however this is not required.

ICA