

**1. DEFINITIONS:** In this document, the following definitions apply:

- 1.1. **“Agreement”** means all bids, purchase orders, and all other documents, between Company and Customer relating to services or materials contracted or provided and includes these Terms and Conditions.
- 1.2. **“Company”** means Foto-Kem Industries, Inc., a California corporation, dba FotoKem Film and Video, Keep Me Posted, L.A. Studios, Margarita Mix Hollywood and Margarita Mix Santa Monica.
- 1.3. **“Company Liability”** means any and all liabilities, losses, damages including consequential and incidental damages, demands, claims, causes of action, judgments, and all related legal fees, costs and expenses.
- 1.4. **“Customer”** means the person or entity applying for an account or requesting services or materials from Company, and any employees, representatives, or agents of person or entity contracting services.
- 1.5. **“Elements”** means all physical film and/or video media containing intellectual property and associated rights as provided by Customer or created by Company on Customer’s request. Elements shall also mean any file-based data recordings containing intellectual property and associated rights as provided by Customer or created by Company on Customer’s request, and all physical storage devices used to record, transport and archive file-based data content.

**2. OWNERSHIP OF ELEMENTS**

- 2.1. **Warranty.** Customer represents and warrants that Customer is the sole owner or the duly authorized representative of all owners of the Elements delivered to Company by Customer (or for Customer’s account) and all intellectual property contained in or represented by the Elements.
- 2.2. **Authority.** Customer represents and warrants that Customer has the legal right and authority to enter into the Agreement and to engage Company to perform all work under the Agreement, and that all facts stated in any document comprising the Agreement are true and complete.
- 2.3. **Transfer.** As long as Customer is indebted to Company, Customer shall not sell, assign, pledge, hypothecate, loan or otherwise encumber or purport to transfer all or any interest in any of the Elements or any right therein without prior written notice to Company.
- 2.4. **Indemnity.** Customer shall indemnify, defend and hold Company harmless from all actual or potential Company Liability, arising out of or in connection with the breach of any Customer warranty or representation or the publication, processing, use, distribution, contents or exhibition of Elements including, without limitation, any claimed libel, slander, defamation, invasion of privacy, misappropriation of personality or infringement of patent, copyright, trademark, trade name, or other proprietary right.
- 2.5. **Claim.** Company shall have no obligation to investigate the validity of any claim adverse to Customer or Company by any third party with regard to ownership, right to possession or control of the contents of the Elements or any other matter. Customer shall indemnify, defend and hold Company harmless from any and all actual or potential Company Liability that may result from action taken by Company as a result of any such claim.
- 2.6. **Response.** Within forty-eight (48) hours after Company provides notice of a claim to Customer, Customer shall notify Company in writing of the response Customer proposes. Thereafter, Company, at its sole discretion, shall have the option to take any reasonable action Company deems appropriate to protect its interests including, but not limited to, releasing or otherwise dealing with any or all of the Elements as requested in the claim, rejecting the claim in whole or in part, restricting access to the Elements or interpleading the Elements. Customer shall indemnify, defend and hold Company harmless from all actual or potential liability arising out of or in connection with any such action.

**3. PAYMENT**

- 3.1. **Prices, Sales and Other Taxes.** All prices are F.O.B. Company’s facility, and do not include sales, use, manufacturing, excise, processing or other taxes, which may be imposed by any government authority. Customer shall indemnify Company for all taxes which Company may be required to pay or collect under any existing or future law in connection with the services or goods provided by Company.
- 3.2. **Terms and Adjustments.** Each invoice from Company shall be due and payable on presentation, or if Company has granted Customer an open account, within thirty (30) days of the invoice date. Customer shall comply with credit terms extended by Company. Any invoice not paid when due shall bear interest at the rate of 1.5% per month (18% per year). Customer shall present any claim for adjustment of an invoice in writing within thirty (30) days from the date of the invoice. Customer waives any claim for adjustment which is not presented within this time.
- 3.3. **Third Party Payment.** Company shall have no obligation to accept work submitted by Customer to be billed to a third party. If Company accepts such work, Customer and the third party are jointly and severally liable for payment to Company.
- 3.4. **Shipping.** After receipt of written instructions from Customer, Company shall use reasonable efforts seeking to cause Elements to be transported to the destination requested, all at Customer’s expense and risk. In the absence of written instructions identifying the carrier or means of shipment, Company shall have the right to make all shipments of Elements via carrier or means Company selects. Unless requested by Customer in writing, Company will not insure shipments through the carrier selected.
- 3.5. **Overtime.** Customer acknowledges that rates in Company’s price list are based on use and operation of Company’s facilities and employment of personnel and equipment during normal working hours, and are subject to increase, on notice to Customer, for work performed on Saturdays, Sundays, holidays or otherwise outside normal working hours.
- 3.6. **Price Changes.** Company may from time to time increase charges shown on the price list based on changes in prices of film, chemicals, other materials used by Company, manufacturing or labor (which shall also include fringe benefits) or other costs or market conditions. Company shall endeavor to give notice to Customer of any such price change.
- 3.7. **Cancellation Fees.** In the event of untimely cancellation of work ordered or scheduled, Customer shall pay Company cancellation fees according to the schedule on Company’s price list, or as provided below, whichever is less.
  - 3.7.1. **All Film Products, Video and Data Duplication, Transcoding and Archiving, or Other Non-Hourly Service.** Cancellation fees will be determined by Company relative to the amount of work completed.

3.7.2. Editing, Mastering, Telecine, Graphics, VFX, Audio Recording, or Any Other Hourly Services. Cancellation made twenty-four (24) hours or more (excluding weekends) before the time work is scheduled by Company to begin will incur no cancellation fee. Cancellation made less than twenty-four (24) hours prior to the time work is scheduled by Company to begin will incur a cancellation fee of 100% of the estimated costs of the project.

3.8. Attorneys' Fees. Customer shall reimburse all attorneys' fees incurred by Company in or in connection with (a) any litigated or non-litigated dispute between Customer and any other person or entity which involves or results in a demand or conflicting demands on Company; (b) any interpleader action involving Company; (c) any litigation or non-litigation action taken by Company to demand payment of, or for the collection of, amounts due or overdue to Company; (d) the interpretation or enforcement of this Agreement; or (e) any other dispute between or involving Customer and Company.

#### **4. RIGHT TO REFUSE PERFORMANCE**

4.1. Generally. In addition to Company's rights above, Company may, without liability to Customer, refuse to perform any service or provide any goods which Company, in its sole discretion, believes could potentially expose Company to a claim or be found to be in any way unlawful, pornographic, defamatory or degrading, or which Company deems as potentially tending to incite prejudice or passion. If Company determines that any such risk exists, Company shall have the right to stop further work, entirely or in part, and retain possession of all Elements until Customer has paid in full for work performed. Other than the obligation to return the Elements on receipt of payment in full from Customer, Company shall incur no further obligation of any kind to Customer.

4.2. Imperfect or Old Elements. Company shall have sole discretion to refuse to accept for processing Elements in old, shrunken, or other imperfect or unusual photographic or physical condition, or any nitrate material. If any such material is accepted for processing, Company shall not be responsible for resulting defects. Company shall have the right, on notice to Customer, to make additional charges for time and materials used, whether or not a satisfactory Element is produced by Company.

**5. LIMITATIONS OF WARRANTY. EXCEPT AS EXPRESSLY STATED IN THESE TERMS AND CONDITIONS, COMPANY MAKES NO WARRANTY, EITHER EXPRESS OR IMPLIED, AS TO MERCHANTABILITY, FITNESS FOR A PARTICULAR USE OR PURPOSE, DESCRIPTION, QUALITY, CHARACTER, OR OTHERWISE WITH RESPECT TO THE SERVICES OR GOODS PROVIDED BY COMPANY.**

#### **6. STORAGE AND REMOVAL**

6.1. Storage. At Customer's written request, and sole risk, Company will store Elements during the time of production, release printing or dubbing and for a reasonable period afterward, up to six (6) months. Thereafter, Customer shall pay Company a storage charge of \$2.00 per month per unit of film, tape, disk or drive, or \$.50 per gigabyte per month for data storage on Company servers or such other rate as Company deems appropriate for storage charge. Company may store such Elements at any place or places Company deems appropriate, still at Customer's risk. At any time, Company may require Customer to retake possession of any or all of Customer's Elements (vaulted or otherwise).

6.2. Request to Store in Vault. Storage of physical Elements in a Company vault may, but does not necessarily, provide security or safety additional to Company's other storage methods. Company shall have no obligation to store Customer's physical Elements in a vault, unless Company agrees to Customer's written request to do so. Company shall use reasonable efforts seeking to implement Customer's reasonable instructions. Company shall not be liable for inaccurate instructions or failure to comply with instructions.

6.3. Name. Customer shall have sole responsibility to ensure that the physical Elements and each of their components are vaulted under the proper Customer name. If any physical Elements are vaulted in the name of a third party, Company may release the physical Elements to the third party or a representative thereof without notice to Customer or liability. Company reserves the right to request a written request authorizing the release of each vaulted or stored Element, signed by an individual specifically authorized as set forth on the Customer Profile or written modification thereof. Company shall have no obligation to provide Elements stored in Company's vault to any individual other than indicated on the Customer Profile. Customer shall notify Company in writing of any change of individuals authorized to receive vaulted or stored Elements.

6.4. Elements outside the Vault. Company shall have the right to make physical Elements not stored in the vault available for pick-up on a will-call basis, and to release such Elements at the will-call window to individuals who purport to have authority to receive them. Customer shall notify Company in advance in writing of any requested limitation or restriction of the release of physical Elements at Company's will-call window. Company will not be responsible nor incur liability for release of any Elements at the will-call window. Company reserves the right to vault or otherwise store any physical Elements that remain unclaimed in Will-Call after fourteen (14) days. Storage charges on these Elements will apply immediately.

6.5. Removal. Within thirty (30) days after written notice to Customer at Customer's last known address as it appears in Company's records, Customer shall, at Customer's sole expense, remove all Elements in storage, whether in the vault, server, or otherwise. If Customer fails to do so, at Company's sole option. Company shall have the right, without liability to Customer or any other person, to either (1) ship or deliver physical Elements at Customer expense to Customer at Customer's last known address as it appears in Company's records; (2) send Customer's physical Elements to a public warehouse or film storage facility to be held in the name of, for the account of, and at the sole risk of Customer, at a rate obtained in good faith by Company; or (3) destroy or otherwise dispose of the physical Elements. Within thirty (30) days after written notice to Customer, as described above, Company shall have the right to purge or erase Customer's data Elements from Company servers, should Customer fail to respond or act on Company's written notice. **THE LIMITATION OF LIABILITY PROVISIONS OF SECTION 9 SHALL APPLY TO THE DISPOSITION OR DESTRUCTION OF CUSTOMER'S ELEMENTS IN ACCORDANCE WITH THIS SECTION 6.5.**

**7. STANDARD FILM SYNCHRONIZATION LEADERS.** Customer shall supply film negatives to Company with standard leaders bearing clean and proper synchronization marks. Any errors in synchronization shall be the sole responsibility of the Customer, and Company shall bear no liability related thereto. Customer shall indemnify, defend and hold Company harmless from any Company liability arising out of, or connected with, Element synchronization.

## MISCELLANEOUS

7.1. All Work. This Agreement applies to all Company work performed, services rendered, and materials furnished for the account of Customer until rescinded, terminated or modified by a subsequent written agreement.

7.2. Entire Agreement. The entire Agreement includes all documents as described in Definitions 1.1 and includes, without limitation, all representations and warranties, agreed by the parties, and replaces and supersedes any provisions on the face or reverse side of any purchase order submitted by Customer other than Company's form or any attachment thereto or any prior general agreement inconsistent with the terms hereof. There are no terms and conditions, either oral or written, between the parties, except as stated in the Agreement herein. No modification or waiver or unenforceability of any one or more provisions of this Agreement shall affect the validity or enforceability of the remaining provisions.

7.3. Remedies Are Cumulative. The failure of Company in any one or more instances to insist on performance of any provision of this Agreement or to exercise any right or privilege in this Agreement shall not be construed as a waiver of any breach or of any other right or privilege.

7.4. Interpretation. Section headings are for convenience only and shall have no effect on the interpretation of the Agreement. The terms of Agreement shall be interpreted and construed according to their fair meanings and not strictly for or against Customer or Company.

7.5. Governing Law. Any claim of breach, or dispute as to validity, construction or performance of this Agreement shall be governed by and construed and enforced according to laws of the State of California. Jurisdiction and venue for any suit, action or proceeding arising out of or relating to the Agreement, shall be proper in any State or Federal court in the County of Los Angeles, State of California.

7.6. Notices and Communications. All notices and communications required or permitted hereunder to Company shall be sent to: Foto-Kem Industries, Inc., P.O. Box 7755, Burbank, California 91510, unless Company notifies Customer otherwise in writing. All notices and communication to Customer shall be sent to Customer at any mailing address and/or email address shown as an address of Customer in Company's records. Notices and communications sent by mail shall be deemed to be delivered at the earlier of actual receipt or three (3) days after dispatch. Notice sent by email shall be conspicuously labeled to call special attention to it and deemed to be delivered the business day after successful transmission.

7.7. Credit Application/References. If Customer applies for credit with Company, Customer authorizes Company to verify the information stated by Customer on the credit application and to obtain any other information Company may request. References are hereby authorized and directed to release such information to Company.

7.8. Modification. The terms of this Agreement shall be modified and/or superseded by the terms of any future forms of these terms and conditions appearing on any invoice or other standard form provided by Company to Customer or at [www.fotokem.com/terms](http://www.fotokem.com/terms). These Terms and Conditions as revised 12-19 are retroactively effective to Customers first work performed by Company and to the date Customer's Elements were first stored by Company. These terms may be amended, waived or modified only by a written agreement signed by Customer and by an authorized officer of Company. Sales personnel of Company are not authorized officers of Company for this purpose.

## 9. LIABILITY LIMITATIONS AND INSURANCE

9.1. Acknowledgments. Customer acknowledges that Company's prices are based on Company's assessment of the value of its good and services, and are not based on value of Elements. Customer acknowledges and agrees that Elements are received, processed, and stored at Customer's risk. Additionally, Company reserves the right to provide Elements to any person to whom Company assigns or subcontracts all or any of the work. Customer acknowledges being informed that **COMPANY IS NOT OBLIGATED TO PURCHASE INSURANCE FOR THE ELEMENTS AND THAT CUSTOMER SHALL BE SOLELY RESPONSIBLE TO INSURE THE ELEMENTS.**

9.2. **LIABILITY LIMITS FOR DAMAGE OR LOSS. COMPANY SHALL NOT BE LIABLE FOR LOST PROFITS, INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR OTHER DAMAGES CAUSED BY (A) LOSS, DAMAGE OR DESTRUCTION OF ANY ELEMENTS, OR OTHER PROPERTY; (B) DELAY IN PROVIDING OR FAILING TO PROVIDE GOODS OR SERVICES; (C) DEFECTIVE PRODUCTS OR SERVICES PROVIDED BY COMPANY; OR (D) ERRORS BY COMPANY IN LABELING OR SHIPPING OR DELIVERY, EVEN IF ANY OF THE FOREGOING, (A) THROUGH (D), ARE CAUSED BY NEGLIGENCE OF COMPANY OR COMPANY'S PERSONNEL. COMPANY'S LIABILITY SHALL BE LIMITED TO REPLACEMENT OF A SIMILAR QUANTITY OF UNEXPOSED RAW STOCK OR NEW UNRECORDED TAPES/DISKS FOR THE QUANTITY OF THE ELEMENTS WHICH ARE LOST, DAMAGED OR DESTROYED, RETURN OF ELEMENTS WHEN GOODS OR SERVICES HAVE BEEN DELAYED OR NOT PROVIDED, REPLACEMENT OR REPAIR OF DEFECTIVE GOODS OR SERVICES PROVIDED BY COMPANY, CORRECTION OF LABELING OR SHIPPING OR DELIVERY ERROR. COMPANY SHALL HAVE NO FURTHER LIABILITY REGARDING SUCH ELEMENTS. COMPANY'S TOTAL LIABILITY TO CUSTOMER OR ANYONE ELSE FOR ANY REASON WHATSOEVER SHALL NOT EXCEED THE PORTION OF THE PRICE ACTUALLY PAID BY CUSTOMER TO COMPANY FOR THAT PORTION OF THE GOODS FURNISHED AND/OR SERVICES RENDERED BY COMPANY UNDER THIS AGREEMENT.**

9.3. Prompt Notice and Time Bar. Customer shall return any defective Element created by Company and provide Company written notice of any imperfection or error or claim in the time stated in Section 9.5.

9.4. **LIABILITY LIMITATIONS FOR DELAY AND DELIVERY. SHIPPING AND DELIVERY DATES ARE ONLY APPROXIMATIONS. COMPANY SHALL NOT BE LIABLE TO CUSTOMER OR ANY OTHER PERSON FOR ANY LOSS, DAMAGE OR LIABILITY CAUSED BY DELAY IN DELIVERY OR SHIPPING, OR FAILURE TO PROVIDE NOTICE OF ANY DELAY. ADDITIONALLY, COMPANY SHALL NOT BE LIABLE FOR DELAY CAUSED BY ANY REASON INCLUDING, BUT NOT LIMITED TO, WEATHER, ACT OF GOD, ACT OF CUSTOMER, ACT OF CIVIL OR MILITARY AUTHORITY, FIRE, FLOOD, EARTHQUAKE, EPIDEMIC, QUARANTINE, WAR, ACT OF TERROR, RIOT, STRIKE, LABOR DIFFICULTIES, EQUIPMENT FAILURE, DELAY IN TRANSPORTATION OR SHORTAGE IN MATERIAL. IN THE EVENT OF DELAY, THE APPROXIMATE DELIVERY OR SHIPPING DATE SHALL BE DEEMED EXTENDED TO A PERIOD NO LESS THAN THE LENGTH OF THE DELAY.**

9.5. Claims and Notice. Customer shall notify Company in writing of any claim or potential claim related to or arising out of the services provided under this Agreement within ninety (90) days after the earliest of shipment or the date Customer knew or the date the Customer should have known of such claim. Any claim that Customer fails to provide written notice of within this time shall be deemed to be waived, released and permanently barred.

9.6. Insurance. Company shall have no obligation to insure any of Customer's Elements while in Company's possession, in transit or otherwise. Customer acknowledges Company's recommendation that Customer order a protection film Element of each cut negative and fully insure physical Elements against all insurable risks including loss, destruction or damage while in Company's possession, in transit or otherwise. Customer shall be solely responsible to fully insure all Elements. Customer waives all rights of subrogation. Without limiting other provisions within Section 9 pertaining to limitation of damages, in no event shall Company be liable for any loss of or damage to the Elements.

9.7. **NO CONSEQUENTIAL DAMAGES. IN NO EVENT SHALL COMPANY, ITS EMPLOYEES, AGENTS OR SUBCONTRACTORS, BE LIABLE FOR ANY LOST PROFITS OR SPECIAL, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES WHATSOEVER INCLUDING, BUT NOT LIMITED, TO THOSE RESULTING FROM ANY DEFECTIVE ELEMENTS, PRODUCTS OR EQUIPMENT DELIVERED, PRODUCED OR PROVIDED BY THE COMPANY; RESULTING FROM LOSS OF, DAMAGE TO, OR DESTRUCTION OF THE ELEMENTS FROM IMPROPER STORAGE, PROCESSING, PACKING, RELEASE, DELAY IN DELIVERY OR SHIPMENT, OR ERRORS IN SHIPMENT OR LABELING BY COMPANY.**

## 10. COMPANY LIENS

10.1. Security Interest. In addition to any other liens, rights or remedies of Company under this Agreement or applicable law, Customer grants, assigns and transfers to Company a security interest in and lien on all Customer's rights, title and interest in the Elements of Customer in the possession of Company, as security for payment for any and all services performed and goods furnished to Customer by Company. If the Elements are voluntarily delivered to Customer or authorized third person prior to payment to Company for such materials and services, the liens and security interest shall not be extinguished but shall survive until payment in full has been received. Customer grants Company its power of attorney to execute and file such documents including any UCC financing statements as may be required or become necessary or appropriate to perfect and give public notice of such security interest.

10.2. **CUMULATIVE RIGHTS. ALL LIENS, RIGHTS AND REMEDIES OF COMPANY SHALL BE DEEMED CUMULATIVE AND NOT EXCLUSIVE OF ONE ANOTHER. THE EXERCISE BY COMPANY OF ANY RIGHT OR REMEDY SHALL NOT PRECLUDE ITS RIGHT TO ENFORCE ANY ONE OR MORE OTHER RIGHTS AND REMEDIES. IF COMPANY EXERCISES ITS RIGHT HEREUNDER BY SELLING THE ELEMENTS AT PUBLIC OR PRIVATE SALE, THEN CUSTOMER AGREES TO PAY TO COMPANY ON WRITTEN DEMAND WHATEVER DEFICIENCY MAY BE DUE AFTER THE PROCEEDS ARE APPLIED TO PAYMENT OF THE INDEBTEDNESS INCLUDING, WITHOUT LIMITATION, ALL LEGAL AND OTHER COSTS, EXPENSES AND CHARGES INCURRED IN THE COLLECTION, SALE, DELIVERY OR PRESERVATION OF THE ELEMENTS.**

10.3. Title to Buyer. If Company shall enforce any rights under this Agreement or applicable law, Company or any other party acquiring any right, title or interest in or to any Elements at public or private sale is hereby granted all rights, title and interest of Customer in such Elements including, without limitation, the unrestricted right and license to distribute, exhibit and otherwise exploit such Elements by all media for its own account.

11. **ATTESTATION.** Customer represents and warrants that the representations made by Customer in this Agreement are true and correct; that Customer has read the foregoing terms and conditions; and agrees that all Elements submitted to Company, and work performed and services rendered for the account of Customer, shall be governed by this Agreement.