

## **ATHLETIC PHOTOGRAPHY AGREEMENT**

This **ATHLETIC PHOTOGRAPHY AGREEMENT** (“Agreement”) is made as of this \_\_\_\_\_ day of July, 2012, by and between the Horseheads Central School District, a public school district of the State of New York having its principal office at One Raider Lane, Horseheads, New York 14845 (“District”), and Gary Sempler, d/b/a Gary Sempler Photography, an individual residing at 216 Stuart Street, Horseheads, New York 14845 (“Service Provider”).

### **RECITALS:**

**WHEREAS**, the District desires to contract with Service Provider and Service Provider desires to enter into a contract with the District for provision of certain athletic photography services during the District’s 2012-2013, 2013-2014, and 2014-2015 school years;

**NOW, THEREFORE**, it is mutually agreed between the parties as follows:

#### **1. TERM OF AGREEMENT**

This Agreement shall be effective for the 2012-2013, 2013-2014, and 2014-2015 school years and shall expire June 30, 2015, unless sooner terminated.

#### **2. SERVICES**

Service Provider shall provide the following photography services as directed by the District:

A. Service Provider shall take individual and team photos each season for all sports. The timing of and locations at which photographs shall be determined by mutual agreement of District and Service Provider; provided, however, that Service Provider agrees to use his best efforts to accommodate District’s timing and location preferences. The coach of each sports team shall serve as Service Provider’s point of contact at District for all photographs taken of members of the team(s) he or she coaches.

B. Upon reaching agreement with District as to the timing and location of photographs, Service Provider shall prepare and provide to the relevant team coach notices to be distributed by such coaches to persons to be photographed containing the following information: (a) name of the sports team(s) to be photographed, (b) dates and locations of team and individual photograph sessions, (c) available picture packages, pricing, and ordering and payment information, (d) clothing suggestions for individuals to be photographed, (e) contact information for Service Provider to which customer service inquiries and reorder requests may be directed.

C. Service Provider shall make available for purchase by individuals photographed such packages as Service Provider may deem appropriate; provided, however, that the packages offered shall include, at a minimum those described in the proposal dated March 29, 2012 submitted by Service Provider to the District for the performance of the services described herein

("Proposal"), which proposal is incorporated herein by reference. All photographs ordered shall be delivered within thirty (30) calendar days of Service Provider's receipt of the order therefor.

D. Service Provider shall furnish to District electronic copies of all individual and team photographs taken at no charge, which copies shall be delivered in such electronic file format as the District may reasonably require. Such copies shall be delivered to District within thirty (30) calendar days of the date of the session at which such pictures are taken.

E. Service Provider shall unconditionally guarantee all individual photographs purchased and shall retake (without charge) all photographs which the individuals photographed determine are of insufficient quality. Service Provider shall further retake (without charge) any team photograph rejected by the relevant team's coach as being of insufficient quality. The scheduling of all retakes of individual photographs shall be arranged by Service Provider directly with the relevant individual(s). The scheduling of all retakes of team photographs shall be arranged by Service Provider with the relevant coach(es). All retakes shall be delivered within thirty (30) calendar days of the date on which such retakes are taken.

### 3. **COMPENSATION**

A. The sole consideration for Service Provider's performance of all obligations owed to the District hereunder shall be District's reasonable cooperation with the Service Provider in making space, students, and District personnel available for the taking of the individual and team photographs described herein, and District's performance of its other obligations hereunder, all consistent with the terms of this Agreement.

B. Service Provider shall be responsible for arranging with individuals photographed, their families, and others for payment for all photographs and packages sold to such persons. For all packages described in the Proposal ("Listed Packages"), prices charged by Service Provider for such packages including photographs taken during the 2012-2013 school year shall be not more than the amounts set forth in such Proposal at section 3.02. For all other packages as may be offered by Service Provider, Service Provider may charge such prices as it shall determine appropriate from time to time. For any Listed Package including photographs taken during the 2013-2014 school year, Service Provider shall charge not more than one hundred and five percent (105%) of the price therefor for the 2012-2013 school year. For any Listed Package including photographs taken during the 2014-2015 school year, Service Provider shall charge not more than one hundred and ten percent (110%) of such price.

### 4. **LICENSE TO USE PHOTOGRAPHS**

Service Provider hereby grants District a nonexclusive license to utilize all team and individual photographs taken pursuant to this Agreement for the following purposes: (a) inclusion of photographs on District's website(s) and printed brochures, flyers, and other materials prepared for or in connection with the activities of the District's sports teams, (b) inclusion of photographs in District archives and displays, and (c) inclusion of photographs in District's yearbook. When utilized, District shall appropriately credit Service Provider as the photographer.

5. **RIGHTS IN AND TO PHOTOGRAPHS**

Service Provider represents and warrants to District that it shall possess all right, title, and interest in and to all intellectual property rights with respect to all photographs delivered by Service Provider to District and/or to any third party pursuant to this Agreement, free and clear of all competing claims and encumbrances and that neither its sale and delivery of such photographs to such persons nor the granting of the license described above in Section 4 shall result in any infringement or misappropriation of any intellectual property right of any person. This representation and warranty shall be deemed reaffirmed with respect to each photograph delivered to District and/or a third party upon the date of such delivery.

6. **USE OF PHOTOGRAPHS BY SERVICE PROVIDER**

Service Provider shall not sell, use, publish (on the Internet or otherwise), or distribute any photograph taken pursuant to this Agreement without the prior written consent of the individual(s) photographed and, in the case of any such individual under the age of eighteen (18) years, the prior written consent of his or her parent or legal guardian.

7. **RELATIONSHIP AS INDEPENDENT CONTRACTOR**

The relationship of Service Provider to the District shall be that of independent contractor. Service Provider, in accordance with this status as an independent contractor, covenants and agrees that he will conduct himself in accordance with this status and that he will neither hold himself out as, nor claim to be, an officer or employee of the District by reason thereof, and that he will not by reason thereof make any claim, demand, or application to or for any right or privilege applicable to an officer or employee of the District, including, but not limited to, workers' compensation coverage, or retirement membership or credits.

8. **COOPERATION**

Service Provider and the District recognize that in performance of this Agreement the greatest benefits will be derived by promoting the interests of both parties and each of the parties does, therefore, enter into this Agreement with the intention of loyally cooperating with the other in carrying out the terms of this Agreement, and each party agrees to perform its obligations hereunder in such manner as will promote the interests of both and of the public.

9. **COMPLIANCE WITH APPLICABLE LAWS**

Service Provider agrees to fully comply with all Federal, State, and local statutes, rules, or regulations which govern student privacy and confidentiality of student records and information. Service Provider also agrees to refrain from re-disclosing or using for any other purpose any information or educational records of students that are obtained in the course of the performance of its duties under this Agreement.

Service Provider shall furnish services in accordance with applicable requirements of law, if any, and shall cooperate with the District as may be required so that the District shall be able to fulfill its function and responsibilities thereunder.

10. **NEW FEDERAL OR STATE REQUIREMENTS**

In the event that Federal or State authorities issue new or revised requirements to the District pertaining to services rendered in the performance of this Agreement, then the District shall promptly notify Service Provider of said change(s) and Service Provider shall then have a reasonable amount of time to comply with said requirements.

11. **ASSIGNMENTS**

Service Provider shall not assign, transfer, convey, subcontract, or otherwise dispose of this Agreement or any of his rights or obligations hereunder to any third party without prior written consent of the District, which consent may be withheld by the District in its sole and unfettered discretion. Any purported or attempted assignment, transfer, conveyance, subcontract, or disposition in contravention of the provisions of this Section shall be void *ab initio*.

12. **CONFLICT OF INTEREST**

Service Provider agrees that no officer, trustee, Board of Education member, or employee of the District shall be hired, retained, or otherwise compensated by Service Provider to perform any services required under this Agreement while such a person remains an officer, trustee, Board of Education member, or employee of the District. Service Provider agrees that parents, spouses, siblings, and children of such persons also shall not be hired, retained, or otherwise compensated by Service Provider to perform any services required under this Agreement without prior written approval of the District. Service Provider hereby declares that no such conflicts exist upon the execution of this Agreement and hereby agrees that he shall disclose any such conflicts as soon as they arise. Such obligation to disclose shall continue through the entire term hereof.

13. **NONAPPROPRIATION**

This Agreement shall be deemed executory only to the extent of monies appropriated and available for the purpose of the Agreement and no liability on account thereof shall be incurred by the District beyond the amount of such monies. It is understood that neither this Agreement nor any representation by any public employee or officer creates any legal or moral obligation to request, appropriate, or make available monies for the purpose of this Agreement.

14. **INDEMNIFICATION**

Service Provider agrees to defend, indemnify, and hold harmless the District, its board members, officers, employees, and agents, against all claims, causes of action, liability, judgments, costs, and expenses (including, without limitation, reasonable attorneys' fees) arising

out of the acts or omissions of Service Provider, his agents, officers, employees, or anyone else under the control of Service Provider in performing the work under this Agreement. The obligations of the Service Provider set forth in this Section shall survive the termination of this Agreement.

15. **INSURANCE**

A. Service Provider shall maintain, at Service Provider's sole expense, such insurance coverages as will protect it and District from all claims which arise out of or which result from Service Provider's performance of its obligations under this Agreement including, but not limited to, the acts of anyone directly or indirectly employed or retained by Service Provider, or the acts of anyone for whose acts the Service Provider may be liable.

B. Service Provider shall, at a minimum, maintain the coverages prescribed below:

- (a) Workers' Compensation, Employer's Liability, Disability Benefits, and other similar coverages, in amounts no less than those required by law;
- (b) Commercial General Liability (CGL) on an occurrence basis, using ISO form CG0001 or equivalent. The policy limits shall be at least \$1,000,000 per occurrence and \$1,000,000 aggregate. The CGL will include Personal Injury and Contractual Liability; and
- (c) Automobile liability covering all owned, non-owned, and hired vehicles. The policy shall have a combined single limit of at least \$1,000,000.

C. Prior to commencing work under this Agreement and upon District's request from time to time, Service Provider shall provide evidence that Service Provider has obtained and is maintaining the aforesaid insurance coverage and that such coverage remains available. Such evidence shall be in form and substance reasonably acceptable to District. Such policies shall include a provision that the policies under which the aforesaid insurance coverage is provided will not be changed or cancelled until at least thirty (30) days' prior written notice has been given to District.

D. If Service Provider subcontracts any portion of this contract, it shall require by contract that each subcontractor or consultant retained by Service Provider maintain insurance of the types and in the amounts set forth herein.

E. CGL and automobile liability policies shall be endorsed to name the District and its employees, officers, and Board members as additional insureds on a primary basis.

F. The insurance requirements set forth herein shall not act as any kind of limitation on the liability of Service Provider for claims arising out of or resulting from Service Provider's performance hereunder.

16. **COMPLIANCE WITH DISTRICT RULES AND REGULATIONS**

When present at District facilities, Service Provider shall comply with all District regulations and rules of conduct as may be required from time to time. Service Provider shall further comply with all instructions of District personnel pertaining to the use of District facilities or conduct while on District premises.

17. **TERMINATION**

This Agreement may be terminated prior to the expiration of its term as follows:

A. by either District or Service Provider upon the commission of a material breach of any provision of this Agreement by the other party, in which event, termination shall be effective immediately upon delivery of written notice thereof by the non-breaching party to the breaching party;

B. by mutual consent of District and Service Provider; or

C. by District for its convenience upon sixty (60) days' prior written notice to Service Provider.

18. **NONDISCRIMINATION**

The Service Provider and District agree to comply with all applicable rules and regulations regarding nondiscrimination pertaining to work to be performed under this Agreement. In compliance with New York State and Federal Laws, Service Provider and District shall not discriminate because of age, race, creed, sex, color, disability, national origin, marital status, military status, sexual preference, or employment in the performance of this Agreement, nor shall either party retaliate against any person for reporting alleged acts of discrimination or for asserting any discrimination based claims.

19. **NOTICES**

All notices required or otherwise made pursuant to this Agreement shall be made in writing and shall be addressed to the parties at the addresses first set forth above or at any other address as designated in writing from time to time by each party. All notices shall be sent by either certified mail, return receipt requested, or by overnight service. All notices will be deemed delivered three (3) days after the date of transmittal.

20. **GENERAL PROVISIONS**

A. This Agreement contains all the terms and conditions agreed upon by the parties and supersedes all prior or contemporaneous agreements and understandings, oral or otherwise, regarding the subject matter of this Agreement.

B. The paragraph headings in the Agreement are inserted for convenience and reference only and shall not be used in any way to interpret this Agreement.

C. This Agreement may be amended only by a writing executed by the authorized representatives of both parties.

D. Each party hereto represents and warrants that this Agreement has been duly authorized and executed by each and constitutes a valid and binding Agreement and any governmental and other material approvals necessary for the performance of this Agreement have been obtained.

E. If either party waives or excuses any breach by the other party, such waiver or excusal shall not be construed to be a waiver or excusal of any other breach, whether such other breach arises before or after such waiver or excusal. A waiver or excusal shall be binding only if in writing and executed by the waiving or excusing party.

F. This Agreement shall be construed in accordance with the laws of the State of New York, determined without regard for conflict of laws principles. Any legal action or proceeding pertaining to this Agreement shall be brought in the courts of the State of New York in the County of Chemung and all parties consent to the jurisdiction of and the laying of venue in such courts.

G. If any term or provision of this Agreement or the application thereof shall, to any extent, be held invalid or unenforceable, the remainder of this Agreement, other than those portions as to which it is held invalid or unenforceable, shall not be affected.

H. This Agreement may be executed in any number of counterparts and all such counterparts, taken together, shall constitute one document. Signatures transmitted by fax shall be deemed originals for all purposes.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the date first set forth above.

HORSEHEADS CENTRAL SCHOOL DISTRICT  
("District")

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By: Ralph Marino, Jr., Superintendent

Service Provider:

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Gary Sempler