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SYSTEM AGREEMENTS

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I. Introduction

§ 20:1. System components

A “System,” as used in a system agreement, typically consists of the vendor's proprietary software, along with third-party software and third-party hardware. In addition, interfaces are usually required to enable communication between the components of the system and between the system and external disparate computer applications within a user's environment.

§ 20:2. Turnkey agreement

System agreements are often referred to as “turnkey agreements.” This is because, after the vendor installs the system, the user should only have to “turn the key” to use the system in its business environment.

Users favor system agreements, as users can acquire an integrated solution by entering into an agreement with just one vendor, as opposed to acquiring products from vendors under a number of separate agreements. In addition, system agreements provide users with the perception that the bulk of the obligations and risks are placed on the vendor.

Vendors also favor system agreements as the vendor's application may be best marketed as “the” solution, as opposed to only a part thereof. However, as vendors usually do not own all parts of a system, vendors should attempt to shift some of the risks and responsibilities to the user.

§ 20:3. Certain considerations

System agreements contain a number of considerations not otherwise encountered in a software license agreement.[1] Many of these considerations address the contractual assumption of risk, as between the user and vendor, of third-party system components. Three such areas are 1) acceptance testing; 2) post-acceptance performance warranty; and 3) indemnification.

[FN1] *See, generally,* §§ 18:1 et seq.

§ 20:4. Acceptance testing

As a system is typically composed of not just the vendor's proprietary components, a user should strongly consider testing the entire system against adequate acceptance testing criteria. As a vendor may not have the ability to correct errors or defects within third-party system components, vendors should attempt to limit such acceptance testing to the vendor's proprietary system components. Should this not be acceptable to the user, a vendor could consider including the entire system as part of acceptance testing; provided the vendor has contractual commitments from third-party licensors/manufacturers to correct any errors and defects. In that event, a vendor should consider limiting the testing criteria for third-party system components to the descriptions contained within the third-party licensor's/manufacturer's then-published documentation.

II. Key Considerations

§ 20:5. System performance warranty

A user should consider requiring that the vendor represent and warrant the post acceptance functional performance of not only the vendor's proprietary system components, but also all third-party system components. Users should also consider extending the post acceptance functional performance warranty period for as long as the user elects to receive system support services from the vendor. Vendors should resist such a warranty, as the vendor may not have the ability to correct third-party system component errors or defects. Further, vendors should also resist such a warranty as third-party licensors/manufacturers typically will not provide an evergreen performance warranty under its reseller agreement with a vendor.

In addition, as all system components will likely need to operate together to meet a user's business needs, a user should, at a minimum, consider requiring that the vendor represent and warrant that all system components are compatible. However, as a third-party manufacturer of system hardware components may, for example, upgrade or change operating systems, vendors should resist such a representation and warranty as the vendor may have no control over the manner and timing of any such upgrade or change.

§ 20:6. Indemnification

As a third-party intellectual property infringement suit may be brought based on any system component, users should attempt to obtain indemnification coverage for all system components. Conversely, as a vendor may have no control over the development and/or manufacturing of third-party system components, vendors should attempt to limit its indemnification obligations to the vendor's proprietary system components. In the event the vendor will not extend indemnification coverage to nonvendor proprietary system components, a user should make sure to include a good title warranty for third-party system hardware components and a right to sublicense warranty for third-party software system components.

§ 20:7. Other considerations

In addition to the foregoing, there are a number of additional considerations and issues inherent in system agreements. These include, but are not limited to, 1) hardware ownership; 2) sublicensing terms; and 3) system response time. The annotated system agreement attached as an appendix to this chapter addresses many of the considerations and issues, along with strategies to mitigate associated risks.

§ 20:8. Annotated system agreement

The following annotated system agreement has been drafted from a user's perspective and annotated with both users and vendors as intended readers. The annotated system agreement is not intended to be used without obtaining independent legal advice.

§ 20:9. [Sample Annotated] System Acquisition Agreement

This System Acquisition Agreement (“Agreement”) is entered into by and between _____, with offices at _____, _____, _____ (hereinafter, “User”) and _____, with offices at _____, _____, _____ (hereinafter, “Vendor”).
NOW, THEREFORE, in consideration of the foregoing and the mutual covenants, promises and agreements contained herein, the parties hereto hereby agree as follows:

Definitions.

a. “Deliverables” shall mean the deliverables (excluding all System components) to be created or provided by Vendor as part of Technical Services.[1]

b. “Effective Date” shall mean the date of the last party's execution of this Agreement.

c. “Hardware” shall mean the hardware components supplied by Vendor to User under this Agreement, as described in Exhibit A, including any replacements, enhancements, modifications, updates, releases, versions and upgrades of the foregoing.[2]

d. “RFI” shall mean the document entitled “_____ _____” and dated _____, _____, and which is incorporated into this Agreement by this reference and deemed a part hereof.[3]

e. “Software” shall mean the Vendor's application software and other Vendor software programs licensed by Vendor to User under this Agreement, as described in Exhibit A, including all Upgrades.[4]

f. “Statement of Work” shall mean a document executed by Vendor and User setting forth the Technical Services to be provided by Vendor under this Agreement, and which specifically references this Agreement.[5]

g. “System” shall mean the Software, Hardware, Third Party Software, and related documentation or any individual component thereof.[6]

h. “Technical Services” shall mean the consulting services to be provided by Vendor under this Agreement as more fully described within Statement(s) of Work.[7]

i. “Third Party Software” shall mean the operating software and other software programs designated as third party software on Exhibit A, including any enhancements, modifications, updates, releases, versions and upgrades of the foregoing.[8]

j. “Upgrades” shall mean any and all major and minor bug fixes, updates, modifications, versions, releases and enhancements of the Software, which shall include changes to the left and to the right of the decimal point (e.g., 3.0 to 3.1; 3.0 to 4.0; 3.0.1 to 3.0.2).[9]

Implementation Plan, Delivery, and Risk of Loss.

Within _____ (___) days after Vendor and User execute this Agreement, Vendor and User shall complete a mutually agreed-upon implementation plan and such implementation plan shall be incorporated herein by this reference and deemed a part of this Agreement.[10] Vendor shall deliver the Hardware, Software, and Third Party Software to the site(s) designated by User in Exhibit B by the delivery date(s) set forth in Exhibit B. Vendor hereby acknowledges that time is of the essence with respect to the resolution of any delay in meeting such delivery date(s).[11] Vendor shall also deliver any written materials regarding the Hardware, Software, and Third Party Software that the manufacturer, Vendor, and applicable third parties supply with such Hardware, Software, and Third Party Software in the regular course of business. All shipments shall be made F.O.B. Destination.

Site Preparation and Installation.

Vendor shall provide specifications for each site set forth in Exhibit B. Upon User's request, Vendor shall examine such sites before creating the specifications. User, with advice from Vendor, will prepare the spaces in which the System will be installed in accordance with Vendor's specifications for operating conditions such as environment, power, and cabling. After preparation of a installation site, Vendor shall, prior to the date(s) for initial delivery of the System under Exhibit B, inspect the prepared installation site and shall notify User in writing of any detected deficiencies in the way the installation site fails to meet Vendor's specifications. Vendor will endeavor to provide a thorough inspection, however, notwithstanding such inspection, Vendor will not be liable for damages, costs, or delays caused by User's failure to adequately prepare the site in accordance with Vendor's specifications and advice. Upon User's receipt of the Hardware, Software, and Third Party Software from Vendor, Vendor shall install the Hardware, Software, and Third Party Software for the installation fee set forth in Exhibit A.

Software.

a. License. Vendor grants to User a paid-up, nonexclusive, perpetual, and nontransferable (except as otherwise provided in Miscellaneous section, subpart C (Assignment)) license to install and use each component of the Software and related documentation at the sites set forth in Exhibit B and to use the Software and related documentation only for User's internal business purposes, subject to the provisions of this Agreement.[12] Vendor also grants to User a nonexclusive and

nontransferable sublicense to use each component of the Third Party Software and related documentation at the sites set forth in Exhibit B and to use the Third Party Software and related documentation only for User's internal purposes only, subject to the terms and conditions of the third party license agreements attached hereto as Exhibit C.[13]

b. Copies. User shall have the right, at no additional cost, to make and use copies of the Software for testing, training, disaster recovery and backup purposes and, to the extent permitted under Exhibit C, the Third Party Software, to satisfy User's internal requirements, provided User reproduces any copyright or other proprietary notice provided thereon.[14] User shall have the right, at no additional cost, to make copies of all documentation as necessary to satisfy User's internal requirements.[15] No other copies of the Software, Third Party Software, and documentation shall be made without the prior written consent of Vendor.

c. Title. Title to the Software and Third Party Software shall at all times remain vested exclusively in Vendor or applicable third parties. User will not claim any copyright or other proprietary right to any part of the Software and Third Party Software.

Hardware.

Title and ownership of each individual component of Hardware shall pass to User individually as payment is made for each individual Hardware component. Until such title and ownership vests in User, Vendor shall retain a valid, perfectible security interest in such Hardware components. Notwithstanding the foregoing, Vendor shall not have the rights of a secured creditor, including, but not limited to, the right to repossess or disable the Hardware, under this Agreement.[16]

System Acceptance Testing.[17]

User shall test the System in accordance with the following testing provisions:

a. Installation Testing. Upon successful completion of all tasks set forth in the implementation plan which are a prerequisite to the commencement of installation testing, including, but not limited to, installation of the System (including all components thereof) at the sites set forth in Exhibit B, User shall have ten (10) days to test the System to ensure that the System conforms to the descriptions, standards, specifications, and criteria set forth in Exhibit F ("Installation Criteria"). In the event User does not notify Vendor of any nonconformance within said ten (10) day period, the System will be deemed to have successfully passed installation testing. In the event User notifies Vendor that the System failed to perform in accordance with the Installation Criteria within said ten (10) day period, Vendor shall have ten (10) days from receipt of such notice to submit all corrections at no cost to User. Upon expiration of said ten (10) day period or upon Vendor certifying in writing to User that all nonconformances have been corrected, whichever is earlier, User shall have ten (10) days to test the System ("Retesting Period"). In the event User does not notify Vendor of any nonconformance within the Re-testing Period, the System will be deemed to have successfully passed installation testing. In the event User notifies Vendor that the System failed to perform in accordance with the Installation Criteria within the Retesting Period, User shall have the right to: (i) terminate this Agreement upon written notice to Vendor, and Vendor shall promptly refund to User all sums paid to Vendor under this Agreement; or (ii) extend to Vendor additional ten (10) day cure periods, and subsequent Retesting Period(s), as specified above.[18] User's election of "(ii)" above shall not preclude User from electing "(i)" above in the event Vendor fails to correct all nonconformances. The refund set forth in this Section shall not bar User from pursuing other legal and/or equitable remedies; subject to the terms of Limitation of Liability Section of this Agreement. In addition, in the event User terminates this Agreement pursuant to this Section, Vendor shall be responsible for any and all costs incurred in deinstalling the System, removing the System from User's premises, and in transporting the System back to Vendor.

b. Test Environment Testing. Upon successful completion of all tasks set forth in the implementation plan which are a prerequisite to the commencement of test environment testing, including, but not limited to, successful completion of installation testing under Section above and successful installation of the System (including all components thereof) in

User's test environment, User shall have thirty (30) days to test the System to ensure that the System conforms to the descriptions, standards, specifications, and criteria set forth in Exhibit G, the RFI, the warranties within this Agreement, and the documentation which is hereby incorporated herein by this reference ("Acceptance Criteria"). In the event User does not notify Vendor of any nonconformance within said thirty (30) day period, the System will be deemed to have successfully passed test environment testing. In the event User notifies Vendor that the System failed to perform in accordance with the Acceptance Criteria within said thirty (30) day period, Vendor shall have thirty (30) days from receipt of such notice to submit all corrections at no cost to User. Upon expiration of said thirty (30) day period or upon Vendor certifying in writing to User that all nonconformances have been corrected, whichever is earlier, User shall have the then-remaining testing period, or fifteen (15) days, whichever is longer, to test the System ("Retesting Period"). In the event User does not notify Vendor of any nonconformance within the Retesting Period, the System will be deemed to have successfully passed test environment testing. In the event User notifies Vendor that the System failed to perform in accordance with the Acceptance Criteria within the Retesting Period, User shall have the right to: (i) terminate this Agreement upon written notice to Vendor, and Vendor shall promptly refund to User all sums paid to Vendor under this Agreement; or (ii) extend to Vendor additional thirty (30) day cure periods, and subsequent Retesting Period(s), as specified above. User's election of "(ii)" above shall not preclude User from electing "(i)" above in the event Vendor fails to correct all nonconformances. The refund set forth in this Section shall not bar User from pursuing other legal and/or equitable remedies; subject to the terms of Limitation of Liability Section of this Agreement. In addition, in the event User terminates this Agreement pursuant to this Section, Vendor shall be responsible for any and all costs incurred in deinstalling the System, removing the System from User's premises, and in transporting the System back to Vendor.

c. Production Environment Testing. Upon successful completion of all tasks set forth in the implementation plan which are a prerequisite to the commencement of production environment testing, including, but not limited to, successful completion of test environment testing under Section 6.b. above and successful installation of the System (including all components thereof) in User's production environment, User shall have thirty (30) days to test the System to ensure that the System conforms to the Acceptance Criteria. In the event User does not notify Vendor of any nonconformance within said thirty (30) day period, User shall be deemed to have accepted the System. In the event User notifies Vendor that the System failed to perform in accordance with the Acceptance Criteria within said thirty (30) day period, Vendor shall have thirty (30) days from receipt of such notice to submit all corrections at no cost to User. Upon expiration of said thirty (30) day period or upon Vendor certifying in writing to User that all nonconformances have been corrected, whichever is earlier, User shall have the then-remaining testing period, or fifteen (15) days, whichever is longer, to test the System ("Retesting Period"). In the event User does not notify Vendor of any nonconformance within the Retesting Period, User shall be deemed to have accepted the System. In the event User notifies Vendor that the System failed to perform in accordance with the Acceptance Criteria within the Retesting Period, User shall have the right to: (i) terminate this Agreement upon written notice to Vendor, and Vendor shall promptly refund to User all sums paid to Vendor under this Agreement; or (ii) extend to Vendor additional thirty (30) day cure periods, and subsequent Retesting Period(s), as specified above. User's election of "(ii)" above shall not preclude User from electing "(i)" above in the event Vendor fails to correct all nonconformances. The refund set forth in this Section shall not bar User from pursuing other legal and/or equitable remedies; subject to the terms of Limitation of Liability Section of this Agreement. In addition, in the event User terminates this Agreement pursuant to this Section, Vendor shall be responsible for any and all costs incurred in deinstalling the System, removing the System from User's premises, and in transporting the System back to Vendor.

Payment Terms.

a. System Acquisition. Vendor shall invoice User for the System purchase price, license/sublicense fees, and all other amounts set forth on Exhibit A in accordance with the payment schedule set forth in Exhibit D. User shall pay each invoice within thirty (30) days after User's receipt of such invoice.

b. Taxes. User will be responsible for any sales, use, or other taxes, if any, levied with respect to this Agreement, other than taxes imposed on or measured by Vendor's net income.[19]

c. Out-of-Pocket Expenses. User shall reimburse Vendor for all reasonable and actual out-of-pocket expenses incurred by Vendor in connection with the performance of Vendor's obligations under this Agreement, provided such expenses are pre-approved by User. Such expenses shall be invoiced once per month and shall be payable within thirty (30) days after User's receipt of invoice. Travel time between a Vendor's place of business and/or residence to User's site shall be nonchargeable time.

d. No penalty and/or termination provision contained within this Agreement shall apply if User withholds payment because a good faith dispute exists regarding a material duty, obligation or term contained in this Agreement. In the event an invoice is disputed, Vendor shall, at User's option, continue to perform fully while said dispute is being resolved.[20]

Warranties.

a. Vendor warrants that:

i. for a period of one (1) year after User's acceptance of the System pursuant to Section 6.c., and thereafter, provided User is receiving support services from Vendor,[21] the System[22] shall operate in accordance with the Acceptance Criteria (excluding any postacceptance alterations or modifications to the documentation which degrade the functionality of the System);[23]

ii. the Deliverables will not materially degrade the functionality or utility of the System;[24]

iii. each Update shall be compatible with and shall not degrade the functionality or the utility of the Deliverables;[25]

iv. User will receive good and clear title to the Hardware being purchased hereunder, free and clear of all liens and encumbrances;

v. the System does not contain any disabling code (defined as computer code designed to interfere with the normal operation of the system or user's hardware or software) or any program routine, device or other undisclosed feature, including but not limited to, a time bomb, virus, software lock, drop-dead device, malicious logic, worm, trojan horse, or trap door which is designed to delete, disable, deactivate, interfere with, or otherwise harm the System or User's hardware or software;

vi. that the media on which the software and third-party software are delivered will be free of defects in materials and workmanship under normal use;

vii. that the System provided to User hereunder, includes or shall include at no additional cost to User, both design and performance so that User shall not experience the System abnormally ending and/or invalid and/or incorrect results from the System in the operation of the System, and that the System shall be otherwise “Date Compliant.”[26] “Date Compliant” means the system is capable of recording and maintaining all dates in a format which includes a four-digit year representing century and year and which will allow a date value of at least 2050. The system design to ensure date compatibility shall include, but not be limited to, date data century recognition, mutually agreed upon calculations that accommodate same century and multicentury formulas and date values, and date data values, and date data interface values that reflect the century

viii. the System will not violate or in any way infringe on any patent, copyright, trademark, trade secret or any proprietary or other right of a third party;[27]

ix. it has used its best efforts to scan for viruses within the System;[28]

x. Vendor shall not install or deliver to User any software code that is ALPHA or BETA code, without first notifying User in writing and receiving User's prior written consent;

xi. the System and Vendor's performance of all services hereunder will be in compliance with all applicable laws and regulations; and

xii. it is the lawful owner of the Software and Third Party Software or has all rights necessary for it to license the Software and Third Party Software to User under the terms of this Agreement.[29]

b. If Vendor[30] is notified of a failure to conform to any of the warranties set forth in this Agreement, Vendor shall be entitled to a reasonable period of time, not to exceed thirty (30) days, from the date of said notification to cure said failure at no cost to User. If Vendor does not cure said failure within the foregoing period of time, Vendor shall promptly continue to modify, repair, or replace the System so as to provide User with a System which conforms to warranty and, if Vendor is unsuccessful after utilizing its reasonable best efforts within a reasonable time, User shall have the right to: (i) terminate this Agreement and Vendor shall refund to User (a) a pro rata portion of the support service fees paid by User under this Agreement, based on the then-remaining term for which such fees apply, and (b) a pro rata portion of all other sums paid by User under this Agreement (less amounts paid by User for Hardware paid for and not returned by User) based on a ten (10) year straight-line amortization calculated from the date of User's acceptance of the System pursuant to System Acceptance Testing Section, subpart c. above;[31] or (ii) terminate use of the nonconforming system component(s) and any other System component(s) the utility or functionality of which is materially affected or diminished due to the nonconforming System component(s) and Vendor shall refund to User (a) a pro rata portion of the support services fees paid by User for such System component(s), based on the then-remaining term for which such fees apply, and (b) a pro rata portion of all other sums paid by User under this Agreement for such System component(s) based on a ten (10) year straight-line amortization calculated from the date of User's acceptance of the System pursuant to System Acceptance Testing Section, subpart c. above.[32]

Termination.

Either party may terminate this Agreement upon the default of the other party. A party shall be deemed in default upon the occurrence of the following:

a. Upon breach of any material obligation referred to in this Agreement and the continuation of such breach for a period of thirty (30) days, after the breaching party's receipt of the nonbreaching party's written notice thereof which shall specify the breach; or

b. Upon breach of any material obligation referred to in this Agreement and the continuation of such breach for any other applicable period of time otherwise set forth in this Agreement, after the breaching party's receipt of the nonbreaching party's written notice thereof which shall specify the breach.

Termination Rights and Obligations.

a. Vendor's Rights Upon Termination. Upon termination of this Agreement by Vendor due to a default by User, User shall return to Vendor: (i) all nonarchived copies of the Software and Third Party Software, including related documentation, in its possession or control; and (ii) all Hardware which is not paid for by User, all at User's sole cost and expense. In addition, Vendor may demand that User erase, delete, or otherwise destroy all nonarchived copies of the Software and Third Party Software.[33]

b. User's Rights Upon Termination. Upon termination of this Agreement by User due to a default by Vendor, Vendor shall not be entitled to any further payments. If User terminates this Agreement due to a default by Vendor prior to User's acceptance of the System pursuant to System Acceptance Testing Section, subpart c. of this Agreement, Vendor

shall promptly refund to User all sums paid to Vendor under this Agreement. If User terminates this Agreement due to a default by Vendor after User's acceptance of the System pursuant to System Acceptance Testing Section, subpart c. of this Agreement, Vendor shall promptly refund to User: (a) a pro rata portion of the support service fees paid by User under this Agreement, based on the then-remaining term for which such fee applies, and (b) a pro rata portion of all other sums paid to Vendor under this Agreement, less amounts paid by User for Hardware paid for and not returned by User, based on a ten (10) year straight-line amortization calculated from the date of User's acceptance of the System pursuant to System Acceptance Testing Section, subpart c. Vendor shall be responsible for all costs incurred in deinstalling the System, removing the System from User's premises, and in transporting the System back to Vendor.[34]

c. Transition Period. If this Agreement is terminated by User due to a default by Vendor, User may elect to continue to use the System and receive System support services and other services for a period of up to ninety (90) days after the effective date of termination in order to migrate to an alternative solution.[35]

d. The remedies set forth in this Agreement are in addition to and not in lieu of any legal and/or equitable remedies available to Vendor or User; subject to the provisions of Limitation of Liability Section of this Agreement.

Training.

Vendor shall provide the training services set forth in Exhibit A for the training fees set forth in Exhibit A.

System Support Services Charges.[36]

Upon User's acceptance of a System pursuant to System Acceptance Testing Section, subpart c. above of this Agreement and for a period of one (1) year thereafter, Vendor shall provide, at no charge to User, the support services set forth in this Agreement.[37] Thereafter, support services shall automatically renew for successive twelve (12) month periods (each a “Renewal Term”), unless the user gives written notice to the vendor of its intention not to renew within thirty (30) days before the expiration of the then-current term.[38]

a. User shall pay a fee for support services provided by Vendor for each Renewal Term as described below.
The first Renewal Term's support services fee shall be as set forth in Exhibit A.[39] Thereafter, the vendor may increase the support services fee once per annum provided such an increase does not exceed the percentage increase in the Consumer Price Index (CPI) during the previous twelve (12) month period, or five percent (5%) of the previous year's support services fee, whichever is less.[40]

System Support Services Coverage.

Vendor shall provide User with System support services three hundred and sixty-five (365) days per year on a twenty-four (24) hours a day, seven (7) days per week, basis.

Scope of System Support Services.

a. Telephone support. Vendor shall provide User with telephone support, via a toll-free number, for information and problem calls during the hours set forth above. Vendor shall respond to all service calls within one (1) hour in order to begin the process of resolving System issues. Telephone support services shall include, but are not limited to:

i. Receipt and logging of User requests for assistance;

ii. Response from, or dispatching of, service representatives, and/or on-site visits to help diagnose and fix System problems;

iii. Assistance in the ordinary use of the System; and

iv. Applications and software support coordination.

b. Upgrades. Vendor shall provide System fixes and all Upgrades, at no additional cost to User.[41]

c. Services. In addition to the foregoing, as part of support services, Vendor agrees, at a minimum, to: (i) support and assist User in the use of the System and to maintain the System to support all updated, new, replacement, follow on, or next generation operating system versions and releases, (ii) provide all labor, parts, and support services necessary to keep the System in good working order and free from defects in material and workmanship, (iii) provide all labor, parts, and support services necessary to keep the System in conformance with the warranties set forth in this Agreement,[42] (iv) provide User with on-site assistance to correct System errors within two (2) hours after User's request for on-site assistance, and (v) make available all Hardware replacement parts for a period of no less than ten (10) years.

d. Support Services Warranty. Vendor warrants that: (i) its employees, agents, and subcontractors providing support services under this Agreement shall perform such services in a professional and workmanlike manner in accordance with standard industry practices and shall be adequately experienced and trained before being assigned to perform such support services; and (ii) it will provide support services in accordance with the terms of this Agreement.[43]

e. Remote Access. User shall provide Vendor with remote access to the System only when required by Vendor, provided Vendor adheres to User's reasonable safety and security guidelines.

f. Subcontracting Support Services. Vendor may subcontract its support service obligations under this Agreement upon User's prior written approval; provided Vendor shall remain responsible for the performance of all support services under this Agreement as if performed by Vendor. Vendor hereby agrees to be responsible for and to guarantee the performance of support services performed by any subcontractor.

g. Termination of Support Services. In addition to and without limiting any other terms of this Agreement, User shall have the right to terminate support services in the event Vendor is notified of a material failure to perform such support services and Vendor fails to correct such failure within thirty (30) days, or any other applicable period of time otherwise set forth in this Agreement, after receipt of User's notice of such failure. In the event User so terminates support services, Vendor shall refund to User a pro rata portion of the support service fees paid by User based on the then-remaining term for which such fee applies. If User so terminates support services or otherwise elects not to renew support services, such termination and/or election shall not affect User's license of the Software and Third Party Software hereunder nor User's use of the System and this Agreement shall remain in full force and effect.

Confidential Information.

In the course of performance of this Agreement, either party may find it necessary to disclose to the other party, or either party may otherwise obtain from the other party, certain information which is confidential and such confidential information shall include, but not be limited to, information relating in any way to either party's employees, trade secrets, customers, vendors, finances, and other business information (“Confidential Information”). In the event Confidential Information is disclosed to, or otherwise obtained by either party, the following terms shall apply:

a. The receiving party shall treat such Confidential Information as confidential and shall use the same degree of care as it employs in the protection of its own confidential information, which shall not be less than a reasonable degree of care.

b. The receiving party will only use the Confidential Information in connection with the transactions contemplated by

this Agreement, and shall disclose Confidential Information only to employees or contractors having a need to know, provided such employee or contractor agrees to the terms within this Section.

c. Information shall not be subject to these terms if:

i. it is in the public domain at the time of disclosure, or enters the public domain without breach of this Agreement;

ii. it is known to the receiving party prior to the disclosure, or it is independently developed by the receiving party; or

iii. it is obtained by the receiving party in good faith from a third party not under obligation of secrecy to the disclosing party.

d. Unless prohibited by law, if the receiving party is the subject of a court or government agency order to disclose the other party's Confidential Information, the receiving party will notify the disclosing party promptly to allow the disclosing party to contest such order.

e. Breach of this Section may cause irreparable injury to the nonbreaching party for which the award of monetary damages may be wholly inadequate. Both parties therefore agree that the nonbreaching party will, in addition to all other legal rights and remedies, have the right to seek injunctive relief in the event of any breach or threatened breach of this Section. The provisions of this Section shall survive the termination, nonrenewal, rescission, or expiration of this Agreement.

Limitation of Liability.

EXCEPT AS REQUIRED TO FULFILL ITS OBLIGATIONS OF INDEMNIFICATION UNDER THIS AGREEMENT, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY CONSEQUENTIAL, INCIDENTAL, OR INDIRECT DAMAGES WHATSOEVER, ARISING OUT OF ITS PERFORMANCE OR NONPERFORMANCE PURSUANT TO THIS AGREEMENT. THIS LIMITATION OF LIABILITY DOES NOT APPLY TO TANGIBLE PROPERTY DAMAGE, DAMAGE ARISING FROM TORTIOUS CONDUCT, OR BREACHES OF SECTION 15 (CONFIDENTIAL INFORMATION).[44]

Security Requirements.

Vendor and its employees shall, at all times, adhere to User's reasonable safety and security guidelines while performing its obligations under this Agreement.[45]

Indemnification.

Vendor shall defend, indemnify, and hold User, its officers, directors, employees, affiliates, and agents harmless from and against all claims, suits, actions, liability, damages, fees (including reasonable attorney's fees), and losses arising out of the use of the System, in connection with any allegations that the System[46] (or any component thereof) or User's reasonably anticipated use thereof infringes any patent, copyright, trademark, or trade secret, or violates any other proprietary right of a third party.[47] Vendor shall be given reasonably prompt notice of such claim, and given information, reasonable assistance (except financial), and sole authority to defend or settle the claim. The obligations of Vendor stated in this Section survive termination, expiration, nonrenewal, or rescission of this Agreement.[48]

Replacement of System.

If a third-party claim or threatened claim causes a user's reasonable use of the system (or any component thereof) to be

seriously endangered or disrupted,[49] Vendor shall promptly, without additional charge to User: (a) replace the System with a compatible, functionally equivalent and noninfringing System; (b) modify the System to provide User with a compatible, functionally equivalent and noninfringing System; (c) obtain for User the right to continue use of the System and pay for any additional fees required for such use; or (d) if none of the foregoing alternatives are possible even after Vendor's best efforts, then User shall have the right to: (i) terminate use of the infringing System component(s) and any other System component(s) the utility or functionality of which is materially affected or diminished due to such infringing System component(s) and Vendor shall refund to User (a) a pro rata portion of the support service fees paid by User for such System component(s), based on the then-remaining term for which such fees apply, and (b) a pro rata portion of all other sums paid by User under the Agreement for such System component(s) based on a ten (10) year straight-line depreciation calculated from the date of User's acceptance of the System pursuant to the System Acceptance Testing Section, subpart c. above; or (ii) terminate this Agreement and Vendor shall promptly refund to User (a) a pro rata portion of the support service fees paid by User under this Agreement, based on the then-remaining term for which such fee applies; and (b) a pro rata portion of all other sums paid by User under this Agreement (less amounts paid by User for Hardware paid for and not returned by User) based on a ten (10) year straight-line amortization calculated from the date of User's acceptance of the System pursuant to the System Acceptance Testing Section, subpart c. above.[50]

Source Code,

a. Source Code.[51]
If Vendor or its successor corporation which assumes its obligations under this Agreement ceases to transact business or maintain its computer software research, development, and support services at levels sufficient to meet its obligations and responsibilities under this Agreement on an ongoing basis,[52] then Vendor, its trustees, receivers, or agents shall deliver to User promptly upon User's demand a copy of the source code for the Software on media and all user documentation owned or developed by Vendor (including the source code for any Third Party Software to the extent Vendor has the right to release such Third Party Software source code for the benefit of User under this Section), and (ii) a description of any Third Party Software object code for which Vendor does not have the right to release for the benefit of User under this Section (collectively, “Source Code”).

i. Delivery shall in no case occur more than fourteen (14) days after receipt of User's written demand.

ii. In the event of a release of the Source Code to User, User shall have the right to use, copy, modify, maintain, and enhance the Source Code for User's internal use only. User agrees that the Source Code delivered under this Section is subject to the confidentiality restrictions recited elsewhere in this Agreement. Notwithstanding any terms to the contrary, User may disclose the Source Code to consultants and agents for the sole purpose of supporting and maintaining the System, provided such consultants and agents agree to be bound by the confidentiality restrictions which are applicable to User hereunder.

b. In addition, Vendor will, at Vendor's sole expense, deposit the Source Code with _____ (“Escrow Agent”) pursuant to the Escrow Agreement between Vendor and Escrow Agent (“Escrow Agreement”), a copy of which is attached hereto as Exhibit E, and Vendor shall maintain such escrow, and update the Source Code, for the term of User's license under this Agreement. Vendor's agreement to maintain such escrow and update the Source Code is a material provision of this Agreement. Additionally, no later than _____(___) days after the Effective Date, User shall be added as a beneficiary to the Escrow Agreement. User shall use its reasonable efforts to promptly provide the Escrow Agent with executed documents as may be required of User pursuant to the Escrow Agreement. Vendor shall be responsible for payment of the fees applicable to adding User as a beneficiary and for payment of all annual fees and User shall be responsible for payment of the fees applicable to technical verification of the Source Code. Vendor and User desire the Escrow Agreement to be supplementary to this Agreement, pursuant to 11 U.S.C.A. § 365(n) (Bankruptcy; executory contracts and unexpired leases

Audit.

Upon reasonable written notice to Vendor, User, and/or an independent third party[53] identified by User may inspect Vendor's facilities, systems, processes and all records relating to the System and services to the extent necessary for User to confirm Vendor's compliance with its obligations hereunder and to verify amounts paid and owing by User hereunder. Vendor may require such persons to provide reasonable evidence of their authority before being admitted to Vendor's facilities. To the extent User determines that Vendor has failed to comply with its obligations hereunder, Vendor will have a period of thirty (30) days to cure such noncompliance.

Miscellaneous.

a. Use of Name. Except as may be necessary for it to carry out its obligations under this Agreement, Vendor shall not under any circumstances whatsoever use User's name, trade names, trademarks, or service marks, nor the name of any employee of User in any public announcement, news release, advertising, or promotional literature, without User's express, prior, written consent, which consent may be withheld in User's absolute discretion. Violation of this Section is a material breach of this Agreement by Vendor, and shall entitle User to seek both equitable and legal remedies. The terms of this Section survive the termination, expiration, nonrenewal, or rescission of this Agreement.

b. Governing Law. This Agreement is made and performed in _____, and is governed by _____ law, however, no _____ conflicts-of-laws or choice-of-laws provisions apply to this Agreement, and to the extent that the substantive and procedural law of the United States would apply to this Agreement it supersedes the application of _____ law. Both parties hereby consent to the exclusive jurisdiction of the _____ and to the exclusive venue of _____.

c. Insurance. Upon execution of this Agreement, Vendor shall provide User with a certificate of its respective insurance coverage with the limits clearly defined, which limits shall be no less than $1,000,000 per occurrence and $3,000,000 in the aggregate.[54] In addition, Vendor shall maintain such respective insurance coverage during the term of this Agreement.

d. Replacement of Personnel. If at any time a Vendor employee or subcontractor is deemed, in User's reasonable judgment, to be unacceptable to User, Vendor shall, upon receiving notice from User, promptly replace such employee and/or subcontractor, as applicable, with an employee and/or subcontractor that is acceptable to User, but in no event more than seven (7) days after Vendor's receipt of User's notice.

e. Assignment. Neither party may assign, voluntarily, by operation of law or otherwise, any rights or delegate any duties under this Agreement without the other party's prior written consent, which consent will not be unreasonably withheld, except in the case of a merger, acquisition, or sale of all or substantially all of the assets of the party, subject to the successor entity expressly assuming the obligations of the assigning party. This Agreement will bind and inure to the benefit of the parties and their respective successors and permitted assigns.

f. Modification to Agreement. This Agreement may not be modified or altered except in writing by an instrument duly executed by authorized officers of both parties.[55]

g. Notices. All notices given between Vendor and User shall be in writing and shall be deemed given: (i) when sent by electronic mail to the electronic address set forth below, (ii) when personally delivered to the person identified below, or (iii) when received by the person identified below if deposited in the U.S. mail, certified, first class postage prepaid, to the address set forth below. Either party may change its address for the giving of notice by so notifying the other party by written notice given in the manner set forth in this Section.

For User:

Company

Address
City, State Zip Code
Attn:
Fax:

For Vendor:

Company
Address
City, State Zip Code
Attn:
Fax:

h. Force Majeure. Neither party shall be responsible for the nonperformance of its obligations under this Agreement for a maximum period of sixty (60) days if such nonperformance is caused by acts of God, acts of civil or military authority, civil disturbance, war, fires, laws, regulations, or orders of any governmental body, agency, or official ("Force Majeure Event").[56] The party so affected shall give notice to the other party and shall do everything reasonably possible to resume performance. If the period of nonperformance exceeds sixty (60) days from the receipt of notice of the Force Majeure Event, the party whose ability to perform has not been so affected may terminate this Agreement upon written notice and the nonperforming party shall be deemed in default.

i. Entire Agreement. The parties agree that this Agreement (including all documents incorporated herein by reference) is the complete and exclusive statement of the agreement between the parties with regard to the subject matter contained herein, which supersedes and merges all prior proposals, understandings, and all other agreements, oral or written, between the parties relating to this Agreement.[57] Any other terms and conditions supplied by the vendor with the system (e.g., "shrink-wrap," installation screen license terms, terms contained on an order form or invoice) or otherwise shall have no effect and are superseded by this agreement.[58] Exhibits A, B, C, D, E, F, G, and H attached hereto and each Statement of Work are incorporated into this Agreement and deemed a part of this Agreement. For the purposes of interpreting this Agreement, neither party shall be considered the author or drafter, and this Agreement shall not be construed against either party on that basis.

j. Non-Waiver/Severability. A waiver by either party of any term or condition of this Agreement shall not be deemed or construed as a waiver of such term or condition in the future, or of any subsequent breach thereof, whether of the same or of a different nature. If any provision of this Agreement is held to be invalid or unenforceable under any statute or rule of law, the provision is to that extent to be deemed omitted, and the remaining provisions shall not be affected in any way.

k. Section Headings. The section headings used in this Agreement are for convenience only and shall not be considered in construing the terms of this Agreement.

l. Time for Actions. No mediation, arbitration, or other action under this Agreement, unless involving death or personal injury, may be brought by either party against the other more than one (1) year after the cause of action arises.[59]

m. No Upgrade Fee. User shall not be required to pay a fee due to User's upgrade of the computers or servers with which User uses the System, nor shall User be charged a fee for a transfer of the System to another computer or server.

IN WITNESS WHEREOF, the parties hereto, through their duly authorized officers, have executed this Agreement.
AGREED:

("User") ("Vendor")

By:_____ By:_____

Signature	Signature
_____	_____
Name *(Print or Type)*	Name *(Print or Type)*
_____	_____
Title	Title
_____	_____
Date	Date

Exhibits A—G [not included]
Exhibit A—System Components, Training Services; Fees
[Intentionally left blank]
Exhibit B—Delivery Date(s) and User Sites
[Intentionally left blank]
Exhibit C—Third Party License Agreements
[Intentionally left blank]
Exhibit D—Payment Schedule
[Intentionally left blank]
Exhibit E—Source Code Escrow Agreement
[Intentionally left blank]
Exhibit F—Installation Test Criteria
[Intentionally left blank]
Exhibit G—System Specifications
[Intentionally left blank]

Exhibit H—Technical Services.[60]

This Exhibit H is attached to and incorporated into the System Acquisition Agreement ("Agreement") by and between _____, a _____, with offices at _____, _____, _____ ("User") and _____, with offices at _____ ("Vendor").

1. Performance by Vendor.

Vendor agrees to provide the Technical Services and Deliverables specified in the Statement of Work attached hereto, and in any additional Statements of Work, which are attached hereto pursuant to Section 5 herein (all of which are hereinafter collectively referred to as "SOW"). In the event of any conflict or inconsistency between the terms of this Agreement and any SOW attached hereto, the terms of the SOW shall prevail.

2. Payment for Services.

a. Fees, Price Protection. User agrees to pay Vendor for the Technical Services and Deliverables in accordance with the fee schedule set forth in the SOW. The fees specified in the SOW are the total fees and charges for the Technical Services and will not be increased during the term of the Agreement except as the parties may mutually agree to in writing. Overtime, if any, must be preapproved by User, and shall be charged at the same hourly rate, unless specified to the contrary in the SOW, as other work under the same SOW. User shall not pay any fees or expenses which may arise from Vendor having to reperform or correct any Technical Service or Deliverable which fails to conform to the applicable standards, descriptions, or performance criteria set forth in the Agreement. Vendor represents that the price stated for the Technical Services performed and Deliverables provided hereunder is at least as favorable as that charged to any other customer for the same or similar services.

b. Invoices. Unless otherwise set forth in a SOW, Vendor shall invoice User monthly for Technical Services rendered during the preceding monthly period.[61] The invoice shall detail the work performed during such period.

c. Unpaid Time Off (UTO). During the duration of each SOW, Vendor may be authorized to take a mutually agreed upon amount of Unpaid Time Off (UTO) if designated in the SOW. This time off includes holidays, vacation, sick days, trip days not directed by User, and other time required for personal reasons. UTO is not charged to User. All UTO must be preapproved by User except for sick days.

3. Obligations of Vendor.

a. Reports. Vendor shall prepare and submit to User written reports setting forth the status of the Technical Services and Deliverables in a format and frequency to be mutually agreed upon by Vendor and User.

b. Screening Processes. User may require that Vendor conduct essential employee screening processes on individual employees of Vendor to be assigned in connection with the performance of Technical Services and provision of Deliverables under the Agreement. These processes would include, but not be limited to, criminal background investigations, testing for substance abuse, and Department of Motor Vehicle inquiries. Vendor represents that all such investigations, inquiries, or tests will be conducted as a precondition of assignment to the performance of Technical Services and provision of Deliverables under the Agreement, with the knowledge and consent of the individual employees involved, and in compliance with all applicable state and federal laws and regulations.

4. Obligations of User.

User agrees to make available to Vendor, upon reasonable notice, personnel, computer programs, data and documentation ("Resources") required by Vendor to complete the Technical Services and provide the Deliverables. Vendor agrees to utilize such Resources solely to fulfill the requirements of the SOW, and for no other purpose. All Resources provided to Vendor by User shall be immediately returned to User upon User's demand, completion of all Technical Services and Deliverables under a SOW, or Vendor's receipt of a notice of termination of the Agreement or a SOW, whichever occurs first.

5. Additional Statements of Work.

a. In General. When required by the user, the parties shall in good faith negotiate additional SOWs, each of which upon signing shall be deemed a part of the agreement. Such additional SOWs shall be substantially in the same format as the initial statement of work. Unless otherwise agreed in an additional SOW, the following provisions shall govern additional SOWs generally:

i. Payment. Additional SOWs may call for lump sum or periodic payment, or payment against performance milestones, or for compensation based on time and materials or on a fixed price.

ii. Specifications. Additional SOWs shall include written specifications for any Technical Services and Deliverables to be provided thereunder.

iii. Costs of Negotiating. In the event that the parties do not conclude negotiations for a specific SOW, each party shall bear its respective costs relating to the negotiations unless otherwise agreed, and the progress of such efforts and discussions shall not obligate either party to the other.

6. Ownership.

a. All Deliverables prepared for or submitted to User by Vendor under the Agreement shall belong exclusively to Vendor.[62] Vendor hereby grants to User a nonexclusive, perpetual, paid-up, and irrevocable license to use, copy, distribute, and create derivative works of the Deliverables solely for User's internal business purposes. Notwithstanding any terms to the contrary, User will have the right to disclose the Deliverables to third parties for such third parties to use, copy, modify, and create derivative works of the Deliverables solely for User's internal business purposes.[63] In addition and notwithstanding any terms to the contrary, all information and written material disclosed to Vendor by User, or acquired from a customer or prospective customer of User, and all User Confidential Information, are and shall remain the sole and exclusive property and proprietary information of User or such customers, and are disclosed in confidence by User or permitted to be acquired from such customers in reliance on Vendor's agreement to maintain them in confidence and not to use or disclose them to any other person except in furtherance of User's business. All such materials listed in this paragraph, whether prepared by Vendor or provided to Vendor by User or its agents, representatives or designees, shall be immediately delivered to User upon termination of the Agreement or the expiration or termination of the applicable SOW.

b. User shall have unrestricted access to all computer media containing User data from time to time in connection with the performance of Technical Services.

7. Recruitment.

Neither party hereto shall solicit for employment any employee of the other party who is directly involved in the performance of Technical Services during the term of the respective Statement of Work except as may otherwise be agreed in writing by the respective parties hereto. This Section shall not restrict the right of either party to (a) solicit the employment of employees of the other party after such employees have separated or have been separated from the service of such other party, provided that the soliciting party did not solicit such separation, or (b) solicit or recruit generally in the media.

8. Warranties.

Vendor warrants and represents the following with respect to Technical Services and Deliverables provided hereunder:

a. Compliance with Specifications. Vendor's Technical Services and Deliverables will materially comply with the descriptions and representations as to the Technical Services and Deliverables (including performance capabilities, completeness, specifications, configurations, and function) that appear in the SOW and the Technical Services performed and Deliverables provided hereunder will not create or contain any disabling code (defined as computer code designed to interfere with the normal operation of the Deliverable(s) or User's hardware or software) or any program routine, device, or other undisclosed feature, including but not limited to, a time bomb, virus, software lock, drop-dead device, malicious logic, worm, trojan horse, or trap door which is designed to delete, disable, deactivate, interfere with, or otherwise harm the Deliverables or User's hardware or software. Vendor further warrants that it has used its best efforts to scan for viruses within the Deliverables.

b. Non-Infringement of Third Party Rights. The Technical Services and Deliverables will not violate or in any way infringe upon the rights of third parties, including property, contractual, employment, trade secrets, proprietary information, and nondisclosure rights, or any trademark, copyright, or patent rights.

c. Services Performed. Vendor and its employees and agents providing Technical Services under the Agreement, shall perform the Technical Services in a professional and workmanlike manner in accordance with standard industry practices, and shall be adequately experienced and trained before being assigned to perform Technical Services.

d. No Conflicts. Vendor has no other agreement or relationship or commitment to any person or entity that conflicts with Vendor's obligations to User under the Agreement.

9. Termination.

a. User shall have the right to terminate any Statement(s) of Work for convenience, in whole or in part, at any time by giving Vendor written notice thereof not less than ten (10) days prior to the effective date of such termination and User shall promptly pay (on a pro-rata basis if fixed fee) for Technical Services rendered and expenses properly incurred through the date of termination.

b. In addition to the terms of the Agreement, User and Vendor shall have the right to terminate any Statement(s) of Work immediately in the event of a material breach of any Statement(s) of Work by the other party, which breach remains uncured for a period of ten (10) days after written notice reasonably specifying the nature of the breach is given to the breaching party; provided, Vendor shall only have the right to terminate a SOW for an uncured material breach by User under a SOW.[64]

c. In the event of termination of the Agreement or any Statement(s) of Work for any reason, Vendor shall deliver to User within ten (10) days of the date of termination (a) all Deliverables prepared pursuant to Technical Services provided under any such Statement(s) of Work, in whatever current stage such Deliverables are in on the date of termination;[65] (b) all Confidential Information of User disclosed or otherwise provided to Vendor under any such Statement(s) of Work; (c) all other property and assets of User provided to or otherwise obtained by Vendor under any such Statement(s) of Work; (d) all works, files, documentation, media, related material, and any other material owned by User; and (e) Vendor's written certification to User of Vendor's return of the foregoing.

10. Indemnification.

a. Vendor shall defend, indemnify, and hold User, its officers, directors, employees, affiliates, and agents harmless from and against all claims, suits, actions, liability, damages, fees (including reasonable attorney's fees), and losses arising from or in connection with the performance of Technical Services and provision of Deliverables under the Agreement (including any allegations that the Technical Services performed, or the Deliverables provided hereunder, infringe any patent, copyright, trademark, or trade secret, or violates any other proprietary right of a third party). Vendor shall be given reasonably prompt notice of such claim, and given information, reasonable assistance (except financial), and sole authority to defend or settle the claim. The obligations of Vendor stated in this Section 10.a. survive termination, expiration, nonrenewal, or rescission of the Agreement.

b. If a third party claim or threatened claim causes User's reasonable use of the Technical Services and/or Deliverable(s) to be seriously endangered or disrupted, Vendor shall promptly, without additional charge to User: (i) reperform, repair, or replace the Technical Services and/or Deliverable(s) so as to provide User with compatible, functionally equivalent, and noninfringing Technical Services and Deliverable(s); (ii) modify the Technical Services and/or Deliverable(s) so as to provide User with compatible, functionally equivalent, and noninfringing Technical Services and Deliverable(s); (iii) obtain a license for User to continue to use the Technical Services and Deliverable(s) and pay for any fees required for such license; or (iv) if none of the foregoing alternatives are possible even after Vendor's best efforts, then the applicable SOW is terminated and Vendor shall promptly refund to User all sums paid to Vendor for such Technical Services and/or Deliverable(s). Said refund shall be in addition to and not in lieu of any other remedies available under law and/or in equity; subject to the terms of Section 16 of the Agreement. In taking actions described under this Section, Vendor acknowledges that time is of the essence in any interruption of User's use of the Technical Services and Deliverables.

11. Date Compliance.

Notwithstanding anything to the contrary, Vendor warrants that all Deliverables provided hereunder shall include, at no additional cost to User, both design and performance so User shall not experience the Deliverables abnormally ending and/or invalid and/or incorrect results from the Deliverables and that the Deliverables shall be otherwise “Date Compli-

ant." "Date Compliant" means the Deliverables are capable of recording and maintaining all dates in a format which includes a 4-digit year representing century and year and which will allow a date value of at least 2050. The Deliverables design to ensure Date compatibility shall include, but not be limited to, date data century recognition, mutually agreed upon calculations that accommodate same century and multi-century formulas and date values, and date data values, and data interface values that reflect the century. Upon breach of the foregoing warranty, Vendor shall promptly modify, repair, or replace the Deliverables at no additional charge so as to provide User with Deliverables which conform to the warranty; or, if Vendor is unsuccessful after utilizing its best efforts within a reasonable time, refund all fees paid by User pursuant to the applicable SOW upon return of said Deliverables to Vendor. Said refund shall be in addition to and not in lieu of any other remedies available under law and/or in equity; subject to the terms of Section 16 of the Agreement. In taking actions described under this Section, Vendor acknowledges that time is of the essence in any interruption of User's use of the Technical Services and Deliverables.

12. Subcontracting.

Any subcontract made by Vendor with the consent of User shall incorporate by reference all the terms of the Agreement. Vendor agrees to guarantee the performance of any subcontractor used in performance of the Technical Services or provision of the Deliverables.

13. Change Orders.

a. User may at any time request a change to the scope of work required under a SOW on any task, including, but not limited to, alterations, additions, deletions, deviations, and omissions from or to the scope of work. User shall initiate such a change by providing Vendor with a Change Order as defined herein.

b. The Change Order shall be in writing and shall be sequentially numbered without a break in sequence. The Change Order shall describe the proposed changes to a SOW.

c. Vendor shall provide User with a written assessment within a reasonable time identifying the price and schedule impact of implementing the Change Order. Vendor shall not be obligated to commence work on the requested change until User and Vendor have executed a Change Order which reflects an equitable adjustment to the SOW price.

d. No change to a SOW shall be binding on User or Vendor unless in a Change Order signed by the duly authorized representatives of the parties.

14. Independent Contractor.

Vendor and User are contractors independent of one another and neither party's employees will be considered employees of the other party for any purpose. The Agreement does not create a joint venture or partnership, and neither party has the authority to bind the other to any third party.

STATEMENT OF WORK NO. 1 TO THE SYSTEM ACQUISITION AGREEMENT BY AND BETWEEN _____("USER") AND _____ ("Vendor") WITH AN EFFECTIVE DATE OF _____, _____

1. Description of Technical Services:

2. Description of Deliverables:

3. Fee Schedule:

4. Term of Engagement:

IN WITNESS WHEREOF, and in acknowledgment that the parties hereto have read and understood each and every provision hereof, the parties have executed this Statement of Work on the dates set forth below.
AGREED:

By:_____

Signature

_____

Name *(Print or Type)*

_____

Title

_____

Date

By:_____

Signature

_____

Name *(Print or Type)*

_____

Title

_____

Date

[FN1].

This Agreement has been drafted to cover an engagement where the Vendor will be providing consulting services (beyond standard installation/implementation services) to the User after the User's acceptance of the System. Please note, in the event successful completion of such consulting services is tied to a User's perceived "value" of the System; Users should attempt to include the performance of such consulting services as part of the initial System acquisition. This Agreement has been drafted to affect such a result. From a Vendor's perspective, such incorporation should be strongly resisted as a failure to perform consulting services could enable the User to terminate the Agreement and obtain remedies under the Agreement. With that in mind, Vendors should separate the acquisition of the "System" from the performance of consulting services.

[FN2].

Users should be sure to include replacements, enhancements, modifications, etc., within the Hardware definition. As a result, such replacements, etc., would be deemed "Hardware" under the Agreement and subject to its terms (e.g., warranty; title).

[FN3].

In the event the user has a Response to a Request for Information (or other similar document) containing the vendor's representations as to the ability of the system to conform to the user's requested performance criteria, users should either attach such document to the agreement or, at a minimum, incorporate such document into the agreement. Vendors should resist attaching/incorporating the RFI into the agreement, as the RFI could contain "marketing" or other "puffing." In the event the RFI must be attached/incorporated, the vendor should carefully review the RFI and should only attach/incorporate the RFI "functionality sections."

[FN4].

Users should be sure to include any and all major and minor fixes, updates, modifications, enhancements, releases and versions (Upgrades) of the originally licensed software within the definition of software. By doing so, the warranty (e.g., right to license), indemnification and other provisions applicable to the originally licensed software would apply to such upgrades. *See also* "Upgrade" definition within subpart j. On the other hand, vendors should attempt to exclude versions and/or releases of the software which amount to a "new product" from the software and particularly, from the "Upgrade" definition. Such "new product definition" could be drafted as follows:

> New Modules shall mean substantial collections of new functionality which are designed to support a well-defined function and which are separately priced or marketed by the Vendor.

[FN5].

See Definitions Section, subpart a.

[FN6].

As the user is acquiring a system and not just the vendor's own applications, the user should include a system definition within the agreement. Thereafter, the defined term system may be used throughout the agreement to protect the user's business and legal interests. In the event the vendor is truly providing a "System," such a definition should not be problematic for the vendor. However, as discussed later in the agreement, vendors should consider limitations to their obligations with respect to third-party software and, as a minimum, should be sure to attempt to limit the user's remedies (and the vendor's liability) for nonconformances due to nonvendor system components.

[FN7].

See Exhibit H as an example.

[FN8].

Users should be sure to include enhancements, modifications, etc., within the third-party software definition. As a result,

such enhancements, etc., would be deemed “Third Party Software” under the agreement and subject to its terms (e.g., warranty).

[FN9].
See Definitions Section, subpart e.

[FN10].
In the best of all worlds, both the vendor and user would complete the implementation plan prior to agreement execution. However, often the specifics of such a plan can only be determined postexecution. Nonetheless, in the event there are known specific dates and/or other milestones for which the project must adhere to, users should include such within the agreement prior to execution. This will protect the user in the event the user and vendor may later disagree as to such dates and/or milestones. Further, in the event the “scope” of the implementation is also known, it is important to also include such “scope” as part of the agreement prior to execution. This is particularly important (from the user's perspective) in the event the vendor has quoted a “fixed fee” for performance of implementation tasks. On the other hand, vendors should initially resist incorporating the implementation plan, especially if the bulk of the implementation tasks are to be performed by the vendor. In the event the implementation plan is incorporated into the agreement, vendors should include language within the agreement that the vendor will not be liable for delays in the vendor's performance if such delays are caused by events beyond the vendor's reasonable control. Such language could be inserted within a force majeure provision (which, by its nature, is usually buried within the “General Provisions” section at the end of an agreement). Please note, if the implementation plan is not incorporated into the agreement, both the user and vendor may not have any contractual recourse in the event the other party fails to perform its implementation responsibilities. *See* Mizuna, Ltd. v. Crossland Federal Sav. Bank, 90 F.3d 650 (2d Cir. 1996); Pickens-Kane Moving & Storage Co., Inc. v. Aero Mayflower Transit Co., Inc., 468 F.2d 490 (7th Cir. 1972).

[FN11].
Vendors should resist including “time is of the essence” language so as to avoid potential liability for nonmaterial delays. *See* Bellefleur v. Gervais, 201 A.D.2d 524, 609 N.Y.S.2d 617 (2d Dep't 1994) (one-day delay in performance resulted in complete forfeiture of funds in light of express provision indicating that time was of the essence). Further, if delivery date(s) are to be set forth in the agreement, vendors should also include language within the agreement that the vendor will not be liable for delays in the vendor's performance if such delays are caused by events beyond the vendor's reasonable control.

[FN12].
Users should be certain to carefully review its license rights under the agreement. In the event the user will be using the system for nonuser entities (e.g., affiliates) or the user will need nonuser entities to execute and use the system, the user should be sure to include language granting for such use rights. In addition, the user should consider obtaining the right to transfer the system to user-site(s) beyond those initially set forth in Exhibit B. Such transfer could be made upon prior written notice to the vendor and should be at no cost to the user (except for any implementation services, etc., which are performed by the vendor at the request of the user). If such a transfer is acceptable to the vendor, the vendor should include language setting forth that it will not be liable for any damages, etc., in the event such site(s) fail to meet the environmental specifications or a system nonconformance results due to causes not attributable to the vendor. Lastly, depending on where the new site may be located and how support services are priced, the vendor should consider obtaining the right to increase “support service fees” in order to offset any additional costs attributable to the new location.

[FN13].
Although it is appropriate to limit a user's third-party software use rights to those rights to which the vendor can only convey, users should be sure to review all third-party license agreements for acceptability.

[FN14].
Vendors may wish to limit such additional nonproduction use rights, particularly with respect to copies of third-party software.

[FN15].

As users may need the ability to copy the documentation in order to use the system, users should attempt to include such right within the agreement. In the event the vendor wants to charge for individual copies of the documentation, the vendor should limit the number of copies which the user may use to the number provided by the vendor. Thereafter, the vendor could include language covering the cost of additional copies provided by the vendor.

[FN16].

Whether a transaction involving the licensing of software would be considered a transaction in goods within Article 2 of the Uniform Commercial Code (UCC) is subject to debate. For the proposition that Article 2 of the Uniform Commercial Code applies to agreements involving computer software licenses, *see* Advent Systems Ltd. v. Unisys Corp., 925 F.2d 670, 13 U.C.C. Rep. Serv. 2d 669 (3d Cir. 1991); RRX Industries, Inc. v. Lab-Con, Inc., 772 F.2d 543, 41 U.C.C. Rep. Serv. 1561 (9th Cir. 1985); Valley Farmers' Elevator v. Lindsay Bros. Co., 398 N.W.2d 553, 556, 2 U.C.C. Rep. Serv. 2d 1495 (Minn. 1987) (overruled by, Hapka v. Paquin Farms, 458 N.W.2d 683, Prod. Liab. Rep. (CCH) P 12545, 12 U.C.C. Rep. Serv. 2d 60 (Minn. 1990)). However, Article 9 of the UCC conveys additional rights to entities holding a "perfectible security interest" (e.g., the right to "repossess" without breaching the peace; the right to disable the secured collateral without removal). Consequently, users should expressly exclude such rights from the agreement.

[FN17].

This section (System Acceptance Testing) is drafted very favorably for the user. Not only must the system successfully complete installation, test, and production environment testing in order for acceptance to occur, all nonconformances must be corrected by the vendor within a finite period of time and at no cost to the user. Consequently, vendors should have a number of issues with this section. First, vendors should consider whether an acceptance-testing provision could preclude the vendor from recognizing or booking all or a portion of expected revenue pending "acceptance." In the event the user will not forego acceptance testing, vendors could assert that any system "discount" provided to the user was conditioned on the vendor's ability to recognize revenue in the present calendar quarter. In addition, vendors should also make it clear that the user would have contractual protection under the "performance warranty" provision(s) within the agreement. However, if the user will not forego acceptance testing and the vendor is willing to allow for (or partially concede on) acceptance testing, the vendor should attempt to limit acceptance testing to the vendor's software; as opposed to the entire system. Should this not be acceptable, the vendor could include the entire system as part of testing, but limit the testing criteria for the third-party software and hardware to the descriptions contained within the third-party licensor's/manufacturer's then-published documentation.

[FN18].

This provision has been affectionately referred to as the "involuntary servitude" provision; as the vendor is contractually obligated to continue to correct all nonconformances (at no cost to the user) until the user elects its right to terminate. As termination is sometimes not an option for users, such a provision would assist the user in obtaining a functional system. Although vendors do not want the user to terminate the agreement for failure to achieve acceptance, vendors should be sure to avoid such a provision. In addition, vendors should exclude nonconformance issues arising from the user's failure to meet the vendor's environmental specifications or arising from causes beyond the reasonable control of the vendor.

[FN19].

In the event the User is tax exempt, the User should also exclude taxes from which it is exempt (e.g., "… other than taxes imposed on or measured by Vendor's net income and taxes from which User is exempt."). To the extent that Vendor will be responsible for the collection or remission of any taxes relating to the engagement, User may wish to consider inclusion of language relating to Vendor's obligations thereto.

[FN20].

This provision is favorable to users as it allows the user to withhold payment due to a dispute without the vendor having the right to terminate the agreement, charge late fees on such sums, or discontinue the performance of its obligations under the agreement. Although some vendors may agree to forego the ability to terminate the agreement and to charge late fees on unpaid disputed sums, vendors should insist on the right to discontinue performance in the event of a dispute. Should this be acceptable to the user, the user should attempt to limit the vendor's ability to discontinue performance to the "task or task(s)"

for which the vendor is not being paid.

[FN21].

This provision extends the performance warranty period as long as the user is under support services. From a user's perspective, such is fair as one of the principal reasons why a user pays for support services is for the vendor to maintain the system in conformance with the agreement. Vendors should consider whether such “extended” support could impact its ability to recognize revenue. In the event such may preclude revenue recognition or is otherwise unacceptable to the vendor, the vendor should limit the performance warranty period to a set number of days (e.g., “90 days from (acceptance (or) delivery (or) installation”)). In the event the vendor will not extend the performance warranty period beyond a set number of days, there are a number of “work-arounds” available to users which will lead to the same amount of warranty protection. *See* Scope of System Support Services, subpart c.(iii) and subpart d.

[FN22].

Vendors should consider only offering a performance warranty for the vendor's software. In addition, vendors should also propose passing through to the user the third-party software and hardware suppliers' warranties. In the event the vendor is unable to do so under its third-party agreements, the vendor could make the same third-party software and hardware warranties as the suppliers made to the vendor. The following language is proposed for such purpose:

> To the extent that Vendor may do so under agreements with its Third Party Software and Hardware suppliers, Vendor passes through to User the Third Party Software and Hardware warranties set forth in Exhibit C. To the extent that Vendor may not pass them through, Vendor makes to User the same Third Party Software and Hardware warranties as the suppliers make to Vendor and which are also set forth in Exhibit C.

[FN23].

As mentioned, vendors should attempt to limit any performance warranty provision to just the vendor's software. Consequently, vendors should also attempt to limit the performance warranty criteria to the vendor's standard documentation (e.g., user manuals).

[FN24].

Although the term “Deliverables” is broadly defined, such term is intended to cover development of a separate application which would be used by the user in connection with its use of the system (or any replacement system). With that in mind, this warranty provides the user with some assurance that the deliverables will not materially impact the user's use of the system or degrade the functionality of the system.

[FN25].

To the extent the user's use of any deliverable may be dependent on the interoperability with the software, this provision provides the user with some assurance that future upgrades will not materially impact the user's use of such deliverable.

[FN26].

Although the new millennium arrived worldwide years ago, users should still insist (if applicable) on including a Year 2000 warranty provision within agreements. Most (if not all) vendors will assert that a user's Y2K concerns should not exist as we are well past the year 2000. However, the passage of time will not, in and of itself, render a software application able to correctly and accurately calculate dates among and between different centuries.

[FN27].

Vendors should resist this warranty as a breach of such warranty could provide the user with additional remedies beyond those set forth in any intellectual property indemnification provision. As a fall-back, vendors could agree to this warranty, but should limit the user's remedies for a breach of such warranty to those set forth in the intellectual property indemnification provision.

[FN28].

Provided the vendor is capable of scanning all system components prior to delivery, the vendor should propose modifying this warranty to state that it used its “reasonable efforts” or that it “scanned for viruses in accordance with standard industry practices.”

[FN29].

See Warranties Section, subpart a.viii. In addition to the foregoing warranties, users should consider whether a “response time” warranty is appropriate. In the event such a warranty is desirable, users should take care in defining what needs to occur within the agreed-to response time. The following language is suggested for that purpose:

> Response time is defined as the elapsed time between (a) the moment the terminal operator pushes a function key (or the equivalent action with a pointing device) on the workstation and (b) the moment at which all meaningful data has been displayed on the workstation and the workstation is capable of initiating another transaction.

Conversely, vendors should attempt to narrowly define the events which need to occur within the agreed-to response time. The following language is suggested for that purpose:

> Response time is defined as the elapsed time between (a) the moment the terminal operator pushes a function key (or the equivalent action with a pointing device) on the workstation and (b) the moment the first character is displayed in response thereto (e.g., time between pressing the “Return” key for a new screen and the beginning of the first line draw for the new screen).

In addition, as a number of external factors may impact a system's response time, vendors should be sure to exclude such external factors from the response time calculation.

[FN30].

Vendors should resist much of the language within this subpart b., and should instead propose to extend to the user “sole and exclusive” remedies for breach of the warranties. With that in mind, vendors could propose the following language in lieu of the language within this subpart b.:

> Except as otherwise expressly provided within the Indemnification Section of this Agreement, as User's sole and exclusive remedy for any nonconformity against any warranty set forth in this Agreement, and as Vendor's entire liability, Vendor shall use commercially reasonable efforts to correct or cure such nonconformity. If Vendor has not corrected such nonconformity after it has had a reasonable opportunity to do so, User shall have the right to terminate its use of the nonconforming System component and Vendor shall refund the amount paid by User for the nonconforming System component.

In addition, vendors should attempt to exclude the application of such remedies from causes attributable to the user and/or third-party products. The following language is proposed for that purpose:

> These remedies do not apply to the extent a warranty nonconformance is caused by any defect which results directly or indirectly from (a) User's alteration, improper storage, handling, or maintenance of the System; (b) User's use of the System in a manner not authorized by this Agreement; (c) the combination, operation, or use of the System with products not provided by Vendor; or (d) any cause external to the System not caused by Vendor.

[FN31].

In this subpart b., the user has two alternative remedies to select from. The first is the remedy to terminate the agreement and receive a refund of unused support services fees and a pro rata refund of all other sums paid by the user under the agreement based on a ten (10) year (useful life) straight-line calculated from the date of the user's acceptance of the system. This is fair from a user's perspective, as implementation fees, training fees, etc., were expended with the expectation that the user

would obtain utility from such services for the duration of the system's useful life.

[FN32].

This provision allows the user an alternative remedy beyond terminating the agreement. In some instances, the nonconforming system components may be extracted from the system without rendering the system useless to the user. This provision would allow the user to make such a determination. However, in the event the nonconforming system component(s) are the “brain stem” or otherwise “important” for the user's continued use of the system, the user would have available the right to terminate the agreement pursuant to the immediately prior express remedy.

[FN33].

The return or destruction of archived copies of the software, third-party software and related documentation by the user may be burdensome. Accordingly, this provision allows the user to retain such copies. User should determine whether retention of one copy of the Software, Third Party Software, and/or related documentation is necessary for legal, regulatory compliance, audit, or other limited purposes.

[FN34].

Vendors should resist a blanket refund provision within the termination section of the agreement, as any number of nonsystem related “material” breaches could give rise to a refund. Users should resist deleting the refund provision, as it is much easier to prove “initial” damages if the agreement specifies the same. However, in the event the vendor will not agree to an express refund provision within this section, the user could forego including such a provision, provided the user makes sure to include language that the remedies set forth in the agreement are in addition to, and not in lieu of, any other legal and/or equitable remedies available to the user. *See* Termination Rights and Obligations Section, subpart d. above for sample language.

[FN35].

The specifics of a posttermination migration provision are highly dependent upon the nature of the system. The proposed provision would be appropriate for a noncritical system. The user should consider whether a posttermination migration period is appropriate irrespective of the reason for termination. This consideration is particularly applicable when the system is mission-critical.

[FN36].

Including the vendor's support service, obligations within the agreement operate to protect the user's investment in the event the vendor fails to perform such services. Conversely, vendors should seek to separate its support obligations (and the user's remedies) from those otherwise contained in the agreement. This may be done, for example, by executing a separate support agreement. Please note, in the event the vendor's support obligations are not part of the agreement, the vendor's liability for failure to perform such services will (most likely) be greatly limited under the separate support agreement (e.g., limited to “repair or replacement” and/or “to support fees paid”). From a user's perspective, this could prove seriously inadequate, as a user could be left with a nonfunctional system and inadequate remedies. To protect against such a result, the user should insist on including the vendor's support obligations within the agreement. Failing that, the user should attempt to have all performance warranties continue as long as the user is receiving support from the vendor. *See* section 8.a.(i). Lastly, if the vendor refuses to extend such warranties, users should be sure to include language enabling the user to obtain the source code to allow for internal support. *See* Source Code Section.

[FN37].

This provision would operate as a cost-save for the user, as support services would be provided free of charge for one (1) year after acceptance. As support services fees are a revenue stream for vendors, vendors should resist such a provision and insist on having support services fees commence at a much earlier date (e.g., installation). In addition, as the vendor has support obligations pertaining to the nonvendor components (which the vendor may be reliant on third parties to perform), the vendor should also determine when support fees would be charged by such third parties (e.g., upon installation). In the event such third-party fees are to be charged prior to the above one (1) year term, the vendor should insist that support fees for all such components be payable upon the date third-party fees commence.

[FN38].

As users will typically be dependent on the vendor providing support services, users should resist allowing the vendor to terminate support services without cause. This provision achieves that end as only the user has the right to terminate support services, without cause, upon written notice. Although some vendors may believe it will not in the near future sunset a product, vendors should insist on having a without-cause termination right as well. Should the vendor fail to agree to forego such a right, the user should obtain a minimum support services term commitment from the vendor. The following language is submitted for that purpose:

> Unless support services are earlier terminated under this Agreement, Vendor will make available to User support services for a minimum of five (5) consecutive twelve (12) month terms. Thereafter, Vendor may terminate support services by providing written notice to User at least six (6) months in advance of the end of any Renewal Term.

[FN39].

Typically, the support services fee initially quoted by the vendor will be based on the vendor's present year's support services fee. In this agreement, such fee would be set forth in Exhibit A. In the event the user can obtain the vendor's agreement to forego payment of support services fees during the initial warranty period, the user runs a rather high probability of obtaining support services at an outdated fee once the initial warranty period has expired. This could save the user a fair amount, especially if the vendor agrees to limit future-year increases based on prior-year support fee amounts. Obviously, vendors should readjust the support services fee prior to executing the agreement to avoid such a result.

[FN40].

As a user may likely be dependent on the vendor to provide support services, users should also attempt to cap support fee increases. Although an annual cap increase may be acceptable, vendors should consider the possibility of third-party support fees increases (which could, conceivably, exceed the annual cap within the agreement). With that in mind, vendors could propose to cap increases in its support services fees and allow for any third-party support service fee increases to be passed onto the user. The following language is proposed for that purpose:

> Vendor may increase support services fees for the Third Party Software and Hardware concurrent with increases assessed by the manufacturers or suppliers of any support services for such components. Such increases shall equal the percentage increases in support services affected by the manufacturers or suppliers. Should a manufacturer or supplier decrease the price of support services for such component(s), Vendor shall decrease the fees charged to User by an equal percentage.

[FN41].

As mentioned in Definitions Section, subpart e., users should be sure to include any and all major and minor upgrades, updates, modifications, enhancements, releases, and versions (Upgrades) of the originally licensed software within the definition of “Software.” By doing so, the warranty (e.g., right to license), indemnification, and other provisions applicable to the originally licensed software would apply to such upgrades. In addition, users could also include language requiring the vendor to provide all “Upgrades” as part of the vendor's support services obligations. On the other hand, vendors should attempt to exclude versions and/or releases of the software which amount to a “new product” from the “Upgrade” definition.

[FN42].

As mentioned in Warranties Section, subpart a.i., in the event the vendor will not extend the performance warranty period beyond a set number of days, there are a number of “work-arounds” available to users which lead to the same amount of warranty protection. This is one of the work-arounds. As drafted, a breach of this warranty would be subject to the terms of the Warranties Section, subpart b. in no different manner than would a breach of the performance warranty set forth within the Warranties Section, subpart a.(i).

[FN43].

This is another work-around, although less obvious. The vendor would be in breach of this provision in the event (for example) the vendor failed to perform its support services obligations under the Scope of System Support Section, subpart c.(iii).

[FN44].

All limitation of liability provisions should be reciprocal. For example, if the vendor insists on excluding consequential, indirect, special, and incidental damages, such liability exclusion should apply mutually to both parties. Please note, the exclusions listed in this Section are suggestions (from a user's standpoint) and, like most things, are negotiable. However, a vendor's indemnification obligations should always be excluded from any limitation of liability cap. This is fair as the vendor is in the best position to know whether its software (for example) may be infringing and the user should not have to establish that its damages incurred by any such lawsuit were directly caused by the inability to use the software.

In addition to any negotiated "reciprocal" limitation of liability provision, a vendor should also attempt to limit its liability for damages with respect to the third-party software and hardware. The following language is proposed for that purpose and would be inserted in a separate subsection within Section:

To the extent that Exhibit C contains liability limitations with respect to the Hardware and Third Party Software, such limitations state the total maximum liability of Vendor (but only to the extent that Vendor can collect from the supplier for User's benefit) and each supplier with respect to Hardware and Third Party Software.

[FN45].

To the extent that sensitive information (trade secrets, the personally identifiable information of the user's customers, etc.) will be disclosed to the vendor under the agreement, the user should consider the addition of specific provisions relating to the handling, transmission, and storage of such data as applicable. Specifically, if the user is a healthcare provider or "covered entity" pursuant to the Health Insurance Portability and Accountability Act of 1996 and will be disclosing patient health information to the vendor pursuant to the agreement, the user should consider inclusion of the following:

i. Vendor is, shall remain during the term of this Agreement, and shall provide the services and System, in compliance with all applicable federal, state and local laws, regulations, orders, and policies, including but not limited to: (a) laws relating to licensing and regulation of health care facilities; (b) the requirements of the Joint Commission on Accreditation of Health Care Organizations or other private accreditation organizations that have established standards relevant to medical care; (c) Public Law 104-191 of August 21, 1996, Health Insurance Portability and Accountability Act of 1996, Subtitle F—Administrative Simplification, Sections 261 et seq. as from time to time amended and all implementing regulations, as amended, supplemented or substituted for from time to time (collectively, "HIPAA"); (d) other health and information technology-related laws, regulations, and orders applicable to and affecting User, the System and services, and the operations of Vendor; and (e) all other applicable legal and regulatory obligations (collectively, "Compliance Obligations").

ii. The System and services provided pursuant to this Agreement shall at all times fully comply with the administrative simplification provisions of HIPAA. To the extent that User's intended use of the System is subject to standards set forth in HIPAA, the System shall contain functionality necessary to enable User's compliance therewith not later than the date provided under HIPAA for implementation of such functionality. Without limiting the foregoing, the System and services shall conform to all HIPAA standards and provisions relating to transactions, code sets and identifiers, regardless of whether Vendor is directly subject to such standards as a covered entity under HIPAA.

iii. Vendor shall, from time to time upon User's request, provide User with reasonable assurances regarding full compliance of the System and services with HIPAA, the HCFA Internet Policy, the attached HIPAA Compliance Addendum (if applicable) and other applicable Compliance Obligations. Vendor agrees to establish and maintain an effective program to prevent and detect violations of Compliance Obligations in a manner consistent with the United States Sentencing Commission's Federal Sentencing Guidelines Manual and the Department of Health and Human Services, Office of the Inspector General Compliance Program Guidance.

iv. If Vendor is a business associate of User, as that term is defined in HIPAA, the attached Addendum is hereby incorporated into this Section and made a part of this Agreement.

b. The obligations of Vendor set forth in this Section shall be observed and performed solely at the expense of Vendor.

No additional fees shall be due and payable to Vendor on account of such observance and performance. Vendor shall be responsible for any breach of this Section by its agents, representatives, or employees, and shall defend, indemnify, and hold User its officers, directors, employees, affiliates, and agents harmless from and against all damages, costs, expenses, and fees (including attorney's fees) resulting from such breach.

As noted above, in the event the vendor has access to a client's patient information as part of the services, the privacy regulations under HIPAA require that the parties must execute a business associate agreement, which regulates the use and disclosure of patient-identifying information by the vendor.

If the user is a “financial institution” and transmits nonpublic personal information to the vendor as part of support or technical services, the user should consider the inclusion of the provision below. Financial institutions are entities that are “significantly engaged” in “financial activities” as described in section 4(k) of the Bank Holding Company Act, including but not limited to lenders, check cashers, wire transfer services, sellers of money orders, credit counselors, financial planners, tax preparers, accountants, investment advisors, loan brokers, loan servicers, and debt collectors. Nonpublic personal information is personally identifiable financial information that a “financial institution” collects about an individual in connection with providing a financial product or service, unless that information is otherwise “publicly available.”

“Vendor acknowledges that User is regulated as a financial institution under 15 U.S.C. §§ 6801 et seq. (Title V of the Gramm-Leach-Bliley Act), and that Vendor, as a recipient of certain information from User, is subject to the limitations under said Act and applicable regulations on reuse and re-disclosure. For purposes of this Agreement and notwithstanding the provisions of the Confidential Information above, “Confidential Personal Information” means any information that User may, directly or indirectly, disclose to Vendor or to which Vendor may have access due to Vendor's relationship with User that relates to an individual. This includes, but is not limited to, financial information, including credit history; income; financial benefits; application, policy or claim information; health information; medical records; names or lists of individuals derived from nonpublic personally identifiable information or otherwise derived from User; and the identification of an individual as a customer of User. Vendor will develop, implement, and maintain a comprehensive information security program that includes physical, technical and administrative safeguards that are appropriate to its size and complexity, the nature and scope of its activities, and the sensitivity of the Confidential Personal Information at issue. Vendor shall use the Confidential Personal Information only for the purposes specified in this Agreement with User. Vendor will not disclose said Confidential Personal Information to any other person or entity except to its agents who need such Confidential Personal Information to further the objectives of an agreement with User and who agree in writing to maintain its security and confidentiality. If the Gramm-Leach-Bliley Act or any other applicable state or federal law or regulation, now or hereafter in effect, imposes a higher standard of confidentiality or security with respect to such Confidential Personal Information, such standard shall prevail over the provisions of this Agreement or other agreement with User. This Section shall survive any expiration, termination, nonrenewal, or rescission of this Agreement.”

[FN46].

As a number of system components may be owned by third parties, vendors should attempt to limit its indemnification obligations to the vendor's software. In the event the vendor will not extend indemnification coverage to nonvendor system components, the user should make sure to include a good title warranty for the hardware and a right to license warranty for the third-party software. *See* the Warranties Section, subpart a.(iv) and a.(xii). Such warranty coverage will likely provide the user with at least some form of contractual recourse in the event of a third-party claim relating to such components.

[FN47].

A user should consider whether the expansion of the vendor's indemnity obligations to other causes of action is warranted. For example, if the vendor's personnel will be performing services at the user's facilities, the user may wish to include an indemnity provision that would cover personal injury or property damage claims arising out of the vendor's acts or omissions. Similarly, if the vendor will have access to particularly sensitive or regulated information, the user may wish to expand the indemnity coverage to include claims and liability arising out of the vendor's breach of its confidentiality and/or data security obligations. Of course, the most comprehensive coverage would be a broad-form indemnity clause that would apply to any breach of the vendor's obligations. With respect to indemnification relating to infringement claims, vendors should at-

tempt to limit their indemnification obligation to patents and copyrights. However, from a user's perspective, such a limitation should be unacceptable. Software developers often seek to protect their software through “trade secret” protections. In addition, system components may also, for example, be protected by contract. Therefore, users should strongly resist a vendor's attempt to limit such coverage.

[FN48].

Vendors should attempt to “condition” its indemnification obligation upon the user promptly notifying the vendor of such claims, the user providing reasonable assistance, etc. The following language is submitted for that purpose:

> Vendor's indemnification obligations are conditioned upon User notifying Vendor promptly in writing of any such action, the User providing reasonable assistance and information in the defense of such action, and the User providing Vendor with sole control of the defense of any such action and all negotiations for its settlement or compromise.

Users should resist a vendor's efforts to condition its obligations, as a vendor could use such to avoid its indemnification obligations.

[FN49].

Vendors should attempt to trigger its obligations upon “a court finally determining that the Software infringes on any United States copyright or patent.” However, such a limitation should be recognized by users as unacceptable; as a user's ability to use the software [system component] may be jeopardized long before a “court finally determines” that the software [system component] was infringing.

[FN50].

Again, vendors should attempt to limit a user's remedies and the vendor's indemnification obligation to the vendor's software. Accordingly, the vendor should propose refunding the license fee paid for the infringing software module as the user's sole and exclusive remedy in this section. However, from a user's perspective, in the event the infringing system component [or software module] is critical to the user's continued use of the system, the user should have the right to discontinue the use of the system and obtain an equitable refund of sums paid under the agreement.

[FN51].

Users should obtain a direct source code obligation from the vendor. In addition, users should also require the vendor to escrow the source code with an impartial third-party escrow agent. Such third-party escrow will cover the user in the event the vendor fails to conduct business or otherwise fails to respond to any user inquiries under this section.

[FN52].

Vendors should attempt to limit the source code “release events.” The following language contains some suggested vendor source code “release event” language:

> The Vendor will release the Source Code to the User upon the existence of any one or more of the following circumstances, which remain uncorrected for more than forty-five (45) days:
> a. Entry of an order for relief for Depositor under Title 11 of the United States Code or any similar proceeding initiated under the law of any other country or province;
> b. The making by Depositor of a general assignment for the benefit of creditors;
> c. The appointment of a general receiver or trustee in bankruptcy of Depositor's business or property;
> d. Action by Depositor under any state insolvency or similar law for the purpose of its bankruptcy, reorganization or liquidation; or
> e. Depositor's failure to continue to do business in the ordinary course.

[FN53].

To the extent that the user's use of the system may be subject to scrutiny by state or federal regulators, the user should

identify such third parties in the list of persons which may have audit privileges.

[FN54].

The user should consider whether the identification of specific coverages and policy limits is warranted (e.g. workers' compensation, comprehensive general liability, automobile liability, professional errors and omissions etc.).

[FN55].

In many jurisdictions, a contract containing a nonoral modification provision may be orally modified by the parties. *See* Much v. Pacific Mut. Life Ins. Co., 266 F.3d 637 (7th Cir. 2001); Canada v. Allstate Ins. Co., 411 F.2d 517 (5th Cir. 1969); Larson v. Hill's Heating and Refrigeration of Bemidji, Inc., 400 N.W.2d 777, 781 (Minn. Ct. App. 1987) (a written contract can be varied or rescinded by oral agreement of the parties, even if the contract provides that it shall not be orally varied or rescinded).

[FN56].

This provision is favorable to users as the "Force Majeure events" contain events the occurrence of which are both equally unpredictable and unpreventable by both parties. However, as the vendor's performance may be dependent on the performance of third parties (e.g., third-party software and hardware providers), Vendors should attempt to include "events beyond the reasonable control of either party" as an additional "Force Majeure event." Users should resist such language as such may cause the user to equally assume all of the vendor's risks of doing business (e.g., delay in delivery of the vendor's deliverables; strikes). In the event the vendor insists on including an "events beyond the reasonable control of either party" provision, the user should consider inserting a time period (e.g., 60 days, as set forth in section 30) for the party so affected to resume performance.

[FN57].

Integration clauses are used not only to expressly reference all agreement terms, but also to exclude terms which are not part of the agreement. Terms which are not made part of the agreement will be unenforceable.; United Artists Communications, Inc. v. Corporate Property Investors, 410 N.W.2d 39, 42 (Minn. Ct. App. 1987) ("… [t]he [parol evidence] rule forbids to add by parol [oral agreement] where the writing is silent, as well as to vary where it speaks."). Consequently, both vendors and users should make sure all documents and other terms which are a part of the parties' agreement are incorporated into the agreement and deemed a part thereof.

[FN58].

Shrink-wrap, click-wrap, and other nonexecutable agreements are likely enforceable. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 39 U.S.P.Q.2d 1161, 29 U.C.C. Rep. Serv. 2d 1109 (7th Cir. 1996) (shrink-wrap agreement held enforceable as the user had the opportunity to review the terms, was aware of the terms, and failed to object, thereby accepting them); M.A. Mortenson Co., Inc. v. Timberline Software Corp., 93 Wash. App. 819, 970 P.2d 803, 37 U.C.C. Rep. Serv. 2d 892 (Div. 1 1999), aff'd, 140 Wash. 2d 568, 998 P.2d 305, Prod. Liab. Rep. (CCH) P 15893, 41 U.C.C. Rep. Serv. 2d 357 (2000) (although the plaintiff asserted that it never saw the shrink-wrap agreement, such agreement was held enforceable as it is understood that use of software is governed by licenses containing a number of terms); *see also* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 24 Media L. Rep. (BNA) 2100, 39 U.S.P.Q.2d 1502, 1996 FED App. 0228P (6th Cir. 1996) (court held that by typing the word "agree" on an online registration form, the defendant agreed to be bound by the terms of the click-wrap license that was displayed on the screen). Consequently, users should take care to exclude the application of such agreements. This provision serves that purpose.

[FN59].

This provision could come back to harm both the user and the vendor since, in many jurisdictions, a breach of a sales agreement accrues when the breach occurs, regardless of the nonbreaching party's lack of knowledge of the breach. Should a breach be latent or otherwise not known, the above one-year limitation period could pass prior to discovery of the breach.

[FN60].

As mentioned, vendors should strongly resist including consulting services as part of the agreement; as a failure to perform consulting services could enable the user to terminate the agreement. With that in mind, vendors should separate the acquisition of the "System" from the performance of consulting services.

[FN61].

Depending on the engagement, users should either enter into a "fixed fee" or a "time and materials not to exceed" fee engagement. In the event the user enters into a time and materials not to exceed fee engagement, the user should require the vendor to provide weekly or monthly accountings of the hours expended by the vendor and the vendor's estimate as to the number of hours remaining to complete the technical services and the deliverables. Conversely, unless the scope of the project is well defined within the statement of work, vendors should insist on providing consulting services on a time and materials basis.

[FN62].

In this exhibit, the vendor will own the deliverables. In the event the user is to obtain ownership of the deliverables, the user must include "work made for hire" and "assignment" language to obtain such ownership rights. The following provision is submitted for that purpose:

> All Deliverables prepared for or submitted to User by Vendor under the Agreement shall belong exclusively to User and shall be deemed to be "Works Made For Hire." To the extent such works are not deemed to be "Works Made For Hire," Vendor hereby assigns all proprietary rights, including copyright, in these works to User without further compensation.

[FN63].

This section conveys the user broad "irrevocable" use rights. Further, and importantly, the user has the right to disclose the deliverables to third parties to enable the user to exercise such rights. Lastly, the "notwithstanding" language is also important, as the user will be assured that another provision (e.g., Confidentiality Provision) will not conflict with such third-party disclosure rights.

[FN64].

This provision is favorable to users. This provision would allow the user to terminate the agreement in the event a deliverable is not delivered pursuant to the terms of the statement of work. In addition, in the event of a user breach under a statement of work, the vendor is only conveyed the limited right to terminate such statement of work; rather than the agreement.

[FN65].

Prior to delivering deliverables to the user posttermination, vendors should insist that the user pay all fees accrued and owing for such deliverables. Users, conversely, should condition such delivery upon payment of "undisputed" sums for such deliverables.