



## 310: Outsourcing Your Company's Technology Operations

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## Faculty Biographies

### **Karen L. Boudreau**

Karen L. Boudreau was most recently director, commercial legal affairs for Iomega Corporation and is presently in transition.

Ms. Boudreau has been in-house counsel for a variety of companies including IBM, Oracle, The GAP, Sony Electronics, Gateway, and Marshalls.

She is licensed to practice law in California, New York, Massachusetts, Connecticut, Maine, and the District of Columbia.

She received her JD from George Washington University's National Law Center with Honors.

### **Michael F. Finn**

Michael Finn is senior counsel at General Dynamics in Falls Church, Virginia, where he focuses on intellectual property (counseling, litigation, transactions), information technology, and other matters across the company. He is also a member of the General Dynamics technology council and its government contracts council.


Previously, he served as general counsel at publicly-traded, software provider Sideware Systems, Inc., associate general counsel at Teligent, Inc., and prior to that as a senior associate in the Washington DC office of Willkie Farr and Gallagher. He also worked in government, as an attorney in the Office of General Counsel at the Federal Communications Commission, and as law clerk to Judge Frank M. Johnson, Jr. of the Court of Appeals for the Eleventh Circuit and to Chief Bankruptcy Judge Conrad B. Duberstein in the Eastern District of New York.

Mr. Finn is on the board of the Washington Metropolitan Area Corporate Counsel Association (WMACCA) and cochairs the WMACCA information technology and intellectual property forum.

Mr. Finn received a BS with honors from Indiana University and received his JD with honors from New York University School of Law.

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**Session 310: Outsourcing Your  
Company's Technology  
Operations**

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**Agenda**

- Considerations
- Preparation
- Negotiations
- Common Issues
- Vendor Concerns
- After the Contract...

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## Define Impacts of Outsourcing

- Define what changes you would like as part of outsourcing
- Define what personnel, licenses and equipment will no longer be needed
  - What is the cost of terminating any Agreements or Personnel
  - What are the accounting implications of termination
- Define what will need to be transferred
  - Do the present Agreements allow such transfer?
  - What would the cost of such transfer be?

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## Define Your Present Situation

- Prepare a List of All Personnel, Equipment, IP and Services Presently Being Used
- Prepare Binders of the Contracts For The Above
  - Purchase Agreements
  - Licenses (including amendments)
  - Maintenance or Support Agreements
  - Development or Consulting Agreements
  - Define what issues outsourcing is likely to solve
- Verify that you are in compliance with the present Agreements

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## Preparing for Negotiation

- Identify the Negotiating Team
  - Major Business functions
  - Legal
  - Finance
  - HR
  - IT
- Define Selection Criteria
- Define the Timeline allow 2 to 4 months

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## Preparing the RFP

- Defining the RFP
  - Consider using RFI to help define the RFP
  - Consider using a consultant to draft the RFP
  - Consider if your internal organization can bid
- Clearly define your present situation
- Clearly define the expected state
- Prepare for Vendor Due Diligence

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## Issuing the RFP

- Who will receive the RFP?
- Make sure there is a confidentiality agreement
- In What form do you want the Proposal?
- Do not disclose the decision date
- How will questions be handled?
- Will there be a bidder's conference?
- Limit Contact to specific Team members
- Will you accept late responses and amendments?

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## Contents of RFP

- Background of Customer
- Description of Present State
- Goals of Outsourcing
- Description of RFP Process
- Questions for Vendor
  - Include SLAs
- Sample Agreement or Terms to be Accepted
- Agreement by Authorized Rep. to Proposal

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## The Bidding Process

- Receipt of the RFPs
  - Have the entire team read the Proposals
  - Score the Proposals including contract responses
  - Prepare a list of questions for the Bidders
  - Consider a presentation by the top 3 to 4 Bidders
- Negotiate with at least the top 2 Bidders
- **DO NOT ANNOUNCE A WINNER UNTIL THE CONTRACT IS FULLY NEGOTIATED**
- Try to Deal with all issues with in the Agreement

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## Top Customer Considerations

- Important to negotiate terms up front
  - Leaving items until later leaves the door open for terms to change in vendor's favor
- Refer to RFP and strategic goals
  - Aim to fulfill all previously-defined goals for the outsourcing
- Some specific terms a customer should seek...

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## Service Level Agreements

- Set the standard for quality and quantity of the provider's deliverables
- Enforced through performance credits
  - If the supplier falls short of an SLA, the price paid by the customer for the product will go down
- Can set the quality by any mutually agreeable measure
  - E.g. "meets customer's satisfaction"

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## Security and Confidentiality

- Contract should contain detailed security plans
  - Should address physical as well as electronic security
- Vendor may have access to information sensitive to customer's business
  - Vendor should be prohibited from disclosing this information to third parties
  - Extra care should be taken if the vendor has access to personally identifiable information

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## Indemnities

- Vendor should indemnify the customer for most claims
  - Typical claims include IP infringement, property damage, violation of law, fraud, and failure to obtain required consent
  
- Customer's indemnification of the vendor usually limited to negligence or intentional misconduct on the part of the customer

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## Liability

- Liability is typically limited to direct damages and capped at a certain dollar amount
  - Typical included claims are cost to correct vendor errors and increased costs of substitute services
  - Some customers succeed in negotiating liability for specific, named indirect damages
  
- Liability cap usually does not apply to certain types of damages
  - Claims for breach of confidentiality, indemnification, and data protection obligations are common

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## Abandonment by the Vendor

- Vendor may only withhold services in case of total nonpayment by customer
- If vendor breaches the above covenant not to withhold services:
  - Customer will be entitled to an injunction compelling specific performance
  - Liability cap will not apply to customer's recovery of any resulting damages
- Rationale
  - Customer relies on vendor heavily for smooth continued operation

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## Escapes

- Contract usually allows customer to terminate the outsourcing more easily than the vendor
- Common causes for termination by the customer
  - Material breach – failure to satisfy a critical service level
  - Persistent breach – repeated failure to satisfy a non-critical service level
  - Convenience – sometimes requires the payment of a termination fee

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## Termination Services

- Customer often requires continued service from the vendor during a transition phase
  - Should be detailed and planned fully in advance
  - One of the most important clauses in the contract
  
- Requirements for the vendor
  - Assist the customer in transferring outsourcing data and processes to a new vendor or back in-house
  - Continue to provide the outsourced product until the new vendor is online
  - Allow the customer to share relevant IP or information about the vendor with the new vendor

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## Due Diligence

- Representations in Contract
- Due Diligence Plan
- Software
- Hardware
- Technical Due Diligence

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## Required Consents

- What are Required Consents
- Who has contractual responsibility
- Who has sway with customers
- What cost assumptions have been made
- What happens if you cannot obtain them
  - Highly unlikely
  - Always a price

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## Governance

- Who Should Govern
  - Appropriate Representatives
  - Commitment of Time
  - Understanding of the Deal
- Strategic Governance
  - Evolution of Technology
  - Evolution of Services
  - Changes in Business

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## Governance

- Tactical Governance
  - Scheduled meetings
  - Scheduled Agenda
  - Traced Back to Contract
  - Implementation and Follow through

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## Employees

- Vendors Want
  - Freedom of Action
  - Freedom to Reward
- Clients Want
  - Accountability
  - Continuity
  - Avoidance of New Employees
- Employees Want
  - Career Advancement
  - Options for reward

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## Service Levels

- What is the purpose
- Do not use as Guillotine
- Goal should be incentive to improve
- Attainment should be achievable regularly
- Service levels should improve over time
- Root cause analysis as important as achievement

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## Changes in Circumstances

- Laws
  - What is a "law"
  - Were the changes contemplated
  - How does one assess the risk and cost
- Business Fortunes
  - Most contingencies are addressed in contract
  - Need to make deal work for both sides
  - Partnership requires give and take

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## Partnership

- What is Partnership
- How fast can change be achieved
- Partnership is two way street
- What does Vendor Expect out of Partnership
- Ability to Work with Other Vendors
- Look at Whole Relationship and not pieces

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## Termination and Conclusion

- Obligation to Continue to Perform
- Choose where to put resources
- Provide additional work as be needed
- Can Service Levels still be met?
- Avoid double payment
- Avoid endless extensions of Termination Rights

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## Termination and Conclusion

- Intellectual Property
- Services Agreement is not Perpetual License
- Maintenance of Licenses
- Ability to Perform Services
- Client should not be held hostage

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## Termination and Conclusion

- Employees
  - Should have right to hire
  - Additional training may be at cost
  - Salary and employment issues are client concern
  - No obligation to move to new employer

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## Partnership and Social Contract

- Nature and Purpose of Agreement
- Culture? Does it work or clash
- Awareness of the Deal
- Neglect of the Deal
- How Decisions are Made
- Continued Reevaluation

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## Dispute Resolution

- What Disputes can arise
- What is the method to resolve
- Are there barriers to Resolution
  - Time commitments
  - Acceptance
  - Adequate Staff
- How to ensure performance during dispute
  - Payment
  - Services

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## Considerations in Outsourcing: A Customer Perspective

By Michael Finn<sup>\*</sup> and Jay Harris<sup>†</sup>

As many of you know, outsourcing of business functions has increased significantly in the last decade to encompass information technology, payroll, benefits, facilities management, accounting, and other areas. The cost savings and performance benefits from outsourcing can be significant, but nothing is guaranteed. There are numerous risks and many ways that outsourcing benefits can be eroded. Below are several areas that should be considered if your company is considering outsourcing one of its processes and an attachment containing some sample outsourcing clauses from the customer's perspective.

### 1. To Outsource or Not To Outsource: Define Strategic Goals

As an initial matter, a company should determine what processes, if any, may be outsourced to the company's advantage. Outsourcing is often beneficial for programming, administrative, call center functions, and other non-critical matters or processes that can tolerate some level of disruption. Careful consideration should be given to whether outsourcing is useful for (i) functions that are critical or involve strategic importance, (ii) functions that would make a business overly dependent on a vendor, (iii) functions where the quality of service required is critical, or (iv) where the cost of reversing the decision to outsource would be high.

A business contemplating outsourcing should compare how well the services planned for outsourcing are currently being fulfilled in-house and how much improvement is expected from the outsourcing vendor. Goals for cost or efficiency improvements must be defined before they can be compared to the risks of outsourcing in an effective risk-benefit analysis. It is important to be realistic about those improvements and not to overlook hidden costs or other issues that will undermine the benefits of the outsourcing. For example, senior management will have to spend time setting up and managing a new relationship, especially in the initial phases of the project, and additional fees may have to be paid to allow the outsourcing vendor to use your company's software or other processes. For a successful outsourcing, a company must transform its strategic goals into a list of specific requirements to be met by the vendor. Service levels, transition timetables, staffing requirements, and other necessary components should be determined before the RFP is issued. If the company's requirements are not well-defined in the RFP, it is unlikely that the vendor's proposal will meet the company's goals.

It can be difficult to define business processes with this much specificity. This is especially true when an outsourcing is the first time that a business process is defined, a common situation. In short, starting with a set of well-defined goals for the outsourcing is important for maintaining a coherent strategy during negotiations with vendors and achieving the intended benefits of an outsourcing once it has begun.

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## **2. Don't Put Things Off To Another Day**

Often, vendors will respond to particular terms in an RFP with the phrase "to be determined" or "will be negotiated later." Your RFP should make clear that these answers will be treated as "no's." Allowing these types of responses leaves the door open for the vendor to increase its price or demand less stringent production guidelines once it has been selected as the vendor for the project. You should compare vendor responses to your previously defined goals for the outsourcing (see item #1) and to ensure that the selected vendor meets all of your requirements before entering contract negotiations.

It is a good idea to treat the vendor contract in a similar manner by negotiating specific plans and schedules before the contract is signed. One contract term that highlights the importance of negotiating details before signing is the transition of business processes from in-house production to the vendor. The initial transition phase should be carefully planned in its entirety before it begins, and the vendor should be held accountable to the resulting plan of action. Delays are costly and dangerous in terms of interrupting service and losing potential future business. A good strategy is to make performance credits (see item #6) available if the vendor falls behind schedule. If your business is using the outsourcing as a way to transform itself, there is an especially large risk of interruption or delay and even more attention should be focused on planning the transition.

While strict requirements for the vendor should be included in the RFP and the ensuing contract, allowing a certain degree of flexibility for the future is also often prudent and neither party should be locked into a permanent, rigid agreement. Acquiring the flexibility to alter the supply of services as required is one advantage of outsourcing. It is easier for a specialized vendor to adjust the supply of services required by your company than for your company to downsize or supplement its workforce in response to a change in market demand. A vendor is also often in a better position to implement new technology or procedures efficiently by spreading the cost of those improvements over several vendees. In order to realize these advantages, flexibility must be provided for in the contract at the outset by specifying procedures for renegotiation or intervals for reviewing the state of the outsourcing. Alternatively, the contract can allow for changes in in-scope services so long as they are not materially different from those described in the agreement.

## **3. You Are The Vendor**

A vendor's outsourcing solutions often are branded so as to be indistinguishable from products produced in-house by your company. Your customers will not distinguish whether you or the vendor produced a particular product, but will simply assume that all work has been done by your company. As a result, any failure by the vendor to perform to your customers' expectations will likely result in negative feelings about your company on the customer's part, and can easily impact your reputation and future business prospects. (Conversely, your company can, of course, take credit if the vendor performs well.) Additional dangers stem from concerns about the financial stability and longevity of the vendor. If a vendor faces financial difficulties, then interruptions of services, security breaches, confidentiality breaches, problems with IP, a decline in product quality, and almost all of the other problems discussed below become more likely.

For the above reasons, thorough due diligence should be undertaken into every potential vendor's financial history and current situation. The following aspects of any potential vendor should also be investigated for the purpose of determining potential risks: internal audit functions and procedures, external audit functions and procedures, information security functions and procedures, network infrastructure and network integrity (primarily important for IT outsourcing projects), hardware and software configurations, and logical and physical security measures employed.

One should think twice about vendors who lack proof of financial stability. If your company decides to outsource to such a vendor, your company should be sure to include all of the contract provisions described below that will protect your company's interests. Your company should also negotiate a lower overall contract price, with a possible provision for the price to go up once the vendor has proven itself reliable and capable for the task. In dealing with a financially questionable vendor, your company should make a special effort to take the precautions described below to monitor the vendor's activity, including having a well-planned exit strategy in place (see item #10). The vendor will know that it is under review and will be more likely to deliver a quality product on time; your company will be alerted promptly of any problems so it can correct them or take action to mitigate the consequences. If a large outsourcing is contemplated, the compatibility and reliability of a vendor can be tested with a discrete project before a larger, more critical process is transferred. Use of multiple vendors can also minimize the likelihood that a problem with one of them will have a significant adverse effect on your company's business.

#### **4. It Takes Two Horses to Run a Race**

A frequent strategy is to pare down the vendors to the best two and then negotiate simultaneously with each vendor while letting them know that dual negotiations are occurring. This kind of open competition often results in more favorable terms for your business. Many companies will inform Vendor A that Vendor B has agreed to Point X and therefore Vendor A should step up or be disadvantaged. Be aware that taking an over-aggressive stance may actually result – if the vendors are too zealous – with vendors accepting terms that they cannot actually meet. This is not uncommon and typically yields a fractious and strained relationship. In sum, while open competition is beneficial to customers, one should be careful not to stampede vendors into accepting terms they can never meet. The best deals are those beneficial to both sides.

#### **5. Sweat the Small Stuff**

There are several areas of particular concern when negotiating the agreement. Your company should always ensure that adequate privacy, security, and confidentiality measures are undertaken to protect your company's critical data and proprietary processes. These terms can encompass virtual security, mandating firewalls and other means of electronic protection, as well as physical security of the vendor's premises. The appropriate level of security depends on the sensitivity level, and sometimes the amount, of information at risk. Security precautions benefit both parties, but disputes can arise over who should bear the costs. Arrangements should be planned carefully in advance to avoid lapses in security while details are being adjusted. Financial instability can also cause lapses in security if the vendor's cost-savings measures reduce the level of security. There is even a possibility that a vendor might sell your company's proprietary information to generate additional revenue. These potential problems underscore the importance of due diligence when selecting a vendor (see item #2) and monitoring a vendor during an outsourcing project (see item #8).

Vendors are typically prohibited from disclosing your company's proprietary information to third parties. If your company is outsourcing human resource tasks, benefits plans, or any processes involving personally identifiable information, nondisclosure clauses become quite important for protecting your employees privacy. Confidentiality clauses are usually not reciprocal since your company might need permission to disclose information to another vendor in the event that the outsourcing is transferred before it is completed. In such a case, the first vendor's contract would probably still be in effect as the vendor fulfilled its obligations to assist the transfer or continue to provide the product during a ramp-down period (see item # 10). Finally, vendors will often seek a minimum revenue commitment from your company, and if so, you should negotiate a caveat that it will no longer be effective if your business declines significantly.

## 6. It's All About the Service Levels

Service levels are the standards by which a vendor's performance is measured. They describe the quality and quantity of the product that the customer expects from the vendor in order for the vendor to fully perform under the contract. They can be objective, describing the required product in detail; subjective, using a phrase such as "meeting the company's expectations;" or refer to accepted industry standards or other relevant comparisons. Service levels should be set prior to contract signing. Negotiating them later puts your company at a disadvantage in negotiating the product quality that its business requires. Similarly, your company should not agree to relatively lenient "transition" service levels for an initial period at the start of the outsourcing.

Service levels can be fine-tuned for business processes according to their priority. One such plan works by labeling processes as critical, normal, or low priority, and the remedy for the customer varies for different priority levels. For example, failing to meet the service level for a critical process might result in a termination right for your company, while failing to meet the service level for a normal process might generate a certain amount of performance credits for your company (see below in this item), and failing to meet the service level for a low priority process might generate a smaller amount of performance credits. With an agreement like this, the most important aspects of your company's outsourced project will receive the attention that they require, yet the vendor does not face a possible termination of the contract for every immaterial breach of its obligations. However, the system must not be overly complicated – the cost of monitoring the service levels should be justified as compared to the benefits that they provide. The contract should also allow for some flexibility by specifying when and how the service levels will be updated to keep pace with changing business.

Performance credits are a method by which a customer can enforce service levels without terminating the agreement entirely. They consist of reductions of the charges paid by the customer when the vendor fails to meet the service level agreements. They are characterized as liquidated damages, not fines or punishments, and are typically held enforceable. They are usually an exclusive remedy when the service level failure is immaterial, but they should not release any claim that your company has for a material failure to meet a service level. Performance credits, like the service levels they enforce, should be adjustable to evolve in conjunction with the customer's business.

## 7. Pricing Issues

The overall price of a contract is often a contentious issue. There are several models for determining a base price, including an incremental fee for volume of resources, a fee based on number of customer users, revenue sharing, a fixed fee, and price caps, each with its own advantages and disadvantages. Benchmarking is a device for setting a contract price that compares price or other contract terms to other industry contracts as a way of measuring whether they have evolved appropriately. The phrase "comparable service," often used in conjunction with a benchmarking analysis, is usually the subject of protracted negotiation. Gainsharing is another device that can be used in an outsourcing to provide a vendor an incentive to utilize new technology or processes in providing the service.

Many customers want assurances that they will always have the best pricing. Hence, they begin negotiations seeking a "most favored customer" clause requiring a vendor to provide the service to the customer for the same price that the vendor provides similar services to other companies. Vendors, however, seek to avoid this clause because of the difficulty of comparing services and pricing plans of various contracts. If a customer succeeds in negotiating this term, it should specify that the price protection lasts for the duration of the contract, rather than only being in effect at the beginning.

## **8. Project Administration – Overseeing the Vendor**

No matter how advantageous the terms of an outsourcing contract are for your company, the value will diminish if the vendor fails to perform. Thus, your company must check that all aspects of the project are going as planned and require the vendor to provide immediate notice of any changes or problems. For a large outsourcing, a dedicated project executive can be useful in organizing and implementing the supervision of the vendor. Specifically, your company should check that the security measures detailed in the contract are in place with the necessary levels of controls. Your company should also implement whatever financial audits were specified in the contract. Checks should occur on a periodic basis and whenever the procedures or finances of the vendor undergo a material change. A security review may be appropriate for reasons other than direct security concerns, such as when the vendor undergoes a substantial change in management or the financial stability of the vendor is in question. You can even include a clause in the contract reserving the right to request the removal from your account of employees who do not perform at a high service level.

The vendor's obligations in this area should include making regular reports on service level compliance, performance credits, technology improvements, quality improvement issues, industry trends, and changes in personnel assigned to the project. The contract should also establish procedures to resolve operational issues, to prevent escalation, and to ensure continued service in the event that your company discovers something unexpected by way of one of the above checks. If a serious problem is discovered, contract terms that allow for renegotiation or modification of the contract can spare both companies the difficulties of termination.

## **9. Liability and Indemnity**

The parties' liability to each other under an outsourcing contract is usually limited by both type and amount. Outsourcing contracts often allow recovery of direct damages, such as costs to correct provider errors, costs to transition services after termination, and any increased cost to obtain substitute services. Whether to make parties liable to each other for indirect and consequential damages, such as loss of business, profit, or revenue, can be contentious. Vendors typically seek to exclude such recovery. However, customers increasingly tend to specify particular categories of damages, such as regulatory liabilities or certain third-party claims, that will be recoverable from the vendor. Many vendors seek to cap their liability as a multiple of monthly charges, often between six and 36 months. Liability limits typically do not apply to damages arising out of the following events: a breach of confidentiality or data protection obligations, indemnification claims, claims for intentional misconduct or gross negligence, breach by the vendor of its obligation not to withhold services, or payments by the vendor in the event of force majeure.

Generally, the vendor should indemnify your company for claims against your company which arise out of actions on the part of the vendor. Common claims for which your company might seek indemnification include IP infringement, personal injury or property damage, violation of law, fraud, or intentional misconduct, the vendor's failure to obtain any required consent for which it is responsible, all claims by the vendor's employees and subcontractors, and claims by transitioned employees not resulting from your company's wrongful acts. In some instances, a vendor will insist on passing over to your company any liability associated with the product or service. In this case, you should re-evaluate your own insurance coverage and adjust the price or other terms of the contract in light of the increased liability.

## 10. Getting Out

An outsourcing contract should provide methods for terminating the outsourcing relationship in addition to the expiration of the specified term. Typically, the customer may terminate for material breach, such as a failure to meet one or more critical service levels, for persistent nonmaterial breach, such as a repeated failure to meet any service level, or for any other enumerated circumstance such as a change in control of the provider or other provider reorganization. The customer is sometimes also permitted to terminate for convenience, but many vendors require payment of a termination fee if your company exercises that right. This payment is intended to compensate the provider for its unrecovered investment in the transaction and the amount is typically heavily negotiated. The vendor, however, usually has limited rights to terminate the agreement; suspension of services is typically only allowed in the case of the customer's undisputed nonpayment. The rationale for this rule is the extent to which the customer relies on the vendor for continued operation. Any damages resulting from an unauthorized suspension of services are usually recoverable not subject to limits of liability.

## 11. Transition Requirements are Essential

One key area that is often overlooked is post termination transition to a new vendor. Without a well thought-out plan, a customer will be at the mercy of its just-terminated vendor, who will likely be less enthusiastic about aiding your company's transition at the end of the outsourcing than it was at the beginning. To avoid this problem, parties to an outsourcing should agree on a detailed plan for transitioning out of the outsourcing relationship upon termination of the contract.

The end of the outsourcing relationship can involve transferring the outsourced service to another vendor, transferring it back in-house, or gradually stopping the service altogether. To prevent business interruption, your company often needs the vendor to continue providing its service during the transition. The contract should state that your company has the right to transfer the service to another vendor before the expiration of the contract term and require the vendor to provide post-termination transition service while the process is performed at the new vendor. You should detail the form and format that data will be transferred back to your company or to the new vendor. It is also wise to retain the rights to disclose necessary information about the old vendor and to share relevant IP with the new vendor. Consider whether software and other IP should be placed in escrow for the duration of an outsourcing contract so it is available to your company in such a situation. There can be employment issues mirroring the issues at the start of the outsourcing when personnel are transferred, hired, or laid off upon a contract's termination. To ensure that the vendor will not be legally excused from its end-of-contract obligations – a danger if the vendor terminates for nonpayment – your company can pay for termination assistance in advance, making the termination assistance provisions in the contract operate independently from the rest of the contract.

**ATTACHMENT 1****Model Clauses****I. Services Not Withheld**

(a) Prohibition. Provider will not voluntarily refuse to provide all or any portion of the Services in violation or breach of the terms of the Agreement and/or any Transaction Document.

(b) Injunctive Relief. If Provider breaches or threatens to breach Section 5.9(a), Provider agrees that ABC will be irreparably harmed and shall be entitled to apply to a court of competent jurisdiction for and be granted an injunction compelling specific performance by Provider of its obligations under the Agreement and/or applicable Transaction Document without the necessity of posting any bond.

**II. Change Control Procedure**

Consistent with the Agreement, the following process shall be followed to originate, process and maintain control over Change Order Requests and Change Orders under the Agreement.

A. Either Provider or ABC may identify and submit for consideration a proposed change to the Agreement.

B. All requests for changes shall be submitted in writing to the Account Executives designated by Provider and ABC pursuant to the Agreement and the ABC Procurement Officer and the ABC Compliance Officer. The following areas should be clearly addressed in each Change Order Request:

1. Origination;
2. Clear statement of requested change;
3. Rationale for change;
4. Impact of requested change in terms of operations, cost, schedule and compliance with the matters referred to in Section 9.5 of the Master Agreement;
5. Effect of change if accepted;
6. Effect of rejection of change;
7. Recommended level of priority;
8. Date final action is required; and
9. Areas for signature by the approval authorities of each Party.

C. The Account Executives and the ABC Procurement Officer and the ABC Compliance Officer shall review all Change Order Requests, determine whether to recommend the Change Order Request be accepted or rejected by the Parties and forward the Change Order Request, their individual recommendations and the basis for their recommendations to Provider and ABC for a final decision.

D. The Account Executives and the ABC Procurement Officer and the ABC Compliance Officer will be responsible for the final approval of all Change Order Requests.



E. The Account Executives will be responsible for the implementation of all Change Orders approved pursuant to Change Order Requests, including the coordination of the preparation and execution by the Parties of addendums to the Agreement and/or its associated Exhibits and Schedules to incorporate each requested and agreed change into the Agreement, as applicable.

F. No Change Order or change shall be effective or binding upon the Parties to the Agreement until an addendum to the Agreement and/or its associated Exhibits and Schedules, as applicable, incorporating such change into the Agreement and/or its associated Exhibits and Schedules has been executed by Provider and ABC.

### III. Performance Credits

(a) Incurrence of Performance Credits; Exclusive Remedy for Immaterial Breach. If Provider fails to provide the Services in accordance with the Service Levels set forth in any Transaction Document, Provider shall apply the resulting Performance Credits against the Charges owed to Provider for the second month following the month in which the Performance Credits were incurred. The Parties agree that the Performance Credits are a fair estimate of the damages that the ABC Group will incur for each event for which a Performance Credit is granted in the Agreement which constitutes an immaterial breach of the Agreement, that the actual damages incurred by the ABC Group in each such event would be difficult and costly to determine, and that the Performance Credits are liquidated damages awarded in lieu of actual damages incurred by the ABC Group in such case. The Parties agree that the Performance Credits are not penalties and are the sole and exclusive remedy of ABC with respect to the incident or event with respect to which such Performance Credits are paid or credited by Provider to ABC, subject to this Section 4.6 and the provisions of Sections 12, 13 and 17.3.

(b) Performance Credits not Exclusive Remedy for Material Breach. Notwithstanding ABC's acceptance of any Performance Credit, ABC reserves the right for up to twelve (12) months following any Service Level breach to claim that such breach was a material breach of the Agreement or one of a series of immaterial breaches that together amounted to a material breach. In such a case, the Performance Credits will not be ABC's exclusive remedy, but instead shall be retained by ABC as a credit against any actual damages recoverable by ABC for such material breach, and ABC shall be entitled to pursue all remedies that it may have against Provider for such breach.

### IV. Dedicated Executives

#### 1.1. Provider Account Executive.

(a) Designation and Authority. Provider shall designate, prior to the Initial Commencement Date, a Provider Account Executive for the Provider engagement under this Agreement. The Provider Account Executive, and his/her designee(s), shall have the authority to act for and bind Provider and its contractors and subcontractors in connection with all aspects of this Agreement. All of ABC's communications shall be sent to the Provider Account Executive or his/her designee(s).

(b)

(c) Selection. Before assigning an individual to the position of Account Executive, whether the person is initially assigned or subsequently assigned, Provider shall:

- (i) notify ABC of the proposed assignment for ABC's approval;
- (ii) introduce the individual to appropriate ABC representatives; and
- (iii) consistent with law and Provider's reasonable personnel practices, provide ABC with any other information about the individual that is reasonably requested.

(d) Term. Provider shall cause the person assigned to the position of Account Executive to maintain his or her principal office at a location designated by ABC and to devote all time and effort that is reasonably necessary to the provision of the Services under this Agreement. Provider shall use commercially reasonable efforts to maintain the initial Provider Account Executive at ABC for the minimum term of twenty-four (24) months following the Initial Commencement Date, and each of the subsequent Provider Account Executives for a minimum term of twenty-four (24) months, unless such Account Executive (i) voluntarily resigns from Provider, (ii) is dismissed by Provider for (A) misconduct or (B) unsatisfactory performance in respect of his or her duties and responsibilities to ABC or Provider, (iii) is unable to work due to his or her death, injury or disability, or (iv) is removed from the ABC assignment at the request of ABC. Whenever possible, Provider shall give ABC at least ninety (90) days advance notice of a change of the Account Executive or if such ninety (90) days notice is not possible, the longest notice otherwise possible.

(e) Removal. If ABC determines that it is not in the best interests of the ABC Group for the Provider Account Executive to continue in his or her capacity, then ABC shall give Provider written notice requesting that the Account Executive be replaced. Provider shall replace the Account Executive as promptly as practicable, but, in any case, within thirty (30) days, in accordance with this Section 8.1.

## 1.2. **ABC Account Executive**

(a) Designation and Authority. ABC shall designate, prior to the Initial Commencement Date, an ABC Account Executive for the Provider engagement under this Agreement. The ABC Account Executive and his/her designee(s) shall have the authority to act for and bind ABC and its contractors in connection with all aspects of this Agreement. All of Provider's communications shall be sent to the ABC Account Executive or his/her designee(s).

(b) Term. ABC shall cause the person assigned to the position of Account Executive to devote substantial time and effort to the management of ABC's responsibilities under this Agreement. Whenever possible, ABC shall give Provider at least ninety (90) days advance notice of a change of the Account Executive or if such ninety (90) days notice is not possible, the longest notice otherwise possible.

## V. Customer Requests for Vendor Personnel Changes

If Provider fails under any Transaction Document to meet the Service Levels thereunder persistently and if ABC reasonably believes such failure is attributable in whole or in part to Provider's reassignment, movement, or other changes in the human resources allocated by Provider to the performance and delivery of the Services pursuant to such Transaction Document or the Agreement and/or to the Provider subcontractors assigned to the ABC service team, ABC will notify Provider of such belief and the basis therefor. Upon receipt of such notice from ABC, Provider: (i) will promptly provide to ABC a report setting forth Provider's position regarding the matters raised by ABC in its notice; (ii) will meet with ABC in the context of the Services Oversight Committee to discuss the matters raised by ABC in its notice and Provider's positions with regard to such matters; and (iii) will promptly and diligently take commercially reasonable action to eliminate any Provider human resource practices or other practices and/or processes identified by ABC or Provider as adversely impacting the performance and delivery of the Services by Provider.

## VI. Confidentiality and Data

### 1.1. Company Information

Provider and ABC each acknowledge that the other Party may possess and may continue to possess information, which has commercial value in such other Party's business and is not in the public domain. Such information may have been discovered or Developed by such other Party or provided to it by a third party, and such other Party may hold property rights in such information by assignment, license or otherwise. For the purposes of this Section 11, neither Provider nor its Affiliates nor subcontractors shall be considered contractors or subcontractors of ABC or the ABC Group.

### 1.2. Obligations

(a) ABC and Provider will each refrain from unauthorized storage and disclosure, will hold as confidential and will use the same level of care (including both facility physical security and electronic security) to prevent unauthorized access by, storage, disclosure, publication, dissemination to and/or use by third parties of, the Company Information of the other Party as it employs to avoid unauthorized access, storage, disclosure, publication, dissemination or use of its own information of a similar nature, but in no event less than a reasonable standard of care. The concept of a "reasonable standard of care" shall include compliance by the Party receiving Company Information of the other Party with all laws applicable to the security (facility physical security and electronic access and data security), access, storage, disclosure, publication, dissemination and use of such Company Information in the receiving Party's possession, as well as all laws applicable to the security (facility physical security and electronic access and data security), access, storage, disclosure, publication, dissemination and use of such Company Information in the disclosing Party's possession. Notwithstanding the foregoing confidentiality and similar obligations in this Section 11 (but subject to compliance with law), the Parties may disclose to and permit use of the Company Information by, in the case of ABC, other members of the ABC Group, and in the case of both Parties and the other members of the ABC Group, their respective legal counsel, auditors, contractors and subcontractors where: (i) such disclosure and use is reasonably necessary, and is only made with respect to such portion of the Company Information that is reasonably necessary, to permit the Provider and members of the ABC Group to perform their obligations or exercise their rights hereunder or for their respective legal counsel, auditors, contractors and subcontractors to provide the Services to or on behalf of the members of the ABC Group or for the ABC Group to use the Services and/or the ABC Solution; (ii) such auditors, contractors and subcontractors are bound in writing

by obligations of confidentiality, non-disclosure and the other restrictive covenants set forth in this Section 11, at least as restrictive and extensive in scope as those set forth in this Section 11; and (iii) Provider in the case of ABC Company Information, and ABC in the case of Provider Company Information, assumes full responsibility for the acts or omissions of the persons and entities to which each makes disclosures of the Company Information of the other Party no less than if the acts or omissions were those of Provider and ABC respectively.

(b) Neither ABC nor Provider shall disclose or permit the use of the Company Information of the other Party except as specifically permitted in the Agreement. Provider shall be responsible to ensure that its legal counsel, auditors and subcontractors comply with this Section 11.2(b) and ABC shall be responsible to ensure that the other members of the ABC Group and its and their legal counsel, auditors, contractors and subcontractors comply with this Section 11.2(b).

(c) Without limiting the generality of the foregoing, neither Party will publicly disclose the substantive or material commercial terms of the Agreement or the substantive positions of the Parties in the negotiation of the Agreement, except to the extent permitted by this Section 11 and/or to enforce the terms of the Agreement, without the prior written consent of the other Party. Furthermore, except as set forth in the Agreement, neither Provider nor ABC will acquire any right in or assert any lien against the other Party's Company Information, and/or refuse to promptly return, provide a copy in the format requested of, or destroy such Company Information upon the request of the disclosing Party.

(d) Notwithstanding any other provision of the Agreement, neither Party nor the persons and entities to which a Party makes authorized disclosures of the Company Information of the other Party shall be restricted in disclosing and using general knowledge, know-how and experience, including processes, methods, techniques and concepts developed, conceived or acquired by either Party, its Affiliates or their respective contractors and subcontractors in the course of the performance of the Agreement and the performance and use of the Services, which are retained in the minds of employees who have had access to the other Party's Company Information (without reference to any physical or electronic embodiment of such information), unless such disclosure and/or use (i) shall infringe any of the patent rights, copyrights, mask works rights or Trade Secrets which are a part of the other Party's Company Information, (ii) shall constitute a violation by Provider, a member of the ABC Group, and/or their respective contractors or subcontractors or such employee, of any applicable law or (iii) shall involve the use, disclosure or reproduction of any ABC Data.

### 1.3. Exclusions

Notwithstanding the foregoing and excluding the ABC Data, this Section 11 shall not apply to any information which Provider or ABC can demonstrate was or is: (a) at the time of disclosure to it, in the public domain; (b) after disclosure to it, published or otherwise becomes part of the public domain through no fault of the receiving Party; (c) without a breach of duty owed to the disclosing Party, is in the possession of the receiving party at the time of disclosure to it; (d) received after disclosure to it from a third Party who had a lawful right to and, without a breach of duty owed to the disclosing Party, did disclose such information to it; (e) independently developed by the receiving Party without reference to or use of, including any actions authorized in Section 11.2(a), the Company Information of the disclosing Party; (f) a graphical user interface or other screen display that appears on monitors and provides user/operator interfaces to the Services; or (g) user/operator instructions for the use of the Services. Further, either Party may disclose the other Party's Company Information to the extent required by law or order of a court or governmental agency or the rules of the New York Stock Exchange, NASDAQ or similar national stock exchange. However, in the event of disclosure pursuant to an order of Court or governmental agency, and subject to compliance with law or such order of Court or governmental agency, the recipient of such Company Information shall give the disclosing Party prompt notice to permit the

disclosing Party an opportunity, if available, to obtain a protective order or otherwise protect the confidentiality of such information, all at the disclosing Party's cost and expense. The receipt of Company Information under the Agreement will not limit or restrict assignment or reassignment of employees of Provider and the ABC Group within or between the respective Parties and their Affiliates.

#### 1.4. Data Ownership

All ABC Company Information (including, without limitation, ABC Data, records and reports related to the ABC Group, the ABC Business and the Services) whether in existence at the Commencement Date of a Transaction Document or compiled thereafter in the course of performing the Services, shall be treated by Provider and its subcontractors as the exclusive property of ABC or other member of the ABC Group and the furnishing of such ABC Company information, or access to such items by, Provider and/or its subcontractors, shall not grant any express or implied interest in Provider and/or its subcontractors relating to such ABC Company Information, and Provider's and its subcontractors' use of such ABC Company Information shall be limited to such use as is necessary to perform and provide the Services to the ABC Group. Upon request by ABC at any time and from time to time and without regard to the default status of the Parties under the Agreement, Provider and/or its subcontractors shall promptly deliver to ABC the ABC Company Information (including without limitation all data, records and related reports regarding the ABC Group, the ABC Business and the Services) in electronic format and in such hard copy as exists on the date of the request by ABC.

#### 1.5. Data Privacy

(a) ABC shall be and remain the controller of the ABC Data and other ABC Company Information for purposes of all applicable laws relating to data privacy, personal data, transborder data flow and data protection (collectively, the "Privacy Laws"), with rights to determine the purposes for which the ABC Data and other information is processed, and nothing in the Agreement will restrict or limit in any way ABC's rights or obligations as owner and/or controller of its data and information for such purposes. As the controller of such data and other information of the ABC Group, ABC will direct Provider's use of and access to the ABC Data and other information solely in accordance with the terms of the Agreement. The Parties also acknowledge and agree that Provider may have certain responsibilities prescribed as of the Effective Date by applicable Privacy Laws or by ABC's privacy policies (as in effect and updated by ABC from time to time and provided to Provider) as an entity with use of, access to and possibly custody of the ABC Data and information and Provider hereby acknowledges such responsibilities and agrees that such responsibilities will be considered as a part of the Services to be provided by Provider under the Agreement.

(b) If Privacy Laws or ABC's privacy policies applicable to the activities contemplated by the Agreement are modified or new or amended or re-interpreted Privacy Laws that are applicable to such activities come into effect, Provider shall as part of the Services cooperate with ABC in an effort to continue to comply with such Privacy Laws and privacy policies, as so amended, modified or interpreted, but to the extent that such amendments, modifications or interpretations expand the scope or increase the cost of the activities previously undertaken by Provider, Provider will, at ABC' reasonable request, provide such additional activities as New Services; provided, however, that ABC shall not be obligated for any additional Charges with respect to any additional responsibilities imposed on Provider as a processor of data in the ordinary course of its business and Provider shall not be obligated for any amounts with respect to any additional responsibilities imposed on ABC as a controller of data in the ordinary course of its business.

## VII. Termination

### 1.1. Termination by ABC

ABC may terminate the Agreement and any Transaction Document in whole or, in the case of termination pursuant to paragraphs (a) or (b), in part with respect to the affected Services, for any of the following reasons:

(a) Material Breach. A material breach of the Agreement or any Transaction Document by Provider that remains uncured for ten (10) days after receipt of written notice thereof by ABC to Provider. Further, the occurrence of a Provider Critical Service Failure that remains uncured for the applicable cure period(s) set forth in the definition of the Provider Critical Service Failure.

In the event of a partial termination of any Transaction Document pursuant to Sections 12.1(a) or (b), ABC shall provide Provider with written notice of its intent to so terminate, which notice shall specify a termination date no less than ninety (90) days after the date of the notice, and the Charges for the portion of the Services so terminated shall be removed from the "Charges" Schedule to the Transaction Document and the applicable Baselines and any other terms shall be adjusted to reflect the termination of such portion of the Services; or

(b) Persistent Breach. If there exists a series of material breaches that are cured within the permissible periods, or non-material persistent breaches, of the Agreement and/or any Transaction Document by Provider that in the aggregate constitute a material breach or have a material and significant adverse impact (i) on the administrative, management, planning, financial reporting or operations functions of the ABC Group or the portion of the ABC Group constituting the user group of the Services under any Transaction Document, or (ii) on the functions of the ABC Group comprising the Services under any Transaction Document; or (iii) the financial performance of the portion of the ABC Group constituting the user group of the Services under any Transaction Document, and that remain uncured for ten (10) days after receipt of written notice thereof by ABC to Provider; or

(c) Convenience. For convenience effective after the first six(6) calendar months following the execution of any Transaction Document with respect to any part of the Services upon one hundred eighty (180) days prior notice of the effective date of such termination, by ABC to Provider; or

(d) Insolvency. Upon written notice to Provider if Provider or any subcontractor of Provider performing a material portion of the Services becomes insolvent or is unable to pay its debts or enters into or files (or has filed or commenced against it) a petition, arrangement, application, action or other proceeding seeking relief or protection under the bankruptcy laws of the United States or any similar laws of the United States or any state of the United States or transfers all or substantially all of its assets to another person or entity; or

(e) Change of Control. In the event of a Change of Control of Provider, or Provider acquires a Competitor of ABC, ABC may terminate the Agreement upon one hundred eighty (180) days prior written notice to Provider given not later than ninety (90) days after the occurrence of such Change of Control; or

(f) Damages Cap Exceeded. Provider incurs Direct Damages to ABC in excess of the Provider Direct Damages Cap under the circumstances and resulting from the events described in Section 13.1(a) and Provider does not agree to reset to zero the Direct Damages counted toward the Provider Direct Damages Cap upon notice from ABC to reset the Provider Direct Damages Cap; or

(g) Disaster Recovery or Force Majeure Failure. Under the circumstances set forth in Sections 3.4 or 18.3.

#### 1.2. Termination by Provider

Provider may terminate any Transaction Document for a material payment default by ABC thereunder that remains uncured for a period of thirty (30) days after written notice thereof to ABC from Provider.

#### 1.3. Termination Charges/Wind-Down Expenses

(a) Upon Termination by ABC. In the event of a termination by ABC pursuant to Section 12.1(c) for convenience, ABC shall pay Provider the applicable Termination Charge and Wind-Down Expenses. In the event of a termination by ABC pursuant to Section 18.3 for a Force Majeure Event, ABC shall pay Provider the amounts set forth in Section 18.3(ii), but will not be responsible for Termination Charges or Wind-Down Expenses. In the event of a termination by ABC pursuant to Sections 12.1(a) for cause or (b) for persistent breaches or (c) for insolvency or bankruptcy or (d) for a Change of Control or (f) for exceeding the Provider Direct Damages Cap or Sections 3.4 or 18.3 for failing to provide Business Continuity and Disaster Recovery Services, ABC shall not be responsible for the payment of Termination Charges or Wind-Down Expenses.

(b) Cessation of Charges. Except as set forth in Sections 12.3(a) and (c) and 12.4(d), ABC shall not be obligated to pay any Charges that would otherwise accrue and be payable by ABC pursuant to the Agreement or any Transaction Document after the effective date of the expiration or termination of the Agreement or any such Transaction Document.

(c) Upon Termination by Provider. In the event of a termination by Provider pursuant to Section 12.2, ABC will be required to pay the applicable Termination Charge and Wind-Down Expenses, which shall constitute Provider's exclusive remedy in such event.

### VIII. Liability

#### 1.1. Liability Caps

(a) Provider Cap. Except as provided in Section 13.2, the liability of Provider to ABC arising out of or resulting from the performance or non-performance by Provider and its subcontractors of the Services and its obligations under the Agreement shall be limited to "Direct Damages" incurred by ABC for each event which is the subject matter of a claim or cause of action. Except as provided in Section 13.2, each Transaction Document shall contain a provision setting the cap on the aggregate liability of Provider for Direct Damages pursuant to such Transaction Document (the "Provider Direct Damages Cap"). The sum of the Provider Direct Damages Caps set forth in the Transaction Documents shall constitute Provider's aggregate liability for Direct Damages under the Agreement (the "Provider Aggregate Direct Damages Cap").

(b) ABC Cap. Except as provided in Section 13.2, the liability of ABC to Provider arising out of or resulting from the performance and non-performance of its obligations under the Agreement (including the Transaction Documents) shall be limited to Direct Damages incurred by Provider for each event which is the subject matter of a claim or cause of action. Except as provided in Section 13.2, ABC's aggregate liability for Direct Damages under each Transaction Document shall not exceed the amount payable by ABC upon a termination for convenience of each such Transaction

document pursuant to Section 12.1(c) comprised of the Termination Charge and Wind-Down Expenses (the “ABC Direct Damages Cap”). The sum of the ABC Direct Damage Caps set forth in the Transaction Documents shall constitute ABC’s aggregate liability for Direct Damages under the Agreement (the “ABC Aggregate Direct Damages Cap”).

The Provider Direct Damages Cap and the ABC Direct Damages Cap are herein collectively called the “Direct Damages Caps”.

(c) Excluded Damages. Neither Party shall be liable for damages that constitute (i) loss of interest, profit or revenue of the claiming Party, or (ii) incidental, consequential, punitive, multiple or indirect damages suffered by the claiming Party, except as the damages described in (i) and (ii) are included as a part of the Termination Charge, the Performance Credits, the definition of Direct Damages or as otherwise specifically provided for in the Agreement, even if such Party has been advised of the possibility of such losses or damages.

### 1.2. Exclusions, Direct Damages Caps Calculation

(a) Exclusions. Notwithstanding Section 13.1, the Direct Damages Caps (the limitations on the types and amounts of damages set forth in Section 13.1) shall not apply to (a) failure to pay charges for the Services that are due and payable under the Transaction Documents up to the effective date of the early termination of such Transaction Documents (but the Direct Damages Cap will apply to payments due and payable by ABC upon a termination by ABC for convenience under Section 1.1(c) or upon a termination by Provider pursuant to Section 12.2); (b) Losses covered under the Party’s indemnification obligations pursuant to Section 14; (c) Losses arising from a violation of the provisions of Section 11; (d) Losses incurred by ABC caused by or arising out of the intentional misconduct or gross negligence of Provider or its subcontractors in the performance or failure of performance of its obligations under the Agreement or theft or fraud by Provider or its subcontractors or the employees of any of the foregoing; (e) amounts payable by Provider under the force majeure provisions of Section 18.3 of the Agreement; (f) amounts payable and credits owed to ABC by Provider under the Agreement, including, without limitation, Performance Credits and amounts payable under Section 4.7 (Other Credits); (g) Losses arising from a breach by Provider of Section 3.4 (Business Continuity and Disaster Recovery), and Section 5.9 (Services not to be Withheld); (h) Losses arising from a breach by Provider of Section 3.2(a)(ii), (iii) and (iv) (Compliance with laws); and (i) amounts recoverable pursuant to Section 9.6(d) (Payment of Audit Amounts).

(b) Direct Damages Cap. Notwithstanding Section 13.1, none of the amounts or payments made to satisfy damages, Losses and other amounts described in this Section 13.2(a) shall not be included in calculating the Provider Direct Damages Cap or the ABC Direct Damages Cap.

### 1.3. Direct Damages

Unless specifically provided to the contrary in the Agreement (including, without limitation, Section 13.2), neither Party shall have any liability whether based on contract, tort (including, without limitation, negligence), warranty, guarantee or any other legal or equitable grounds to the other Party for any damages other than Direct Damages. “Direct Damages” means actual, direct damages incurred by the claiming Party which include, by way of example but without limitation, (a) the additional costs incurred by the ABC Group over the Charges set forth in the Agreement to obtain services which are the same as or substantially similar to the Services from another provider or providers or to perform services in-house which are the same as or substantially similar to the Services, or a combination of the foregoing, (b) the costs incurred by the ABC Group to correct any deficiencies in the Services provided by Provider; (c) the costs incurred by the ABC Group to transition to another provider or providers of services which



are the same or substantially similar to the Services and/or to take such same or similar services in-house, or a combination of the foregoing; (d) the Performance Credits, (e) fines, penalties and interest assessed against the ABC Group, and (f) similar damages.

## **IX. Indemnity**

### **1.1. Indemnity by Provider**

Provider will indemnify and hold harmless ABC and the other members of the ABC Group, its and their Affiliates, and the respective current, future and former officers, directors, employees, successors and assigns of each of the foregoing, and each of the foregoing persons or entities (the "ABC Indemnitees") on demand, from and against any and all Losses incurred by any of them and shall defend the ABC Indemnitees against all Claims arising from or in connection with:

(a) all Claims that the Services (including the Provider Products and Provider Materials) and/or other resources used by Provider and/or any work performed by Provider, or the resources used and/or work performed by Provider's Affiliates or subcontractors infringe, violate or misappropriate any patent, trade secret, trademark, copyright or other proprietary or intellectual property right of any third party, but excluding any such infringement, violation or misappropriation caused by (i) resources provided by the ABC Group for use by Provider and/or its Affiliates or subcontractors, or (ii) modifications by the ABC Group to resources provided by Provider and/or its Affiliates or subcontractors, to the ABC Group;

(b) all Claims by employees of Provider or any of its Affiliates or subcontractors arising out of or relating to the Agreement or the Services, except to the extent caused by the negligence or intentional misconduct of any member of the ABC Group or any of their Affiliates or contractors (but excluding Provider and its Affiliates and subcontractors from such exception);

(c) all Claims for personal injuries, death or damage to tangible and intangible personal or real property to the extent caused by acts or omissions of Provider or any of its Affiliates or subcontractors, except to the extent caused by the negligence or intentional misconduct of a member of the ABC Group or any of their Affiliates or contractors (but excluding Provider and its Affiliates and subcontractors from such exception);

(d) all Claims arising from a violation of any federal, state, local or foreign law, rule, regulation or order applicable to Provider and/or any of its Affiliates and/or subcontractors or to the ABC Group and/or any member thereof, by Provider or any of its Affiliates or subcontractors, excluding any such violation to the extent caused by a breach of the Agreement by a member of the ABC Group;

(e) all Claims arising from Provider's provision of any services to any third party from the same facilities from which the Services are provided to the ABC Group, except to the extent caused by the negligence or intentional misconduct of any member of the ABC Group or any of their contractors (but excluding Provider and its Affiliates and subcontractors from such exception);

(f) all Claims arising out of Provider's use in performing and/or providing the Services to the ABC Group of products, services or license rights under the Third Party Agreements (including any ABC Software licensed by ABC or any other member of the ABC Group from a third Party), to the extent due to Provider's or any of its Affiliates' or subcontractors' breach of the Third Party Agreement for such products, services or license rights (including a third party's license agreement for the

ABC Software), excluding, however, any Claim arising from the failure of ABC to obtain, or cause to be obtained, the appropriate consents or approvals for such use, or any Claims arising under Section 14.2(a) below;

(g) all Claims by, or increases in the charges payable to, the Third Party Providers under the Third Party Agreements caused by or arising out of any breach of the Agreement by Provider or its Affiliates or subcontractors, or failure to properly and timely perform any duty or responsibility that Provider or any of its Affiliates or subcontractors has under the Agreement, except to the extent caused by any breach of the Agreement by ABC or its Affiliates or contractors (but excluding Provider and its Affiliates and subcontractors from such exception);

(h) all Claims arising out of or resulting from the failure of Provider or any of its Affiliates or subcontractors to properly and/or timely perform Provider's obligations, duties and responsibilities under the Agreement, except to the extent caused by any breach of the Agreement by ABC or its Affiliates or contractors (but excluding Provider and its Affiliates and subcontractors from such exception);

(i) all Claims arising from fraud committed by, or the intentional misconduct of, Provider or its Affiliates or subcontractors or the employees of any of the foregoing;

(j) all Claims for Provider's tax liabilities arising from Provider's provision of Services, as set forth in Section 4.2;

(k) all Claims made by Affiliates and subcontractors of Provider and vendors to any of the foregoing, arising out of or relating to the Agreement or the Services;

(l) all Claims arising out of the failure of Provider to obtain, or cause to be obtained, any consent or approval required for the ABC Group and its contractors and customers to receive and use the Services, or any component thereof, to the full extent provided in the Agreement;

(m) all Claims arising out of Provider's breach of its obligations under Section 3.2(a)(ii), (iii) and (iv) (compliance) or Section 5.9 (Services Not to Be Withheld) of the Agreement; and

(n) all Claims by any Affected Employees arising out of or resulting from their employment, or the termination of their employment, with Provider or its Affiliates and subcontractors, except to the extent any such claim arises from a wrongful act of the ABC Group.

In the event and to the extent that a Claim is made against a ABC Indemnitee by an employee of Provider and/or its subcontractors providing services, products and/or software hereunder, the Parties agree that Provider shall indemnify and hold harmless the ABC Indemnitee to the same extent as if the Claim was made by a non-employee of Provider and/or its subcontractors. Provider's indemnification obligations hereunder shall be primary and immediate. Accordingly, in addition to other provisions herein, and in order to render the Parties' intent and this indemnification agreement fully enforceable, Provider, in an indemnification claim hereunder, expressly and without reservation waives any defense or immunity it may have under any applicable workers' compensation law(s) or any other statute or judicial decision disallowing or limiting such indemnification and consents to a cause of action for indemnity. This waiver and consent to indemnification is made irrespective of and specifically waiving any defense or immunity under any statute or judicial decision.