

# Services Agreement (Pro-Customer) (OH)

PRACTICAL LAW COMMERCIAL TRANSACTIONS,  
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An agreement for the provision of services governed by Ohio law. This Standard Document can be adapted for a specific project, for ongoing services, or for use as a master services agreement. It is drafted from the perspective of the customer in a manner that aims to be reasonable and includes provisions that are common to many types of negotiated services agreements. This Standard Document has integrated notes with important explanations, alternative provisions, and drafting and negotiating tips.

## DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Services agreements vary in length and complexity depending on a variety of factors, such as:

- The relationship between the parties.
- The size of the transaction.
- Whether the services are standard for the provider or custom-designed for the customer.
- The creditworthiness of each of the parties.
- The allocation of responsibilities between the service provider and the customer.

This Standard Document is:

- A short-form agreement for the provision of services.
- Drafted from the perspective of a customer purchasing standard provider services.

## ASSUMPTIONS

This Standard Document assumes that:

- **The agreement is governed by Ohio law.** If the law of another state applies, these terms may have to be modified to comply with the laws of the applicable jurisdiction.
- **The parties to the agreement are US entities and the transaction takes place in the US.** If any party is organized or operates in, or any part of the transaction takes place in a foreign jurisdiction, these terms may need to be modified to comply with applicable laws in the relevant foreign jurisdiction.
- **These terms are being used in a business-to-business transaction.** This Standard Document should not be used in a consumer transaction, which may

involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource.

- **These terms are not industry-specific.** This Standard Document does not account for any industry-specific laws, rules, or regulations that may apply to certain transactions, products, or services.
- **This Standard Document is a short form agreement.** This document provides key provisions for a straightforward service transaction with no customized deliverables. For a more complex transaction requiring more extensive provisions, see Standard Document, Professional Services Agreement ([9-500-2928](#)).
- **The customer purchases the services without accompanying goods.** If the customer purchases or may purchase goods together with the services, the parties must revise this Standard Document to address goods-specific issues or may, depending on whether goods or services predominate, find it more appropriate to begin with a purchase of goods agreement. For sample purchase of goods agreements, see Standard Documents, Sale of Goods Agreement (Pro-Seller, Short-Form) ([0-580-9548](#)) and Sale of Goods Agreement (Pro-Buyer, Short-Form) ([7-575-4057](#)).
- **There is a single service provider and a single customer.** The parties should revise this agreement if there are additional

providers or customers. For example, multiple service providers or customers must determine whether their obligations are joint, several, or joint and several and amend the agreement appropriately. For an example of a provision for several and joint and several liability, see Standard Clause, General Contract Clauses: Joint and Several Liability (OH) ([w-000-1173](#)).

- **The transaction does not involve the sharing of any personally identifiable information between the parties.** The transfer, storage, and use of personally identifiable information of third parties (whether of employees, customers, or other third parties) may be subject to specific privacy and data security laws and regulations above and beyond a party's customary confidentiality obligations. The parties should consider and agree on what steps should be taken and contract provisions included to comply with any applicable privacy and data security rules and regulations. For an overview of US data privacy and security laws, see Practice Note, US Privacy and Data Security Law: Overview ([6-501-4555](#)).

#### BRACKETED ITEMS

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices, to be selected, added, or deleted at the drafter's discretion.

### SERVICES AGREEMENT

This Services Agreement (this "**Agreement**"), dated as of [DATE] (the "**Effective Date**"), is by and between [SERVICE PROVIDER NAME], a [STATE OF ORGANIZATION] [corporation/LLC/[OTHER ENTITY]], with offices located at [ADDRESS] ("**Service Provider**") and [CUSTOMER NAME], a [STATE OF ORGANIZATION] [corporation/LLC/[OTHER ENTITY]], with offices located at [ADDRESS] ("**Customer**").

**WHEREAS**, Service Provider has the capability and capacity to provide certain [CATEGORY OF SERVICES] services; and

**WHEREAS**, Customer desires to retain Service Provider to provide the said services under the terms and conditions hereinafter set forth, and Service Provider is willing to perform such services;

**DRAFTING NOTE: RECITALS**

While not legally required, recitals provide information about the basic background and purpose of the agreement. In this services agreement, they provide only a general description of the parties and the transaction. The parties can revise these recitals to include additional information.

When drafting recitals, the parties should draft them in a way that avoids ambiguity. For example, the parties should not include any language in the recitals that:

- Claims to add legally binding obligations.
- Contradicts the wording contained in an operative provision of the contract.

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Service Provider and Customer (hereinafter, collectively, the **"Parties"**, or each, individually, a **"Party"**) agree as follows:

1. **Services.** Service Provider shall provide to Customer the services (the **"Services"**) set out in one or more statement of work to be issued by Customer and accepted by Service Provider (each, a **"Statement of Work"**). The initial accepted Statement of Work is attached hereto as **Exhibit A**. Additional Statements of Work [substantially in the same form as the Statement of Work attached hereto] shall be deemed accepted [and incorporated into this Agreement] only if signed by the Service Provider Contract Manager and the Customer Contract Manager, appointed pursuant to Section 2.1(a) and Section 3.1, respectively. The Service Provider shall provide the Services (a) in accordance with the terms and subject to the conditions set forth in the respective Statement of Work and this Agreement; (b) using personnel of required skill, experience, and qualifications; (c) in a timely, workmanlike, and professional manner; [and] (d) in accordance with [the highest professional/generally recognized industry] standards in Service Provider's field[./; and (e) to the [reasonable] satisfaction of the Customer.]

**DRAFTING NOTE: SERVICES**

Statements of work should thoroughly set out all key elements of the services to be provided, including project milestones, timing requirements, completion standards, fee schedules, and acceptance testing procedures. This Standard Document assumes that the first statement of work is being executed concurrently with the agreement. It also sets minimum

performance standards and includes optional language requiring the services to be provided to the satisfaction of the customer, with the additional option of limiting the customer's discretion to a reasonableness standard. For a sample statement of work, see Standard Document, Statement of Work (Goods or Services ([9-576-4705](#))).

2. **Service Provider Obligations.** Service Provider shall:

2.1 Appoint representatives to the following positions after obtaining Customer's consent[, which consent shall not be unreasonably withheld [or delayed]]:

- (a) A primary contact to act as its authorized representative with respect to all matters pertaining to this Agreement (the **"Service Provider Contract Manager"**).
- (b) A sufficient number of employees [or agents] to perform the Services set out in each Statement of Work, each of whose names, positions, [billing rates], and respective levels

of experience and relevant licenses shall be set out in the respective Statement of Work (collectively, with Service Provider Contract Manager, “**Provider Representatives**”).

2.2 Make no changes in Provider Representatives except either:

- (a) With the prior consent of Customer [, which consent shall not be unreasonably withheld [or delayed]].
- (b) At the request of Customer, in which case Service Provider shall [use its best efforts to/ use commercially reasonable efforts to] promptly appoint a replacement.
- (c) Upon the resignation, termination, death, or disability of the existing Provider Representative.

**DRAFTING NOTE: PROVIDER REPRESENTATIVE CHANGES**

Under the provisions of Section 2.2, the appointed representatives of the service provider cannot be changed unless:

- The customer approves of the change.
- The customer requests the change.
- The prior representative is no longer employed by the service provider or becomes disabled.

The customer wants to have approval rights over both the main point of contact on any contract issues and each of the individuals that will actually be providing the services on behalf of the service provider. Billing

rates should be included if the task is to be billed on a time-and-materials basis. There is no need to include billing rates if the services are provided on a flat-fee or other non-time basis.

This Standard Document provides for customer approval of each service provider appointee and of changes to the appointees. The service provider wants the customer’s consent to be limited to a reasonableness standard. Section 2.1 and Section 2.2(a) each includes optional requirements that all consents are to not be unreasonably withheld or optionally delayed.

2.3 Assign only qualified, legally authorized Provider Representatives to provide the Services.

2.4 Comply with all applicable laws and regulations in providing the Services.

2.5 Comply with all [material] Customer rules, regulations, and policies of which it has been made aware, in its provision of the Services.

**DRAFTING NOTE: QUALIFICATIONS AND COMPLIANCE OF SERVICE PROVIDER AND ITS REPRESENTATIVES**

Section 2.3, Section 2.4, and Section 2.5 set out minimum standards for service provider and its representatives including that they

be legally authorized to provide services and comply with applicable laws, regulations, and customer rules.

2.6 [Maintain complete and accurate records relating to the provision of the Services under this Agreement, [including records of the time spent and materials used by Service Provider in providing the Services] in such form as Customer shall approve. During the Term (as defined in Section 8.1) [and for a period of [NUMBER] year[s] thereafter], upon Customer’s written request, Service Provider shall allow Customer or Customer’s representative to inspect and make copies

of such records and interview Provider Representatives in connection with the provision of the Services; provided that Customer provides Service Provider with [at least [NUMBER] [business] days/reasonable] advance written notice of the planned inspection[./, and] [any such inspection shall take place during regular business hours[./, and] [no more than once per [PERIOD].]

#### DRAFTING NOTE: SERVICE PROVIDER RECORDS

The customer wants audit rights, especially if the service provider is working on a time and materials or similar variable basis. The service provider is more likely to challenge the need for this optional provision if the services are rendered on a flat fee or otherwise fixed basis. When the service

provider agrees to an audit provision, it wants the right to be subject to:

- A requirement that work be performed during normal business hours.
- A limitation on frequency.
- Reasonable prior notice.

[No required Customer consent or approval under this Section 2 shall be unreasonably withheld [or delayed.]]

#### DRAFTING NOTE: CONSENTS AND APPROVALS

When the customer seeks rights of approval or consent, the service provider seeks to limit the exercise of these rights by requiring

that they not be unreasonably withheld or delayed.

### 3. Customer Obligations. Customer shall:

3.1 Designate one of its employees [or agents] to serve as its primary contact with respect to this Agreement and to act as its authorized representative with respect to matters pertaining to this Agreement (the “**Customer Contract Manager**”), with such designation to remain in force unless and until a successor Customer Contract Manager is appointed, in Customer’s [sole/ reasonable] discretion.

3.2 Require that the Customer Contract Manager respond promptly to any reasonable requests from Service Provider for instructions, information, or approvals required by Service Provider to provide the Services.

#### DRAFTING NOTE: CUSTOMER OBLIGATIONS

As the recipient of services, the customer’s obligations, aside from payment, are minimal. Section 3 requires the customer to appoint a contract manager of its choice

and to require its contract manager to respond to reasonable requests from the service provider for relevant instructions, information, or approvals.

#### 4. Fees and Expenses.

4.1 For the Services to be performed hereunder, the Customer will pay to Service Provider a fee determined in accordance with the fee schedule set forth in each Statement of Work. Unless otherwise provided in the Statement of Work, said fee will be payable within 30 days of receipt by the Customer of an invoice from Service Provider accompanied by documentation reasonably requested by the Customer evidencing all charges.

4.2 The Customer shall reimburse Service Provider for all reasonable expenses incurred in accordance with the Statement of Work[, if such expenses have been pre-approved, in writing by the Customer Contract Manager], within 30 days of receipt by the Customer of an invoice from Service Provider accompanied by receipts and supporting documentation [[reasonably] acceptable to the Customer] [and] [conforming to the requirements of Customer's standard expense reimbursement policy, a copy of which is attached as **Exhibit B**]. All Service Provider expenses not [pre-approved by the Customer Contract Manager or not otherwise] meeting the requirements of this Agreement or the Statement of Work to which it applies shall be the sole responsibility of the Service Provider.

#### DRAFTING NOTE: FEES AND EXPENSES

This services agreement requires the parties to set out their fee arrangement in each statement of work. Service agreement fees are typically structured on either a fixed price or a time-and-materials basis or a blend between the two. For example, a "cost-plus" contract is the cost of all the materials, labor, permits, taxes, and insurance, and all other costs and expenses incurred directly in the work plus a fixed fee (*Petersen Painting & Home Improvement, Inc. v. Znidarsic*, 75 Ohio App.3d 265, 267, 599 N.E.2d 360, 361 (11th Dist.1991)). A statement of work should include all information required to assure that both parties agree on all components of the billing formula, such as (where applicable):

- Billing rate of each provider representative or overall rate to be charged.
- Permitted mark-up of billed expenses.
- Any agreed flat fees for any aspect of the services or the overall project.
- Any ceiling on fees for any aspect of the services or the overall project.
- Any minimum charges.

The time-and-materials basis can be riskier for the customer because the customer may

have less ability to maintain control over the fees. In fixed pricing, on the other hand, the service provider typically seeks to build in a premium to cover its increased risk.

Certain expenses of the service provider in providing the services are usually reimbursed. These should be clearly set out in the statement of work (or in an attached rate schedule) along with any information about:

- Mark-ups to which the service provider is entitled.
- Whether pre-approval of expenses is required.
- If pre-approval is required, whether a threshold is set below which expenses can be incurred without prior approval.
- Whether different levels of approval are required for different levels of expenses (for example, expenses over \$5,000 may require approval from both the customer contract manager and that manager's supervisor).
- Whether, in addition to pre-approval, compliance with the customer's normal expense reimbursement policy is required.

#### 5. Intellectual Property.

5.1 Service Provider assigns to the Customer, Service Provider's entire right, title, and interest in any invention, technique, process, device, discovery, improvement, or know-how, whether patentable or not, hereafter made or conceived solely or jointly by Service Provider while

working for or on behalf of the Customer, which relate to, is suggested by, or results from matters set forth in any active Statement of Work and depends on either:

- (a) Service Provider's knowledge of Confidential Information (as defined in Section 6) it obtains from the Customer.
- (b) The use of Customer equipment, supplies, facilities, information, or materials.

5.2 Service Provider shall disclose any such invention, technique, process, device, discovery, improvement, or know-how promptly to the Customer Contract Manager. Service Provider shall, upon request of the Customer, promptly execute a specific assignment of title to the Customer, and do anything else reasonably necessary to enable the Customer to secure for itself, patent, trade secret, or any other proprietary rights in the United States or other countries. It shall be conclusively presumed that any patent applications relating to a Statement of Work, related to trade secrets of the Customer, or which relate to tasks assigned to Service Provider by the Customer, which Service Provider may file within one year after termination of this Agreement, shall belong to the Customer, and Service Provider hereby assigns same to the Customer, as having been conceived or reduced to practice during the term of this Agreement.

5.3 All writings or works of authorship, including, without limitation, program codes or documentation, produced or authored by Service Provider in the course of performing services for the Customer, together with any associated copyrights, are works made for hire and the exclusive property of the Customer. To the extent that any writings or works of authorship may not, by operation of law, be works made for hire, this Agreement shall constitute an irrevocable assignment by Service Provider to the Customer of the ownership of and all rights of copyright in, such items, and the Customer shall have the right to obtain and hold in its own name, rights of copyright, copyright registrations, and similar protections which may be available in the works. Service Provider shall give the Customer or its designees all assistance reasonably required to perfect such rights.

5.4 If for any reason, including incapacity, the Customer is unable to secure Service Provider's signature on any document needed to apply for, perfect, or otherwise acquire title to the intellectual property rights granted to it under this Section 5, or to enforce such rights, Service Provider hereby designates the Customer as Service Provider's attorney-in-fact and agent, solely and exclusively to act for and on Service Provider's behalf to execute and file such documents with the same legal force and effect as if executed by Service Provider and for no other purpose.

5.5 Service Provider owns the discoveries, improvements, inventions, or intellectual property identified by title and number or date on **Exhibit C**, attached. Such discoveries, improvements, inventions, and intellectual property, made or conceived by Service Provider before the effective date of this Agreement, are expressly reserved and excepted from the provisions of this Agreement. IF THERE ARE NO SUCH DISCOVERIES, IMPROVEMENTS, OR INVENTIONS TO BE EXCLUDED, SERVICE PROVIDER SHOULD INITIAL HERE \_\_\_\_\_.

#### DRAFTING NOTE: INTELLECTUAL PROPERTY

If a service provider develops intellectual property during the course of providing services for the customer, the customer wants to ensure that it is ultimately the owner of that property. Section 5:

- Provides for assignment to the customer of the rights to that creation.
- Requires the service provider's execution of all pertinent documents conferring title.
- Grants the customer a one-year "tail" period during which the service provider must assign to the customer, any patent application relating to:
  - the customer's trade secrets (see State Q&A, Trade Secret Laws: Ohio ([7-506-5629](tel:7-506-5629)));
  - its issued statement of work; or
  - tasks assigned to the service provider by the customer.

- Grants power of attorney to the customer to sign, on the service provider's behalf, assignment documents required to transfer intellectual property ownership from the service provider to the customer if the service provider's signature is unavailable.
- Allows the service provider to set out all of its currently owned intellectual property so that these inventions are not inadvertently included in the transfer requirements of Section 5 while, at the same time, reducing the customer's risk that the service provider may later claim prior ownership of intellectual property that should rightfully belong to the customer.

A service provider with bargaining power is likely to object to:

- The requirement that it assign to the customer ownership of all intellectual

property arising from its work for the customer.

- Having to identify on the attached Exhibit its existing intellectual property, which might include unpublished patent applications or trade secrets.

The customer can argue that it should own the intellectual property because assignment is required only for creations that relate to, are suggested by, or result from matters set out in an active statement of work and depend on either:

- The customer's confidential information.
- The use of the customer's equipment, supplies, facilities, information, or materials.

For a pro-service provider intellectual property provision, see Standard Document, Services Agreement (Pro-Service Provider) (OH) ([w-001-7822](#)).

6. Confidentiality. All non-public, confidential, or proprietary information of Customer ("**Confidential Information**"), including, but not limited to, specifications, samples, patterns, designs, plans, drawings, documents, data, business operations, customer lists, pricing, discounts, or rebates[,/[OTHER ITEMS RELEVANT TO THE TRANSACTION,] disclosed by Customer to Service Provider, whether disclosed orally or disclosed or accessed in written, electronic, or other form or media, and whether or not marked, designated, or otherwise identified as "confidential," in connection with this Agreement is confidential, solely for Service Provider's use in performing this Agreement and may not be disclosed or copied unless authorized by Customer in writing. Confidential Information does not include any information that: (a) is or becomes generally available to the public other than as a result of Service Provider's breach of this Agreement; (b) is obtained by Service Provider on a non-confidential basis from a third-party that was not legally or contractually restricted from disclosing such information; (c) Service Provider establishes by documentary evidence, was in Service Provider's possession prior to Customer's disclosure hereunder[; or (d) was or is independently developed by Service Provider without using any Confidential Information]. Upon Customer's request, Service Provider shall promptly return all documents and other materials received from Customer. Customer shall be entitled to injunctive relief for any violation of this Section.

#### DRAFTING NOTE: CONFIDENTIAL INFORMATION

Section 6 sets out the service provider's obligations regarding the customer's confidential information. The customer should add any transaction-specific items to the list of confidential information to avoid dispute as to whether any disclosed information falls within the general list. Consider adding language to this section if the parties have

a need to create and enforce confidentiality provisions to cover their affiliates, employees, contractors, and other representatives.

The confidentiality obligations in Section 6 can be included in the general list of obligations that survive expiration or termination of the agreement in the survival



clause (Section 8.5) of this Standard Document. If, however, the customer intends for the confidentiality obligations to only survive for a certain period after termination of the agreement, that should be specified in this clause.

For more information on drafting and negotiating confidentiality agreements, see Practice Note, Confidentiality and Nondisclosure Agreements ([7-501-7068](#)).

A customer may also want to make Section 6 mutual, as a service provider using any of its own intellectual property, proprietary skills, or knowledge in its performance of its services will likely object to a one-sided confidentiality provision. For more information on drafting and negotiating mutual confidentiality clauses, see Standard Document, Confidentiality Agreement: General (Mutual) ([1-501-7108](#)) and Standard Clauses, General Contract Clauses: Confidentiality (Long Form) (OH) ([w-000-0963](#)) and Confidentiality (Short Form) (OH) ([w-000-0964](#)).

The service provider also seeks inclusion of an exception for independently developed

information, but since this Standard Document is pro-customer, this exception is included only as an optional provision.

If the customer wants to protect a large quantity of confidential information, it should consider entering into a separate, more detailed confidentiality agreement. For more information on drafting and negotiating a stand-alone confidentiality agreement, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser) ([9-501-6497](#)).

If the confidential information contains trade secrets, the customer may want to position itself to take advantage of additional protection available under the Defend Trade Secrets Act of 2016 ([w-002-2095](#)) by adding notification language consistent with the act. For an example of the prescribed language, see Article, Expert Q&A on the Defend Trade Secrets Act and its Impact on Employers: Review and Revise Agreements Regarding Trade Secrets and Confidential Information ([w-002-2128](#)).

7. [Non-Competition]. During the Term (as defined in Section 8.1) [and for a period of [one year/ [OTHER PERIOD]] thereafter], Service Provider shall not provide services to the direct competitors of Customer listed on **Exhibit D** or any successor in interest to such competitors.]

#### DRAFTING NOTE: NON-COMPETITION

This pro-customer Standard Document includes an optional non-compete provision that prevents:

- The service provider from supplying the same or similar services to the customer's direct competitors or any of their successors.
- The risk of disclosing confidential information to a competitor or loss of a competitive advantage.

In Ohio, courts apply the same enforceability standard to non-competes in the employer-employee context as they do between an independent contractor (like a service provider) and a business (see *Definitive Sols. Co. v. Sliper*, 1st Dist. Hamilton No. C-150281,

2016-Ohio-533, ¶ 16, appeal not allowed, 146 Ohio St.3d 1429, 2016-Ohio-4606, 52 N.E.3d 1204, ¶ 16 (2016)). Therefore, any non-competes that are unreasonable in scope, in duration, or geographically may not be enforceable (see, for example, *Rogers v. Runfolo & Assoc., Inc.*, 57 Ohio St.3d 5, 8, 565 N.E.2d 540, 543 (1991)).

Unless the customer is providing substantial business to the service provider or the service provider is gaining access to important confidential information belonging to the customer, the service provider is likely to object to inclusion of Section 7.

## 8. Term, Termination, and Survival.

8.1 This Agreement shall commence as of the Effective Date and shall continue thereafter [until the completion of the Services [under all Statements of Work/for a period of [TERM]]] unless sooner terminated pursuant to Section 8.3.

### DRAFTING NOTE: TERM

Section 8.1 provides for either a fixed term or one dependent on completion of all of the services. If the term is determined by completion of the services, ensure the applicable statement of work is clear on when and how a particular project is completed, including, if appropriate, a requirement that the service provider issue a notice of completion or the customer issue an acceptance certificate, or both. The statement of work should also specify the standards for the issuance of the applicable certificate, for example, a notice of completion in a pro-customer transaction may require meeting of specific objective

standards and an acceptance certificate may be deemed binding absent manifest error.

In Ohio, if a services agreement does not include a provision regarding the agreement's term, the agreement is terminable at will by either party after reasonable duration and upon reasonable notice (see *Oliver Design Group, Inc. v. Allen-Bradley Co.*, 8th Dist. Cuyahoga No. 75502, 2000 WL 235769, at \*6 (Mar. 2, 2000)). For more information on term and termination, see Standard Clauses, General Contract Clauses: Term and Termination (OH) ([w-001-7827](#)).

8.2 [Customer, in its sole discretion, may terminate this Agreement [or any Statement of Work], in whole or in part, at any time without cause, and without liability except for required payment for services rendered, and reimbursement for authorized expenses incurred, prior to the termination date, by providing at least [60/[OTHER NUMBER]] days' prior written notice to Service Provider.]

### DRAFTING NOTE: TERMINATION FOR CONVENIENCE

Optional Section 8.2, if included, allows the customer to terminate the agreement and, optionally, any statement of work, without cause following a suitable notice period. The service provider requires prior notice sufficient to:

- Provide for a smooth transition to a successor provider.
- Reallocate or adjust its resources to account for the loss of business (particularly if employees were hired

or premises and items of equipment were leased to render the services to the customer).

- Seek to replace the lost business with another customer.

For more information on termination for convenience, see Standard Clauses, General Contract Clauses: Term and Termination (OH): Drafting Note: Termination for Convenience ([w-001-7827](#)).

8.3 Either Party may terminate this Agreement, effective upon written notice to the other Party (the "**Defaulting Party**"), if the Defaulting Party:

- (a) [Materially] [B/b]reaches this Agreement, and such breach is incapable of cure, or with respect to a [material] breach capable of cure, the Defaulting Party does not cure such breach within [30/[OTHER NUMBER]] days after receipt of written notice of such breach.

- (b) Becomes insolvent or admits its inability to pay its debts generally as they become due.
- (c) Becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency law, which is not fully stayed within [seven/[OTHER NUMBER]] business days or is not dismissed or vacated within [45/[OTHER NUMBER]] days after filing.
- (d) Is dissolved or liquidated or takes any corporate action for such purpose.
- (e) Makes a general assignment for the benefit of creditors.
- (f) Has a receiver, trustee, custodian, or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business.

### DRAFTING NOTE: TERMINATION FOR CAUSE

Section 8.3 permits either party to terminate the agreement for the other party's:

- Breach or, optionally, material breach. Typically, a "material breach" of contract is a party's failure to perform an element of the contract that is so fundamental to the contract that the single failure to perform either:
  - defeats the essential purpose of the contract; or
  - makes it impossible for the other party to perform.

(*O'Brien v. Ohio State Univ.*, 10th Dist. Franklin No. 06AP-946, 2007-Ohio-4833, ¶ 5623 (citing Williston on Contracts, Section 63:3)).

- Bankruptcy, insolvency, or financial distress (also known as an ipso facto clause).

The service provider typically seeks a right to terminate with a substantially shorter cure period or none at all, for the customer's failure to make timely payments.

Although a clause allowing a party to terminate an agreement due to the other party's bankruptcy or insolvency is generally unenforceable against a debtor during bankruptcy, this clause should still be included in contracts because it can be triggered by events outside of bankruptcy (such as the inability to pay debts as they become due). Without this clause, none of these events can become grounds to terminate the agreement. This clause is enforceable again once the bankruptcy case is closed if the debtor commits a new act described in the clause.

8.4 Upon expiration or termination of this Agreement for any reason, Service Provider shall promptly:

- (a) Deliver to Customer all documents, work product, and other materials, whether or not complete, prepared by or on behalf of Service Provider in the course of performing the Services for which Customer has paid.
- (b) Return to Customer all Customer-owned property, equipment, or materials in its possession or control.
- (c) Remove any Service Provider-owned property, equipment, or materials located at Customer's locations.
- (d) Deliver to Customer, all documents and tangible materials (and any copies) containing, reflecting, incorporating, or based on Customer's Confidential Information.
- (e) Provide reasonable cooperation and assistance to Customer [upon Customer's written request [and at Customer's expense,]] in transitioning the Services to an alternate service provider.

- (f) On a pro rata basis, repay all fees and expenses paid in advance for any Services which have not been provided.
- (g) Permanently erase all of Customer's Confidential Information from its computer systems.
- (h) Certify in writing to Customer that it has complied with the requirements of this Section 8.4.

#### DRAFTING NOTE: OBLIGATIONS OF SERVICE PROVIDER UPON EXPIRATION OR TERMINATION

Section 8.4 sets out the service provider's obligations on expiration or earlier termination of the agreement. Consider adding further post-termination obligations, covering, for example:

- The extension of the agreement until specific obligations are completed.
- If appropriate for the type of services being provided, an exit plan or transition

services to be implemented after the expiration or termination of the agreement.

- Payment of the service provider's outstanding invoices for services supplied up to the date of termination (unless the termination results from the service provider's breach).

8.5 The rights and obligations of the Parties set forth in this Section 8 and Section 5, Section 6, Section 9, Section 10, Section 11, Section 13, Section 15, Section 22, Section 23, and Section 24, and any right or obligation of the Parties in this Agreement which, by its nature, should survive termination or expiration of this Agreement, will survive any such termination or expiration of this Agreement.

#### DRAFTING NOTE: SURVIVAL

Section 8.5 identifies the rights and obligations that continue after the termination of the agreement. The customer should include the specific provisions applicable to its circumstances. Confidentiality and indemnification clauses are commonly included in the survival clause.

For more information on survival, see Standard Clause, General Contract Clauses: Survival ([w-002-6039](#)) and Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Survival of Representations and Warranties ([9-519-8869](#)).

### 9. Independent Contractor.

9.1 It is understood and acknowledged that the Services which Service Provider will provide to Customer hereunder shall be in the capacity of an independent contractor and not as an employee or agent of the Customer. Service Provider shall control the conditions, time, details, and means by which Service Provider performs the Services. The Customer shall have the right to inspect the work of Service Provider as it progresses solely for the purpose of determining whether the work is completed according to the applicable Statement of Work.

9.2 Service Provider has no authority to commit, act for or on behalf of the Customer, or to bind the Customer to any obligation or liability.

9.3 Service Provider shall not be eligible for and shall not receive any employee benefits from Customer and shall be solely responsible for the payment of all taxes, FICA, federal and state unemployment insurance contributions, state disability premiums, and all similar taxes and fees relating to the fees earned by Service Provider hereunder.

#### DRAFTING NOTE: INDEPENDENT CONTRACTOR

Section 9 aims to minimize the risk of an agreement creating an unwanted employment, partnership, joint venture, or agency relationship between the parties. The creation of these relationships may have adverse tax consequences and may result in:

- One party being bound by another in relation to third parties in ways not contemplated by the agreement.
- Becoming liable for the other's acts and omissions.

- The parties being deemed to owe fiduciary duties to each other.

For another provision and additional discussion regarding the issues addressed by this clause, see Standard Clause, General Contract Clauses: Relationship of the Parties ([6-561-3685](#)) and State Q&A, Independent Contractors: Ohio ([9-505-8411](#)).

10. Indemnification. Service Provider shall indemnify, defend, and hold harmless Customer [and its [officers,] [directors,] employees, agents, affiliates, successors, and permitted assigns] ([collectively, ] "**Indemnified Party**") against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including [reasonable] attorneys' fees, fees, and the costs of enforcing any right to indemnification under this Agreement, and the cost of pursuing any insurance providers, [incurred by Indemnified Party/awarded against Indemnified Party] [in a final [non-appealable] judgment] (collectively, "**Losses**"), [relating to/arising out of or resulting from] any claim of a third party [or Customer] arising out of or occurring in connection with Service Provider's negligence, willful misconduct, or breach of this Agreement. Service Provider shall not enter into any settlement without Customer's or Indemnified Party's prior written consent.

#### DRAFTING NOTE: INDEMNIFICATION

In this pro-customer agreement, the indemnification provision is unilateral, in favor of the customer. The customer should expect the service provider to seek a similar indemnification obligation covering the customer's breach of the agreement but the customer can argue that its only obligation is payment, which is adequately covered by an action for monetary damages. The bracketed definition of Indemnified Party includes third-party beneficiaries. Therefore, if the customer wants to ensure that third-party beneficiaries can seek remedies under

this indemnification provision, it should carve them out from Section 21.

When drafting a unilateral provision, the customer should consider broadening the scope of the service provider's indemnity, for example, by:

- Defining losses broadly to include all losses incurred by the indemnified party, not limited to:
  - judicial awards generally; or
  - final, non-appealable judgments.

- Including the broader “relating to” nexus phrase. For more information on nexus phrases, see Practice Note, Indemnification Clauses in Commercial Contracts: Choosing the Right Nexus Phrase ([5-517-4808](#)).

The customer should consider extending this provision by adding the optional phrase “or Customer” to cover direct claims (the customer’s claims against the service provider) in addition to third-party claims. For more information on indemnification for direct claims, see Practice Note, Indemnification Clauses in Commercial Contracts: Direct Versus Third-Party Claims ([5-517-4808](#)).

The service provider generally wants to limit its indemnity obligation, for example by:

- Qualifying certain provisions, for example, by using reasonableness to qualify attorneys’ fees.
- Including the bracketed language to limit payment to losses that are finally adjudicated.
- Narrowing the definition of “Indemnified Party.”
- Limiting the indemnity obligation to losses and liabilities that are not covered by:

- insurance proceeds received by the indemnified party; and
- tax benefits received by the indemnified party.
- Replacing the broad nexus phrase “relating to” with a narrower nexus phrase such as “caused by” or “solely resulting from.”
- Limiting the scope of third-party claims to those caused by actual breaches and not merely those caused by alleged breaches. This may eliminate the obligation to defend (and reimburse or pay attorneys’ fees) for third-party claims adjudicated in favor of the indemnified party.
- Limiting the scope of liability to those caused by the service provider’s gross negligence, intentional acts, or material breaches of the Agreement.
- Including exceptions and liability limitations such as:
  - a liability cap; and
  - a basket.

For more information on drafting and negotiating indemnification clauses, see Practice Note, Indemnification Clauses in Commercial Contracts ([5-517-4808](#)) and Standard Clauses, General Contract Clauses: Indemnification (OH) ([w-000-1141](#)).

## 11. Remedies.

11.1 If the Service Provider violates any provision of this Agreement, the Customer shall, in addition to any damages to which it is entitled, be entitled to [seek] immediate injunctive relief against the Service Provider prohibiting further actions inconsistent with the Service Provider’s obligations under this Agreement.

11.2 Because the damages the Customer would sustain on a breach by Service Provider of the Confidentiality provisions set forth in Section 6 of this Agreement are not readily ascertainable, for each unauthorized use or disclosure of the Customer’s Confidential Information, Service Provider will be liable to, and shall pay the Customer the sum of [AMOUNT]] as liquidated damages (the “**Liquidated Damages**”). The Parties intend that the Liquidated Damages constitute compensation, and not a penalty. The Parties acknowledge that the Liquidated Damages are a reasonable estimate of the anticipated or actual harm that might arise from a Service Provider breach of Section 6. The Service Provider’s payment of the Liquidated Damages is its sole liability and entire obligation and the Customer’s exclusive remedy for any Service Provider breach of Section 6.

11.3 To the extent a Party is required to seek enforcement of this Agreement or otherwise defend against an unsuccessful claim of breach, the unsuccessful Party shall be liable for all attorney’s fees and costs incurred by the successful party to enforce the provisions of this Agreement.

11.4 Except for a breach of Section 6, all rights and remedies provided in this Agreement are cumulative and not exclusive, and the exercise by either Party of any right or remedy does not preclude the exercise of any other rights or remedies that may now or subsequently be available at law, in equity, by statute, in any other agreement between the Parties, or otherwise. Despite the previous sentence, the Parties intend that the Service Provider's exclusive remedy for Customer's payment breach shall be its right to damages equal to its earned but unpaid fees.

### DRAFTING NOTE: REMEDIES

This pro-customer services agreement provides for injunctive relief in addition to damages. Depending on the relative bargaining power of the parties, the customer can expect the service provider to seek:

- Removal of this provision.
- Incorporation of the optional "seek" language in Section 11.1.
- A limitation of its applicability to certain clauses (for example, confidentiality).
- An explicit requirement for the posting of a bond, if an injunction is sought.

### ENFORCEABILITY OF LIQUIDATED DAMAGES

Section 11.2 provides for liquidated damages for each violation of Section 6. Ohio courts generally enforce liquidated damages clauses if:

- Damages are hard to quantify and difficult to prove.
- The amount of stipulated damages is reasonable and proportionate to the contract as a whole to justify the conclusion that the amount expresses the true intention of the parties.
- The contract supports the parties' intent to liquidated damages following any breach.

(*Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 29, 465 N.E.2d 392, 394 (1984).)

Again, a service provider with bargaining power is likely to seek:

- Removal of the clause.
- A reduction in the amount of damages.
- A limitation on the meaning of what may constitute a "use" or "disclosure."

### CUMULATIVE REMEDIES

Section 11.4 seeks to ensure that the rights and remedies set out in the agreement other

than with respect to Section 6, are in addition to any rights provided by law or equity and not in substitution for them. The extent to which express terms preclude implied terms without a cumulative remedies clause is unclear and may vary among jurisdictions. In Ohio, courts have sometimes taken the position that agreements specifying a specific remedy will not preclude courts from awarding other possible remedies not specified in the agreement (see, for example, *M.G.A., Inc. v. Amelia Station, Ltd.*, 2002-Ohio-5091, ¶¶ 14-17 (1st Dist. Hamilton) (citing *Forest Park Partners Ltd Partnership v. Ponderosa, Inc.*, 2nd Dist. Montgomery No. 15688, 1996 WL 596531 at \*1-3)).

Ohio courts generally ask whether the specified exclusive remedy fails of essential purpose and, if so, other remedies might be available. Without the cumulative remedies clause, there may be a presumption (that may be supported by the entire agreement language) that all the terms intended to govern the parties' relationship are in the agreement itself and that, in doing so, rights and remedies provided by law that are not specified in the agreement are intentionally displaced. Where the customer wishes to preserve the rights and remedies available to it under law and equity, it should therefore include this clause.

Besides Section 11.2, this pro-customer Standard Document does not contain any additional exclusive remedies, which means that the customer intends to exercise all rights and remedies available to it under the agreement as well as those available by law or in equity. However, if the parties include any additional exclusive remedies in the agreement, then they should ensure that the provisions under which the remedies are granted are excluded from this provision (see "Except for a breach of Section 6" language in Section 11.4). For example,

the service provider may insist that the remedies under the agreement's warranty or indemnification provisions are exclusive.

For more information on drafting and negotiating cumulative remedies

clauses, see Standard Clause, General Contract Clauses: Cumulative Remedies (with Exclusive Remedies Carve-Out) ([7-508-3001](#)).

12. Compliance with Law. Service Provider is in compliance with and shall comply with all applicable laws, regulations, and ordinances. Service Provider has and shall maintain in effect all the licenses, permissions, authorizations, consents, and permits that it needs to carry out its obligations under this Agreement.

**DRAFTING NOTE: COMPLIANCE WITH LAW**

This agreement includes a general compliance with laws provision. The customer should revise this agreement to include any specific government standards or requirements that apply to the particular services or relevant industry. For more information on drafting and negotiating compliance with law clauses, see Standard Clause, General Contract Clauses: Compliance with Laws ([2-524-6307](#)).

The service provider may object to this provision as overly broad and seek to include materiality or knowledge qualifiers to limit its liability. The service provider may also insist on a reciprocal provision requiring the customer to represent its compliance with law.

13. Insurance. For a period of [TIME PERIOD] after the Effective Date, Service Provider shall, at its own expense, maintain and carry insurance in full force and effect with financially sound and reputable insurers, that includes, but is not limited to, commercial general liability with limits no less than \$[AMOUNT] per occurrence and \$[AMOUNT] in the aggregate[, including bodily injury and property damage and completed operations and advertising liability], which policy will include contractual liability coverage insuring the activities of Service Provider under this Agreement. Upon Customer's request, Service Provider shall provide Customer with a certificate of insurance from Service Provider's insurer evidencing the insurance coverage specified in this Agreement. The certificate of insurance shall name Customer as an additional insured. Service Provider shall provide Customer with [NUMBER] days' advance written notice in the event of a cancellation or material change in Service Provider's insurance policy. Except where prohibited by law, Service Provider shall require its insurer to waive all rights of subrogation against Customer's insurers and Customer or the Indemnified Parties.

If it shall have any employees providing services for Customer, Service Provider shall also provide workers' compensation insurance covering those employees for at least [\$100,000/[OTHER AMOUNT REQUIRED BY LAW]] and shall provide a certificate of insurance to Customer evidencing such coverage within [30/[OTHER NUMBER]] days of the effective date of this Agreement.



**DRAFTING NOTE: INSURANCE**

The customer must adjust this provision based on:

- The type and size of the transaction.
- The price or sophistication of the services.
- Any applicable minimum insurance coverage imposed by federal or Ohio law.

The determination of the appropriate types of insurance coverage and policy limits for

a particular transaction should be made by the customer in consultation with its risk management departments and insurance specialists.

For more information about insurance, see Practice Note, Insurance Policies and Coverage: Overview ([9-505-0561](#)).

14. Entire Agreement. This Agreement, including and together with any related exhibits, schedules, attachments, and appendices, constitutes the sole and entire agreement of the Parties with respect to the subject matter contained herein, and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, regarding such subject matter.

**DRAFTING NOTE: ENTIRE AGREEMENT**

Section 14 (also known as a merger or integration provision) is used to prevent the parties from being liable for any understandings, agreements, or representations and warranties other than

those expressly set out in the agreement. For more information on drafting and negotiating entire agreement clauses, see Standard Clause, General Contract Clauses: Entire Agreement ([9-520-4139](#)).

15. Notices. All notices, requests, consents, claims, demands, waivers, and other communications under this Agreement (each, a “**Notice**”, and with the correlative meaning “**Notify**”) must be in writing and addressed to the other Party at its address set forth below (or to such other address that the receiving Party may designate from time to time in accordance with this Section). Unless otherwise agreed herein, all Notices must be delivered by personal delivery, nationally recognized overnight courier, or certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise provided in this Agreement, a Notice is effective only (a) on receipt by the receiving Party; and (b) if the Party giving the Notice has complied with the requirements of this Section 15.

Notice to Customer:	[CUSTOMER ADDRESS] [Facsimile: [NUMBER]] [Email: [EMAIL ADDRESS]] Attention: [TITLE OF OFFICER TO RECEIVE NOTICES]
Notice to Service Provider:	[SERVICE PROVIDER ADDRESS] [Facsimile: [NUMBER]] [Email: [EMAIL ADDRESS]] Attention: [TITLE OF OFFICER TO RECEIVE NOTICES]

**DRAFTING NOTE: NOTICES**

Section 15 governs how any notice under the agreement must be given and the time when the notice is deemed to be formally given. This notices provision does not permit the delivery of formal notice by facsimile or email (to protect the receiving party from being bound by a notice that it does not actually see) but the fax number

and email address should be listed in case courtesy copies are to be sent or separate arrangements are agreed for any particular individual notice. For more information on drafting and negotiating notices clauses, see Standard Clause, General Contract Clauses: Notice ([6-533-1025](#)).

16. Severability. If any term or provision of this Agreement is found by a court of competent jurisdiction to be invalid, illegal, or unenforceable, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction[; provided, however, that if any fundamental term or provision of this Agreement (including [FUNDAMENTAL TERMS]), is invalid, illegal, or unenforceable, the remainder of this Agreement shall be unenforceable]. [Upon a determination that any term or provision is invalid, illegal, or unenforceable, [the Parties shall negotiate in good faith to/the court may] modify this Agreement to effect the original intent of the Parties as closely as possible in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.]

**DRAFTING NOTE: SEVERABILITY**

The purpose of the severability clause is to clarify that if one or more terms or provisions is held to be invalid, illegal, or unenforceable, the parties intend the agreement as a whole to survive by severing the invalid, illegal, or unenforceable terms or provisions from the agreement to preserve the parties' intent.

The non-compete provision in Section 7 is the most likely one to be challenged because it tends to raise public policy concerns and must be narrowly tailored to be enforceable. Ohio applies the equitable reformation doctrine and can reform

agreement terms to make them reasonable under the law, which is something Ohio courts often do in the area of restrictive covenants (see *Raimonde v. Van Vlerah*, 42 Ohio St.2d 21, 24, 325 N.E.2d 544, 546-547 (1975)).

For more information on drafting and negotiating severability provisions, see Standard Clause, General Contract Clauses: Severability (OH) ([w-000-0975](#)). For more information on non-compete provisions, see Practice Note, Contracts: Equitable Remedies: Non-Compete and Non-Solicitation Agreements ([0-519-3197](#)).

17. Amendments. No amendment to[, or] modification of [or rescission, termination, or discharge of] this Agreement is effective unless it is in writing[, identified as an amendment to [or rescission, termination, or discharge of] this Agreement] and signed by [an authorized representative of] each Party.

**DRAFTING NOTE: AMENDMENTS**

For more information on drafting and negotiating amendment clauses, see Standard Clause, General Contract Clauses: Amendments (OH) ([w-000-0935](#)).

For a sample amendment agreement, see Standard Document, Amendment Agreement ([1-523-2278](#)).

18. **Waiver.** No waiver by any Party of any of the provisions of this Agreement shall be effective unless explicitly set forth in writing and signed by the Party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any right, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof, nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

**DRAFTING NOTE: WAIVER**

Either party may fail to enforce its rights under a contract, whether as a result of oversight or because of the commercial realities of the situation. Section 18 provides that a waiver of a breach of the terms on one occasion does not affect the rights of the waiving party if there is a further breach or if that party later requires compliance with the relevant terms.

For more information on drafting and negotiating waiver clauses, see Standard Clause, General Contract Clauses: Waivers (OH) ([w-000-0933](#)). For a sample waiver of contractual provisions, see Standard Document, Waiver (OH) ([w-000-1879](#)).

19. **Assignment.** Service Provider shall not assign, transfer, delegate, or subcontract any of its rights or obligations under this Agreement without the prior written consent of Customer [which consent shall not be unreasonably withheld[, conditioned,] [or delayed]]. Any purported assignment or delegation in violation of this Section 19 shall be null and void. No assignment or delegation shall relieve the Service Provider of any of its obligations hereunder. Customer may at any time assign or transfer any or all of its rights or obligations under this Agreement without Service Provider's prior written consent.

**DRAFTING NOTE: ASSIGNMENT**

Assignment clauses are included in agreements to restrict the parties' ability to assign their rights under the agreement, often, as here, by requiring the non-assigning party's prior written consent.

Anti-assignment clauses are frequently used because contracts are otherwise generally freely assignable. Exceptions to this general rule of free transferability, which may apply whether or not a contract

contains an anti-assignment and anti-delegation clause, include assignments and delegations that either:

- Violate:
  - public policy (see, for example, *Sparagowski v. Williams*, 6th Dist. Lucas, 1980 WL 150172, at \*3 (July 25, 1980) (prohibiting assignments of legal malpractice claims)); or

- the law (see, for example, R.C. 1321.32 (prohibiting the assignment of wages except for support payments)).
- Are personal in nature (see *Korey v. Gross*, 2004-Ohio-4940, ¶ 23 (5th Dist. Stark)).

Section 19, a pro-customer provision, favors the customer by:

- Prohibiting the service provider from assigning or delegating without the customer's consent. However, the parties can adapt this provision to allow the service provider to assign or delegate without the customer's consent in specific situations.
- Permitting the customer to assign or delegate.

The second sentence renders any assignment by the service provider in

violation of the clause ineffective. Without this sentence, the customer may only have a breach of contract claim if the service provider assigns the contract without the customer's consent.

The service provider may seek reciprocal restrictions or the limitation of the customer's consent right by not permitting it to be unreasonably withheld or, optionally, delayed or conditioned.

For more information on drafting and negotiating assignment clauses, see Standard Clauses, General Contract Clauses: Assignment and Delegation (OH) ([w-000-1042](#)). For a sample form of assignment agreement, see Standard Document, Assignment and Assumption Agreement and Optional Novation ([6-519-2171](#)).

20. Successors and Assigns. This Agreement is binding on and inures to the benefit of the Parties and their respective successors and permitted assigns.

#### DRAFTING NOTE: SUCCESSORS AND ASSIGNS

For more information on drafting and negotiating successors and assigns clauses, see Standard Clause, General

Contract Clauses: Successors and Assigns (OH) ([w-002-4388](#)).

21. No Third-Party Beneficiaries. [Subject to the next paragraph, this/This] Agreement benefits solely the Parties and their respective successors and permitted assigns and nothing in this Agreement, express or implied, confers on any third party any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.

[The Parties hereby designate [CLASS OF INDEMNIFIED PERSONS] as third-party beneficiaries of [SECTION(S)], having the right to enforce [SECTION(S)].]

#### DRAFTING NOTE: NO THIRD-PARTY BENEFICIARIES

Most contracts contain an unqualified "no third-party beneficiaries" clause, which expressly states that third parties do not have enforceable rights under the contract. However, if the parties intend for certain

third parties to benefit from the contract, they must qualify Section 21 by:

- Choosing the phrase "Subject to the next paragraph" from the alternatives

in the bracketed language in the first paragraph.

- Adding the optional second paragraph and listing the third-party beneficiaries and the corresponding sections of the contract. In some cases, the parties add that the third-party beneficiaries have the direct right to enforce the specified provisions of the contract.

In a services agreement, the third-party beneficiaries are most often indemnified parties. The issue is whether specified non-parties can enforce the indemnification provisions of this agreement. Ohio follows

the majority rule that a third person for whose benefit a promise has been made by another may maintain an action on the contract (see *Grant Thornton v. Windsor House, Inc.*, 57 Ohio St.3d 158, 566 N.E.2d 1220 (1991); see also *Asia-Pacific Futures Research Symposium Planning Comm. v. Kent State Univ.*, 2016-Ohio-2691, ¶ 18 (11th Dist. Portage)).

For more information on drafting and negotiating no-third-party-beneficiaries clauses, see Standard Clause, General Contract Clauses: Third-Party Beneficiaries ([6-519-7630](#)).

22. Choice of Law. This Agreement, including all exhibits, schedules, attachments, and appendices attached to this Agreement and thereto[, and all matters arising out of or relating to this Agreement,] is governed by, and is to be construed in accordance with, the laws of the State of Ohio[, without regard to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of Ohio].

#### DRAFTING NOTE: CHOICE OF LAW

Section 22 allows parties to choose the substantive law of Ohio to apply to the contract.

Ohio courts generally uphold the choice of law clause if there is a substantial relationship with the chosen forum and it is not contrary to public policy (*Century Business Servs., Inc. v. Barton*, 197 Ohio

App.3d 352, 2011-Ohio-5917, 967 N.E.2d 782, ¶ 62 (8th Dist.)).

For more information on drafting and negotiating choice of law clauses, see Standard Clause, General Contract Clauses: Choice of Law (OH) ([w-000-1032](#)) and Practice Note, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#)).

23. Choice of Forum. Each Party irrevocably and unconditionally agrees that it will not commence any action, litigation, or proceeding of any kind whatsoever against the other Party in any way arising from or relating to this Agreement, including all exhibits, schedules, attachments, and appendices attached to this Agreement, and all contemplated transactions[, including contract, equity, tort, fraud, and statutory claims], in any forum other than the US District Court for the [Northern/Southern] District of Ohio or[, if such court does not have subject matter jurisdiction,] the courts of the State of Ohio sitting in [POLITICAL SUBDIVISION], and any appellate court from any thereof. Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of such courts and agrees to bring any such action, litigation, or proceeding only in the US District Court for the [Northern/Southern] District of Ohio or[, if such court does not have subject matter jurisdiction,] the courts of the State of Ohio sitting in [POLITICAL SUBDIVISION]. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

**DRAFTING NOTE: CHOICE OF FORUM**

In Section 23, the parties confer personal jurisdiction on the courts of a selected state and agree that the selected forum is the exclusive forum for bringing any claims under (and sometimes, more broadly relating to) the agreement. For more information on drafting and negotiating choice of forum clauses, see Standard Clauses, General Contract Clauses: Choice of Forum (OH) ([w-000-1027](#)) and Practice Note, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#)).

To settle or avoid protracted forum selection negotiations, the parties sometimes elect to include a floating forum selection clause that forces a party initiating litigation to do so in the home jurisdiction of the counterparty being sued. For a sample floating forum selection clause, see Standard Clauses, General Contract Clauses: Choice of Forum (Floating: Reciprocal) (OH) ([w-000-1028](#)).

If the customer prefers to resolve disputes by arbitrating rather than litigating them, then it must replace this provision with an arbitration clause. For more information

on arbitration and other alternative dispute resolution agreements, including sample clauses, see:

- Practice Note, Drafting Arbitration Agreements Calling for Arbitration in the US ([2-500-4624](#)).
- Practice Note, Standard recommended arbitration clauses ([1-381-8470](#)).
- Standard Clauses, Clauses for the AAA, ICDR, ICC, and UNCITRAL Arbitration ([6-502-3569](#)).

This short-form Standard Document does not contain a dispute resolution escalation provision, which is more commonly used in long-term master service agreements. Escalation provisions first require the parties to resolve their disputes by alternative dispute resolution (ADR), including a period of negotiation and then mediation before submitting the dispute to litigation or ad hoc arbitration. For more information on drafting and negotiating escalation clauses, see Standard Clauses, General Contract Clauses, Alternative Dispute Resolution (Multi-Tiered) ([9-555-5330](#)).

24. [Waiver of Jury Trial. EACH PARTY ACKNOWLEDGES THAT ANY CONTROVERSY THAT MAY ARISE UNDER THIS AGREEMENT, INCLUDING EXHIBITS, SCHEDULES, ATTACHMENTS, AND APPENDICES ATTACHED TO THIS AGREEMENT, IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES AND, THEREFORE, EACH SUCH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LEGAL ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ANY EXHIBITS, SCHEDULES, ATTACHMENTS, OR APPENDICES ATTACHED TO THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY.]

**DRAFTING NOTE: WAIVER OF JURY TRIAL**

Commercial agreements frequently include this optional provision. Many sophisticated parties prefer that a judge hear and decide any dispute arising out of a complex agreement rather than a jury which may not appreciate or understand the potentially

complex issues involved in the litigation. For more information on drafting and negotiating waiver of jury trial clauses, see Standard Clause, General Contract Clauses: Waiver of Jury Trial (OH) ([w-000-1087](#)).

25. Counterparts. This Agreement may be executed in counterparts, each of which is deemed an original, but all of which together are deemed to be one and the same agreement. [Notwithstanding anything to the contrary in Section 15, a signed copy of this Agreement delivered by facsimile, email, or other means of electronic transmission is deemed to have the same legal effect as delivery of an original signed copy of this Agreement.]

#### DRAFTING NOTE: COUNTERPARTS

The parties should include the bracketed language that addresses the confirmation of actual receipt if facsimile and email are not accepted as means of sending notices under

Section 15. For more information on drafting and negotiating counterparts clauses, see Standard Clauses, General Contract Clauses: Counterparts ([5-564-9425](#)).

26. Force Majeure. Any delay or failure of either Party to perform its obligations under this Agreement will be excused to the extent that the delay or failure was caused directly by an event beyond such Party's control, without such Party's fault or negligence and that by its nature could not have been foreseen by such Party or, if it could have been foreseen, was unavoidable (which events may include natural disasters, embargoes, explosions, riots, wars, or acts of terrorism) (each, a "**Force Majeure Event**"). Service Provider's financial inability to perform, changes in cost or availability of materials, components or services, market conditions, or supplier actions or contract disputes will not excuse performance by Service Provider under this Section 26. Service Provider shall give Customer prompt written notice of any event or circumstance that is reasonably likely to result in a Force Majeure Event, and the anticipated duration of such Force Majeure Event. Service Provider shall use all diligent efforts to end the Force Majeure Event, ensure that the effects of any Force Majeure Event are minimized and resume full performance under this Agreement.

#### DRAFTING NOTE: FORCE MAJEURE

A force majeure clause aims to exclude liability for breach of contract where delay or failure to perform is a result of an event outside the reasonable control of the party who would otherwise be in default.

As the service provider is responsible for the main obligations under the agreement (the customer's only major obligation is to pay for the services), the customer wants the force majeure clause to be drafted as narrowly

as possible and for the definition of force majeure events to be limited to events that are genuinely outside the service provider's control.

For more information on drafting and negotiating force majeure clauses, see Standard Clause, General Contract Clauses: Force Majeure (OH) ([w-000-0945](#)) and Practice Note, Force Majeure Clauses: Key Issues ([5-524-2181](#)).

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the Effective Date by their respective officers thereunto duly authorized.

[CUSTOMER NAME]

By \_\_\_\_\_

Name:

Title:

[SERVICE PROVIDER NAME]

By \_\_\_\_\_

Name:

Title:

## EXHIBITS

### EXHIBIT A

#### INITIAL STATEMENT OF WORK

[KEY ELEMENTS OF SERVICES TO BE PROVIDED, PROJECT MILESTONES, TIMING REQUIREMENTS, COMPLETION STANDARDS, FEE SCHEDULES, ACCEPTANCE TESTING PROCEDURES, AND OTHER IMPORTANT ITEMS]

### EXHIBIT B

#### EXPENSE REIMBURSEMENT POLICY

[CUSTOMER'S EXPENSE REIMBURSEMENT POLICY]

### EXHIBIT C

#### SERVICE PROVIDER OWNED INVENTIONS

[LIST OF PRE-OWNED SERVICE PROVIDER INVENTIONS]

### EXHIBIT D

#### CUSTOMER COMPETITORS

[LIST OF CUSTOMER'S COMPETITORS COVERED BY NON-COMPETE]

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