

**CITY OF LA VISTA  
MAYOR AND CITY COUNCIL REPORT  
AUGUST 6, 2024 AGENDA**

<b>Subject:</b>	<b>Type:</b>	<b>Submitted By:</b>
PROFESSIONAL SERVICES AGREEMENT – KENO AUDIT PREPARATION	◆ RESOLUTION ORDINANCE RECEIVE/FILE	MEG HARRIS FINANCE DIRECTOR

**SYNOPSIS**

A resolution has been prepared to approve a professional services agreement with BerganKDV for audit compliance with Nebraska County and City Lottery Regulations and provide the City Administrator or designee authority to negotiate a contract with BerganKDV in an amount not to exceed \$9,500.

**FISCAL IMPACT**

The FY25/FY26 Biennial Budget provides funding for this agreement.

**RECOMMENDATION**

Approval.

**BACKGROUND**

The professional services of BerganKDV are necessary to prepare the 2024 audit work papers and audit financial reports for the City's Keno game as required by the Nebraska County and City Lottery Regulations.

**RESOLUTION NO. \_\_\_\_\_**

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY OF LA VISTA, NEBRASKA TO APPROVE A PROFESSIONAL SERVICES AGREEMENT WITH BERGANKDV FOR AUDIT COMPLIANCE IN AN AMOUNT NOT TO EXCEED \$9,500.00.

WHEREAS, the City Council of the City of La Vista has determined that assistance in preparation for the city's audit is necessary; and

WHEREAS, the FY25/FY26 Biennial Budget provides funding for this agreement; and

WHEREAS, Subsection (C) (9) of Section 31.23 of the La Vista Municipal Code requires that the city administrator secure Council approval prior to authorizing any purchase over \$5,000.00;

NOW, THEREFORE BE IT RESOLVED, that the Mayor and City Council hereby approve a professional services agreement with BergankDV to provide professional services associated with audit compliance.

PASSED AND APPROVED THIS 6TH DAY OF AUGUST 2024.

CITY OF LA VISTA

\_\_\_\_\_  
Douglas Kindig, Mayor

ATTEST:

\_\_\_\_\_  
Pamela A. Buethe, MMC  
City Clerk

# Engagement Agreement

## AGREED-UPON PROCEDURES

Sent via electronic mail.

This letter is to confirm and summarize our understanding of the terms and objectives of our engagement and the nature and limitations of the services we will provide.

Name	Address
City of La Vista	8116 Park View Boulevard La Vista, NE 68128-2198
Contact Name	Agreement Date
Kevin Pokorny	July 30, 2024
Contact Email	
kpokorny@cityoflavista.org	

## SUMMARY OF ENGAGEMENT TERMS

Level of Service
Agreed-Upon Procedures
Specified Parties
City of La Vista, NE and EHPV Lottery Services, LLC
Subject Matter
Keno operations of City of La Vista, Nebraska

**Purpose of Engagement**

Test compliance with Nebraska County and City Lottery Regulations

**Reporting Period**

As of and for the year ended September 30, 2024

**Engagement Partner**

Timothy M. Lens

**Fees**

Our fees for these services will follow our standard billing and collection policy. We estimate our fees for these services to be \$9,500

**Nonattest Services Performed by BerganKDV**

Assistance with the preparation of the City's financial statements and other professional services as requested.

**Nonattest Services Performed by Creative Planning\***

Assistance with the preparation of the City's financial statements and other professional services as requested.

\* Creative Planning, LLC and its affiliates (Creative Planning) and BerganKDV practice under an alternative practice structure in accordance with the AICPA Code of Professional Conduct and other applicable laws, regulations, and professional standards. BerganKDV is an independent, separately governed and licensed CPA firm that provides audit and attest services to its clients. Creative Planning provides wealth management, tax, business consulting, financial, and other professional services to its clients. Creative Planning is not a licensed CPA firm. See alternative practice structure below for additional details.

### Agreed Upon Procedures

1. COMPLIANCE REQUIREMENT: An unannounced observation of the keno activity must be made at least annually for all sponsors who use a manual ball draw method for selection of winning numbers during the conduct of a keno lottery. Regulation 35-616.01.

PROCEDURE: For the purpose of this requirement, unannounced means that no individual involved directly or indirectly with the operation of the keno lottery will have knowledge of, or be given any advance information regarding the dates or times of, the observation. In addition to observing the operation of the keno activity, the steps outlined in Procedure 2 must be performed.

2. COMPLIANCE REQUIREMENT: Regulations 35-613.03L, 35-613.04, 35-613.04A, 35-613.04B, 35-613.04B(1), 35-613.04B(2), 35-613.04B(3), and Nebraska County and City Lottery Act, Neb. Rev. Stat. 9-607(4).

PROCEDURE: During the unannounced visit, observe five keno games and verify that the keno operator (lottery operator or sales outlet location) has a minimum of three lottery workers involved during the drawing of the 20 keno numbers when a manual ball draw method of winning number selection is used, without exception. A keno lottery using an automated ball draw system may be conducted with less than three lottery workers as prescribed in Regulation 35-621.06B. The sponsor's representative should observe that: a. The number of the game being drawn is recorded on a blank keno draw ticket; b. One lottery worker calls the ball numbers as they enter the rabbit ears; c. A different lottery worker enters the numbers on the draw ticket on which the number of the game is recorded; d. The keno manager verifies the numbers drawn by comparing the rabbit ears to the draw ticket and to the numbers entered into the keno system prior to computing the game; and e. At the time of the unannounced visit, the lottery operator is using the method of winning number selection which agrees with the designated selection method on file with the sponsor and the Department. Practical Guidance: Determine that the manual draw tickets are verified by the keno manager, as evidenced by the signature or initials of the manager, in addition to observing the conduct of the game. Determining the method of winning number selection may be accomplished at the unannounced visit or by reviewing the transaction log if the number selection method is designated on the log.

3. COMPLIANCE REQUIREMENT: Regulation 35-621.06J

PROCEDURE: Sponsors who use an automated ball draw method of winning number selection must verify that keno management personnel have performed a next-day review of all "no read" and duplicate number occurrences. A written log of reviews must be maintained by the lottery operator or sales outlet location where the automated ball draw equipment is in use.

4. COMPLIANCE REQUIREMENT: Regulations 35-613.04C(1) through 35-613.04C(5) and Regulations 35-621.06C(1) through 35-621.06C(6).

PROCEDURE: View the video tape or digital recording for a minimum of five games for each month (from at least two different weeks within each month) to determine that the following items are in compliance with the regulations a. The video tape or digital recording has a clear image to show (1) the empty rabbit ears or wheel, (2) the date and time, and (3) the full rabbit

ears or wheel. The video tape or digital recording must also show the game number or the time and date which will relate to the game number. b. The winning numbers drawn per the video tape or digital recording agree with the draw ticket prepared by a lottery worker in the case of a manual ball draw, and the winning numbers are recorded on the transaction log. Verify that all discrepancies were reported to the Department, by the lottery operator, sales outlet location, or sponsor. Report all discrepancies not previously reported directly to the Department. Compare the time of the video tape or digital recording to the transaction log; also examine any procedures which would allow the lottery operator or sales outlet location the opportunity to affect the outcome of the keno game. c. The video tapes are retained and are not reused until the sponsor has performed the compliance procedures on the tapes and has released the tapes.

5. COMPLIANCE REQUIREMENT: Regulation 35-616.01.

PROCEDURE: Verify the accuracy of monthly game summary information provided by the lottery operator, by reconciling the gross proceeds and prize payouts from the keno system's transaction log to the monthly summary information.

6. COMPLIANCE REQUIREMENT: Regulation 35-622.03E and Nebraska County and City Lottery Act, Neb. Rev. Stat. 9-650.

PROCEDURE: Determine that the gross proceeds of the keno lottery, less prizes paid in cash, are deposited into a separate bank account of the sponsor or lottery operator. On a monthly basis, reconcile the deposits per the daily cash summary and the transaction log to the keno operations bank account, to determine that the proper amount has been deposited within five business days and report any discrepancies. Verify no player used a debit card to deposit more than \$200 to a player account in a single day.

7. COMPLIANCE REQUIREMENT: Regulation 35-622.03D.

PROCEDURE: Examine any cash overage or shortage in excess of \$25 per keno writer, per shift, per day, and report unexplained and unresolved discrepancies and irregularities.

8. COMPLIANCE REQUIREMENT: Regulation 35-614.05.

PROCEDURE: The computer-generated prize pay tables for all types of wagers must agree with the published prize pay tables. Verify that the lottery operator has a procedure to maintain a log of all updates and changes to the prize pay tables and that the active prize pay tables on the keno system agree with the published prize pay tables.

9. COMPLIANCE REQUIREMENT: Regulations 35-613.11, 35-613.11A, and 35-613.11B.

PROCEDURE: Examine the financial security provided for prize payments to verify that the funds are guaranteed and in compliance with the regulations.

10. COMPLIANCE REQUIREMENT: Regulation 35-622.

PROCEDURE: Ensure that all lottery records are maintained as prescribed in Schedule 59 - County/ City Lottery Records approved by the Records Management Division of the Nebraska Secretary of State's office and Regulation 35-622.

11. COMPLIANCE REQUIREMENT: Regulation 35-622.04. PROCEDURE: The sponsor must file a Nebraska County/City Lottery Report, Form 35K, for the annual period corresponding to the sponsor's fiscal year. The report must be filed with the Department within 90 days of the end of the sponsor's fiscal year.

## SCOPE OF ENGAGEMENT

We will apply the procedures as identified in the summary of engagement terms and described in an attached schedule. By signing this engagement agreement, you agree to those procedures and acknowledge that the procedures to be performed are appropriate for the intended purpose of the engagement, which is identified in the summary of engagement terms. Our engagement to apply agreed-upon procedures will be conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants (AICPA). Those standards require that we obtain your written agreement to the procedures to be applied and your acknowledgment that those procedures are appropriate for the intended purpose of the engagement, as described in this letter. A refusal to provide such agreement and acknowledgment will result in our withdrawal from the engagement. We make no representation that the procedures we will perform are appropriate for the intended purpose of the engagement or for any other purpose.

Because the agreed-upon procedures listed in the attached schedule do not constitute an examination or review, we will not express an opinion or conclusion on the subject matter as identified in the summary of engagement terms. In addition, we have no obligation to perform any procedures beyond those to which you agree.

We will issue a written report upon completion of our engagement that lists the procedures performed and our findings. Our report will be addressed to those parties charged with governance, unless specified otherwise. If we encounter restrictions in performing our procedures, we will discuss the matter(s) with you. If we determine the restrictions are appropriate, we will disclose the restrictions in our report. Our report will contain a paragraph indicating that had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

There may exist circumstances that, in our professional judgment, will require we withdraw from the engagement. Such circumstances include the following:

- ◆ You refuse to provide written agreement to the procedures and acknowledge that they are appropriate for the intended purpose of the engagement.
- ◆ You fail to provide requested written representations, or we conclude that there is sufficient doubt about the competence, integrity, ethical values, or diligence of those providing the written representations, or we conclude that the written representations provided are otherwise not reliable.
- ◆ We determine that the description of the procedures performed, or the corresponding findings are misleading in the circumstances of the engagement.
- ◆ We determine that restrictions on the performance of procedures are not appropriate.

An agreed-upon procedures engagement is not designed to detect instances of fraud or noncompliance with laws or regulations; however, should any such matters come to our attention, we will communicate them in accordance with professional standards and applicable law. In addition, if, in connection with this engagement, matters come to our attention that contradict the subject matter as identified in the summary of engagement terms, we will communicate such matters to you.



You agree to the procedures to be performed and acknowledge that they are appropriate for the intended purpose of the engagement.

You are responsible for the subject matter identified in the summary of engagement terms. In addition, you are responsible for providing us with (1) access to all information of which you or the appropriate party are aware that is relevant to the performance of the agreed-upon procedures on the subject matter, (2) additional information that we may request from the appropriate party for the purpose of performing the agreed-upon procedures, and (3) unrestricted access to persons within the entity from whom we determine it necessary to obtain evidence relating to performing those procedures.

The engagement partner, as identified in the summary of engagement terms, is responsible for supervising the engagement and signing the report or authorizing another individual to sign it.

## **MANAGEMENT WRITTEN REPRESENTATIONS**

At the conclusion of our engagement, we will require certain written representations in the form of a representation letter from management that, among other things, will confirm management's responsibility for the subject matter as identified in the summary of engagement terms.

## **ALTERNATIVE PRACTICE STRUCTURE**

Creative Planning, LLC and its affiliates (Creative Planning) and BerganKDV operate under an alternative practice structure in accordance with the AICPA Code of Professional Conduct and other applicable laws, regulations, and professional standards. BerganKDV provides audit and attest services and is closely aligned with Creative Planning that provides other professional (nonattest) services. Pursuant to a services agreement with Creative Planning, BerganKDV leases professional and administrative staff, both of which are employed by Creative Planning, to support BerganKDV's performance of audit and attest engagements. The professional and administrative staff leased under the services agreement will be under the direct control and supervision of BerganKDV, which is solely responsible for the professional performance of audit and attest engagements.

As identified in the summary of engagement terms, Creative Planning, which is not a licensed CPA firm, may provide permitted nonattest services, which are not covered under this agreement. BerganKDV, Creative Planning, and its affiliates will share confidential client information with each other to assist in the performance of those services. Your acceptance and signing of this agreement are also your consent for BerganKDV, Creative Planning, and its affiliates to share your information to provide you those services.

## **OTHER SERVICES**

BerganKDV and/or Creative Planning may provide other nonattest services, as identified in the summary of engagement terms. These services may not be fully covered under this agreement and may be billed separately under other agreements with you.

You may request that BerganKDV and Creative Planning perform additional services not contemplated by this agreement. If this occurs, we will communicate with you regarding the scope of the additional services and the estimated fee. BerganKDV or Creative Planning also may issue a

separate agreement covering the additional services. In the absence of any other written communication from us documenting such additional services, our services will continue to be governed by the terms of this agreement.

We will perform the services in accordance with applicable professional standards. We, in our sole professional judgment, reserve the right to refuse to perform any procedure or take any action that could potentially impair our independence.

## INDEPENDENCE

Professional and certain regulatory standards require us to be independent in the performance of our services in both fact and appearance. As such, BerganKDV and Creative Planning will not perform any management functions, make any management decisions, or perform any services or activities, without the appropriate safeguards, that would impair our independence.

You agree to assume all management responsibilities for the nonattest services, as identified in the summary of engagement terms, and any other services provided by BerganKDV and Creative Planning; oversee the services by designating an individual, preferably from senior management, with suitable skill, knowledge, or experience; evaluate the adequacy and results of the services; and accept responsibility for them.

To ensure our independence is not impaired under professional and regulatory standards, you agree to inform the engagement partner before entering into any substantive employment discussions with any BerganKDV and Creative Planning personnel.

## FEES

Our fees for these services are detailed in the summary of engagement terms. The fee estimate is based on anticipated cooperation from your personnel, the assumption that all requested information will be provided timely and accurately, and we will not encounter any significant or unusual circumstances which will affect the scope of our engagement, including unforeseen disruptions in providing our services. If significant additional time is necessary, our fees will be adjusted accordingly.

We commit staff and resources to your engagement at the time scheduled with you and your team. Failure to provide the required documentation and engagement support by the agreed upon due dates may result in an inconvenience fee of 25% of the base fee noted in the summary of engagement terms.

## DOCUMENTATION

During our engagement, we may accumulate records containing data which should be reflected in your books and records. You will determine that all such data will be so reflected. Accordingly, you understand that our firm does not accept responsibility for hosting client information; therefore, you have the sole responsibility for ensuring you retain and maintain in your possession all your financial and non-financial information, data and records.

Our role is strictly limited to the engagement described in this agreement and summary of engagement terms, and we offer no assurance as to the results or ultimate outcomes of this

engagement or of any decisions that you may make based upon our communications with, or our reports to you. Your entity will be solely responsible for making all decisions concerning the contents of our communications and reports, for the adoption of any plans and for implementing any plans you may develop, including any that we may discuss with you.

## PROFESSIONAL SERVICES TERMS AND CONDITIONS

The parties agree that this Engagement Letter/Agreement incorporates the **Professional Services Terms and Conditions** (the "Terms") (collectively, the "Agreement"), all of which shall remain confidential between Client and BerganKDV. By signing this Engagement Letter/Agreement, Client acknowledges and agrees that Client has had an ample opportunity to review the terms contained in the Agreement. Client further agrees that Client has had the opportunity to obtain legal counsel and through Client's own determination, with or without counsel, accepts this Agreement.

The undersigned represent and warrant they are authorized signers for their respective organizations.

Sincerely,

Executed by BerganKDV:	Acknowledged and Accepted by:
<i>Timothy M. Lens</i>	
Title:	Title:
Shareholder	

## PROFESSIONAL SERVICES TERMS AND CONDITIONS

These Professional Services Terms and Conditions (the “**Professional Services Terms and Conditions**” or “**T&C**”) are made part of the Engagement Letter (the “**Engagement Letter**”) entered into by the individual or entity client identified therein (hereinafter “**Client**”) and the BerganKDV identified therein (hereinafter “**Service Provider**”) (collectively, the Professional Services Terms and Conditions and the Engagement Letter, the “**Agreement**”). In the event of a conflict between these Terms and Conditions and the Engagement Letter, these Terms and Conditions shall control, unless the Engagement Letter makes specific reference to the section of this Professional Services Agreement that it intends to supersede. All capitalized terms not defined herein shall have the meaning as defined in the Engagement Letter.

**1. Definitions.** In addition to the terms defined elsewhere in this Professional Services Agreement, the following terms shall have the meanings set forth below when used in the Agreement:

“**Affiliate**” or “**Affiliates**” means any company, corporation, or limited liability company that directly or indirectly controls, is controlled by, or is under common control with a party to this Agreement.

“**Client Materials**” means any and all physical or electronic materials, information, data, dates, formulas, financial statements, records, Client’s Confidential Information, and any other information related to Client that Client provides to, or otherwise makes available to, Service Provider in the course of providing the Services to Client hereunder this Agreement.

“**Confidential Information**” shall collectively refer to: (1) all information or materials concerning any aspect of the business or affairs of the disclosing party that in any form, which is confidential, proprietary, or otherwise not generally available to the public, including without limitation the disclosing Party’s business or financial information and plans, documents, works in progress, work processes, trade secrets, customer information, and all other secret or confidential matter related to the disclosing Party’s business or projects and/or their Affiliates; and (2) any other information that disclosing Party designates as confidential, or which, under the circumstances of disclosure, the receiving Party reasonably knows should be treated as confidential.

“**Force Majeure Event**” means any event or circumstance beyond the control of a Party, including: (1) acts of God; (2) fire, flood, or explosion; (3) war, invasion, acts of terrorism, or other civil disorder; (4) national or regional emergency; (5) epidemics, outbreaks, pandemics (including, without limitation COVID-19); or (6) the operation of the Internet, interruption or failure of telecommunication or digital transmission links, and Internet slow-downs or failures.

“**Intellectual Property Rights**” means copyrights, trade and service marks, trade names, rights in logos and get-up, inventions, confidential information, trade secrets, registered designs, design rights, patents, all rights of whatsoever nature in computer software and data, database rights, all rights of privacy and all intangible rights and privileges of a nature similar to any of the foregoing, in every case in any part of the world and whether or not registered, and including all granted registrations and all applications for registration in respect of any of the same.

“**Party**” and “**Parties**” means either or both of the Service Provider and the Client.

“**Report**” means any physical or electronic document or output that Service Provider creates in providing the Services to Client, including but not limited to, reports, related work product, materials, presentations, and related communications (written or otherwise).

“**Representatives**” means a Party’s officers, directors, agents, advisors, employees and contractors.

“**Services**” means the work product and services to be provided by Service Provider pursuant to this Agreement and the Engagement Letter.

“**Service Provider Materials**” means: (1) any of Service Provider including, without limitation, computer hardware or software programs, products, materials or methodologies and reports, studies, data, diagrams, charts, specifications, gateways, bridges and integrations with third-party code; (2) any modifications to Service Provider’s pre-existing software produced on behalf of Client; (3) works or materials created and developed by Service Provider prior to or independently of the Services; and (4) residual knowledge and know-how of general applicability resulting from performance of the Services.

“**Third-Party Software Provider**” means any third party that provides software, software as a service, or other platform or software related products and services that Service Provider engages to assist with the performance of the Services.

## **2. Services.**

**2.1. Services and Additional Services.** The Services to be performed by Service Provider for Client are set forth in the Engagement Letter. If any time Client requests that Service Provider perform additional services outside the scope of the Services (“**Additional Services**”) and Service Provider agrees to perform the work but Service Provider and Client do not enter into a separate Engagement Letter setting forth the Additional Services, then Client agrees to pay Service Provider additional fees based in part upon the amount of time required at our standard billing rates, plus out-of-

## PROFESSIONAL SERVICES TERMS AND CONDITIONS

pocket expenses, the Additional Services will be subject to the terms and conditions of this Professional Services Agreement, and all references to the term “Services” in this Professional Services Agreement shall be construed to mean the Services and the Additional Services. Service Provider, in its sole professional judgment, reserves the right to refuse to perform any Services or take any action that could be construed as assuming Client’s responsibilities as set forth herein.

**2.2. Third-Party Software Providers.** Client acknowledges and agrees that such Services may be performed by Service Provider, or any of its Affiliates, or Third-Party Software Providers. Client acknowledges and agrees that Service Provider may enter into contracts or licenses with such Third-Party Software Provider and Service Provider shall have the right to enter into, amend, terminate, or modify any such contract or license with any Third-Party Software Provider at any time in its sole discretion and without the consent of or notification to Client. If applicable to Client’s Services, Client may need to agree to Third-Party Software Providers’ terms and conditions or other contractual agreements in order to use Third-Party Software Providers’ services.

**2.3. Quality Inputs.** Notwithstanding anything herein to the contrary, Client agrees and acknowledges that the quality of the Services and any Reports is reliant on the accuracy, reliability, availability, and validity of the Client Materials provided by Client to Service Provider and Service Provider makes no representation or warranty with respect to issues with the Services that result from or are based on issues with accuracy, reliability, availability or validity of the Client Materials. Client hereby agrees that it will immediately notify Service Provider when it becomes aware of issues with the accuracy, reliability, availability, and validity of the Client Materials provided to Service Provider and Client assumes all risk, loss, and damages that arise therefrom, including, but not limited to any costs associated with redoing the Services and any Reports.

### **3. Payment for Services.**

**3.1. Service Fees and Payment Terms.** Client agrees to pay the fees for the Services as set forth in the Engagement Letter and in these Professional Services Terms & Conditions. Any amounts owed by Client hereunder will be invoiced monthly and all payments shall be due within thirty (30) days of Client’s receipt of the applicable invoice, unless stated to the contrary in the Engagement Letter. Client may not offset, defer or deduct any invoiced amounts. If Client objects to any invoiced amount, Client must promptly notify Service Provider in writing (but in no event more than thirty (30) days of the invoice date) and provide a detailed summary of all objections. Client hereby waives any objections to any invoice if timely objections are not made. If Client objects to any invoice, Client shall promptly pay all undisputed amounts and work with Service Provider in good faith to attempt to resolve any disputes.

**3.2. Prepayments.** Service Provider shall have the right to require Client to prepay up to fifty percent (50%) of the anticipated fees for the Services prior to any Services being provided to Client. If Service Provider determines in its sole discretion that the total cost for providing the Services cannot be reasonably determined at the outset, then Service Provider shall have the right to require Client pay a prepayment to Service Provider in an amount reasonably determined by Service Provider prior to Service Provider providing the Services.

**3.3. Interest on Past Due Amounts.** If any invoice is not paid by its due date, Service Provider will charge Client and Client will pay an interest charge of one percent (1%) per month on the unpaid balance of such invoice. For any amounts that are disputed in good faith, Client may still be liable for the interest if such amounts are later found to be rightfully due and owing. Alternatively, for any disputed amounts that are made in good faith, Client can pay such amounts into a mutually agreeable interest-bearing escrow account, in which case Client will not be obligated to pay such interest provided it cooperates in good faith with Service Provider to promptly resolve the dispute.

**3.4. Certain Remedies for Nonpayment.** If an undisputed invoice is not paid when due, Client shall pay Service Provider a service charge accruing from the due date in the amount of one and half percent (1.5%) per month or the highest lawful rate, whichever is less, on the unpaid balance of such invoice. If Client fails to pay to Service Provider, within ten (10) days after Service Provider makes written demand for any past-due amount payable under the Agreement (including interest thereon), then, in addition to all other rights and remedies which Service Provider may have at law or in equity, Service Provider may seek collection from Client of unpaid amounts due and shall be entitled to all of its attorneys’ fees, costs of court and other costs of collection regardless if formal litigation is commenced. Service Provider is also entitled to accelerate and demand full payment of any future amounts due under the Engagement Letter. Service Provider may, in its sole discretion, decide to suspend Client’s access to the Services, including any Services provided by a Third-Party Software Provider, until all past due amounts are paid in full. Any withholding of Services or support due to a failure by Client to pay amounts due does not relieve Client from its contractual obligation to pay for the Services during the time the Services and/or support are withheld. If Client makes full payment and restores its account to good standing and the Agreement has not otherwise been terminated, then Service Provider may resume Services. Notwithstanding any term to the contrary herein, Client acknowledges and agrees that Services Provider shall not be liable for any damages that Client incurs resulting from Service Provider’s suspension of Services until all amounts due are paid in full to Service Provider.

## PROFESSIONAL SERVICES TERMS AND CONDITIONS

**3.5. Taxes.** All of Service Provider's invoiced amounts are exclusive of any taxes. Client is responsible for and shall pay all sales, use, excise, personal property or other taxes, whether federal, state or local, however designated, levied or imposed on any Services or invoiced amounts. Income, franchise or similar taxes related to Service Provider's earnings or business entity are Service Provider's responsibility.

### **4. Term of Agreement.**

**4.1. Term and Termination.** The term of this Agreement shall commence on the Effective Date of the Engagement Letter and shall continue until terminated as provided herein. This Agreement may be terminated pursuant to the following: (1) either Party may terminate the Agreement for convenience by giving the other Party ninety (90) days' prior written notice; or (2) either party may terminate this Agreement "for cause" if the other party is in breach of any material term of this Agreement and does not cure the breach within thirty (30) days after receipt of the written notice of the alleged breach. Should such termination occur while Client still has Services remaining on any applicable agreement, except in situations where Client has terminated this Agreement for cause, then all of those amounts due presently and during the remainder of the Services term shall be immediately due and payable upon the effective termination of this Agreement.

**4.2. Enforceability Post-Termination; Survival.** Upon the termination of this Agreement, Service Provider has no further responsibility to provide Services. Client's obligation to pay Service Provider shall survive termination until all amounts due and owing to Service Provider are fully paid and Client shall be obligated to pay Service Provider for any fees or expense on a proportional basis for Services performed up to and including the Effective Date. Any provisions of this Agreement that by their terms require performance or have application to events following termination shall survive and remain in full force and effect.

**4.3. Procedures Upon Termination.** Upon the end of the Term, Service Provider shall prepare final invoices for Services and provide them to Client, and Client shall pay the same pursuant to the invoice terms. Both parties shall return any and all Confidential Information, reports, materials, or other service-related items as required by this Agreement in a timely manner. Both Parties are not obligated to delete data that is solely on their backup systems, provided that should the backup system's data that includes Confidential Information be restored to the primary system where the data is more readily accessible, then the Parties will at that time have the obligation to delete the Confidential Information.

### **5. Confidentiality, Certain Restrictive Covenants, and Intellectual Property.**

**5.1. Confidentiality Obligations.** The receiving Party shall maintain the confidentiality of the disclosing Party's Confidential Information and protect such Confidential Information with the same degree of care that it applies to the receiving Party's own similar Confidential Information, but in no event less than a reasonable degree of care, given the nature of the information disclosed. The disclosing Party's Confidential Information shall be used by the receiving Party solely for the purpose of rendering or obtaining Services (as applicable) pursuant to this Agreement and, except as permitted herein, shall not be disclosed to any third party without the prior consent of the disclosing Party. Notwithstanding the foregoing, Client acknowledges that Service Provider may share Client's Confidential Information with those of its Representatives, Affiliates and any Third-Party Software Providers that have a need to know in order to assist with the performance of the Services and who agree to maintain the Client's Confidential Information on the same or similar terms as set forth herein. Client acknowledges that it may be asked by certain Third-Party Software Providers to consent to the sharing of Client's Confidential Information in connection with the Services, and Client agrees to consent to such requests from Third-Party Software Providers. This Agreement shall be deemed Confidential Information.

**5.2. Exceptions.** The restrictions on Confidential Information in this Section 5 shall not apply to information: (1) generally available to the public through no act or omission of the receiving Party, its Representatives, or its Affiliates; (2) independently developed or acquired by the receiving Party without use or reference to the disclosing Party's Confidential Information; (3) approved for release in writing by the disclosing Party; (4) that is received without restriction from another person or organizations lawfully in possession of such information and entitled to provide such information to the receiving Party; or (5) information that was rightfully in the possession of the receiving Party on a non-confidential basis prior to its disclosure by the disclosing Party. Additionally, either Party may use or disclose the other Party's Confidential Information if required by any request or order of any applicable government or regulatory authority, or otherwise as required by applicable law. Before disclosing the disclosing Party's Confidential Information for such purpose, the receiving Party must provide prompt written notice to the disclosing Party of the circumstances requiring disclosure of such Confidential Information, and the Parties shall cooperate with each other, at the disclosing Party's expense, to obtain protection for the confidentiality thereof to the extent available, to contest and avoid such disclosure, to obtain any other appropriate remedy, or to waive compliance with the provisions of this Agreement. In the event that such protective order or other remedy is not obtained, or that the disclosing Party waives

## PROFESSIONAL SERVICES TERMS AND CONDITIONS

compliance with the provisions of this Agreement, the receiving Party will furnish only that portion of Confidential Information which is legally required.

**5.3. HIPAA.** Notwithstanding anything herein to the contrary, to the extent the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") applies to Client, Client acknowledges and agrees that: (1) Client retains all responsibility for being compliant with the applicable provisions of HIPAA that may apply to the Client Materials provided by Client pursuant to the Services; and (2) Service Provider makes no representation or warranty herein regarding its compliance with any applicable HIPAA laws and regulations in connection with the Services.

### **6. Warranties.**

**6.1. Representations and Warranties.** Each Party represents, warrants and covenants to the other that: (1) it has full right, power and authority to enter into and fully perform its obligations under this Agreement; (2) the execution, delivery and performance of this Agreement by that Party does not conflict with any other agreement to which it is a party or by which it is bound; and (3) it shall comply with all material laws, rules and regulations applicable to its activities in connection with this Agreement. Client further represents, warrants, and covenants that: (1) the Client Materials are original to Client or Client has obtained the necessary rights to provide the Client Materials to Service Provider and use the Client Materials in connection with the Services; and (2) the Client Materials as provided to Service Provider are accurate, reliability, availability, and valid for the performance of the Services.

**6.2. Third-Party Software Provider Warranty Disclaimers.** Notwithstanding anything herein to the contrary, Service Provider makes no warranties, express or implied, or guarantees regarding the Third-Party Software Providers services and in no event shall Service Provider be liable to Client for the failure of any Third-Party Software Provider to perform any part of the Services. In the event of an issue or failure in the Services that is performed by a Third-Party Software Provider: (1) the Parties will work together, each at their own cost and expense, to attempt to reach a reasonable solution for the Parties (to the extent one is available); and (2) if Client desires to pursue a claim against the Third-Party Software Provider in a court of law, provided that such claim has a reasonable possibility of success in the opinion of Service Provider but Service Provider does not desire to participate in such claim, then Client will be permitted to seek such a claim in a court of law at its own cost and expense, and to the extent possible, Service Provider will assign any rights it may have with respect to the Third-Party Software Provider related to the claim.

**6.3. All Obligations Set Forth in This Agreement; Limitation.** SERVICE PROVIDER SHALL NOT BE RESPONSIBLE FOR ANY DELAYS AND/OR SERVICE UNAVAILABILITY OF ANY KIND, REGARDLESS OF CAUSE, EXCEPT AS PROVIDED IN THIS AGREEMENT. CLIENT EXPRESSLY WAIVES ANY CLAIMS AGAINST SERVICE PROVIDER FOR LOSS, INJURY, OR DAMAGE OF ANY KIND, DIRECTLY OR INDIRECTLY, RESULTING FROM AVAILABILITY OF THE SERVICES, USE OF THE SERVICES OR FROM ANY LOSS OR CORRUPTION OF CLIENT MATERIALS SOFTWARE, OR HARDWARE, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT.

**6.4. OTHER WARRANTY DISCLAIMERS.** EXCEPT FOR THE EXPRESS WARRANTIES STATED IN THIS AGREEMENT, SERVICE PROVIDER DISCLAIMS ALL OTHER WARRANTIES ON THE SERVICES FURNISHED UNDER THIS AGREEMENT INCLUDING WITHOUT LIMITATION, ALL IMPLIED WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ACCURACY, COMPLETENESS, OR OF ANY RESULTS TO BE ACHIEVED. UNLESS NOTED EXPLICITLY OTHERWISE HEREIN, ALL SERVICES ARE PROVIDED AS-IS. NOTWITHSTANDING ANYTHING TO THE CONTRARY HERE, ANY SERVICES THAT ARE CONTINGENT ON OR PROVIDED BY A THIRD-PARTY SOFTWARE PROVIDER CARRY NO WARRANTY OF ANY KIND BY SERVICE PROVIDER. CLIENT AGREES TO LOOK EXCLUSIVELY TO SUCH THIRD-PARTY SOFTWARE PROVIDER FOR ANY AND ALL LIABILITY. THE EXPRESS WARRANTIES STATED IN THIS SECTION 6 ARE IN LIEU OF ALL OBLIGATIONS OR LIABILITIES ON THE PART OF SERVICE PROVIDER ARISING OUT OF OR IN CONNECTION WITH THE PERFORMANCE OF SERVICE PROVIDER UNDER THIS AGREEMENT.

### **7. Limitation of Liability and Indemnification.**

**7.1. LIMITATION ON DAMAGES.** NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, CLIENT ACKNOWLEDGES AND AGREES THAT THE MAXIMUM AGGREGATE AMOUNT THAT CLIENT CAN COLLECT FROM SERVICE PROVIDER OR ITS AFFILIATES FOR ANY CLAIM RELATED TO THIS AGREEMENT OR THE SERVICES, WHETHER PURSUANT TO THIS AGREEMENT OR OTHERWISE UNDER THE LAW, SHALL BE LIMITED TO AN AMOUNT EQUAL TO THE AVERAGE MONTHLY AMOUNT ACTUALLY PAID FOR THE SPECIFIC SERVICE AT ISSUE BY CLIENT TO SERVICE PROVIDER UNDER THIS AGREEMENT OVER THE PAST TWELVE (12) MONTHS PRIOR TO WHEN THE CLAIM FIRST AROSE.

**7.2. WAIVER OF CERTAIN DAMAGES.** UNLESS SPECIFIED EXPLICITLY HEREIN, NEITHER PARTY SHALL BE LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, LOSS OF PROFITS, LOSS OF USE OF DATA OR INTERRUPTION OF BUSINESS, WHETHER ARISING IN TORT, CONTRACT, OR INDEMNITY, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES; PROVIDED THAT NOTHING IN THIS PARAGRAPH IS ENTITLED TO LIMIT OR WAIVE THE AMOUNTS DUE FROM CLIENT TO SERVICE PROVIDER.

## PROFESSIONAL SERVICES TERMS AND CONDITIONS

**7.3. MUTUAL INDEMNIFICATION.** Each Party (“**Indemnifying Party**”) will defend, indemnify, and hold harmless the other Party and its Affiliates, and any of their Representatives (“**Indemnified Party**”), from and against any and all losses, claims, actions, proceedings, and suits, and all related liabilities, damages, judgments, settlements, penalties, fines, costs or expenses (including reasonable attorneys’ fees and other actual litigation related expenses) (collectively “**Losses**”) incurred by the Indemnified Party, arising out of or relating to: (1) any breach or alleged breach of the Indemnifying Party’s representations and warranties; (2) any damage or loss caused by negligence, fraud, dishonesty, or willful misconduct by the Indemnifying Party or any of its Representatives; (3) unauthorized disclosure of confidential information by the Indemnifying Party; (4) claims against the indemnified party by a third party for infringement upon Intellectual Property Rights; and (5) any other violation of this Agreement by the Indemnifying Party. Notwithstanding anything to the contrary contained in this Agreement, in no event will the Indemnifying Party be liable for any amount attributable to the Indemnified Party’s gross negligence, willful misconduct, or breach of this Agreement.

### **8. Miscellaneous.**

**8.1. Non-solicitation of Employees.** During the term of this Agreement and for a period of one (1) year after termination of this Agreement for any reason, Client shall not, directly or indirectly, hire, offer to hire, entice away, solicit, or in any other way persuade or attempt to persuade any Representative to discontinue their relationship with Service Provider. If Client violates this provision, Client shall pay Service Provider an amount equal to the Representatives total annualized compensation, including wages, bonuses and the cost of all benefits, if any, that Service Provider paid or was payable to the Representative during the one (1) year period prior to Client soliciting the Representative as well as the forecasted or actual total annualized compensation that Client will pay or did pay to Representative after the solicitation occurred.

**8.2. Notification.** All notices, requests, demands and other communications which are required or may be given under the Agreement will be in writing and will be deemed to have been duly given, or otherwise properly received: (1) when actually received if personally delivered; (2) when transmitted by confirmed facsimile, electronic or digital transmission method; (3) the day after it is sent, if sent for next day delivery to a domestic United States address by recognized overnight delivery service (e.g., Federal Express); and (4) upon receipt, if sent by certified or registered mail, return receipt requested. In each case, notice will be sent pursuant to the addresses and notice information for each Party set forth in the Engagement Letter, provided, however, that any Party may change such Party’s notice information by written notice to the other Party in the manner set forth above.

**8.3. Force Majeure.** Except for any payment obligations, which shall remain due and payable in accordance with the provisions of this Agreement, either Party shall be excused from delays in performing, or from its failure to perform, its obligations pursuant to this Agreement if such delays or failures result from a Force Majeure Event. In order to be excused from delay or failure to perform due to a Force Majeure Event, a Party must provide prompt written notice to the other Party reasonably identifying the Force Majeure Event and use commercially reasonable efforts to resume performance to the extent possible. If the period of non-performance exceeds thirty (30) days from the receipt of notice of the Force Majeure Event, either party may terminate this Agreement. Notwithstanding any term to the contrary herein this Agreement, Client’s sole and exclusive remedy for any such termination shall be a refund of the pro-rata portion of any pre-paid Service fees.

**8.4. No Agency.** Service Provider is acting solely as an independent contractor in rendering Services under this Agreement. In no way is Service Provider to be construed as the agent or acting as the agent of Client in any respect. Service Provider is neither the employer nor an employee of Client.

**8.5. Assignment.** This Agreement may not be assigned by either Party without the express written consent of the other Party, which shall not be unreasonably withheld, conditioned or delayed. Subject to the foregoing, any assignee under this Agreement shall be subject to all of the terms, conditions and provisions of this Agreement.

**8.6. Waiver.** No waiver or breach of any provision of this Agreement shall be effective unless made in writing nor shall such waiver or breach operate as, or be construed to be, a continuing waiver of such provision or breach.

**8.7. Governing Law; Venue; Waiver of Jury Trial.** This Agreement shall be governed by the laws of the State of Kansas, without regard to its conflict of law provisions. Subject to the alternative dispute resolution process described in section 8.8, any disputes between the Parties in connection with this Agreement shall be exclusively brought only in a court of competent jurisdiction located in either: (1) the county in which the Service Provider’s office sits that is providing the majority of the Services to the Client under this Agreement; or (2) if subsection (1) is inapplicable for any reason, then in Johnson County, in the State of Kansas. THE PARTIES EXPRESSLY AND IRREVOCABLY WAIVE TRIAL BY JURY IN THE EVENT OF ANY DISPUTE UNDER THIS AGREEMENT.

**8.8. Alternative Dispute Resolution – Mediation & Arbitration.** If a dispute arises from or relates to this Agreement or the breach thereof, and if the dispute cannot be settled through direct discussions, the Parties agree to first attempt

## PROFESSIONAL SERVICES TERMS AND CONDITIONS

to settle the dispute by mediation that will be administered by a neutral party, using mediation procedures, both of which have been agreed upon by both Parties before resorting to arbitration. Where mediation fails to produce a binding resolution between the Parties, any continued dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by individual final and binding arbitration in the proper location determined by section 8.7 of these Terms. Except as otherwise provided in this section or mutually agreed upon by the Parties, the arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. All aspects of the mediation and arbitration, including any final and binding award issued by the arbitrator, shall be strictly confidential. Judgment on the final and binding award issued by the arbitrator may be entered in a court described in section 8.7. This clause shall not preclude the Parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

**8.9. Time Period for Claims.** The Parties acknowledge that the nature of the Services makes it inherently difficult, with the passage of time, to present evidence in an arbitration that fully and fairly establishes the facts underlying any dispute that may arise between us. The Parties agree that notwithstanding any applicable statute of limitation that might otherwise apply to a claim or dispute between the Parties, including one arising out of this Agreement or the Services, any arbitration permitted under the Agreement (except related to the collection of sums due from Client) must be commenced within twelve (12) months after the date of delivery of any Report arising from the Services or if no Reports are delivered in connection with the Services, within twelve (12) months after the date of delivery of the Services. This twelve (12) month period applies and begins to run on the date of each report delivered by Service Provider, even if Service Provider continues to perform Services after such date, and even if neither Party has become aware of the existence of a claim or the basis for a possible claim. In the event a dispute within the last sixty (60) days of the twelve (12) month period, the period of limitation to commence a lawsuit shall be extended by up to sixty (60) days, to allow the Parties to conduct nonbinding mediation pursuant to Section 8.8.

**8.10. Attorneys' Fees.** The Party who substantially prevails in enforcing this Agreement shall be entitled to all of its reasonable attorneys' fees, expert witness fees, investigation costs, and court and appeal costs regardless of if a formal lawsuit is commenced. This provision shall remain in force for costs associated with section 8.8 unless the parties agree to allocate costs subject to a separate agreement.

**8.11. Fees for Client Disputes with Third Parties.** Except for disputes arising between the Parties, in the event Service Provider or any of its Affiliates are called as a witness or requested to provide any information (whether oral, written, or electronic) in any judicial, quasi-judicial, or administrative hearing, investigation, trial, appeal, or proceeding regarding information or communications that Client has provided to Service Provider, any documents and materials prepared by Service Provider in accordance with the terms of this Agreement, or any knowledge the Service Provider has related to Client, Client shall pay any and all expenses, including fees and costs for Service Provider's time, at Service Provider's rates then in effect, as well as any legal or other fees that Service Provider incurs as a result of such appearance or production of documents.

**8.12. Subpoenas and Legal Proceedings.** If Service Provider receives a subpoena related to Client, the Services Service Provider performed for Client, or if Service Provider otherwise must engage in any legal proceeding relating to Client or its acts or omissions, Client agrees to reimburse Service Provider for its costs associated with the same (including reasonable attorneys' fees), along with the value of the time its staff incurs in responding to the subpoena and participating in the legal proceeding calculated at the respective staff members' standard billable rate. Client shall pay all such amounts within ten (10) days of written demand.

**8.13. Reproductions of Materials.** Any publication or other reproduction of any Report prepared by Service Provider as part of the Services shall reference Service Provider's name and logo as original prepared and provided to Client. Client agrees to provide Service Provider with printers' proofs or master of such publication or reproduction of a Report for Service Provider's review and approval before it is printed and before it is distributed.

**8.14. Electronic Signatures; Electronic Disclosures.** The Parties agree that this Agreement and any other documents delivered in connection herewith may be electronically signed, and that any electronic signatures appearing on this Agreement or such other documents shall have the same legal validity and enforceability as handwritten signatures to the fullest extent permitted by applicable law. Client hereby authorizes Service Provider and Third-Party Software Providers to deliver to Client electronically formatted data and information, including financial statements, drafts of financial statements, financially sensitive information, spreadsheets, trial balances, or other financial data from Service Providers files.

**8.15. Counterparts.** This Agreement may be executed and delivered by original signature, facsimile, or other image capturing technology, and in one or more counterparts, each of which will be deemed to be an original copy of this Agreement and all of which, when taken together, will be deemed to constitute one and the same agreement.

## PROFESSIONAL SERVICES TERMS AND CONDITIONS

**8.16. Entire Agreement.** This Agreement constitutes the entire agreement between the Parties in relation to the Services provided hereunder and supersedes all prior written or oral communications and representations only with respect to the Services provided hereunder in this Agreement.

**8.17. Severability.** If any portion of this Agreement is held to be void, invalid, or otherwise unenforceable in whole or in part, for any reason whatsoever, such portion of this Agreement shall be amended to the minimum extent required to make the provision enforceable and the remaining portions of this Agreement shall remain in full force and effect.

**8.18. Equitable Relief.** Each Party acknowledges that its breach of Section 5 (**Confidentiality, Certain Restrictive Covenants, and Intellectual Property**) or Section 8.1 (**Non-solicitation of Employees**) will cause irreparable injury to the other Party for which monetary damages are not an adequate remedy. Accordingly, in addition to any other rights and remedies available to such Party, a Party shall be entitled to seek injunctive relief and other equitable remedies in the event of a breach of the terms of Section 5 or Section 8.1 by the other Party.