

G. **Service Provider Representations and Warranties.**

Service Provider represents, warrants and covenants that:

1. it is a business entity duly organized, validly existing and in good standing under the laws of the state in which it is organized;
2. it is fully equipped and qualified to perform the Services and that it is financially solvent, able to pay its debts as they mature, and possesses sufficient working capital to provide the Services contemplated hereunder;
3. it is duly licensed, authorized or qualified to do business and is in good standing in every jurisdiction in which a license, authorization or qualification is required for the ownership or leasing of its assets or the transaction of business of the character transacted by it;
4. it has all requisite corporate power and authority to execute, deliver and perform its obligations under this Agreement;
5. the execution, delivery and performance of this Agreement has been duly authorized by Service Provider;
6. it has visited and had full opportunity to review and has carefully examined the Facilities and has satisfied itself as to the character, quality, and quantity of the Services to be performed, the conditions that may be encountered at the Facilities or that may otherwise affect the cost or difficulty of performing the Services, the labor, equipment, supplies, and materials to be furnished, supplied, or utilized in connection with performance of the Services, and all other requirements of this Agreement;
7. it has not, directly or indirectly, given and will not give, or permit to be given by its representatives, any commissions, payments, kickbacks, lavish or extensive entertainment, or other inducements of more than minimal value or otherwise in violation of EFM's or Client's policies to any third party, government official, employee, representative, advisor or agent of EFM or Client in connection with this Agreement;
8. it will comply with the Applicable Laws in its provision of the Services;
9. Service Provider Personnel and subcontractors that it will use to provide and perform the Services have and will continue to have, the knowledge, skills, experience, expertise, language and speaking capabilities, qualifications and resources to provide and perform the Services in accordance with this Agreement in a diligent, workmanlike manner with due care and skill;
10. none of the Services or Service Provider owned materials applicable to the Services will infringe upon the proprietary rights of any third party;

11. it will not hold itself out as the exclusive representative of, or supplier to, EFM or Client; and

12. it shall maintain appropriate backup, contingency, and remedial plans necessary to ensure Service Provider's continued performance under this Agreement despite labor disturbances, strikes, lockouts, transportation problems, technology problems, equipment breakdowns, and similar events.

H. **Service Warranty.**

1. **Service Warranty.** Service Provider represents, warrants, and covenants to and with EFM and Client that the materials used in the provision of the Services shall be of first class quality, new in all respects and not used, reworked, refurbished or rebuilt, unless otherwise approved by EFM, and Service Provider shall, where applicable, deliver clear title to equipment, materials and improvements provided to EFM and/or Client under this Agreement and ensure and warrant that it has good title in the same and Service Provider warrants that they are delivered free and clear of any and all encumbrances. Service Provider further warrants that all materials, equipment and labor supplied to EFM is and shall be free from errors, faults and defects in workmanship, construction, structural and functional design, material and operations and in conformance with the requirements of this Agreement and the applicable Work Order for a period of twelve (12) months following the completion of the Services to EFM's satisfaction; provided, that if any longer warranty period is specified for any materials, equipment or workmanship under any plans or specifications, this Agreement, a Work Order or any manufacturer's warranty, the longer warranty period shall govern. Service Provider shall ensure that all materials and equipment that have a manufacturer's warranty are registered with the manufacturer in Client's name.

2. **Service Provider Warranty Obligations.** During the warranty period, Service Provider shall, at no cost to EFM, promptly and satisfactorily replace, correct or repair (as applicable) any Services, material or workmanship found to be defective or otherwise not in conformity with the requirements of this Agreement and promptly remedy any damage resulting therefrom.

3. **No Liens.** Service Provider acknowledges that neither EFM nor the Client intend for the Services to constitute "improvements" or meet any similar definition that lends itself to ownership rights of Service Provider or otherwise enables Service Provider to avail itself of any lien statutes. Service Provider shall not file nor permit any person or entity furnishing labor, equipment, supplies, or materials to Service Provider or any person or entity acting for or under Service Provider to file any liens against EFM, the buildings or the Facilities on which the Services are to be performed, including, but not limited to, laborers', materialmen's, construction and mechanics' liens or similar restrictions. Service Provider shall furnish EFM, upon request, affidavits of account status and lien releases as may be required by EFM.

4. EFM Remedies. If at any time or from time to time EFM should determine that Client or EFM or any of their property, respectively, might become liable for any claim or subject to any lien that is chargeable to or through Service Provider, EFM may retain out of any payment then due Service Provider under the applicable Work Order, any other Work Order(s) between EFM and Service Provider, or any such payment thereafter to become due an amount sufficient to indemnify EFM and Client completely against such liens, judgments and/or claims including, without limitation, all of EFM's and Client's costs associated therewith. EFM may retain the amount withheld until Service Provider delivers to EFM a complete release of the claims and liens that is satisfactory to EFM. Further, EFM may at any time or from time to time require that Service Provider post a bond, at no cost to EFM, to remove any liens, judgments and/or claims. EFM may discharge, settle or remove any liens, judgments and/or claims by bonding, payment or otherwise, all of which, together with all reasonable legal fees and costs, are chargeable to Service Provider. EFM may set off any amounts so paid or incurred to discharge, settle or remove any such liens, judgments and/or claims against any payment then or thereafter due to Service Provider.

I. Compliance with Laws.

1. Compliance with Laws. Service Provider represents warrants and covenants that Service Provider possesses and shall maintain at its own expense all permits, licenses, approvals, registrations, consents and certificates and pay all fees required by law with respect to any Services and/or performance of this Agreement. Service Provider and Service Provider Personnel shall, in connection with performance of Services, comply with all Applicable Laws.

2. Notice of Changes in Laws. Service Provider will monitor and promptly identify and notify EFM of all changes in Applicable Laws that have an impact on the Services or this Agreement.

3. EFM Supplier Code of Conduct. Service Provider shall comply with the Supplier Code of Conduct set forth on Exhibit 5, attached hereto and made a part hereof.

4. U.S. Patriot Act. Service Provider represents and warrants that it is in full compliance with the **USA Patriot Act** of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001), and that neither Service Provider nor any Affiliate, employee, officer or director of Service Provider has been designated as a "specifically designated national and blocked person" on the most current list published by the U.S. Treasury Department Office of Foreign Assets Control at its official website, <http://www.treas.gov/ofac/t11sdn.pdf>, or at any replacement website or other replacement official publication of such list, and Service Provider and its Affiliates are currently in compliance with and will at all times during the term of this Agreement (including any extension thereof) remain in compliance with the regulations of the Office of Foreign Asset

Control of the Department of the Treasury and any related statute, executive order (including the September 24, 2001, Executive Order Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism) or other similar governmental action relating thereto.

5. Equal Employment Opportunity. This Agreement is subject to the requirements of 41 CFR 60-1.4 and 29 CFR part 471, Appendix A to Subpart A, which are incorporated into this Agreement by reference, **as applicable**. In addition, this Agreement is subject to the requirements of 41 CFR 60-300.5(a) and 41 CFR 60-741.5(a), which are incorporated herein by reference, **as applicable**. **The latter two regulations prohibit discrimination against qualified individuals on the basis of protected veteran status and disability and require affirmative action to employ and advance in employment protected veterans and qualified individuals with disabilities.** The regulations that are cited in these provisions also involve equal employment opportunity and affirmative action related to race, ethnicity, gender, persons with disabilities, certain categories of veterans; and, union-employee notice requirements.

6. Sarbanes-Oxley. When applicable to the Service Provider, Service Provider shall comply with Sarbanes-Oxley (Public Law 107-204) ("SOX") and any EFM or Client written policies related to SOX compliance, and any non-compliances or deficiencies related to the provision of Services will be immediately reported to EFM. EFM and/or Client shall maintain the right to review Service Provider's operations, systems, files, processes or other matters related to the Services for SOX compliance that may impact the Services or Service Provider's ability to perform the Services to the extent allowed by U.S. securities laws and regulations.

7. Immigration Reform and Control Act of 1986. Service Provider represents and warrants that it shall fully comply with the Immigration Reform and Control Act of 1986 (IRCA) which legally mandates that U.S. employers verify the employment eligibility status of newly-hired employees. For purposes of this Section, an "undocumented worker" is a person who (i) illegally resides in the United States and is (ii) unwilling or unable to provide documents required by the U. S. government validating that such person is legally eligible to reside and be employed in the United States. Service Provider shall not employ or contract with an undocumented worker to perform Services under this Agreement. In addition, Service Provider shall not enter into a contract with a subcontractor that employs or contracts with an undocumented worker. Service Provider further represents, warrants, and agrees that it has verified that it does not employ any undocumented worker by participation in any applicable verification programs administered by the Social Security Administration or the Department of Homeland Security (e.g., e-Verify). Service Provider shall comply with all requests made in the course of an investigation by EFM, Client or any state or federal governmental authority related to the possible employment of undocumented workers including, without limitation, allowing access to the employment records of its employees to insure compliance with this provision. Notwithstanding anything to the contrary contained herein, in the event that Service Provider fails to comply with any of the requirements of this Section, Client or EFM may terminate this

Agreement for Default and the Service Provider shall indemnify, defend and hold harmless EFM and Client from and against any liabilities, damages (including, without limitation, direct, special and consequential damages), costs, expenses, suits, losses, claims, actions, fines and penalties (including, without limitation, court costs, reasonable legal fees and any other reasonable costs of litigation) that EFM or Client may suffer, sustain or incur arising out of or in connection with Service Provider's violation of this Section.

J. **Service Provider Personnel.**

1. **EFM Acceptance of Service Provider Personnel.** Service Provider shall have in its employ at all times and shall provide a sufficient number of capable and competent Service Provider Personnel having expertise suitable to their assignments and qualified to perform the Services safely, legally and efficiently in accordance with Service Provider's obligations hereunder. Service Provider Personnel must be acceptable to EFM, and EFM reserves the right to require Service Provider to remove immediately any of Service Provider Personnel from performing the Services, with or without cause, in EFM's sole discretion for reasons including, but not limited to, substance abuse at the Facilities as provided in subsection 3 below.

2. **Removal for Substance Abuse; Substance Abuse Policy.** To the extent permitted by Applicable Laws, Service Provider agrees to immediately remove (or cause to be removed) any Service Provider Personnel who is known to be or reasonably suspected of engaging in substance abuse while at a Facility, in a Client or Service Provider vehicle or while performing Services or otherwise in violation of Service Provider's policies regarding substance abuse. In the case of reasonable suspicion, such removal shall be pending completion of the applicable investigation. Substance abuse includes the sale, attempted sale, possession or use of illegal drugs, drug paraphernalia, or, to the extent not permitted on Facilities, alcohol, or the misuse of prescription or non-prescription drugs. Service Provider represents and warrants that it has and will maintain a substance abuse policy and that such policy will be applicable to all Service Provider Personnel performing Services under this Agreement. Service Provider represents and warrants that it shall require its subcontractors providing Services to have and maintain such policy and practices and to adhere to this provision.

3. **Drug Testing/Background Checks.** To the extent applicable to the Services and allowed by law, Service Provider acknowledges, warrants and represents that it will comply with the Drug Testing and Background Investigation for Service Provider Personnel set forth in **Exhibit 5A** to this Agreement.

4. **Service Provider Personnel Not Employees of EFM.** All Service Provider Personnel, as applicable, will be and remain employees of Service Provider or its subcontractors and not of EFM when performing Services. Service Provider and its subcontractors, as applicable, will be solely responsible for: (a) all salaries, benefits and other compensation of the Service Provider Personnel, (b) making all deductions and withholdings from its employees' salaries and other compensation; (c) the supervision and direction of the activities of Service Provider

Personnel; and (d) the payment of all contributions, taxes and assessments. EFM and Client shall not be deemed to be an employer or joint or co-employer with respect to any Service Provider Personnel, including employees of Service Provider or subcontractors.

5. **Conduct of Service Provider Personnel.** Service Provider will ensure that the Service Provider Personnel, while at any Facilities, (a) comply with all facility, federal, state or local safety, health and security rules and regulations, and other instructions of EFM and Client, when performing Services at a Facility, and shall conduct their work at Facilities in such a manner as to avoid endangering the safety, or interfering with the convenience of EFM or Client or its customers, (b) comply with reasonable requests of EFM or Client pertaining to personal and professional conduct, and (c) otherwise conduct themselves in a professional and businesslike manner. In addition, Service Provider shall maintain records of all recordable injuries or illnesses (as defined by any government entity) occurring to Service Provider Personnel while performing Services. Subject to Applicable Laws, Service Provider shall provide copies of such records to EFM or Client upon request.

6. **Service Provider Personnel Safety.** Service Provider shall use commercially reasonable precautions to prevent injury to its employees and others on or about the Facilities and shall comply with all safety regulations required by the applicable health and safety rules, regulations and laws (e.g., the U.S. Occupational Safety and Health Act) or by any other governmental authority, local law or safety regulation having jurisdiction over EFM, Service Provider, the Services or the Facilities. Service Provider is solely responsible for taking reasonable precautions for the safety of Service Provider 's employees, and Service Provider may not rely upon EFM's implied or stated control of the workplace to reduce this responsibility nor assume that EFM controls or has the ability to control the presence or absence of hazardous conditions in the workplace to which Service Provider's employees may be exposed.

K. **Independent Contractor.** Nothing contained in this Agreement or in the relationship of Service Provider and EFM shall be deemed to constitute a partnership, joint venture, or any other relationship between Service Provider and EFM except for the independent contractor relationship described in this Agreement. Service Provider's authority is limited solely to performing the Services set forth herein in accordance with the terms of this Agreement, the corresponding exhibits and Work Orders. Nothing in this Agreement, in any Work Order or any Service Provider subcontract shall create any contractual relationship or liabilities between any employee, agent or subcontractor (or any employee or agent of subcontractor) of Service Provider and EFM or Client. Further, Service Provider does not have any authority to execute any contracts or agreements for or on behalf of EFM or Client and is not granted any right or authority to assume or create any obligation or liability or to make any representation, covenant, agreement or warranty, express or implied, on EFM's or Client's behalf or to bind EFM or Client in any manner.

L. **Taxes.** Service Provider shall pay any and all Taxes upon receipt of payment for same from EFM. EFM and Client shall be allowed to withhold from amounts payable to Service

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Provider hereunder all Taxes and other charges required to be withheld by law. Service Provider shall take such actions and cooperate with EFM and Client to the extent necessary to ensure that EFM will be treated as a purchasing agent for Client and that the purchase and/or provision of materials, equipment and Services under this Agreement qualify for any applicable manufacturing, resale, or other tax exemption, and where an exemption is not available, the Taxes thereon are minimized. Service Provider shall prepare, execute, file as necessary and retain resale, exemption and similar certificates, and reflect dealer, vendor, EFM and Client exemption or similar numbers on its invoices or billings as necessary to exempt or minimize Taxes on goods and Services provided under this Agreement. Service Provider shall be solely responsible for any penalties or interest resulting from Service Provider's failure to file proper tax returns or promptly to remit to the appropriate taxing authorities Taxes or other payments made to Service Provider by EFM under this Agreement and Service Provider agrees to indemnify, defend (promptly and diligently, at Service Provider's sole expense with legal satisfactory to EFM and Client) and hold harmless EFM and Client against any Claims (as hereinafter defined) that any Indemnified Party (as hereinafter defined) may suffer, sustain or incur as a result of Service Provider failing to do so. This Section shall survive the expiration or termination of this Agreement.

M. **Assignment and Subcontracting.**

1. **Assignment.** Neither Service Provider's interest in this Agreement nor in any Work Order, including without limitation any monies due or to become due to it hereunder, or any portion thereof may be assigned or encumbered, nor may its duties, obligations and responsibilities hereunder or under any Work Order be delegated or subcontracted further to any third party, without the prior express written consent of EFM in each instance. Any such assignment, encumbrance, delegation or subcontract made without the express written consent of EFM shall be null and void *ab initio*. EFM may, without the consent of Service Provider, and at EFM's sole discretion, freely assign or novate its interest in this Agreement and/or in any Work Order.

N. **Insurance Requirements.** During the Term and as otherwise required under this Agreement, Service Provider shall provide the minimum amounts and scope of insurance coverage set forth in Exhibit 6 to this Agreement with such Exhibit hereby being incorporated by reference as a material requirement of this Agreement and which shall not be construed in any way as a limitation of Service Provider's liability under this Agreement, including, without limitation, liability for claims denied or rejected by Service Provider's insurance company or the insurance companies of its agents or subcontractors. Service Provider shall not commence any Services until Service Provider has procured all of the required in insurance policies with minimum amounts of coverage as set forth in Exhibit 6 which must comply with the requirements set forth below:

1. **License/Rating.** All insurance policies shall be in customary forms and shall be issued by companies authorized to do business in the states where the Services are performed and rated "A-," FSC Class VIII or better by the most current A. M. Best's Insurance Reports.

2. Notice of Cancellation. EFM shall, be given not less than thirty (30) days' notice prior to the cancellation of any insurance required by this Agreement for other than non-payment of premiums. EFM shall be given at least ten (10) days' notice prior to cancellation of any required insurance for non-payment of premium.

3. Additional Insured Endorsements. All certificates of insurance provided under this Agreement shall include copies of endorsements to Service Provider's commercial general liability, workers compensation and automobile policies that include Client and EFM (including all participating Affiliates) as additional insured(s) on appropriate ISO forms or equivalent form of Blanket Additional Insured Endorsement, covering the additional insureds for liability arising from all operations and completed operations of Service Provider.

4. No Waiver/Deductible. The failure of EFM to demand such certificate of insurance or failure of EFM to identify a deficiency will not be construed as a waiver of Service Provider's obligation to maintain the insurance required under this Agreement. Service Provider shall be responsible for the amount of any deductible contained in any of the above-described insurance policies and certificates of insurance.

5. Service Provider Insurance Primary. Service Provider's insurance shall be deemed primary with respect to coverage extended to the additional insureds, whose insurance shall be excess and non-contributory with that required of Service Provider hereunder

6. Waiver of Subrogation. To the fullest extent permitted by law, all insurance policies shall contain provisions that the insurance companies waive the rights of recovery or subrogation against Client, EFM, their respective Affiliates, and each of their and their Affiliates' respective agents, officers, directors, shareholders, employees, insurers, successors and assigns.

7. Additional EFM Rights. The failure to secure and maintain or add by endorsement the Indemnified Parties shall not act as a defense to the enforcement of the terms of this Agreement. Any failure to provide the agreed endorsements shall entitle EFM to terminate this agreement or to acquire coverage necessary to protect Client and EFM from the failure and charge the cost thereof to the Service Provider. Service Provider shall require or provide the same minimum insurance requirements as listed above from all of its permitted subcontractors unless otherwise agreed by EFM in writing.

8. Performance Bond. At Express Facility Managements discretion, a performance bond, or work guarantee maybe required. The performance Bond will be expected to cover:

- a. Credit for missed service
- b. Transition fees for creating a situation where a replacement vendor must be found

i. Covers Penalties for subpar performance (can be a percentage of service fee)

O. **Indemnification and Settlement.**

1. **Indemnification.** To the fullest extent permitted by law, Service Provider shall defend (with counsel approved by Client and/or EFM), indemnify, pay, save and hold the EFM Indemnified Parties harmless from and against any liabilities, damages, costs, expenses, suits, losses, claims, actions, fines and penalties (including, without limitation, court costs, reasonable legal fees and any other reasonable costs of litigation) (hereinafter collectively, the "**Claims**") that any of the EFM Indemnified Parties may suffer, sustain or incur arising out of or in connection with:

a. Service Provider's work or presence on the Facilities or other work site, including but not limited to any negligent acts, errors or omissions, intentional misconduct or fraud of Service Provider or Service Provider Personnel, whether active or passive, actual or alleged, whether in the provision of the Services, failure to provide any or all of the Services or otherwise;

b. any alleged or actual breach of this Agreement by Service Provider or Service Provider Personnel;

c. assertions under workers' compensation or similar employee benefit acts by Service Provider or its employees or agents, and/or any failure by Service Provider to pay any employment benefits and any taxes required of it of any nature whatsoever;

d. failure to comply with any law by Service Provider or Service Provider Personnel;

e. claims by any Service Provider employee or employees of Service Provider subcontractors, including, without limitation, for bodily injury or wrongful discharge; and/or;

f. any infringement or alleged infringement of any patent, copyright, trade secret or other proprietary right of any third party relating to the Services performed under this Agreement.

The foregoing indemnification shall apply irrespective of whether Claims are asserted by a Party, by its employees, agents or subcontractors, or by unrelated third parties. Nothing contained herein shall relieve Service Provider of any responsibility for Claims regardless of whether Service Provider is required to provide insurance covering such Claims or whether the matter giving rise to the Claims is the responsibility of Service Provider's agents, employees or subcontractors. The provisions of this Section shall survive the expiration of the Term or the termination of this Agreement.

2. Settlement. With respect to Service Provider's duties of indemnity under this Agreement, Service Provider shall have the right to control the defense of any litigation, and to settle or compromise all claims and lawsuits subject to its indemnity. However, Service Provider may not settle or compromise such claim or lawsuit without the written consent of EFM if any settlement or compromise (a) requires EFM or its Client to part with any property right or interest, assume any obligation, or make any payment not indemnified, or (b) subjects EFM to any injunction. Subject to the foregoing, EFM shall have the right, at its option and expense, but not the obligation, to retain advisory counsel to represent its interests in defending any such claim or lawsuit.

P. Confidentiality Obligations

1. Confidentiality Obligations. All Confidential Information owned by EFM or Client is and shall remain the property of such party at all times. By disclosing Confidential Information to Service Provider, EFM or Client, as applicable, does not grant any express or implied licenses to Service Provider in any proprietary rights, including without limitation, patents, copyrights, trademarks, trade secret or trade secret information, of EFM or Client. As of the Effective Date, the Confidentiality terms of this Agreement shall supersede and replace the terms of any Confidentiality or Non-Disclosure Agreement previously executed by the Parties with respect to subject matter that is covered by this Agreement. Service Provider agrees to utilize the Confidential Information received by it only for the purpose of providing the Services and for no other purpose whatsoever including, without limitation, diverting, inducing or attempting to divert or induce Client to discontinue or modify the present or future relationship between EFM and Client or otherwise injuring or interfering in the business relationship between EFM and Client. Service Provider shall use the same care and discretion to avoid disclosure, publication or dissemination of any Confidential Information received from EFM or Client as Service Provider uses with its own confidential information that it does not wish to disclose, publish or disseminate, but in no event less than a reasonable degree of care. Service Provider shall not disclose to any person (other than as necessary to Service Provider Personnel directly involved in Service Provider's provision of the Services) Confidential Information at any time, either during the Term or at any time thereafter, without the express written agreement of EFM. Service Provider shall execute any supplemental agreement required by EFM with respect to Confidential Information. Service Provider shall advise all recipients of Confidential Information as to the provisions of this Section and obtain their written agreement to be bound by its conditions. Upon the termination of this Agreement, a Service Provider shall immediately deliver to EFM upon request (i) any and all materials provided to Service Provider, relating in any way to and/or created in connection with the performance of the Services under the terms of this Agreement; and (ii) any and all originals, copies, reproductions and summaries (including without limitation, any written or electronic form of any such information) of any Confidential Information, or at EFM's option, certify destruction of the same. Service Provider shall incorporate the requirements of this Section in all subcontracts, requiring each approved

subcontractor to comply with the provisions hereof in the same manner as is required of Service Provider. Service Provider shall immediately report to EFM any unauthorized disclosure of Confidential Information.

2. Confidential Information Exclusions. Service Provider shall not be liable for disclosure or use of any Confidential Information if: (i) it was in the public domain at the time it was disclosed or used through no fault of Service Provider; (ii) it becomes known to the Service Provider from a source other than EFM or Client without a breach of this Agreement by Service Provider; (iii) it was independently developed by Service Provider without the benefit of the information received from EFM or Client; or (iv) it was disclosed under legal process or other legal requirement provided Service Provider agrees to cooperate in seeking reasonable protective arrangements requested by EFM or Client, and to promptly notify EFM and Client if Service Provider receives any subpoena or other legal process seeking disclosure of Confidential Information.

3. Restrictions on Use of Name and Marks. Service Provider shall not use or display EFM's or Client's name or logo, and shall not utilize other trademarks or service marks of EFM or Client, without such party's prior written consent. Neither Service Provider nor its agents or subcontractors may issue any press, media or publicity releases or give statements to the media identifying EFM or Client or relating to this Agreement or any Facility without the prior written consent of EFM.

4. Remedies. Service Provider hereby irrevocably agrees that irreparable damage to EFM would occur in the event that it breaches any of the provisions of this Section P (*Confidential Information*). Service Provider acknowledges and agrees that EFM shall be entitled to an injunction or injunctions to prevent breaches of this Section P and to specifically enforce the terms and provisions of this Section P, in addition to any other remedy to which EFM is entitled at law or in equity. In the event that any action shall be brought in equity to enforce the provisions of this Section P (*Confidential Information*), Service Provider shall not allege, and hereby waives the defense, that there is an adequate remedy at law.

5. Survival. Service Provider's confidentiality obligations under this Agreement shall survive the termination or expiration of the Agreement.

Q. Ownership of Materials.

1. "Deliverables" means any materials (including software), or any modifications, enhancements or derivative works thereof (including modifications and enhancements to Service Provider owned materials and, to the extent agreed by third parties and subcontractors, third party owned materials), developed pursuant to this Agreement by or on behalf of (a) Service Provider, (b) subcontractors or (c) any combination of Service Provider and subcontractors, to the extent developed originally and specifically for EFM or Client, as part of the Services. All right, title and interest in or to Deliverables will be owned by EFM and Client,

as applicable, and considered to be works made for hire and owned by EFM and Client. If any such Deliverables may not be considered a work made for hire under Applicable Laws, Service Provider hereby irrevocably assigns, and will assign, to EFM and Client without further consideration, all of Service Provider's right, title and interest in and to such Deliverables. Service Provider acknowledges that EFM and Client and their successors and assigns of EFM and Client will have the right to obtain and hold in their own name any intellectual property rights in and to such Deliverables. Service Provider agrees to execute any documents and take any other actions reasonably requested by EFM or Client to effectuate the purposes of this Section. EFM and Client grant to Service Provider a non-exclusive, non-transferable, worldwide, limited right and license to use, execute, reproduce, display, perform, modify and distribute the Deliverables for the sole purpose of providing the Services during the Term. EFM and Client may, in their sole discretion and upon such terms and at such prices as EFM, Client and Service Provider may agree, grant Service Provider a license to use the Deliverables for other purposes and to sublicense such Deliverables.

2. Service Provider Pre-existing Intellectual Property. To the extent that the Deliverables and the Services are not considered to be a work made for hire and consist of or include items previously developed, patented or copyrighted by Service Provider or a third party ("Service Provider Pre-Existing Intellectual Property"), Service Provider hereby grants to EFM and Client an unrestricted, perpetual, royalty-free, fully paid-up, non-exclusive, world-wide, irrevocable license to use such Service Provider Pre-existing Intellectual Property so that EFM and Client may receive the benefit of the Deliverables or Services provided by Service Provider. Notwithstanding anything contained in this Agreement to the contrary, upon the expiration or termination of this Agreement, if the use of the Deliverables or Services is impaired or they cannot be fully utilized, serviced or repaired by EFM or Client without the use of the Service Provider Pre-existing Intellectual Property, Service Provider will grant to EFM and Client an unrestricted, perpetual, royalty-free, fully paid-up, non-exclusive, world-wide, irrevocable license to use such Service Provider Pre-existing Intellectual Property so that EFM and Client may continue to receive the benefit of the Deliverables and Services. Service Provider Pre-existing Intellectual Property includes, without limitation, any equipment, materials, components, software, programmable devices or any other tangible item, in any form or medium, identifiable to the Deliverables or Services included in the applicable Work Order.

R. Mediation, Governing Law and Jury Trial Waiver.

1. Mediation. Each Party commits that in the event a dispute should arise under this Agreement or relating in any manner hereto, the Parties agree to make a good faith attempt to settle their dispute prior to the commencement of formal litigation (i.e., the filing of a lawsuit or other legal proceeding) by using a third-party mediator. Any mediation shall take place in the State of Arizona, unless otherwise agreed to in writing by the Parties. The costs of such mediation shall be equally divided between the Parties. Each Party shall be represented at such mediation by a senior executive of such Party, with authority to bind the Party. The Parties agree to exchange informally such information as is reasonably necessary and relevant to the issues

being mediated. If such mediation is unsuccessful, then either Party shall have the right to initiate litigation in accordance with Section S.3 below. All mediation proceedings shall be confidential, and no information exchanged in such mediation relating to settlement negotiations or offers shall be discoverable or admissible in any litigation involving the Parties. In the event a Party seeks equitable relief (such as injunctive relief or specific performance), or in the event of an approaching deadline prescribed by an applicable statute of limitation, then there shall be no requirement that such Party utilize the mediation process referred to herein.

2. Continued Performance. Each Party agrees that it will, unless otherwise directed by the other Party, continue performing its obligations under the Agreement while any dispute is being resolved; provided that this provision will not operate or be construed as extending the Term or prohibiting or delaying a Party's exercise of any right it may have to terminate the Term as to all or any part of the Services.

3. Governing Law and Jurisdiction. This Agreement shall be construed and governed in accordance with the laws of the State of New York, without regard to conflict of laws principles. The United Nations Convention on Contracts for the International Sale of Goods (CISG) does not apply to this Agreement. In the event the Parties are unable to mediate their dispute to a satisfactory resolution, the Parties agree that the applicable state and federal courts located in New York shall have exclusive jurisdiction to hear and determine any claims or disputes between the Parties arising out of or related to this Agreement. The Parties expressly submit and consent in advance to such jurisdiction in any action or suit commenced in such court, and each Party hereby waives any objection that it may have based upon lack of personal jurisdiction, improper venue or *forum non conveniens*.

4. Jury Trial Waiver. **IN THE EVENT OF LITIGATION PROCEEDINGS AND TO THE EXTENT PERMITTED BY LAW, EACH OF THE PARTIES HEREBY KNOWINGLY AND WILLINGLY WAIVES AND SURRENDERS SUCH PARTY'S RIGHT TO TRIAL BY JURY AND AGREES THAT SUCH LITIGATION SHALL BE TRIED TO A JUDGE SITTING ALONE AS THE TRIER OF BOTH FACT AND LAW, IN A BENCH TRIAL, WITHOUT A JURY.**

S. Notices. Any and all notices, consents, demands, approvals, directives or other communications required or permitted under this Agreement shall be in writing and be delivered personally, properly mailed via first class certified or registered mail, or sent by nationally recognized, private industry express courier service, to the addresses of the Parties set forth below. Any notice shall be deemed to be properly given: (a) when delivered personally; (b) five (5) business days after having been sent by registered or certified mail, return receipt requested, postage prepaid; or (c) two (2) business days after deposit with a private industry express courier specifying next day delivery, with written confirmation of receipt.

Mail to:

Express Facility Management, LLC
3902 E. University Dr, Suite 6
Phoenix, AZ 85034

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EXPRESS
FACILITY MANAGEMENT

Either Party hereto may change its address set forth above for the receipt of notice by giving written notice to the other Party in the manner set forth herein.

T. **Limitation of Liability.** In no event shall EFM be liable to Service Provider for any lost or prospective profits or any other punitive, consequential, incidental or indirect loss or damage, whether based in contract, strict liability, tort or otherwise, with respect to this Agreement or any Work Order regardless of the foreseeability or the cause thereof.

U. **Third Party Beneficiaries.**

1. **Client is Third Party Beneficiary.** Client and each of Client's Affiliates that owns, leases or occupies a Facility from time to time or otherwise derives Services under this Agreement shall be deemed to be a third-party beneficiary entitled to the benefits and protections afforded to EFM under this Agreement with rights of direct enforcement against Service Provider.

2. **No Third-Party Beneficiaries.** No party other than the Parties to this Agreement and the Client shall have any rights in this Agreement. The rights of this Agreement are exclusively those of the Parties to this Agreement and Client and Client's Affiliates, when applicable, where required by EFM's agreement with the Client. There shall be no third-party beneficiaries of this Agreement except as set forth in the immediately preceding sentence. Service Provider represents that it is not aware of any party claiming such rights and in the event it becomes aware of any such party claiming such rights, the Service Provider agrees to immediately notify EFM and to indemnify EFM, and any other EFM Indemnified Parties, as applicable.

V. **Audit.** Service Provider shall maintain accurate and complete records in accordance with generally accepted accounting principles that enable Service Provider to demonstrate full compliance with this Agreement. Upon prior written notice to Service Provider, EFM and/or Client may audit and verify Service Provider's operating environment, business records, compliance with the terms and conditions of this Agreement and any applicable terms and conditions of the agreement between EFM and Client (which shall be set out in Exhibit 4), and service capabilities (but only to the extent that they relate to the provision of Services delivered under this Agreement) during Service Provider's normal business hours to ensure that Service Provider is maintaining adequate controls and security measures, that Service Provider's billings to EFM are correct, and that any reports required under this Agreement are accurate. Service Provider will provide EFM and the Client with non-confidential information and access to facilities and personnel relating to the Services. If the audit discloses that EFM has paid Service Provider for any charges not properly incurred, Service Provider shall promptly refund to EFM, the amount of overpayment, interest at the prime rate from the date of payment, and EFM's cost of audit.

1. Compliance Audits.

- a. May be performed by a 3rd party auditor
- b. Will be performed without notice
- c. Not limited to SOW, license, or certifications

W. Miscellaneous.

1. Headings. The section headings appearing in this Agreement have been inserted for the purpose of convenience and ready reference. They do not purport, and shall not be deemed, to define, limit or extend the scope or intent of the respective Sections.

2. Entire Agreement/Amendment. This Agreement, when fully executed, together with each Work Order issued by EFM, shall supersede any and all prior and existing agreements between the Parties, either oral or in writing, and contains all the covenants and agreements between the Parties with respect to the subject matter of this Agreement. Any amendment or modification to this Agreement must be made in writing and signed by the Parties hereto. This Agreement shall be construed as if drafted jointly by the Parties and no provision in this Agreement shall be interpreted for or against any Party because that Party or that Party's legal representative drafted the provision.

3. Waiver. No term or provision of this Agreement shall be deemed waived and no breach excused unless such waiver or consent shall be in writing and signed by the Party claimed to have waived or consented. Any consent by any Party to, or waiver of, a breach by the other, whether express or implied, shall not constitute a consent to, or waiver of, or excuse for any other different or subsequent breach.

4. Counterparts. This Agreement may be executed in any number of separate counterparts, each of which, when so executed and delivered, shall be deemed an original, but all of which, collectively and separately, shall constitute one and the same instrument. All signatures need not be on the same counterpart. Furthermore, this Agreement and all documents relating hereto, whether previously or hereafter furnished, may be reproduced by any photographic, photostatic, microfilm, miniature photographic, digital storage or other similar process. The Parties agree that any such reproduction shall be admissible in evidence as the original itself in any judicial or administrative proceeding, whether or not the original is in existence and whether or not such reproduction was made by a Party in the regular course of business, and that any enlargement, facsimile or further reproduction of such reproduction likewise shall be admissible in evidence.

5. Survival. All obligations and duties under any provisions, which by their nature extend beyond the expiration or termination of this Agreement, including but not limited to warranties, indemnifications, intellectual property (including protection of proprietary information) shall survive the expiration or other termination of this Agreement of which these provisions are made a part.

6. Authority. Service Provider warrants and represents that it is authorized to enter into this Agreement, and that the person signing on its behalf is duly authorized to execute this Agreement, and that no other signatures are necessary.

7. Legal Fees. The Parties agree that the prevailing Party shall be entitled to all costs and expenses including, without limitation, court costs and reasonable legal fees, in any action commenced relating to a dispute arising under this Agreement.

8. Severability. If any part, term, or provision of this Agreement or any Work Order is held by final judgment of any court of competent jurisdiction to be illegal, invalid or unenforceable, the validity of the remaining portions or provisions shall not be impaired or affected, and the rights and obligations of the Parties shall be construed and enforced as if this Agreement or such Work Order did not contain the particular part, term or provision held to be illegal, invalid or unenforceable.

9. Interpretation. A reference in this Agreement to one gender shall include reference to every gender; words denoting a singular number include the plural and vice versa; references to persons shall include firms, companies and other organizations; a reference to a statutory provision includes a reference to the same as modified, re-enacted or replaced from time to time and any subordinate legislation made under it; a reference to a legal or regulatory body includes a reference to any successor body or bodies to it; the words "include", "includes", "including" and "in particular" shall be construed as if they were followed by the words "without limitation" and a reference to this Agreement shall include its Exhibits. Except as expressly provided in this Agreement, the rights and remedies provided under this Agreement are in addition to, and not exclusive of, any other rights or remedies, whether under this Agreement or provided by law.

10. Currency. All monetary amounts stated in this Agreement are in United States Dollars and all payments hereunder shall be made in such currency.

X. Order of Precedence. This Agreement, all documents listed therein and subsequently issued amendments are essential parts of this Agreement and all conflicts arising therefrom shall be subject to the following order of precedence:

1. This Service Agreement and Amendments, if any;
2. Exhibits, Addenda or Schedules incorporated as part of the Service Agreement; and

3. Work Orders as defined in this Agreement (except when such Work Orders are specifically constructed to take precedence over this Agreement).

This Agreement and any Work Order issued hereunder shall be subject to these terms and conditions to the exclusion of all other terms and conditions (including without limitation any terms or conditions which the Service Provider purports to apply in any document whatsoever and whenever). Any change or modification to these terms and conditions shall have no effect unless expressly agreed in writing and signed by an authorized signatory of EFM.

Y. **Client's Consent; Effectiveness**. In the event that any agreement between EFM and Client shall require Client's approval of this Agreement, then the effectiveness of this Agreement shall be expressly subject to such approval. EFM shall endeavor to obtain such approval within thirty (30) days after the execution of this Agreement by both EFM and Service Provider. In the event Client does not provide such approval within such time, this Agreement shall be null and void and of no force or effect.

Z. **Vendor Screening**. As part of this agreement, you acknowledge that you will enroll in NetVendor within 30 days of contract award. (Exhibit 8)