

# ***Abtech Terms and Conditions of Purchase for Goods and Services***

Seller, defined as the party receiving a purchase order or signed purchase agreement for the purchase of goods or services by Abtech or any third party acting on behalf of Abtech including but not limited to leasing companies, agents, contractors, partners, affiliates, or subsidiaries authorized to do so in writing (hereafter referred to as "Abtech"), hereby unconditionally agrees to the following Terms and Conditions ("Purchase Agreement") by accepting Abtech's order:

## ***Software***

Seller acknowledges that for any software purchased by Abtech that the completion of the license transfer or entitlement and any and all licensing procedures and/or transfers is between the Seller and any other third party Licensor(s) or Licensor(s) Distribution Channels. Seller agrees that all rights to any Intellectual Property (defined as copyrightable works such as but not limited to software, patches, firmware, fixes, passcodes, processes, tools, utilities, documentation, and diagnostics) sold or licensed to Abtech is transferable to Abtech's customers. As a material consideration for Abtech in entering into this Purchase Agreement with Seller, Seller warrants and represents to Abtech that the goods being sold to Abtech under this Purchase Agreement were obtained by Seller in a legitimate manner and as a bona-fide purchaser in good faith. Seller agrees to indemnify and hold Abtech harmless from any and all claims (including attorneys' fees and costs) with respect to the aforementioned representation it is making to Abtech as to the source of the goods and services and Seller's ability to use Intellectual Property in the preparation of such goods and services being sold to it under this Purchase Agreement.

## ***Hardware***

Seller agrees that all equipment purchased by Abtech by this purchase order, unless otherwise explicitly stated, is in good working condition and meets the manufacturers' specifications. Seller agrees to disclose before purchase, to the best of the seller's knowledge, if equipment has been altered in any way since the date of manufacture. Seller agrees that the equipment is sealed before purchase and that Abtech may only break warranty seals with prior written approval from the Seller. Equipment is tested and inspected by Seller's Quality Control Department, and is warranted against defects for 30 days or manufacturer's warranty, whichever is greater, unless otherwise noted. Equipment includes all required cables and accessories unless otherwise noted. Warranted equipment will be repaired or replaced by Seller at their discretion.

Seller agrees that all rights to any Intellectual Property sold or licensed to Abtech is transferable to Abtech's customers. As a material consideration for Abtech in entering into this Purchase Agreement with Seller, Seller warrants and represents to Abtech that the goods being sold to Abtech under this Purchase Agreement were obtained by Seller in a legitimate manner and as a bona-fide purchaser in good faith. Seller further warrants that the equipment is legally configured and licensed (if applicable), and that Intellectual Property used to configure, update, manufacture, assemble, refurbish, or otherwise make goods and services usable to Abtech or Abtech's customers is likewise legally configured licensed and used. Seller agrees to indemnify and hold Abtech harmless from any and all claims (including attorneys' fees and costs) with respect to the aforementioned representation it is making to Abtech as to the source of the goods and services and Seller's ability to use Intellectual Property in the preparation of such goods and services being sold to it under this Purchase Agreement.

## ***Intellectual Property***

Seller represents and warrants, to the best of its knowledge and belief and solely for the benefit of the other party, that any software or other confidential information provided to the other party will not infringe the Intellectual Property rights of any third party in the United States or any country that is a member of the Berne Convention at the time of the alleged infringement. Seller represents and warrants that they are the legal owner, reseller, or lawful licensee of the Intellectual Property that Seller performs services on or with and that all systems are legally configured and licensed.

Seller will defend, indemnify and hold harmless the other party and its affiliates from any claim arising from that party's material breach of the non-infringement warranty described above. If given prompt notice of such a claim and the ability to control its defense, Seller will pay any damages, costs, expenses (including reasonable legal fees) and settlements entered into with its approval in satisfaction of the claim. Each party will cooperate with the other party in any such proceedings.

Under no circumstances shall Abtech agree to supply, distribute, procure, download or otherwise obtain on behalf of Seller any Intellectual Property owned by any third party, including but not limited to software, patches, firmware, fixes, passcodes, or utilities. Seller agrees, upon request, to provide proof of valid ownership of a software license for any software product that any of Abtech's employees, customers, agents, or representatives are requested to load onto hardware intended for Abtech or its customers or in the performance of service or delivery of hardware to Abtech. Abtech's employees, agents and representatives will not load or reload any unauthorized software. Seller agrees to allow Abtech as a contractor, on Seller's behalf, to use third party Intellectual Property of which Seller is the lawful licensee so that Abtech may perform services on customer owned or licensed equipment or software provided by Seller.

If service requires software or Intellectual Property that is not owned or licensed by Abtech or Seller and such software or Intellectual Property should have been provided by Seller to Abtech as part of the sale of goods or services or should have been reasonably foreseen to be needed to provide goods or services to Abtech's customer, Seller agrees to procure the right to use said software or Intellectual Property and do so at no charge to Abtech.

If any software or Intellectual Property requires Abtech to agree to an End-User License Agreement (EULA), Seller shall notify Abtech and send a copy of the EULA to Abtech's purchasing agent.

#### ***Damage***

Unless explicitly stated otherwise, all costs to repair or replace any equipment due to damage and/or loss claims prior to the transfer of title or ownership to Abtech are the sole responsibility of the Seller, including shipping damage regardless of who arranged and paid for shipping. If damage occurs, Abtech agrees to notify Seller within two business days

#### ***Returns***

Cancellations and returns will not incur a restocking fee unless agreed to in writing in advance.

#### ***Support and Consulting Services***

Seller is to provide a Statement of Work (SoW) and complete price estimate for all service deliverables including but not limited to consulting, managed services, hardware maintenance, or software support based on best effort and industry best practices. SoW is to include: specific steps that will be taken to perform the project; all assumptions and clear delineation of Seller's, Abtech's, and Abtech's customer's responsibilities; estimate of hours required by Seller, Abtech, and Customer to perform each assigned task; software, hardware, or media requirements needed to complete the project; optional dates on which the service can be delivered, and completion criteria. Travel and expenses are the responsibility of the Seller unless agreed to in writing by Abtech. Seller shall invoice Abtech for travel and expenses at actual cost without markup and shall provide receipts for travel and expenses upon request

Seller agrees to use all best efforts to complete a service as expediently as possible, without undue delay. Seller agrees to indemnify and hold Abtech harmless from any and all claims (including attorneys' fees and costs) where such claims are based on Seller's service or actions.

In instances where an SoW and associated pricing needs to be expanded due to a customer change of scope, Seller agrees to modify the SoW and pricing in writing based on best effort and

best industry practices. Seller shall not commence with the delivery of these additional services until authorized by Abtech in writing.

It is the responsibility of the Seller to ask the questions needed to properly scope the project and determine pricing. Abtech is not liable for and will not pay for additional services needed to complete the service delivery to Abtech's or Abtech's customer's satisfaction if failure to include necessary services in the SoW and pricing was due to but not limited to: Seller not properly qualifying the project; Seller's misunderstanding of the project; Seller delivering services beyond the SoW without Abtech's prior written consent and agreement to pay; Seller not identifying software or hardware prerequisites that delay or terminate the project; delays due to Seller; Selling having to bring in a third party to complete services; Seller's underestimating the amount of time to complete the SoW. .

Seller further warrants that that any Intellectual Property used to perform the contracted service is legally configured, licensed, and used. Seller agrees to indemnify and hold Abtech harmless from any and all claims (including attorneys' fees and costs) with respect to the aforementioned representation it is making to Abtech as to Seller's ability to use Intellectual Property in the performance of services purchased.

***Confidential Information:***

Seller acknowledges that Abtech's Confidential Information constitutes valuable trade secrets and Seller agrees that the Seller shall use, commercialize or disclose Abtech's Confidential Information only as permitted by this Agreement. Seller will not allow Abtech's Confidential Information to be disclosed, directly or indirectly, to any third party without Abtech's prior written consent. Seller agrees to exercise due care in protecting Abtech's Confidential Information from unauthorized use and disclosure. The foregoing restrictions do not apply to Confidential Information that is: (i) made publicly available through no fault of the receiving party, (ii) obtained by the receiving party from third parties without restrictions on disclosure, (iii) independently developed by the receiving party without reference to the other's Confidential Information, or (iv) required to be disclosed by order of a court or other governmental entity.

Seller shall protect Abtech's Confidential Information during the Term of this Purchase Agreement and in perpetuity.

In the event of actual or threatened breach of the provisions of this Section (including for these purposes, the Use of the Internal Reference Copy or other Software beyond its permitted use), in addition to any other remedies available at law or in equity, Abtech will be entitled to immediate injunctive and other equitable relief, without necessity of posting bond or showing actual damage or irreparable harm.

If Seller reassigns any employee from an Abtech account to any account of a direct competitor of Abtech, Seller shall notify Abtech and make sure that the employee's access to Abtech Confidential Information (including access to Abtech databases or Abtech's website) is terminated immediately and that the employee has not retained any such information. Failure to do so may subject Seller to liability resulting from such failure.

Seller agrees to use only their own employees for professional services contracted to them by Abtech and not use a subcontractor, including subcontractors for backline support for internal escalation of calls. In the event that a subcontractor must be engaged for service delivery or call escalation then Seller must notify Abtech in advance, disclose the contact information of the subcontractor, and receive written agreement by Abtech to utilize this subcontractor on an Abtech account. It is the Seller's responsibility to monitor and insure that their own subcontractors adhere to the full terms of this Purchase Agreement. Without limiting other provisions of this Purchase Agreement, Seller agrees indemnify Abtech and to assume the liability for the actions of their subcontractors that lead to legal action by another third party including but not limited do Abtech Customers and intellectual property owners.

It is stipulated that the following information given to Seller by Abtech or Abtech Customer will always be considered Confidential Information whether identified as such or not: login, access, and security information to Customer systems; Customer-owned or licensed data that Seller may have access to; Customer strategy, policies, or practices that Seller can only know by virtue of access to the Customer; contract pricing; Customer names and contact information; service call, delivery, and remediation information; Abtech strategy, policies, and personnel information; and Customer satisfaction metrics.

### **Hiring**

Seller agrees not to solicit, offer and/or provide employment in any capacity whatsoever, including, but not limited to, as a consultant, independent contractor, employee, agent, partner, officer, shareholder or director, directly or indirectly to any of Abtech's employees during the term of this Agreement and for a period of two (2) years following its termination.

In the event of a violation of any of the provisions of this section by Seller, the parties agree that it would be impractical or extremely difficult to ascertain the actual damages suffered by Abtech. The parties having made diligent but unsuccessful attempts to ascertain the actual damages client would suffer in the event Seller violated any of the provisions of this section agree that a reasonable estimate of such actual damages shall be computed as follows:

A. Seller shall pay to Abtech a sum equal to one and one-half (1 1/2) of the annual salary or compensation that would have been paid to any person solicited or offered employment in violation of this section.

B. Seller shall pay to client a sum equal to three (3) times of the annual salary or compensation that is paid to any person solicited or offered employment in violation of this section where such person accepts said employment.

### **Non-Compete**

During the term of this Agreement and in perpetuity, Seller shall not, directly or indirectly, solicit any of Abtech's customers that Abtech has disclosed to Seller to provide the same or similar goods or services that Seller is performing on behalf of Abtech. In the event any of the provisions of this Section are determined to be invalid by reason of their scope or duration, this Section shall be deemed modified to the extent required to cure the invalidity. In the event of a breach, or a threatened breach, of this Section, Abtech shall be entitled to obtain an injunction restraining the commitments or continuance of the breach, as well as any other legal or equitable remedies permitted by law including, but not limited to, loss of profits, loss of use, reasonable attorney's fees, loss of data, costs of cover, and actual and punitive damages.

Seller agrees to actively find any opportunity to sell any product or service in while engaged Abtech's accounts and to report those opportunities to Abtech for further action within 24 hours. Opportunities in Abtech's accounts are confidential and are not to be disclosed in any form to third parties.

IN THE EVENT OF A VIOLATION OF ANY OF THE PROVISIONS OF THIS SECTION BY SELLER, THE PARTIES AGREE THAT IT WOULD BE IMPRACTICAL OR EXTREMELY DIFFICULT TO ASCERTAIN THE DAMAGES SUFFERED ABTECH. THE PARTIES HAVING MADE DILIGENT BUT UNSUCCESSFUL ATTEMPTS TO ASCERTAIN THE ACTUAL DAMAGES ABTECH WOULD SUFFER IN THE EVENT SELLER VIOLATED ANY OF THE PROVISIONS OF THIS SECTION AGREE THAT A REASONABLE ESTIMATE OF SUCH ACTUAL DAMAGES WOULD BE COMPUTED AS FOLLOWS:

A. SELLER SHALL PAY TO ABTECH A SUM EQUAL TO ONE AND ONE-HALF (1 1/2) THE REVENUE AMOUNT OF HARDWARE OR ONE-TIME SERVICE SOLD OR THE ANNUAL VALUE OF ANY MAINTENANCE CONTRACT THAT ABTECH HAS WITH A PARTICULAR

CUSTOMER IF SUCH CUSTOMER IS SOLICITED BY SELLER IN VIOLATION OF THIS SECTION.

- B. CONTRACTOR SHALL PAY TO ABTECH A SUM EQUAL TO TWICE THE REVENUE AMOUNT OF HARDWARE OR ONE-TIME SERVICE SOLD OR THE ANNUAL VALUE OF ANY MAINTENANCE CONTRACT THAT ABTECH HAS WITH A PARTICULAR CUSTOMER IF SUCH CUSTOMER IS SOLICITED BY SELLER IN VIOLATION OF THIS SECTION.

***Governing Law and Dispute Resolution***

Governing Law. This Agreement shall be governed by the laws of the State of California, without giving effect to principles of conflicts of law thereof. The U.N. Convention on Contracts for the International Sale of Goods shall not apply to this Agreement.

Jurisdiction and Arbitration. Any dispute, controversy or claim arising out of or under this Agreement shall be submitted by the parties to conclusive and binding arbitration in San Diego, California in accordance with the rules of Commercial Arbitration of the American Arbitration Association. The decision of such arbitration shall be final for all purposes and may be enforced in an appropriate court in accordance with California law. Such claims shall be submitted to final and binding arbitration within one (1) year after the claim arose, or be barred. For these purposes, a claim for breach of confidentiality, infringement of a party's Intellectual Property Rights or violation of any Software license restrictions imposed by this Agreement will be deemed to arise on the date that an executive officer of the aggrieved party discovers or should have reasonably discovered the events giving rise to the claim. Arbitration will be conducted according to JAMS/Endispute's Streamlined Arbitration Rules and Procedures in effect at the time of filing for arbitration. The parties will cooperate with JAMS/Endispute and each other in selecting a single arbitrator who shall be a former judge with substantial experience in resolving business disputes with particular experience in resolving disputes involving computer services. The arbitrator shall not be empowered to award damages in excess of, or inconsistent with, the liability limitations contained in this Agreement. Both parties will share the costs and fees of the arbitrators equally. Each party will bear its own costs and expenses of the proceeding. Each party agrees to arbitrate any issue concerning the types of claims that are subject to arbitration. This Agreement involves interstate commerce subject to jurisdiction under the Arbitration Act. This Section may be enforced by any court of competent jurisdiction. This Section shall not preclude either party from seeking equitable and/or legal relief in any court of competent jurisdiction to enforce each party's Intellectual Property Rights (including confidentiality restrictions) or any Software license "scope of use" provisions of this Agreement.

***Miscellaneous***

Force Majeure. Neither party will incur any liability to the other because of any loss or damage resulting from any delay or failure to perform under the Agreement to the extent the delay or failure is caused by events beyond that party's control and without that party's negligence. Such events include, without limitation, acts of God, strikes, lockouts, riots, acts of war, terrorism or other civil disturbance, earthquakes, fires and explosions. However, the inability to meet financial obligations is expressly excluded from this provision.

Severability. If any term, condition, or provision in this Agreement is determined by a court or other tribunal of competent jurisdiction to be invalid, unlawful or unenforceable, it is both party's intentions that the offending provision be conformed to the minimum requirements of the law while reasonably preserving both party's original intent. In case any provision of this Agreement shall be invalid, illegal or unenforceable, such provision shall be severed from this Agreement. The validity, legality and enforceability of the remaining provisions of this Agreement shall not in any way be affected or impaired thereby



Independent Parties. We are independent Sellers to one another. Nothing in this Agreement will be construed to make either of us the agent, employee, partner, franchisee, joint venturer or legal agent or representative of the other party. Neither of us will represent ourselves as having any authority to bind the other party or act on its behalf. Neither party will make any contract, agreement, warranty, or representation on behalf of the other party, or incur any debt or other obligation in the name of the other party, or act in any manner which has the effect of making that party the apparent agent of the other. Neither party will assume liability for, or be deemed liable as a result of, any such action by the other party. Neither party will be liable by reason of any act or omission of the other party in the conduct of its business or for any resulting claim or judgment.

Entire Agreement. This Purchase Agreement and any Abtech Program Exhibit signed by each party's authorized representative contain the entire and exclusive agreement and supersede all previous communications, representations, understandings and agreements, either oral or written, between both parties with respect to that subject matter. This Purchase Agreement supersedes, and cannot be varied, contradicted or supplemented by evidence or any prior or contemporaneous discussions, correspondence, or oral or written agreement of any kind except for an Abtech Subcontractor Master Agreement of Subcontractor Program Exhibits executed pursuant and consistent with this Purchase Agreement. Any extraneous communications, including web site materials with the exception of the posted Abtech Terms and Conditions of Purchase, are specifically excluded from this Purchase Agreement.

Standard Terms & Amendment. Seller's acceptance of this Purchase Agreement is indicated by accepting an order from Abtech in which this Purchase Agreement has been incorporated in full by reference. Customer may issue transactional documents including but not limited to quotations, sales agreements, or invoices however Abtech limits acceptance to this Purchase Agreement, and objects to any other additional or different terms in Customer's transactional documents or any other forms of acceptance. Upon such acceptance both Abtech and Customer are bound by all terms and conditions of this Purchase Agreement contained herein.

Any amendment or modification of any provision of this Purchase Agreement must be in writing and signed by each party's authorized representative. Any attempt at modification that does not adhere strictly to that standard is null and void. Notwithstanding the foregoing, Abtech reserves the right to amend or replace its policies, or other terms or conditions of this Agreement prospectively upon reasonable advance notice. If Seller disagrees with any such amendment proposed by Abtech, Seller may, as its exclusive remedy, terminate this Agreement upon written notice.

Headings. The headings in this Purchase Agreement are inserted for convenience only and shall not be used to define, limit or describe the scope of this Purchase Agreement or any of the obligations herein.

Waiver. Waiver of any provision of this Purchase Agreement or of a party's rights or remedies under this Purchase Agreement must be in writing to be effective. Waiver of any provision hereof does not implicitly waive any other provision hereof. Failure, neglect or delay by a party to enforce any provision of this Purchase Agreement or its rights or remedies at any time, will not be construed or be deemed to be a waiver of such party's rights under this Purchase Agreement and will not in any way affect the validity of the whole or any part of this Purchase Agreement. Waiver of any provision shall not preclude a party from enforcing the provision on future occasions.

Records. Seller agrees to maintain complete and accurate records and make any reports required under any Abtech Program Exhibit. Abtech may examine these books and records upon three (3) days' advance written notice during normal working hours and at its own expense; provided, however, that if such audit reveals an underpayment to Abtech of more than five (5) percent, Seller will reimburse Abtech for the reasonable costs of such audit.

Notices. All notices under this Purchase Agreement must be in writing and shall be effective if (a) delivered in person, (b) sent by registered mail return receipt requested, (c) sent by overnight air courier, or (d) sent by certified mail, postage prepaid to the following address:

If to Abtech:

Abtech Support  
Attention: Dana Collins  
2042 Corte Del Nogal, # D  
Carlsbad, CA 92011-1438

Either Party may change its address by giving written notice to the other Party in the manner prescribed in this provision.

Public Announcements. Both parties will mutually agree on reasonable public announcements regarding this relationship.

Insurance. Seller shall, at its sole cost and expense, procure and maintain commercial general liability insurance in amounts not less than \$1,000,000 per incident and \$1,000,000 annual aggregate, and upon receipt of a purchase order from Abtech, Seller shall have Abtech and Abtech's Customer named as an additional insured. Such commercial general liability insurance shall provide (i) product liability coverage; (ii) broad form contractual liability coverage for Seller indemnification under this Agreement; and (iii) coverage for litigation costs. The minimum amounts of insurance coverage required shall not be construed to create a limit of Seller's liability with respect to its indemnification under this Agreement. Seller shall provide Abtech with written evidence of such insurance upon Abtech's request. Seller shall provide Abtech with written notice of at least fifteen (15) days prior to the cancellation, non-renewal or material change in such insurance. Seller shall maintain such commercial general liability insurance beyond the expiration or termination of this Agreement during the one (1) year period immediately after such period.

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