COMMERCIAL CONTRACT AGREEMENTS

Economical Litigation Agreements for Commercial Contracts as a Means of Reducing Civil Litigation Costs

"The Model Civil Litigation Prenup"

2010 Edition

CPR
International Institute
for Conflict Prevention
& Resolution

STANDARD CONTRACTUAL PROVISION

The following model clause may be inserted into a commercial contract to incorporate by reference the terms of the International Institute for Conflict Prevention & Resolution Economical Litigation Agreement provisions. Because waiver of trial by jury has been held by several jurisdictions to be required to be "knowing, intelligent and voluntary" to be valid, the model clause makes explicit that the civil litigation shall be jury-waived. Some jurisdictions, such as California, explicitly prohibit advance waiver of trial by jury, so the model language defers to such explicit prohibitions. By incorporating a forum selection clause and choice of law clause in their contract, the parties can control whether any litigation occurs in jurisdictions that prohibit advance jury waiver.

XX. **Economical Litigation Agreement**: Any Dispute arising out of or relating to this contract, including the breach, termination or validity thereof, whether based on action in contract or tort, shall be finally resolved by civil litigation in accordance with the International Institute for Conflict Prevention & Resolution Economical Litigation Agreement (2010 edition), by a judge sitting without a jury. In jurisdictions where advance waiver of jury is prohibited as a matter of law, or where all parties to this agreement subsequently agree in writing, such Dispute shall be decided by a jury.

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION
ECONOMICAL LITIGATION AGREEMENT
GENERAL PROVISIONS

Section 1. Purpose

1.1. Prompt and Affordable Justice. The purpose of the parties' Economical Litigation Agreement ("ELA") shall be to provide a means for the parties to secure prompt and affordable resolution of any Dispute arising out of or relating to their contract ("Dispute"). The parties have agreed to this ELA as an alternative to binding arbitration in which significant rights pursuant to civil litigation would have been waived. The ELA shall not have any effect on the court's inherent ability to manage trial or to render judgment in accordance with applicable law.

1.2. Reservation of Arbitration. In the event a judge enters orders contrary to the terms of the ELA between the parties, both parties may by written agreement choose either to waive such provision of the ELA or to submit their Dispute instead to binding arbitration in accordance with the International Institute for Conflict Prevention & Resolution ("CPR") Rules for Non-Administered Arbitration for determination by a sole arbitrator. In the event the parties fail to agree either to waive the affected provisions of the ELA or to submit their Dispute to binding arbitration, any party may seek a summary hearing and ruling from the ELA Arbitrator appointed pursuant to Section 6 that the judge's order materially violates the terms of the ELA. If the ELA Arbitrator so rules, the parties shall submit the merits of their Dispute to binding arbitration before the ELA Arbitrator forthwith. By filing or responding to an action in court, the parties do not waive their right to have the Dispute decided by binding arbitration in such event. Any such arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*., and judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof.

Section 2. Waiver of Right to Trial by Jury

2.1. Jury-Waived Trial. The parties agree that any trial of their Dispute shall be heard by a judge sitting without a jury and that their constitutional right to trial by jury is hereby waived.

2.2. Knowing, Intelligent and Voluntary Waiver. The parties knowingly, intelligently and voluntarily waive their right to trial by jury, after having opportunity to confer with counsel regarding such waiver. The parties acknowledge that they understand their right to trial by jury includes submitting their Dispute to a jury of their peers, randomly chosen from the community, in which they would have the opportunity to challenge any jurors whom they believe to be biased or for other good cause and that judgments only could be rendered upon a jury verdict determined by five/sixths of the jury or such other portion of agreement by the jurors as required by the applicable jurisdiction.

2.3. Exception. Where advance waiver of jury is prohibited as a matter of law, or where all parties agree in writing, the Dispute shall be decided by a jury.

Section 3. Pre-Litigation Mandatory Dispute Resolution

3.1. Exhaustion Required. Except as provided in 3.2, below, the parties agree that no party may file a civil complaint or petition against any party without first exhausting the pre-litigation Dispute resolution procedures contained in this section. The parties by written agreement may extend the deadlines described in this section and may agree to additional pre-litigation Dispute resolution activities.

3.2. Exception: Preservation of Statutes of Limitation Where an applicable statute of limitation may expire during the period required for mandatory pre-litigation Dispute resolution, where a party fails or refuses to timely agree to and execute a tolling agreement of the applicable statute of limitation to allow pre-litigation Dispute resolution to occur, a party may file a civil complaint or petition against such party but shall not serve such complaint or petition until the pre-litigation procedures described in this section have been exhausted, unless otherwise required by law to prevent expiration of such statutes.

3.3. Escalating Negotiation. The parties shall attempt in good faith to resolve any Dispute arising out of or relating to their contract promptly by negotiation between executives who have authority to settle the controversy, who are at a higher level of management than the persons with direct responsibility for administration of the contract and who have not been previously involved in the Dispute. Any party may give another party written notice of any Dispute not resolved in the normal course of business by letter or email captioned "**Demand for Negotiation of Business Dispute**." Within 15 days after delivery of the notice, for which acknowledgment of receipt or receipted delivery has been made ("delivery"), the receiving party shall submit to the other a written response by letter or email. The notice and response shall include (i) a statement of each party's position and a summary of arguments supporting that position, and (ii) the name and title of the executive who will represent that party and of any other person who will accompany the executive at any meeting or conference call. Within 30 days after delivery of the disputing party's notice, the designated executives of both parties shall meet or confer telephonically or by video conference or in person at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the Dispute. All reasonable requests for information made by one party to the other shall be honored. All negotiations pursuant to this section are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence. The parties may be assisted by legal counsel during negotiations, but in no event shall outside legal counsel represent any party in such negotiations. All communication between parties in the negotiation shall occur between executives and not by their outside counsel.

3.4. Mandatory Mediation. If the Dispute has not been resolved by negotiation within 45 days after delivery of the disputing party's notice, or if the parties failed to meet within 30 days as required by Section 3.3, the parties shall endeavor to settle the Dispute by mediation under the then current CPR rules with respect to the mediation of commercial Disputes, or such

other similar procedures as agreed to by the parties. Any mediation between the parties shall conclude no later than 90 days after delivery of the notice of Dispute negotiation.

Section 4. Waiver of Service of Process

4.1. Service by Overnight Delivery Service. Each party defendant agrees to waive service of process. In lieu of formal service of process, the parties agree that any complaint or petition shall be served by overnight delivery service to the business address of the chief executive officer for each party defendant and, if applicable, with a copy by overnight delivery service to the general counsel or senior legal officer of such party defendant.

4.2. Proof of Service. The parties agree that the tracking order showing overnight delivery shall be *prima facie* proof of service and may be filed as an exhibit with an affidavit of service by counsel for each party plaintiff with the court.

Section 5. Time for Responsive Pleading

5.1. Answer Extension as of Right. The parties agree that upon written notice by a defendant to the plaintiff(s) by letter or email to each plaintiff's counsel, the time within which the defendant shall answer, move or otherwise respond to the complaint shall be extended an additional 15 days beyond the date such answer or response otherwise would be due under the applicable rules of civil procedure to the same extent as filing a stipulation and without need for a court motion or order. In the event the extended deadline falls on a weekend or legal holiday, the answer or response shall be due on the next business day following such weekend or legal holiday.

5.2. Counterclaim Reply Extension as of Right. In the event a party defendant files a counterclaim, the parties agree that upon written notice by a counterclaim defendant to the counterclaim plaintiff(s) by letter or email to counterclaim plaintiff's counsel, the deadline for the counterclaim defendant to file an answer, move or otherwise respond shall be extended an additional 15 days beyond the date such answer or response otherwise would be due under the applicable rules of civil procedure to the same extent as filing a stipulation and without need for a court motion or order. In the event the extended deadline falls on a weekend or legal holiday, the answer or response shall be due on the next business day following such weekend or legal holiday.

Section 6. Appointment of ELA Arbitrator

6.1. Agreed Designation by Parties. Within seven business days after the filing of the answer, motion or response, the parties' counsel shall confer for purposes of selecting an ELA Arbitrator who shall preside over all discovery process in the litigation.

6.2. Designation by CPR. Unless counsel for all parties agree on a particular ELA Arbitrator within seven business days after the filing of the answer, motion or other response, counsel for the plaintiff party shall notify CPR in writing, with a copy to counsel for each defendant party, of the need for an ELA Arbitrator in connection with the litigation. Such notice

shall include the names, addresses, telephone and fax numbers, and email addresses of all counsel as well as the names and addresses of all parties to the Dispute. Within seven business days from its receipt of such notice, CPR shall transmit to counsel for all parties a list of no fewer than five attorneys whom CPR has determined to be trained in ELA case management. Such list shall include a brief statement of each candidate's qualifications and the candidate's fees for serving as an ELA Arbitrator. Within seven business days after receipt of such list, each party shall provide to CPR without notice to the opposing party a ranking of the candidates in order of preference and shall note any objection it may have to any candidate. Any party failing without good cause to return the candidate list so marked within seven business days after delivery shall be deemed to have assented to all candidates listed. CPR shall designate as ELA Arbitrator the candidate willing to serve for whom the parties collectively have indicated the highest preference. If a tie should result between two candidates, CPR may designate either candidate. If this procedure for any reason should fail to result in designation of the ELA Arbitrator or if a party fails to participate in this procedure, CPR shall appoint a person whom it deems qualified to fill the position of ELA Arbitrator.

6.3. Duties of ELA Arbitrator. The parties agree that the ELA Arbitrator so designated shall have the power to administer and enforce the pre-trial discovery procedure agreed to by the parties pursuant to the ELA. The ELA Arbitrator shall be responsible for ensuring the prompt and affordable resolution of the parties' Dispute by civil litigation to the point of settlement or disposition by motion or trial. All decisions by the ELA Arbitrator shall be preceded by a summary hearing at which counsel for all parties shall have an opportunity to be heard and, if necessary for decision by the ELA Arbitrator, to present and question evidence. The ELA Arbitrator shall have the power to award monetary damages and sanctions in accordance with the ELA which damages and sanctions shall have the force of a binding arbitration award pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* Actions to confirm any award(s) rendered by the ELA Arbitrator may be entered in any court having appropriate venue and jurisdiction thereof at any time before settlement or within 30 days after the entry of judgment of the underlying Dispute.

6.4. Costs of ELA Arbitrator. The parties agree to bear equally the cost of the ELA Arbitrator's services on an hourly rate, charged by the ELA Arbitrator and CPR, which shall be invoiced monthly by CPR.

6.5. Appearances Before ELA Arbitrator. All communications between the ELA Arbitrator and counsel for the parties may be by email, conference call, video conference or in person, provided that no counsel shall be required to travel further than five miles to attend a meeting in person. No party or counsel may engage in ex parte communications with the ELA Arbitrator.

6.6. Discovery Motions and Compliance. The parties agree that all motions regarding discovery and all issues concerning compliance with this ELA shall be submitted to and decided by the ELA Arbitrator and not by the court, except motions to compel discovery from non-party witness(es) in accordance with Section 13.1.1.

6.6.1. Protective Orders. Any party may seek to limit the scope of discovery that seeks privileged information or trade secrets by motion to the ELA Arbitrator, who shall weigh the relevance, materiality and relative harm to each party to decide the motion.

6.6.2. Obligation to Confer. Before filing any discovery-related motion with the ELA Arbitrator, the moving party shall confer with the opposing party to attempt a negotiated resolution.

Section 7. Motion Practice

7.1. Page Limits. Unless the court sua sponte orders otherwise or local rules of procedure require a lesser number of pages, the parties agree that no motion filed with the court or ELA Arbitrator shall exceed three pages in length, excluding caption and certificates of service, and no memorandum in support of any motion shall exceed ten pages in length, excluding caption, affidavits filed in support of such motions and certificates of service.

7.2. Affidavit Summaries. Unless otherwise ordered by the court, the parties agree that any affidavit filed in court or with the ELA Arbitrator shall be accompanied by an executive summary paragraph no longer than one page prepared by counsel for ease of reference before any statement by the affiant.

7.3. Definition of "Page." For purposes of this section, a "page" shall be 8 ½ by 11 inch paper, 12 point font, with margins no less than one inch on the top, left and bottom margins and no less that ½ inch on the right margin, unless the civil rules or local rules of the court in which the litigation is being conducted provide otherwise, in which case such rule shall prevail.

7.4. Waiver of Oral Argument Before the Court. Except for motions to dismiss, judgment on the pleadings, or summary judgment, the parties agree that all pretrial motions before the court shall be submitted on the papers without oral argument, and no party shall request oral argument, except as the court may otherwise require.

Section 8. Judicial Appearances

8.1. Personal Appearances Waived. Unless the court otherwise requires, the parties agree that they jointly will request that all appearances by counsel for pre-trial conference, including the Rule 16 conference pursuant to the Federal Rules of Civil Procedure or conference pursuant to a comparable state rule of procedure, shall be by telephonic conference call or, if the court permits, video conference with the judge and counsel. No counsel shall appear in person before the judge if any other counsel is not so present, unless such absent counsel has consented in writing in advance of the hearing.

8.2. Submission of ELA to Court. At any conference with the court pursuant to Federal Rules of Civil Procedure Rule 16 or a comparable state rule of procedure, the parties agree that they shall jointly submit the ELA to the judge as their jointly stipulated discovery management procedure.

Section 9. Discovery Sequencing

9.1. Threshold Motions. In the event a defendant party files a motion to dismiss or for judgment on the pleadings, the parties agree that all discovery shall be stayed with the exception of discovery requests that directly concern the basis of that motion until the date the court issues its decision on that motion.

9.2. Summary Judgment Motions. In the event that any party files a motion for summary judgment, all discovery shall be stayed in the case from the date the opposition to the summary judgment motion is filed until the date the court issues its decision regarding summary judgment. For the purposes of this section, opposition solely grounded on Rule 56(f) of the Federal Rules of Civil Procedure or a comparable state rule of procedure shall not be considered to be an opposition for purposes of staying discovery. This section shall not apply to motions for partial summary judgment.

9.3. Preservation of Inherent Judicial Authority. Nothing in this section shall prevent the court from ordering or the parties from requesting that the proceedings be bifurcated to address or try distinct issues in sequence.

Section 10. Discovery Procedure

10.1. Mandatory Disclosure. The parties agree to engage in voluntary disclosure of relevant facts which shall be completed by any party before that party may initiate discovery of any kind. For purposes of disclosure, each party shall produce at its own expense or make available for inspection and copying at the reviewing party's expense all non-electronic documents that support any claim or defense asserted by the party in the possession, custody or control of that document. Each party also shall provide a list of all persons with relevant personal knowledge of any claim or defense; for any such person not able to be contacted through party counsel, the list shall include current or last known contact information. The parties also shall disclose no later than 60 days before any evidentiary hearing or trial all documents in a party's possession, custody or control which such party will offer as evidence or use for cross-examination.

10.2. Scope of Discovery. The parties agree that the scope of permissible discovery shall be information and documents that are both relevant and material to the underlying Dispute between the parties.

10.3. Non-Electronic Discovery Limits and Time for Response. The parties further agree to the following limits on non-electronic discovery based on the lesser of (a) the stated monetary consideration of the contract or (b) the amount claimed in the complaint or counterclaim (see Table 1 for summary chart). Where the value of the Dispute cannot be determined from the face of the contract, claim or counterclaim, upon request of any party, the ELA Arbitrator shall decide the alleged value of the Dispute solely for purposes of determining applicable discovery limits. All discovery interrogatories, document requests, requests for admissions and omnibus conditional discovery requests, shall be responded to within 30 days after the date of service, with three additional days for service by mail, or such additional time as

the parties may agree. If the day a response is required is a weekend or holiday, the response shall be due on the next following business day.

10.3.1. Interrogatories. Interrogatories propounded by any party shall not contain any instructions and shall not include any definitions other than shorthand expression of relevant parties, places or events. No interrogatory shall contain multiple parts or subparts or consist of more than one sentence. All parties are entitled to one interrogatory seeking the name and contact information of all factual witnesses and one interrogatory seeking expert witness(es) information allowed by Rule 26(a)(2) of the Federal Rules of Civil Procedure or a comparable state rule of procedure, if applicable. The parties agree that each party shall be limited to the additional number of interrogatories specified below:

10.3.1.1. Disputes up to $400,000: 5;

10.3.1.2. Disputes up to $1,000,000: 10;

10.3.1.3. Disputes up to $10,000,000: 15;

10.3.1.4. Disputes $10,000,000 or more: 20, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

10.3.2. Requests for Production of Documents: Requests for Production of Documents shall not contain any instructions and shall not include any definitions other than shorthand expression of relevant parties, places or events. No document request shall contain multiple parts or subparts or consist of more than one sentence. Document requests shall be deemed to exclude documents that exist in electronic form only, including emails, on the date the document request is made; electronic discovery shall be conducted exclusively in accordance with Section 12. Document requests may seek categories of documents relevant and material to the case. The parties agree that each party shall be limited to the number of requests specified below:

10.3.2.1. Disputes up to $400,000: 7;

10.3.2.2. Disputes up to $1,000,000: 14;

10.3.2.3. Disputes up to $10,000,000: 21;

10.3.2.4. Disputes $10,000,000 or more: 28, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

10.3.3. Requests for Admission: Requests for Admission shall not contain any instructions and shall not include any definitions other than shorthand expression of relevant parties, places or events. No request shall contain multiple parts or subparts or consist of more than one sentence. The parties agree that each party shall be limited to the number of requests specified below:

10.3.3.1. Disputes up to $400,000: 6;

10.3.3.2. Disputes up to $1,000,000: 12;

10.3.3.3. Disputes up to $10,000,000: 18;

10.3.3.4. Disputes $10,000,000 or more: 24, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

10.4. Omnibus Conditional Discovery Requests. The parties may serve omnibus discovery requests on a conditional basis, consisting of a single document that includes interrogatories, document requests and requests for admission, in which any interrogatory or document request shall be deemed to be withdrawn if a request for admission to which such interrogatory or document request corresponds is admitted. For purposes of the discovery limits, any interrogatory or document request that is withdrawn because a corresponding request for admission has been admitted shall not be counted toward the limit of discovery for such party.

Section 11. Deposition Practice and Witness Interviews

11.1. Depositions Generally. The parties agree that depositions may be conducted by audio visual means by any party upon written notice to all other parties at least one week before the scheduled deposition. Depositions shall not exceed four hours of examination by any party or counsel, excluding recesses agreed to by all counsel or suspension required for resolution of disputes by the ELA Arbitrator. The court reporter shall be responsible for determining the amount of time remaining for each party to conduct an examination and shall be requested to advise such party 30 minutes before the four-hour limit is reached. Counsel for any party may appear at any deposition by conference call or video conference and the party taking such deposition shall make accommodation for such calls or video appearances to occur. The parties agree that deponents shall have seven business days after the court reporter mails the transcript of their testimony to their counsel to review and submit any errata sheet signed by the deponent regarding such deposition testimony.

11.2. Number of Depositions Allowed. The parties agree that the number of depositions shall be limited by the amount in controversy as defined in Section 10.3, and that each party shall be permitted to initiate no more than the following number of depositions. For purposes of these limits, a deposition pursuant to Rule 30 (b)(6) of the Federal Rules of Civil Procedure or comparable state rule of procedure shall be deemed to be one deposition regardless of how many witnesses are tendered by the party being deposed.

11.2.1. Disputes up to $400,000: 2;

11.2.2. Disputes up to $1,000,000: 4;

11.2.3. Disputes up to $10,000,000: 6;

11.2.4. Disputes $10,000,000 or more: 8, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

11.3. Informal Witness Interviews. In addition to depositions, counsel for any party shall be permitted to conduct informal witness interviews with any current or former employees of the opposing party or third persons by teleconference at which all counsel are invited to be present, provided that any counsel wishing to conduct an informal interview of a witness shall give written notice to counsel for all other parties at least seven business days before the interview, the interview is conducted by teleconference at which counsel for any party may dial in to participate, the conference call is audio recorded and the witness so advised at the outset of the interview, and the witness agrees at the outset of the interview to tell the truth. Any witness who fails to agree to be recorded or to agree to tell the truth, or refuses to cooperate with the interview as determined by the ELA Arbitrator, may be subject to deposition by the inquiring party in addition to the limits on number of depositions described above. No counsel may interview a witness longer than 45 minutes, provided that any other counsel for different parties participating in the conference call also may interview the witness in turn for up to 45 minutes each. Counsel for witnesses or any party for whom the witness is currently or was formerly employed may briefly interject cautions to the witness on matters of privilege during any counsel's interview. Each party shall be permitted to initiate the following number of informal witness interviews:

11.3.1. Disputes up to $400,000: 3;

11.3.2. Disputes up to $1,000,000: 6;

11.3.3. Disputes up to $10,000,000: 9;

11.3.4. Disputes $10,000,000 or more: 12, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

11.3.5. Copy of Witness Interviews. Within seven business days after completion of the witness interview,the party initiating the witness interview shall provide a copy of the audio recording, either in analog or digital format, to all counsel who request it in writing or by email and to the witness.

Section 12. E-Discovery. Electronic discovery ("e-discovery") refers to the preservation, search, collection, and production of electronic documents. E-discovery includes both key word-based searches for electronic documents as well as requests for specific electronic documents.

12.1. General

12.1.1. Scope. The parties agree that the scope of permissible e-discovery shall be documents both relevant and material to the underlying Dispute between the parties. The parties shall not be entitled to any e-discovery except as specifically set forth in Section 12. All e-discovery requests shall be responded to within 30 days after the date of service, with three additional days for service by mail, or such additional time as the parties may agree.

12.1.2. Search Tools. To the extent necessary, parties shall conduct key word-based searches using any software tool or tools that are capable of searching searchable files and e-mails, including the contents of e-mail archive files (such as .PST and .NSF), attachments, and the contents of files compressed using common formats, such as ZIP, RAR, GZIP, LHZ and TAR. E-mails shall be searched with a tool or tools capable of searching the FROM, TO, CC, BCC, SENT, RECEIVED and SUBJECT fields, the body of the e-mail, and any searchable attachments.

12.1.3. Document Retrieval. Specific electronic documents requested by a party may be retrieved in any manner at the sole discretion of the custodial party that does not alter the contents of the document. The retrieval may alter metadata with the exception of "created by" and "doc date."

12.1.4. Non-Searchable Files. Parties are under no obligation to make non-searchable files searchable. Parties shall not produce a non-searchable version of a document when a searchable version exists and can be accessed by the same custodian.

12.1.5. Format. Spreadsheets, or the exported contents of databases, shall be produced in native format, unless the native format would render the data not reasonably accessible because it would require software not licensed to the requesting party. In such case, the spreadsheet or database export shall be produced in an alternate searchable format that maintains the organization of the spreadsheet or database export to the extent possible. All other documents need not be produced in native format and, at the sole discretion of the custodial party, may instead be produced in alternate formats that are at least as searchable as the documents' native format.

12.1.6. Identification. An identification of a document's custodian shall be provided with each document or group of documents.

12.1.7. Preservation of Privileges and Work Product. The parties agree that the attorney-client privilege and work product doctrine and any other privileges recognized in the jurisdiction which laws govern the substantive Dispute shall not be waived by disclosure of any privileged information to any other party. Notwithstanding any such disclosure during e-discovery, the parties reserve the right to object and move to strike any privileged or work product-protected information to the court in connection with any submission to or introduction of evidence to the court. Nothing in Section 12 shall prevent the custodial party from objecting to the production of privileged documents or attorney work product. A party shall be under no obligation to withhold documents subject to privilege or work product protections prior to production, and the parties agree that a failure to withhold such documents prior to production shall not constitute a waiver of the applicable privilege or work product protections.

12.1.8. Protective Relief. To the extent a party believes that a request for electronic discovery is beyond the scope of discovery or made for an improper purpose, that party may submit a discovery motion seeking relief to the ELA Arbitrator.

12.2. Presumptions. It shall be presumed that:

12.2.1. Metadata. Metadata or slack space need not be searched or produced, with the exception of "created by" and "doc date."

12.2.2. Reasonable Accessibility. Electronic repositories that are not reasonably accessible because of undue burden or cost need not be restored, searched, or produced. Examples of not reasonably accessible repositories include backup tapes that are intended for disaster recovery purposes and that are not searchable, legacy data from obsolete systems and not readable, and deleted data potentially discoverable through forensics.

12.2.3. Personal Digital Devices. Electronic information residing on PDAs, Smartphones, and instant messaging systems need not be searched, collected or produced unless such repository is the only place where particular discoverable information resides.

12.2.4. Voicemail. Voicemail systems need not be searched, collected or produced.

12.2.5. Foreign Privacy Laws. Repositories of documents subject to the European Union's Data Protection Directive or other foreign laws restricting the processing or transfer of data to the United States for use in civil litigation ("Foreign Privacy Laws") need not be searched and documents subject to Foreign Privacy Laws need not be produced.

12.3. Overcoming Presumptions. A party seeking to rebut the presumptions set forth in Section 12.2 may submit a discovery motion to the ELA Arbitrator showing good cause why such discovery is essential to a claim or defense along with an explanation why the same or equivalent information cannot be found from a different source**.**

12.4. Preservation. Custodial parties shall take reasonable steps to preserve electronic documents that reasonably can be anticipated to be relevant and material to a Dispute.

12.4.1. Exception: Written Information Management Policy. Notwithstanding the above, to the extent an organization has a written information management policy, that organization may continue to follow that policy, including the destruction of documents in the ordinary course of business, with the exception of documents located in repositories accessible by a custodian. Such repositories must continue to be preserved during the pendency of the Dispute even if documents in such repositories were scheduled for destruction in the ordinary course of business unless, after a good faith investigation by the custodial party, a party has a good faith reasonable belief that no documents that are relevant and material to a known Dispute are located in a particular repository.

12.4.2. Exception: Permission of ELA Arbitrator. To the extent a custodial party believes that the preservation of a particular electronic repository is unreasonably

burdensome, the custodial party can seek relief by motion to the ELA Arbitrator, with a specific showing of the burden that makes preservation unreasonable.

12.5. E-Discovery Limits. The parties agree to the following limits on e-discovery determined by the amount in controversy based on the lesser of (a) the stated monetary consideration of the contract or (b) the amount claimed in the complaint or counterclaim (see Table 2 for summary chart). Where the value of the dispute cannot be determined from the face of the contract, claim or counterclaim, upon request of any party, the ELA Arbitrator shall decide the alleged value of the dispute solely for purposes of determining applicable discovery limits.

12.5.1. Document Requests for Specific Electronic Documents. Requests for Specific Electronic Documents shall not contain any instructions and shall not include any definitions other than shorthand expression of relevant parties, places or events. No request for electronic documents shall contain multiple parts and subparts or consist of more than one sentence. Requests for Specific Electronic Documents shall reasonably describe the specific electronic document that is sought. In the case of a database or spreadsheet, the Request shall further reasonably identify the specific tables or records requested. Requests for Specific Electronic Documents shall not seek broad categories of documents or require key word searches. To the extent a database subject to a Request for Specific Electronic Documents has a built-in search capability, the parties shall not be required to use any search tools to extract relevant records from the database other than that built-in capability. The parties agree that each party shall be limited to the number of requests specified below:

12.5.1.1. Disputes up to $400,000: 4;

12.5.1.2. Disputes up to $1,000,000: 7;

12.5.1.3. Disputes up to $10,000,000: 15;

12.5.1.4. Disputes $10,000,000 or more; 25 plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

12.5.2. Document Requests for Key Word Searches. Requests for Key Word Searches of Electronic Documents shall include an identification of the custodians whose electronic repositories are to be searched, along with a single set of key words that will be searched in those repositories. Requests shall not contain any other instructions and shall not include any definitions other than shorthand expression of relevant parties, places or events. No request for key word searches shall contain multiple parts and subparts or consist of more than one sentence.

12.5.2.1. General

12.5.2.1.1. Designation of Custodian. Subject to the limitations set forth below, a party may designate any current or former employee or executive of

another party as a custodian if there is a reasonable basis for believing that custodian has relevant documents.

12.5.2.1.2. Scope of Search. For each identified custodian, subject to the limitations of Section 12, searches shall be run in the Custodian's live and archived e-mail and work computer(s) (desktop and/or laptop). Searches also shall be run in any network locations that are associated with the custodian's work computer, including group shares, that, after a reasonable investigation by the custodial party, are determined to be reasonably likely to contain relevant and material information.

12.6.2.1.3. Limits of Search. The custodial party shall not be obligated to search an electronic repository if, after a reasonable investigation by the custodial party, it is determined to not be reasonably likely to contain relevant information, even though that electronic repository is accessible by the custodian.

12.5.2.1.4. Key Words. Key words shall consist of words or Boolean phrases with proximity believed to be reasonably likely to return a reasonable volume of relevant documents. A key word shall not include a word that is not substantively related to the dispute (such as "and"). Key words shall not include the name of a product, a party, or a current or former employee or executive of a party, but may include these words in combination with other key words. A Boolean combination of key words shall count as a single key word. Key words may include a reasonable use of wild cards and root extenders.

12.5.2.1.5. Number of Key Word Search Requests. A party shall make no more than two requests for key word searches, which may include in total the key word search limits described below.

12.5.2.1.6. Protective Orders. A custodial party that believes that a requested key word or custodian was selected for an improper purpose, or would result in an unreasonable volume of documents, after consultation with opposing counsel to attempt to resolve the issue by agreement, can file a motion with the ELA Arbitrator requesting relief. Such motion shall include the results of sampling, or other evidence, showing the unreasonableness of the requested key word or custodian.

12.5.2.2. Key Word Search Limits. The parties agree that each party's Requests for Key Word Searches shall be limited as specified below:

12.5.2.2.1. Disputes up to $400,000: No Requests for Key Word Searches allowed.

12.5.2.2.2. Disputes up to $1,000,000: Requests for Key Word Searches may be sent in the form of an e-document request as follows: Identifying no more than 4 custodians of information; for a period of time no more than six months, which may include multiple periods of time aggregating to no more than six months; and involving not more

than six key words likely to lead to the discovery of information both relevant and material to the underlying dispute.

12.5.2.2.3. Disputes up to $10,000,000: Requests for Key Word Searches may be sent in the form of an e-document request as follows: Identifying no more than 8 custodians of information; for a period of time no more than 1 year, which may include multiple periods of time aggregating to no more than one year; and involving not more than 18 key words likely to lead to the discovery of information both relevant and material to the underlying dispute.

12.5.2.2.4. Disputes more than $10,000,000: Requests for Key Word Searches may be sent in the form of an e-document request as follows: Identifying no more than 16 custodians of information; for a period of time no more than three years, which may include multiple periods of time aggregating to no more than three years; involving not more than 40 key words likely to lead to the discovery of information both relevant and material to the underlying dispute; and upon an assertion that additional requests are necessary to discover information both relevant and material to the underlying dispute, the ELA Arbitrator may allow additional e-discovery at the request of any party.

Section 13. Discovery Disputes and Cost-Shifting

13.1. Exclusive Authority of ELA Arbitrator. Any discovery-related motion, including motions for protective orders, motions to compel, motions for sanctions, and motions regarding e-discovery, shall be served on all other parties and then sent to the ELA Arbitrator without filing in court. The ELA Arbitrator shall invite any opposition to be submitted in writing and then shall convene a hearing at which all interested parties may be heard. After the hearing, the ELA Arbitrator shall enter an order regarding discovery, including the presumption of an award of attorneys' fees to the prevailing party in accordance with Section 13.2., which shall have the force of an arbitration award.

13.1.1. Exception: Non-Party Witness Subpoenas and Compelled Testimony. In the event a non-party witness will not voluntarily submit to discovery in accordance with this ELA, the party seeking discovery may initiate subpoenas and seek judicial orders to compel compliance with such discovery.

13.1.2. Exception: Preclusive Motions. Nothing in this ELA shall preclude any party from seeking a judicial order to preclude from hearing or trial any discovery that was not timely disclosed in accordance with the requirements of this ELA, in addition to damages and costs to be awarded by the ELA Arbitrator.

13.2. Attorney Fee Shifting. Unless the ELA Arbitrator finds that the discovery dispute was (a) reasonable and (b) not susceptible of voluntary resolution between counsel, the ELA Arbitrator shall determine and award attorneys' fees incurred by the party who prevailed in any discovery dispute to be paid by the opposing party. In making the determination whether a dispute was susceptible of voluntary agreement by counsel, the ELA Arbitrator shall consider

whether any counsel engaged in lack of civility or professional courtesy. The parties agree that the ELA Arbitrator shall award damages in the amount of increased costs of litigation as well as reasonable costs and attorneys' fees to any party who prevails in a hearing before the ELA Arbitrator to enforce the terms of their ELA.

Section 14. Further Agreement of Parties

The parties may agree in writing at any time to additional or different procedures consistent with the purpose of this ELA.

TABLE 1: PAPER DISCOVERY LIMITS					
	Interrogatories	Document Requests	RFAs	Depositions	Interviews
Up to $400,000	5	7	6	2	3
Up to $1,000,000	10	14	12	4	6
Up to $10,000,000	15	21	18	6	9
$10,000,000 or more	20+	28+	24+	8+	12+

[+ = Additional found by ELA Arbitrator to be necessary to prepare for dispositive motion or trial.]

TABLE 2: E-DISCOVERY LIMITS				
	Requests for Specific E-Documents	Key Word: Custodians	Key Word: Time Period	Key Words Number
Up to $400,0000	4	0	0	0
Up to $1,000,000	7	4	6 months	6
Up to $10,000,000	15	8	1 year	18
$10,000,000 or more	25 +	16 +	3 years +	40 +

[+ = Any additional found by ELA Arbitrator to be necessary to prepare for dispositive motion or trial.]