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APA - Article VIII Survival, Indemnification, Limited Recourse

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ARTICLE VIII - SURVIVAL; INDEMNIFICATION; LIMITED RECOURSE

8.1 Survival; Exclusive Remedy.

The representations and warranties contained in this Agreement shall survive the Closing and continue in full force and effect for as long as Buyer has any payment obligation under **Section 2.3**, except that the representations and warranties contained in (a) **Sections 4.1** (Organization and Good Standing), **4.2** (Authorization of Agreement), **4.3** (Conflicts; Consents), **4.9** (Assets of the Business), **4.21** (Financial Advisors), **4.23** (Transactions with Affiliates), **5.1** (Organization and Good Standing), **5.2** (Authorization of Agreement), **5.3** (Conflicts; Consents) and **5.5** (Financial Advisors) shall survive the Closing and continue in full force and effect indefinitely; (b) **Sections 4.8** (Taxes), **4.12** (Employee Benefit Plans) and **4.20** (Environmental) will survive the Closing and continue in full force and effect until the expiration of the statute of limitations (as may be extended by any Governmental Body) applicable to the subject matter of such representations or warranties, and (c) **Section 4.10** (Intellectual Property) shall survive the Closing and continue in full force and effect for a period of five (5) years after the Closing Date. If written notice of a claim has been given prior to the expiration of the applicable period set forth above by any party hereto to the other party hereto in accordance with the notice requirements under **Section 9.4** below, then the indemnification claim with respect to such representation, warranty or covenant shall survive as to such claim, until the claim has been finally resolved. Any knowledge or investigations by or on behalf of a party hereto shall not constitute a waiver of such party's right to enforce any of its rights pursuant to this **Article VIII**.

8.2 Obligation of Seller to Indemnify.

Subject to the terms and conditions of this **Article VIII**, Seller agrees to reimburse, defend, indemnify and hold harmless Buyer, its present and future Affiliates, and its and their present and future directors, officers, employees and representatives (individually, a "**Buyer Indemnified Party**," and collectively, the "**Buyer Indemnified Parties**") from, against, and in respect of any and all losses, fees, liabilities, damages, claims, deficiencies and all costs and expenses (including defense and settlement costs, interest, penalties and reasonable attorneys' and accountants' fees and disbursements) (each, a "**Loss**" and collectively, the "**Losses**"), that any Buyer Indemnified Party may suffer, sustain, incur or become subject to and that exist or arise due to any of the following:

- (a) prior to their expiration in accordance with **Section 8.1** hereof, any inaccuracy of any representation or breach of any warranty made or given by Seller in this Agreement or the Seller Documents (or any claim that if true, would constitute such an inaccuracy or breach);
- (b) the breach by Seller of, or any non-fulfillment or failure to perform or comply with, any covenant or agreement on the part of Seller contained in this Agreement (or any claim that if true, would constitute such a non-fulfillment or failure);

(c) any Liability for Taxes with respect to the Business or the Acquired Assets or Assumed Liabilities arising prior to the Closing Date;

(d) any non-compliance by Seller with bulk sales or registration of bills of sale Laws, or other Laws for the protection of creditors, with respect to the transactions undertaken under this Agreement.;

(e) any fraud, intentional misrepresentation or criminal acts committed by or on behalf of Seller or any Affiliate on or prior to the Closing with respect to this Agreement, the Business, the Acquired Assets or the Acquired Intellectual Property; and

(f) the Excluded Assets or the Excluded Liabilities, except to the extent caused by the failure of a representation or warranty of Buyer under this Agreement to be true and correct.

8.3 Obligation of Buyer to Indemnify.

Subject to the terms and conditions of this **Article VIII**, Buyer agrees to reimburse, defend, indemnify and hold harmless Seller, its present and future Affiliates, and its and their present and future directors, officers, employees and representatives (individually, a "**Seller Indemnified Party**," and collectively, the "**Seller Indemnified Parties**") from, against, and in respect of any and all Losses, that any Seller Indemnified Party may suffer, sustain, incur or become subject to and that exist or arise due to any of the following:

(a) prior to their expiration in accordance with **Section 8.1** hereof, any inaccuracy of any representation or breach of any warranty made or given by Buyer in this Agreement or the Buyer Documents (or any claim that if true, would constitute such an inaccuracy or breach);

(b) the breach by Buyer of, or any non-fulfillment or failure to perform or comply with, any covenant or agreement on the part of Buyer contained in this Agreement (or any claim that if true, would constitute such an inaccuracy or breach);

(c) liabilities for Taxes arising from the operation of the Business and the ownership of the Acquired Assets by Buyer on or after the Closing Date;

(d) the Assumed Liabilities, except to the extent caused by the failure of a representation or warranty of Seller under this Agreement to be true and correct; and

(e) any fraud, intentional misrepresentation or criminal acts committed by or on behalf of Buyer or any Affiliate on or prior to the Closing with respect to this Agreement, the Business, the Acquired Assets or the Acquired Intellectual Property.

8.4 Notice and Opportunity to Defend.

(a) A party seeking indemnification hereunder (an "**Indemnified Party**") shall give the party from whom indemnification is sought (an "**Indemnifying Party**") written notice of any matter which an Indemnified Party has determined has given or may give rise to a claim for indemnification under this Agreement, prior to the expiration of any applicable survival period set forth in **Section 8.1**. In the event of a claim by a third party, such notice shall be given within 30 days after receiving written notice from a third party which may give rise to a claim for indemnification under this Agreement (a "**Third Party Claim**"). Such notice shall state the nature of the claim, the amount of the Loss, if known, the method of computation thereof, and contain a reference to the provisions of this Agreement in respect of which such right of indemnification is claimed or arises; provided, however, that the failure to provide such notice shall not release an Indemnifying Party from any of its obligations under this **Article VIII** except to the extent, and then only to the extent, that the Indemnifying Party is actually prejudiced by such failure and shall not relieve such Indemnifying Party from any other obligation or Liability that it may have to an Indemnified Party otherwise than under this **Article VIII**.

(b) Following receipt of a notice of a claim for indemnification under this Agreement in accordance with **Section 8.4(a)** (other than a Third Party Claim which will be governed by **Section 8.4(c)**), the Indemnifying Party will have 30 days from the date it receives notice of such claim (the "**Dispute Period**") to make such investigation of the claim as the Indemnifying Party deems necessary or desirable. For purposes of such investigation, the Indemnified Party will make available to the Indemnifying Party all the material information related to such claim in the possession or control of the Indemnified Party or relied upon by the Indemnified Party to substantiate such claim. If the Indemnifying Party disagrees with the validity or amount of all or any portion of such claim made by the Indemnified Party, the Indemnifying Party will deliver to the Indemnified Party written notice thereof (the "**Dispute Notice**") prior to the expiration of the Dispute Period. If no Dispute Notice is received by the Indemnified Party within the Dispute Period or if the Indemnifying Party provides notice that it does not have a dispute with respect to such claim, such claim will be deemed approved and consented to by the Indemnifying Party (such claim being referred to herein as an "**Approved Indemnification Claim**"). The amount of the Approved Indemnification Claim shall be paid by the Indemnifying Party by wire transfer of immediately available funds to the account designated in writing by the Indemnified Party within five (5) Business Days after such claim is determined to be an Approved Indemnification Claim. If a Dispute Notice is received by the Indemnified Party within the Dispute Period and the Indemnified Party and the Indemnifying Party do not agree to the validity and/or amount of such disputed claim, no payment will be made to the Indemnified Party until such disputed claim is resolved, whether by adjudication of such matter, agreement between the Indemnified Party and the Indemnifying Party or otherwise (and upon any such resolution becoming final, such claim will be deemed to be an Approved Indemnification Claim and subject to the payment procedures set forth in the preceding sentence).

(c) Following receipt of a notice of a Third Party Claim in accordance with **Section 8.4(a)**, an Indemnifying Party shall be entitled to participate therein, and to the

extent that it wishes, to assume and control the defense of such Third Party Claim through counsel of its choice if it gives notice of its intention to assume and control the defense to the Indemnified Party within 30 days of the receipt of the notice of a Third Party Claim from the Indemnified Party; provided, however, that the Indemnified Party may participate in such defense and after notice of the Indemnifying Party's election to assume the defense thereof, the Indemnifying Party will not be liable to the Indemnified Party for any further legal or other expenses subsequently incurred by the Indemnified Party in connection with the defense of the Third Party Claim, other than reasonable out-of-pocket costs of investigation, unless the Indemnifying Party does not actually assume the defense thereof following notice of such election. Notwithstanding the foregoing, if (i) there exists or is reasonably likely to exist a good-faith conflict of interest that would make it inappropriate for the same counsel to represent both the Indemnified Party and the Indemnifying Party, (ii) the Indemnified Party elects to pursue one or more defenses or counterclaims available to it that are inconsistent with one or more of those that are being pursued by the Indemnifying Party in respect of such Third Party Claim or any litigation relating thereto, (iii) the Third Party claim seeks injunctive or other nonmonetary relief against the Indemnified Party, (iv) the Indemnifying Party does not promptly assume the defense thereof following notice of such election or (v) the Indemnified Party shall have reasonably concluded that its business interests warrant such action, then the Indemnified Party may participate in the defense of such Third Party Claim and shall be entitled to retain its own counsel in each jurisdiction for which the Indemnified Party reasonably determines counsel is required, at the expense of such Indemnifying Party in the case of (i) through (iv) above. In the event an Indemnifying Party exercises the right to undertake any such defense against any such Third Party Claim as provided above, the Indemnified Party shall cooperate with the Indemnifying Party in such defense and make available to such Indemnifying Party, at such Indemnifying Party's expense, all witnesses, pertinent records, materials and information in the Indemnified Party's possession or under the Indemnified Party's control relating thereto as is reasonably required by such Indemnifying Party. Similarly, in the event the Indemnified Party is, directly or indirectly, conducting the defense against any Third Party Claim, the Indemnifying Party shall cooperate with the Indemnified Party in such defense and make available to the Indemnified Party, at the Indemnifying Party's expense, all such witnesses, records, materials and information in the Indemnifying Party's possession or under the Indemnifying Party's control relating thereto as is reasonably required by the Indemnified Party. The party controlling the defense of a Third Party Claim will consider in good faith any recommendation made by the other party with respect to the defense of such Third Party Claim. The Indemnifying Party shall not, without the prior written consent of the Indemnified Party settle, compromise or offer to settle or compromise any such Third Party Claim on a basis which might give rise to liability (other than monetary liability paid in full by the Indemnifying Party) or limit in any manner any right, activity or conduct of the Indemnified Party or any subsidiary or Affiliate thereof, or does not include an unconditional release of the Indemnified Party for any liability arising out of such claim or demand.

(d) If the Indemnifying Party does not elect to assume control or otherwise participate in the defense of any Third Party Claim, the Indemnifying Party shall be bound by the results obtained in good faith by the Indemnified Party with respect to such claim.

8.5 Limitations on Liability.

(a) Notwithstanding any other provision of this Agreement to the contrary, the liability of an Indemnifying Party under every provision of this Agreement shall be limited in the manner set out in this **Section 8.5**. If there is any inconsistency between the provisions of this **Section 8.5** and any other provision of this Agreement, then the provisions of this **Section 8.5** shall prevail.

(b) Claim Value and Liability Limits.

(i) The obligations of Seller as an Indemnifying Party pursuant to **Section 8.2(a)** hereof (A) will not apply to any Losses of the Buyer Indemnified Parties unless and until the total aggregate of such Losses exceeds \$25,000 (the "**Threshold Amount**"), provided that if such Threshold Amount is met, then, in addition to Buyer's right of offset set forth in **Section 8.5(c)** below, Seller will be liable for the Losses up to and no more than \$100,000 (the "**Indemnity Cap**"). Except as set forth in **Section 8.5(c)** below, the maximum aggregate liability of Seller with respect to this Agreement and the transactions relating to and/or undertaken in connection with this Agreement shall not exceed the Indemnity Cap, except for claims arising under, and only to the extent based on, **Sections 4.10, 6.3, 6.4, 8.2(e) or 8.2(f)**, hereof.

(ii) The obligations of Buyer as an Indemnifying Party pursuant to **Section 8.3(a)** hereof (A) will not apply to any Losses of the Seller Indemnified Parties unless and until the total aggregate of such Losses exceeds the Threshold Amount, provided that if such Threshold Amount is met, then Buyer will be liable for all Losses and not just the portion that exceeds such Threshold Amount, and (B) will be limited to, and will not exceed the Indemnity Cap, except for Losses related to the nonpayment of amounts due under **Section 2.3** and except for claims arising under and only to the extent based on **Section 8.3(e), 6.4, 8.3(c) and 8.3(d)** hereof, which shall not be limited.

(c) **Buyer's Right of Offset.** To the extent that Buyer has a good-faith claim against Seller under **Section 8.2**, in addition to any remedies that Buyer may have, Buyer shall have the right to offset such claim against any amount owed to Seller under **Section 2.3** of the Agreement. For purposes of clarification, Buyer's right of offset set forth in this **Section 8.5(c)** shall not be limited to the Indemnity Cap.

8.6 Recourse Only to Seller.

Buyer agrees that (i) this Agreement is solely between Buyer and Seller, (ii) Seller shall be solely responsible for all of its liabilities, obligations, agreements and undertakings under this Agreement with respect to the iCare Software, and (iii) no party other than Seller shall have any liability to Buyer whatsoever under this Agreement with respect to the iCare Software.