



AGENDA ITEM
NO. **D-14**

COUNTY OF HUMBOLDT

For the meeting of: April 19, 2016

Date: April 1, 2016
To: Board of Supervisors
From: Kelly Sanders, Clerk/Recorder/Registrar of Voters *KS*
Subject: Approval of Registration Agreement

RECOMMENDATION(S):

That the Board of Supervisors:

1. Authorize the County Clerk/Recorder/Registrar of Voters or her designee to execute the attached Registration Agreement listing the County of Humboldt as a beneficiary, to carry out the purpose of the Board's order.

SOURCE OF FUNDING:

Any expenses incurred by the Registration Agreement will be borne by HART InterCivic, the voting system vendor.

DISCUSSION:

HART InterCivic is the voting system vendor for the County of Humboldt. Pursuant to Elections Code 19212, the voting system vendor for the county is required to place election source code in an escrow account. Additionally, California Code of Regulations 20611 "**Reasons for Placing Source Code into Escrow**" subsection (d) states:

"(d) Unless otherwise superseded by a contract between a vendor and an election jurisdiction, preserve the necessary source code information to permit the election

Prepared by Kelly E. Sanders CAO Approval *[Signature]*
REVIEW: Auditor _____ County Counsel *[Signature]* Human Resources *[Signature]* Other _____

TYPE OF ITEM:
 Consent
 Departmental
 Public Hearing
 Other _____

BOARD OF SUPERVISORS, COUNTY OF HUMBOLDT
Upon motion of Supervisor Fennell Seconded by Supervisor Bass
Ayes Sundberg, Fennell, Lovelace, Bohn, Bass
Nays _____
Abstain _____
Absent _____

PREVIOUS ACTION/REFERRAL:

Board Order No. _____

Meeting of: _____

and carried by those members present, the Board hereby approves the recommended action contained in this Board report.

Dated: April 19, 2016
By: *[Signature]*
Kathy Hayes, Clerk of the Board

jurisdiction to continue the use and maintenance of the source code in the event the vendor is unable, or otherwise fails, to provide maintenance. At no time shall this be construed as a way for either the vendor or the county to violate a contractual obligation to gain access to source code.”

In order to fulfill the requirement of California Code of Regulations 20611(d), the California Secretary of State has determined that the Registration Agreement shall be written such that the counties are listed as beneficiaries to the agreement.

Approving the Registration Agreement supports the Board’s Strategic Framework by safe guarding the public trust and integrity of local Elections.

FINANCIAL IMPACT:

There will be no financial impact on the County of Humboldt. Any costs associated with this agreement will be borne by the vendor, HART InterCivic.

OTHER AGENCY INVOLVEMENT:

Risk Management

ALTERNATIVES TO STAFF RECOMMENDATIONS:

Because depositing the voting system source code into an escrow account is governed by statute, no alternatives are being recommended.

ATTACHMENTS:

Registration Agreement
California State Voting System Software Escrow Agreement No. 44993, dated 3/29/2010

Date: |Appendix 2

Registration Agreement

NOTE: A COPY OF THIS REGISTRATION AGREEMENT MUST BE DULY SIGNED BY AN AUTHORIZED SIGNATORY AND RETURNED TO ESCROW AGENT BEFORE A LICENSEE CAN CLAIM PROTECTION UNDER THE ESCROW AGREEMENT.

Agreement between:

- (1) Hart InterCivic, Inc. whose principal office is at 15500 Wells Port Drive, Austin, TX, 78728 USA ("Licensor");
- (2) NCC Group, Inc. a corporation organized and existing under the laws of Georgia with an office at 123 Mission Street, Suite 900, San Francisco, CA 94105 USA ("Escrow Agent"); and
- (3) Licensee's Name: Humboldt County.....
whose principal office is at
County Clerk and Recorder, Courthouse 5th Floor, 825 Fifth Street, Eureka, CA, 95501 ("Licensee");

Agreement:

- 1) This registration agreement ("**Registration Agreement**") is supplemental to the terms and conditions of the deposit account style software escrow agreement number 44993 dated March 29, 2010 (Escrow Agreement) and the Deposit Account Agreement(s) (as defined in the Escrow Agreement) number(s) 45010 dated June 01, 2010, both between Licensor and NCC Group.
- 2) This Registration Agreement, the Escrow Agreement, and the relevant Deposit Account Agreement (s) together shall form a binding agreement between Licensor, NCC Group and Beneficiary in accordance with the terms of the Escrow Agreement.
- 3) Should Beneficiary direct NCC Group to act on any direction or notice it may render hereunder, the Beneficiary shall then agree to take the benefit of, agree and undertakes to perform its obligations under and be bound by the terms and conditions of the Escrow Agreement as though they were a party to the Escrow Agreement and the Deposit Account Agreement and named therein as a Beneficiary. Further, Beneficiary agrees to defend and indemnify NCC Group and to hold NCC Group harmless from an against any claims, suits or other proceedings, actions, losses, costs, liabilities or expenses incurred in connection with the defence thereof (including reasonable attorney's fees), in each case which may be imposed on, or incurred by or asserted against NCC group in any way related to the Beneficiary's acts, omissions or written directions to NCC Group relating in any way to this Agreement, providing that Beneficiary shall not be liable for that portion of any such indemnification amount resulting from NCC group's negligence of intentional misconduct.
- 4) This Registration Agreement shall take effect when the Licensor has provided NCC group with a signed Registration Agreement, as evidenced herein, an NCC group has registered Beneficiary as a party to the relevant Deposit Account Agreement.
- 5) The Release Events for the undersigned Beneficiary are as follows:
 - a) A receiver, trustee, or similar officer is appointed for the business or property of Licensor; or
 - b) Licensor files a petition in bankruptcy, files a petition seeking any reorganization (without confirming immediately in writing to Beneficiary that it will continue to maintain the Software in accordance within the terms of the Licensee Agreement or any applicable maintenance agreement), makes an arrangement, composition, or similar relief under any law regarding insolvency or relief for debtors, or makes an assignment for the benefit of creditors; or
 - c) Any involuntary petition or proceeding under bankruptcy or insolvency laws is instituted against Licensor and not stayed, enjoyed, or discharged within 60 days; or
 - d) Licensor takes any corporate action authorizing any of the foregoing; or
 - e) Any similar or analogous proceedings or even to those in Clauses 5 (a) to 5 (c) above occurs in respect of Licensor within any jurisdiction outside the USA; or
 - f) Licensor ceases to carry on its business or the part of its business which relates to the Software; or
 - g) Licensor or, where relevant, its agent, parent, subsidiary or associated company is in material breach of its obligations as to maintenance or modification of the software under the Licensee Agreement or any maintenance agreement entered into in connection with the software and has failed to remedy such default notified by Beneficiary to Licensor within a reasonable period.

Signed for and on behalf of Humboldt County

Name: |

Position: | (Authorized Signatory)

Date: |

Signed for and on behalf of Hart InterCivic, Inc.

Name: |

Position: | (Authorized Signatory)

Date: |

Signed for and on behalf of NCC GROUP, INC.

Name: |

Position: | (Authorized Signatory)

Date: |

Approved as to form by the Secretary of State as Certifying Agent.

Name: |

Position: | (Authorized Signatory)

Date: |



**California State Voting System
Software Escrow Agreement
Deposit Account Style**

Date March 29, 2010
Licensor Hart InterCivic, Inc. 44993
Agreement Number [Agreement#]

Notice: The parties to this Agreement are obliged to inform NCC Group of any changes to the Software or in their circumstances (including change of name, principal office, contact details or change of owner of the intellectual property in the Software).

Escrow Agreement Dated:

Between:

- (1) Hart InterCivic, Inc. whose principal office is at 15500 Wells Port Drive, Austin, TX 78728 ("**Licensor**"); and
- (2) NCC Group, Inc. a corporation organized and existing under the laws of Virginia with its principal office at 1731 Technology Drive, Suite 880, San Jose, California 95110, USA ("**NCC Group**").

Background:

- (A) Licensor has been granted approval by the California Secretary of State to sell Voting System hardware and software to various Election Jurisdictions inside the state of California.
- (B) Contingent to being approved to license their voting system solution to various Election Jurisdictions, the Licensor has agreed to be bound by various Laws and Regulations stipulated by the California Secretary of State.
- (C) In its role as Certifying Agent (as defined below), the California Secretary of State's office has the right to access and inspect the Licensor's Software and Source Code.
- (D) Various Election Jurisdictions inside the state of California have been or will be granted a license by Licensor to use the Software which comprises computer programs.
- (E) Certain technical information and/or documentation relating to the Software is the confidential information and intellectual property of Licensor or a third party.
- (F) Licensor acknowledges that in certain circumstances, such information and/or documentation would be required by the Certified Agent or the Election Jurisdictions in order for them to continue to exercise their rights under the California Elections Code and/or License Agreement with the Licensor.
- (G) The parties therefore agree that such information and/or documentation should be placed with a trusted third party, NCC Group, so that such information and/or documentation can be released to the Certified Agent or the Election Jurisdiction should certain circumstances arise.

Agreement:

In consideration of the mutual undertakings and obligations contained in this Agreement, the parties agree that:

1 Definitions and Interpretation

1.1 In this Agreement the following terms shall have the following meanings:

"Agreement" means the terms and conditions of this deposit account style software escrow agreement set out below, including the Schedules and Appendices hereto.

"Beneficiary" means any person, firm, company or other entity:

- 1.1.1 to whom the right to a license to use the Software has been granted by the Licensor; and
- 1.1.2 whom Licensor and Certifying Agent have approved for registration under a Deposit Account Agreement; and
- 1.1.3 who shall be bound by the terms and conditions of a Deposit Account Agreement by the Licensor returning a completed Registration Agreement, forwarding the same to NCC Group and the receipt and registration of which has been acknowledged by NCC Group in writing to Licensor, Certifying Agent and/or Beneficiary.

"Certifying Agent" means the Secretary of State of the State of California, which reviews and approves the Licensor's voting system and Software for use by various Election Jurisdictions in the State of California.

"Confidential Information" means all technical and/or commercial information not in the public domain and which is designated in writing as confidential by any party.

"Deposit Account" means an account set up on the execution of a Deposit Account Agreement under which specific Escrow Material is deposited by the Licensor with NCC Group.

"Deposit Account Agreement" means an agreement in the form attached as Appendix 1, for the setting up of a Deposit Account.

"Deposit Form" means the form at Schedule 1 which is to be completed by Licensor and delivered to NCC Group with each deposit of the Escrow Material.

"Election Jurisdiction" means the State of California or a District with the authority to tax citizens, a County, a City or a City and County inside the state of California with the right to conduct government elections, who licenses certain Software and purchases certain hardware and systems from the Licensor. For the purposes of this Escrow Agreement, the Election Jurisdictions who meet the qualifications for "Beneficiary" as defined above shall be third party Beneficiaries of this Agreement.

"Escrow Material" means the Source Code of the Software and such other material and documentation (including updates and upgrades thereto and new versions thereof) as are necessary to be delivered or deposited to comply with Clause 3 of this Agreement.

"Integrity Testing" means tests performed by NCC Group as prescribed in Clause 11 to ensure that Escrow Materials deposited by Licensor are accessible.

"Intellectual Property Rights" mean any copyright, patents, design patents, registered designs, design rights, utility models, trademarks, service marks, trade secrets, know how, database rights, moral rights, confidential information, trade or business names, domain names, and any other rights of a similar nature including industrial and proprietary rights and other similar protected rights in any country or jurisdiction together with all registrations, applications to register and rights to apply for registration of any of the aforementioned rights and any licenses of or in respect of such rights.

"License Agreement" means the agreement under which a party was granted a license by the Licensor to use the Software.

"Letter of Intent" means the form completed by a party or the parties containing the information to enable NCC Group to set up this Agreement, a Deposit Account Agreement or a Registration Agreement.

"Registration Agreement" means an agreement in the form set out in Appendix 2 to be signed by Licensor, NCC Group and any organization (as may be required) wishing to be a party to a Deposit Account Agreement or Deposit Account Agreements, as a Beneficiary and, accordingly, to take the benefit of and be bound by the terms and conditions of the Agreement including payment obligations as may be defined in the Registration Agreement.

"Release Purposes" for the Certifying Agent means the purposes of reviewing, testing, verifying and certifying that the Escrow Material is in compliance with the Licensor's obligations pursuant to the California State Elections Code. Release Purposes for the Election Jurisdiction means the purposes of understanding, maintaining, modifying and correcting the Software exclusively for and on behalf of Election Jurisdiction together with such other purposes (if any) as are permitted under the License Agreement.

"Software" means the software together with any updates and upgrades thereto and new versions thereof licensed to a party under the License Agreement details of which are set out in Schedule 1 of a Deposit Account Agreement.

"Source Code" means the computer programming code of the Software in human readable form.

"Voting System" means the Software and hardware, together or separately, that the Licensor sells to various Election Jurisdictions in the state of California.

- 1.2 This Agreement shall be interpreted in accordance with the following:
 - 1.2.1 headings are for ease of reference only and shall not be taken into consideration in the interpretation of this Agreement;
 - 1.2.2 all references to Clauses and Schedules are references to Clauses and Schedules of this Agreement; and
 - 1.2.3 Unless otherwise specified, all references to a party or parties are references to a party or parties to this Agreement.

2 Deposit Accounts

- 2.1 Each time that the Licensor wishes to deposit different Escrow Material under the terms of this Agreement, the Licensor and NCC Group must execute a completed Deposit Account Agreement containing the details of the Escrow Material to be deposited in accordance with the obligations contained in Clause 3.
- 2.2 Each signed Deposit Account Agreement shall be supplemental to and be governed by the terms of this Agreement.
- 2.3 The parties hereto agree that the Escrow Material deposited under this Agreement shall be for the sole benefit of government entities inside the State of California, including but not limited to, the California Secretary of State and various Election

Jurisdictions who execute License Agreements with the Licensor and qualify as a "Beneficiary" as defined above.

- 2.4 For the avoidance of doubt, if the Escrow Material to be deposited is an update to or development of Escrow Material already deposited under an existing Deposit Account, the deposit of such Escrow Material shall not require a new Deposit Account and shall be deposited under the relevant existing Deposit Account.

3 Licensor's Duties and Warranties

3.1 Licensor shall:

- 3.1.1 deliver a copy of the Escrow Material to NCC Group within 30 days of the date NCC Group receives an executed Deposit Account Agreement;
- 3.1.2 deliver an update or replacement copy of the Escrow Material to NCC Group within 30 days of a material update, error correction, enhancement, maintenance release or functional modification to the Software which results in an updated delivery of the object code version of the Software to Certifying Agent and/or Beneficiary;
- 3.1.3 within five days of delivering a deposit of Escrow Material to NCC Group, notify the Certifying Agent and/or Beneficiary in writing of the delivery of a deposit of Escrow Material in accordance with its obligations under the Elections Code and the relevant License Agreement;
- 3.1.4 ensure that each copy of the Escrow Material deposited with NCC Group comprises the Source Code of the latest version of the Software used by Certifying Agent and/or Beneficiary;
- 3.1.5 deliver with each deposit of the Escrow Material a Deposit Form which includes the following information:
- 3.1.5.1 details of the deposit including the full name of the Software (i.e. the original name as set out under Schedule 1 to the Deposit Account Agreement together with any new names given to the Software by Licensor), version details, media type, backup command/software used, compression used, archive hardware and operating system details; and
- 3.1.5.2 password/encryption details required to access the Escrow Material;
- 3.1.6 deliver with each deposit of the Escrow Material the following technical information (where applicable):
- 3.1.6.1 documentation describing the procedures for building, compiling and installing the Software, including names and versions of the development tools;
- 3.1.6.2 Software design information (e.g. module names and functionality); and

- 3.1.7 deposit a detailed list of the suppliers of any third party software and tools required to access, install, build or compile or otherwise use the Escrow Material.
- 3.2 Licensor warrants to both NCC Group and Certifying Agent and/or Beneficiary at the time of each deposit of the Escrow Material with NCC Group that:
 - 3.2.1 it has the full right, ability and authority to deposit the Escrow Material;
 - 3.2.2 in entering into this Agreement and any Deposit Account Agreement and performing its obligations under such agreements, it is not in breach of any of its ongoing express or implied obligations to any third party(s); and
 - 3.2.3 the Escrow Material deposited under Clause 3.1 contains all information in human-readable form and is on suitable media to enable a reasonably skilled programmer or analyst to understand, maintain, modify and correct the Software.
- 3.3 Licensor warrants that neither it, nor any officer of the company, currently has, nor will it undertake, any ownership position or investment in NCC Group.

4 Certifying Agent's Rights

- 4.1 Certifying Agent shall have the right to "Inspect" the Escrow Material during NCC Group's standard business hours with or without prior notice to Licensor and NCC Group. For purposes of this Agreement, Inspect shall mean that the Certifying Agent will have the right to review the labelling of the Escrow Material to ensure that it conforms with product names and versions of Voting Systems approved for use inside the State of California. During any Inspection, the Certifying Agent shall not load the media containing the Escrow Material on to any computer drive and review the actual contents of the media. Should time and circumstance allow, the Licensor will have the right to attend any Inspection of their Escrow Material. NCC Group shall inform the Licensor of any Inspection of the Escrow Material, in advance if possible, but at a minimum, within one day after any Inspection.
- 4.2 Certifying Agent shall have the right to "Access" the Escrow Material upon providing the Licensor and NCC Group two business day's notice of its intent to do so. For the purposes of this Agreement, Access shall mean that the Certifying Agent will have the right to electronically verify that the source code and documentation present in the Deposit Account(s) is identical to the version of the software for the Voting System, voting machine or vote tabulating device approved by the Certifying Agent. When accessing a set of Escrow Material, the Certifying Agent will have the right to load the media on to a computer drive and review the actual source code for the software. Further the Certifying Agent will have the right to compile the source code and test the resulting Object Code for the software. The Certifying Agent will have the right to perform this Access either at NCC Group's site, if time and resources are available to host the Access there, or the Certifying Agent will have the right to remove a full and complete copy of the Escrow Material to its own facilities for this testing. The Licensor will have the right to attend any Access of their Escrow Material.

5 NCC Group's Duties

5.1 NCC Group shall:

- 5.1.1 at all times during the term of this Agreement, retain the latest deposit of the Escrow Material in a safe and secure environment;
- 5.1.2 notify Licensor, Beneficiary and the Certifying Agent of the acceptance of any Registration Agreement; and
- 5.1.3 inform Licensor and Certifying Agent of the receipt of any deposit of the Escrow Material by sending to both parties a copy of the Deposit Form and/or the final Integrity Testing report generated from the testing processes carried out under Clause 11.

5.2 Given the right and responsibility of the Certifying Agent to "Inspect" and "Access" a Licensor's Escrow Material as specified in Clause 4 above, NCC Group shall bear no obligation or responsibility to any party to this Agreement or person, firm, company or entity whatsoever to determine or report the existence, relevance, completeness, accuracy, operation, effectiveness, functionality or any other aspect of the Escrow Material received by NCC Group under this Agreement.

5.3 NCC Group may appoint agents, contractors or sub-contractors, subject to review and/or rejection by Licensor, to carry out Integrity Testing, as prescribed in Clause 11 of this Escrow Agreement. NCC Group shall ensure that any such agents, contractors and sub-contractors are bound by the same confidentiality obligations as are contained in Clause 9.

5.4 NCC Group has the right to make such copies of the Escrow Material as may be necessary solely for the purposes of this Agreement, provided NCC Group shall provide Licensor notice of any such copy made.

5.5 For purposes of this Agreement, NCC Group must obtain and maintain certification by the California Secretary of State as an approved escrow company and approval by the California Secretary of State of its escrow facility.

5.6 NCC Group warrants that neither it, nor any officer of the company, currently has, nor will it undertake, any ownership position or investment in Licensor.

6 Payment

6.1 The parties shall pay NCC Group's fees and charges as published from time to time or as otherwise agreed, in the proportions set out in the Letter of Intent between the parties. NCC Group's fees as published are exclusive of any applicable sales tax.

6.2 If NCC Group is required to perform any additional or extraordinary services as a result of being an escrow agent including intervention in any litigation or proceeding, NCC Group shall receive reasonable compensation for such services and be reimbursed for all costs incurred, including reasonable attorney's fees.

6.3 NCC Group shall be entitled to review and vary its standard fees and charges for its services under this Agreement from time to time but no more than once a year and only upon 45 days written notice to the parties.

- 6.4 All invoices are payable within 30 days from the date of invoice. Interest shall accrue at the lesser of 1.5% per month or the maximum amount permitted by applicable law for any fees that are undisputed by the paying party and remain unpaid for more than 30 days past the due date of the applicable invoice.
- 6.5 In the event of a dispute made in good faith as to the amount of fees, the party responsible for payment agrees to remit payment on any undisputed amount(s) in accordance with Clause 6.1 above. In such circumstances, the interest on the fees shall not accrue as to any disputed amounts unless not paid within 30 days after such dispute has been resolved by the parties.
- 6.6 NCC Group shall have no obligations under this Agreement until the initial invoice has been paid in full.

7 Release Procedures

- 7.1 Subject to: (i) the remaining provisions of this Clause 7 and (ii) the receipt by NCC Group of the fees chargeable upon a release and any other fees and interest (if any) outstanding under this agreement, NCC Group will release the Escrow Material or a copy of the Escrow Material, as appropriate, to a duly authorized representative of Certifying Agent and/or Beneficiary if any of the events listed at Clause 5 of a Registration Agreement, in the case of the Beneficiary, or those listed below, in the case of the Certifying Agent ("**Release Event(s)**") occur.
- 7.2 The Release Events for the Certifying Agent are as follows:
 - (i) the Certifying Agent undertakes an investigation or prosecution regarding the Voting System, vote counting equipment or procedures; or
 - (ii) Certifying Agent makes a reasonable determination that a release of the Escrow Material from the escrow account is required by the State of California in order to fulfil the provisions of the California Elections Code related to the approval of voting systems; or
 - (iii) Certifying Agent requires a release of the Escrow Material from the escrow account in order to verify that the software on a voting system, voting machine, or vote tabulating device currently in use by any Beneficiary is identical to the version approved by the California Secretary of State's office; or
 - (iv) Upon the Certifying Agent finding that an escrow facility or escrow company is unable or unwilling to maintain materials in compliance with the California Elections Code, and no alternate escrow company has been certified by the State; or
 - (v) Certifying Agent requires a release of the Escrow Material from the escrow account for any other purpose deemed necessary to fulfil the provisions of the California Elections Code or Section 12172.5 of the Government Code.

- 7.3 It is agreed by the parties that the Licensor shall have ten (10) business days for any "counter-notice" period defined in the Escrow Agreement. This counter-notice period will apply to, but not be limited to, any objection the Licensor may have regarding the facts or circumstances surrounding the Certifying Agent's or Beneficiary's request for NCC Group to release the Escrow Material.
- 7.4 Certifying Agent and/or Beneficiary must notify NCC Group of the occurrence of a Release Event by delivering to NCC Group a notice in writing ("**Notice**") declaring that such Release Event has occurred and specifying the Deposit Account(s) so affected, and setting out the facts and circumstances of the Release Event, that the License Agreement and any maintenance agreement, if relevant, for the Software was still valid and effective up to the occurrence of such Release Event and exhibiting such documentary evidence in support of the Notice as NCC Group shall reasonably require.
- 7.5 Upon receipt of a Notice from Certifying Agent and/or Beneficiary claiming that a Release Event has occurred:
 - 7.5.1 NCC Group shall submit a copy of the Notice to Licensor (with a copy to the Certifying Agent and/or Beneficiary in order to acknowledge receipt of the Notice) by courier or other form of guaranteed delivery; and,
 - 7.5.2 NCC Group will release the Escrow Material or a copy of the Escrow Material, as appropriate, to Certifying Agent and/or Beneficiary for its use for the Release Purposes, unless within the time period prescribed within the Registration Agreement, if a counter-notice period is allowed, NCC Group receives a counter-notice in writing from Licensor stating that in their view no such Release Event has occurred or, if appropriate, a Court Order providing an injunction to delay or prevent the release of the Escrow Material.
- 7.6 In the event that the Escrow Material is released under this Clause 7, Certifying Agent and/or Beneficiary shall:
 - 7.6.1 keep the Escrow Material confidential at all times;
 - 7.6.2 use the Escrow Material only for the Release Purposes;
 - 7.6.3 not disclose the Escrow Material to any person save such of Certifying Agent's employees or contractors who need to know the same for the Release Purposes. In the event that Escrow Material is disclosed to its employees or contractors, Certifying Agent shall ensure that they are bound by the same confidentiality obligations as are contained in Clause 9;
 - 7.6.4 ensure all media containing the Escrow Material is maintained in a safe and secure environment at all times; and
 - 7.6.5 forthwith destroy the Escrow Material should Certifying Agent and/or Beneficiary cease to be entitled to use the Software under the terms of the License Agreement or California Elections Code.
- 7.7 Upon receipt of the counter-notice or Court Order from Licensor under Clause 7.3, NCC Group shall send a copy of the counter-notice and any supporting evidence

or Court Order to Certifying Agent and/or Beneficiary (with a copy to Licensor in order to acknowledge receipt of the counter-notice or Court Order) by courier or other form of guaranteed delivery.

- 7.8 Within 90 days of dispatch of the counter-notice by NCC Group, Certifying Agent and/or Beneficiary may give notice to NCC Group that they wish to invoke the dispute resolution procedure under Clause 8.
- 7.9 If, within 90 days of dispatch of the counter-notice by NCC Group to Certifying Agent and/or Beneficiary, NCC Group has not been informed by Certifying Agent and/or Beneficiary that they wish the dispute resolution procedure under Clause 8 to apply, the Notice submitted by Certifying Agent and/or Beneficiary will be deemed to be no longer valid and Certifying Agent and/or Beneficiary shall be deemed to have waived their right to release of the Escrow Material for the particular reason or event specified in the original Notice. In such circumstances, this Agreement shall continue in full force and effect.

8 Disputes

- 8.1 Upon receipt of Certifying Agent and/or Beneficiary's notice requesting dispute resolution pursuant to Clause 7.8 above, NCC Group shall notify Licensor of the Certifying Agent and/or Beneficiary's request for dispute resolution. Licensor and Certifying Agent and/or Beneficiary shall submit their dispute to expedited binding arbitration in Sacramento County, California under Commercial Arbitration Rules of the American Arbitration Association by one arbitrator appointed by the said rules. The decision of the arbitrator shall be final and binding upon the parties to the arbitration and enforceable in any court of competent jurisdiction, and a copy of such decision shall be delivered immediately to Licensor, Certifying Agent and/or Beneficiary and NCC Group. The parties to the arbitration shall use their best efforts to commence the arbitration proceedings within 14 days following delivery of the counter-notice. The sole question to be determined by the arbitrator shall be whether or not there existed a Release Event at the time Certifying Agent and/or Beneficiary delivered the Notice to NCC Group.
- 8.2 If the arbitrator finds that a Release Event existed at the time of delivery of the Notice to NCC Group, NCC Group is hereby authorized to release and deliver the Escrow Material or copy of the Escrow Material, as appropriate, to the Certifying Agent and/or Beneficiary within 5 working days of the parties' being notified of the arbitrator's decision. If the arbitrator finds to the contrary, then NCC Group shall not release the Escrow Material and shall continue to hold it in accordance with the terms of this Agreement.
- 8.3 The costs and expenses of the arbitrator, the reasonable attorneys' fees and costs incurred by the prevailing party in the arbitration and any costs incurred by NCC Group in the arbitration shall be paid by the non-prevailing party in the arbitration.

9 Confidentiality

- 9.1 The Escrow Material shall remain at all times the confidential and intellectual property of its owner.
- 9.2 In the event that NCC Group releases the Escrow Material to Certifying Agent and/or Beneficiary, Certifying Agent and/or Beneficiary shall be permitted to use the Escrow Material only for the Release Purposes.
- 9.3 Subject to Clause 9.4, NCC Group agrees to keep all Confidential Information relating to or included in the Escrow Material and/or the Software that comes into its possession or to its knowledge under this Agreement in strict confidence and secrecy. NCC Group further agrees not to make use of such information and/or documentation other than for the purposes of this Agreement and, unless the parties should agree otherwise in writing and subject to Clause 9.4, will not disclose or release it other than in accordance with the terms of this Agreement.
- 9.4 NCC Group may release the Escrow Material to the extent that it is required by applicable federal, state or local law, regulation, court order, judgment, decree or other legal process, provided that NCC Group has notified Licensor and Certifying Agent and/or Beneficiary prior to such required release, has given Licensor and/or Certifying Agent and/or Beneficiary an opportunity to contest (at their own expense) such required release, within the time parameters mandated by such applicable regulation, court order, judgment, decree or other legal process. NCC Group is hereby expressly authorized to obey and comply with all orders, judgments, or decrees so entered or issued by any court, upon the reliance of its legal counsel's direction, which it believes in good faith is valid and enforceable. Where NCC Group obeys or complies with any such order, judgment or decree, NCC Group shall not be liable to Certifying Agent and/or Beneficiary, Licensor or any third party by reason of such compliance, notwithstanding that such order, judgment or decree may subsequently be reversed, modified or vacated.

10 Intellectual Property Rights

- 10.1 The release of the Escrow Material to Certifying Agent and/or Beneficiary will not act as an assignment of any Intellectual Property Rights that Licensor or any third party possesses in the Escrow Material. However, upon deposit of the Escrow Material, the title to the media upon which the Escrow Material is deposited ("**Media**") is transferred to NCC Group. Upon delivery of the Escrow Material back to Licensor, the title to the Media shall transfer back to the Licensor. If the Escrow Material is released to the Certifying Agent and/or Beneficiary, the title to the Media shall transfer to the Certifying Agent and/or Beneficiary.
- 10.2 The Intellectual Property Rights in the final Integrity Testing report shall remain vested in NCC Group. Licensor and Certifying Agent and/or Beneficiary shall each be granted a non-exclusive right and license to use the final Integrity Testing report for the purposes of this Agreement and their own internal purposes only.

11 Integrity Testing

- 11.1 NCC Group shall bear no obligation or responsibility to any party to this Agreement or person, firm, company or entity whatsoever to determine the existence, relevance, completeness, accuracy, operation, effectiveness, functionality or any other aspect of the Escrow Material received by NCC Group under this Agreement.
- 11.2 As soon as practical after the Escrow Material has been deposited with NCC Group, NCC Group shall apply to the Escrow Materials, the following Integrity Testing processes:
 - 11.2.1 A virus check is carried out (where applicable).
 - 11.2.2 The material is read to ensure that all data can be retrieved successfully.
 - 11.2.3 Any compressed files are checked to ensure that they can be decompressed successfully and if the compressed files are protected by passwords, the passwords are obtained, if not already supplied*.
 - 11.2.4 Any encrypted files are de-encrypted and the methods to de-encrypt noted (passwords etc)*.
 - 11.2.5 A check is carried out to ensure that any source code files deposited are in human readable form.
 - 11.2.6 A detailed description of the contents of each deposit shall be created as an artifact of the testing process and shall be stored with the deposit, but this description shall not be included as part of the final test report described in Section 11.3 below.
- 11.3 If any part of the Escrow Material tested fails any of the tests listed above, NCC will notify Licensor and appropriate corrective action will be taken. (Note: Licensor is not allowed to make any modifications or changes to deposited source code materials. Any source code needed to replace corrupt or inaccessible Escrow Material must be provided only by a federal testing laboratory approved by the Certifying Agent.) Upon successful completion of the tests listed above, NCC will issue a brief final test report outlining the following information:
 - 11.3.1 Licensor
 - 11.3.2 Premium Escrow Agreement Number
 - 11.3.3 Date of Deposit
 - 11.3.4 Name and Version of software with which the deposited material is associated (from Schedule 1 (Deposit Form))
 - 11.3.5 Brief Description of Material deposited (e.g. Source Code on DVD, Supplementary Build Instructions in Hardcopy, etc. from Schedule 1 (Deposit Form)), but this description will not include a detailed inventory of the contents included in/on each item deposited
 - 11.3.6 Statement that deposit materials successfully passed Integrity Testing in accordance with Clause 11 of this Escrow Agreement

The report may indicate that the Escrow Material tested utilized passwords to protect certain parts of the Material, but the passwords themselves will not be included in the report.

- 11.4 Integrity Testing conducted under this Clause 11 upon Escrow Material's being initially deposited with NCC shall be a one-time event.
- 11.5 With the exception of one-time Integrity Testing conducted as prescribed in this Clause 11, or as may be approved in writing by Licensor, NCC Group (including its agents, contractors or sub-contractors), shall not access the contents of Licensor's Escrow Material or conduct any type of review, testing, analysis, examination, evaluation or verification thereof.
- 11.6 Nothing in this Clause prohibits the Office of the California Secretary of State from exercising the Certifying Agent's Rights defined in Clause 4 of this Escrow Agreement.

12 NCC Group's Liability

- 12.1 Nothing in this Clause 12 excludes or limits the liability of NCC Group for gross negligence or intentional misconduct.
- 12.2 Subject to Clause 12.1, NCC Group shall not be liable for:
 - 12.2.1 any loss or damage caused to either Licensor, Certifying Agent or Beneficiary except to the extent that such loss or damage is caused by the negligent acts or omissions of or a breach of any contractual duty by NCC Group, its employees, agents or sub-contractors, and in such event, NCC Group's total liability with regard to all claims arising under or by virtue of this Agreement or in connection with the performance or contemplated performance of this Agreement, shall not exceed the sum of \$100,000 (one hundred thousand US dollars) per named party or registered Beneficiary hereunder, not to exceed \$5,000,000 (five million dollars) in aggregate; and
 - 12.2.2 any special, indirect, incidental or consequential damages whatsoever.
- 12.3 NCC Group shall not be responsible in any manner whatsoever for any failure or inability of Licensor or Certifying Agent and/or Beneficiary to perform or comply with any provision of this Agreement.
- 12.4 NCC Group shall not be liable in any way to Licensor or Certifying Agent and/or Beneficiary for acting in accordance with the terms of this Agreement and specifically (without limitation) for acting upon any notice, written request, waiver, consent, receipt, statutory declaration or any other document furnished to it pursuant to and in accordance with this Agreement.
- 12.5 NCC Group shall not be required to make any investigation into, and shall be entitled in good faith without incurring any liability to Licensor or Certifying Agent and/or Beneficiary to assume (without requesting evidence thereof) the validity, authenticity, veracity and due and authorized execution of any documents, written requests, waivers, consents, receipts, statutory declarations or notices received by it in respect of this Agreement.

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13 Indemnity

Licensor agrees to defend and indemnify NCC Group and to hold NCC Group harmless from and against any claims, suits or other proceedings, actions, losses, costs, liabilities or expenses incurred in connection with the defense thereof (including reasonable attorney's fees), in each case which may be imposed on, or incurred by or asserted against NCC Group in any way arising out of or relating to this Agreement, provided that Licensor shall not be liable for that portion of any such indemnification amount resulting from NCC Group's negligent acts or omissions, intentional misconduct, or breach of any contractual duty.

14 Term and Termination

- 14.1 This Agreement and any Deposit Account Agreement shall continue until terminated in accordance with this Clause 14.
- 14.2 If Licensor or Beneficiary, as the case may be, fails to pay an invoice addressed to it for services under this Agreement and/or any Deposit Account Agreement within 30 days of its issue, NCC Group reserves the right to give that party written notice to pay the outstanding invoice within 30 days. If Licensor has not paid its invoice by the expiry of the 30 day notice period, NCC Group will give Beneficiary(ies) a period of 30 days to pay Licensor's invoice. If Licensor or Beneficiary (as appropriate) has not paid its invoice after being given notice in accordance with this Clause, NCC Group shall have the right to terminate this Agreement, the relevant Deposit Account Agreement or the registration of Beneficiary (as appropriate) without further notice. Any amounts owed by Licensor but paid by Beneficiary(ies) will be recoverable by Beneficiary(ies) direct from Licensor as a debt and, if requested, NCC Group shall provide appropriate documentation to assist in such recovery.
- 14.3 Upon termination of this Agreement and/or a Deposit Account Agreement in their entirety under the provisions of Clause 14.2, for 30 days from the date of termination NCC Group will make the Escrow Material available for collection by Licensor or its agents from the premises of NCC Group during office hours. After such 30 day period NCC Group has the authority to destroy the Escrow Material.
- 14.4 Notwithstanding any other provision of this Clause 14, NCC Group may resign as Escrow Agent hereunder and terminate this Agreement and/or a Deposit Account Agreement(s) by giving sixty (60) days written notice to Licensor and Certifying Agent and/or Beneficiary(s). In the event that this Agreement and/or a Deposit Account Agreement is terminated in its entirety, Licensor and Beneficiary(s) shall appoint a mutually acceptable new custodian on similar terms and conditions to those contained herein, provided such new custodian and their escrow facility are approved by the Certifying Agent. If a new custodian is not appointed within 14 days of delivery of such notice, Licensor or Beneficiary(s) shall be entitled to request the American Arbitration Association to appoint a suitable new custodian upon terms and conditions consistent with those in this Agreement. Such appointment shall be final and binding on Licensor and Beneficiary(s). If NCC Group is notified of the new custodian within the notice period, NCC Group will forthwith deliver the Escrow Material to the new custodian. If NCC Group is not notified of the new custodian within the notice period and this Agreement and/or a Deposit Account Agreement has been terminated in its entirety, NCC Group will

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return the Escrow Material to Licensor. Should NCC resign as Escrow Agent and terminate this Agreement and/or Deposit Account Agreements at a time not coincident with the respective Agreement annual renewal date, NCC will be responsible for refunding any unused fees paid in advance, in addition to executing administrative actions to facilitate transfer of the Escrow Material to the new custodian or the Licensor, as applicable, at no charge to Licensor, Certifying Agent or Beneficiary.

- 14.5 Beneficiary may terminate any and all Deposit Account Agreements in respect of itself only at any time by giving sixty (60) days prior written notice to NCC Group.
- 14.6 If the License Agreement with a Beneficiary has expired or has been lawfully terminated, then Beneficiary shall give notice to NCC Group and the Certifying Agent within 14 days thereof to terminate its interest under the relevant Deposit Account Agreement(s), failing which, Licensor shall be entitled to give written notice to NCC Group to terminate the relevant Beneficiary's interests under the relevant Deposit Account Agreement(s). Upon receipt of such a notice from Licensor, NCC Group shall notify Certifying Agent and Beneficiary of Licensor's notice to terminate. Unless within 30 days of NCC Group giving such notice to Certifying Agent and Beneficiary, NCC Group receives a counter-notice from Beneficiary disputing the termination of the License Agreement, then Beneficiary shall be deemed to have consented to such termination and Certifying Agent and Beneficiary's rights under the relevant Deposit Account Agreement shall immediately automatically terminate. Any disputes arising under this Clause shall be dealt with in accordance with the dispute resolution procedure in Clause 8.
- 14.7 Subject to Clause 14.6, Licensor may only terminate the interests of any Beneficiary under a Deposit Account Agreement with the written consent of that Beneficiary.
- 14.8 Subject to Clause 14.6, Licensor may only terminate this Agreement or a Deposit Account Agreement in its entirety with the written consent of all Beneficiaries.
- 14.9 A Deposit Account Agreement shall automatically immediately terminate in respect to a Beneficiary upon release of the Escrow Material to that Beneficiary in accordance with Clause 7.
- 14.10 If this Agreement or a Deposit Account Agreement is superseded and replaced by a new agreement in respect of the Escrow Material, this Agreement and/or the relevant Deposit Account Agreement shall, upon the coming into force of the new agreement in respect of a Beneficiary, automatically terminate in respect of that Beneficiary. When, as the result of a new agreement in respect of the Escrow Material, this Agreement and/or a Deposit Account Agreement has been terminated in respect of all Beneficiaries who are registered under it, it shall immediately terminate in its entirety. The relevant party or parties shall request NCC Group to either transfer the Escrow Material to the new agreement or ask Licensor under the new agreement to deposit new material. If new material is deposited, upon its receipt, NCC Group shall, unless otherwise instructed, destroy the Escrow Material.

- 14.11 The termination of this Agreement and/or a Deposit Account Agreement in respect of a Beneficiary shall be without prejudice to the continuation of this Agreement and/or the Deposit Account Agreement in respect of any other Beneficiaries.
- 14.12 If any terminations of Beneficiaries' interests under this Agreement and/or a Deposit Account Agreement result in there being no Beneficiaries registered under this Agreement and/or the Deposit Account Agreement, unless otherwise instructed by Licensor, this Agreement and/or the Deposit Account Agreement will continue and the Escrow Material will be retained by NCC Group pending registration of other Beneficiaries.
- 14.13 The provisions of Clauses 1, 4.2, 6, 9, 10, 11.1, 12, 13, 14.13 to 14.15 (inclusive) and 15 shall continue in full force after termination of this Agreement.
- 14.14 On and after termination of this Agreement and/or a Deposit Account Agreement, Licensor and/or Beneficiary(s) (as appropriate) shall remain liable to NCC Group for payment in full of any fees and interest which have become due but which have not been paid as at the date of termination.
- 14.15 The termination of this Agreement and/or a Deposit Account Agreement, however arising, shall be without prejudice to the rights accrued to the parties prior to termination.

15 General

- 15.1 Licensor and Certifying Agent and/or Beneficiary(s) shall notify NCC Group and each other, within 30 days of its occurrence, of any of the following:
 - 15.1.1 a change of its name, principal office, contact address or other contact details; and
 - 15.1.2 any material change in its circumstances that may affect the validity or operation of this Agreement or a Deposit Account Agreement.
- 15.2 This Agreement shall be deemed entered into in California and will be governed by and construed according to the laws of the state of California, excluding that body of law known as conflict of law. The parties agree that any dispute arising under this Agreement will be resolved in the state or federal courts in Sacramento County, California and the parties hereby expressly consent to the jurisdiction thereof.
- 15.3 This Agreement, the relevant Deposit Account Agreement together with, in respect of each Beneficiary, their Registration Agreement represents the whole agreement relating to the escrow arrangements between NCC Group, Licensor and that Beneficiary for the Software and shall supersede all prior agreements, discussions, arrangements, representations, negotiations and undertakings. In the event of any conflict between these documents, the terms of this Agreement shall prevail.
- 15.4 Unless the provisions of this Agreement otherwise provide, any notice or other communication required or permitted to be given or made in writing hereunder shall be validly given or made if delivered by hand or courier or if dispatched by certified or registered mail (airmail if overseas) addressed to the address specified for the parties in this Agreement or their Registration Agreement (or such other

address as may be notified to the parties from time to time) or if sent by facsimile message to such facsimile number as has been notified to the parties from time to time and shall be deemed to have been received:

- 15.4.1 if delivered by hand or courier, at the time of delivery;
 - 15.4.2 if sent by certified or registered mail (airmail if overseas), 3 business days after posting (6 days if sent by airmail);
 - 15.4.3 if sent by facsimile, at the time of completion of the transmission of the facsimile with facsimile machine confirmation of transmission to the correct facsimile number of all pages of the notice.
- 15.5 Except where Licensor merges, is acquired or has substantially all of its assets acquired and the new entity or acquirer agrees to assume all of Licensor's obligations and liabilities under this Agreement and the relevant Deposit Account Agreement, Licensor and Beneficiary shall not assign, transfer or subcontract this Agreement or any rights or obligations hereunder without the prior written consent of the other parties.
- 15.6 Except where NCC Group merges, is acquired or has substantially all of its assets acquired and the new entity or acquirer agrees to assume all of NCC Group's obligations and liabilities under this Agreement and the relevant Deposit Account Agreement(s), NCC Group shall not assign or transfer this Agreement without the prior written consent of the other parties.
- 15.7 This Agreement shall be binding upon and survive for the benefit of the successors in title and permitted assigns of the parties.
- 15.8 If any provision of this Agreement is declared too broad in any respect to permit enforcement to its full extent, the parties agree that such provision shall be enforced to the maximum extent permitted by law and that such provision shall be deemed to be varied accordingly. If any provision of this Agreement is found by any court, tribunal or administrative body of competent jurisdiction to be wholly or partly illegal, invalid, void, or unenforceable, it shall, to the extent of such illegality, invalidity or unenforceability, be deemed severable and the remaining part of the provision and the rest of the provisions of this Agreement shall continue in full force and effect.
- 15.9 Save as expressly provided in this Agreement, no amendment or variation of this Agreement or a Deposit Account Agreement shall be effective unless in writing and signed by a duly authorized representative of each of the parties to it.
- 15.10 The parties shall not be liable to each other or be deemed to be in breach of this Agreement by reason of any delay in performing, or failure to perform, any of their obligations under this Agreement if the delay or failure was for a reason beyond that party's reasonable control (including, without limitation, fire, flood, explosion, epidemic, riot, civil commotion, any strike, lockout or other industrial action, act of God, war or warlike hostilities or threat of war, terrorist activities, accidental or malicious damage, or any prohibition or restriction by any governments or other legal authority which affects this Agreement and which is not in force on the date of this Agreement). A party claiming to be unable to perform its obligations under this Agreement (either on time or at all) in any of the circumstances set out above

must notify the other parties of the nature and extent of the circumstances in question as soon as practicable. If such circumstances continue for more than six months, any of the other parties shall be entitled to terminate this Agreement by giving one month's notice in writing.

15.11 No waiver by any party of any breach of any provisions of this Agreement shall be deemed to be a waiver of any subsequent or other breach and, subject to Clause 7.9, no failure to exercise or delay in exercising any right or remedy under this Agreement shall constitute a waiver thereof.

15.12 This Agreement may be executed in any number of counterparts and by different parties in separate counterparts. Each counterpart when so executed shall be deemed to be an original and all of which together shall constitute one and the same agreement.

Signed for and on behalf of Hart InterCivic, Inc.

Name: Phillip W. Brantford

Position: SKP & GM

[Handwritten Signature]
(Authorized Signatory)

Signed for and on behalf of NCC GROUP, INC.

Name: Craig Motta

Position: NCC Group, Inc.

General Manager, NA

[Handwritten Signature]
(Authorized Signatory)

Approved as to form by the Secretary of State as Certifying Agent

Name: Lowell Finley

Position: Deputy Secretary of State

[Handwritten Signature]
(Authorized Signatory)

