



# EMPLOYER APPLICATION ERISA WRAP PLAN

## SECTION 1 - EMPLOYER INFORMATION

Company Name: \_\_\_\_\_  
*(Full and complete legal business name)*

Street: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ ZIP: \_\_\_\_\_

Phone: \_\_\_\_\_ Employer's Tax ID Number: \_\_\_\_\_

State of Organization or Incorporation: \_\_\_\_\_ Fiscal Year End Date: \_\_\_\_\_

### TYPE OF ENTITY

C Corporation

S Corporation

Non-Profit

Sole Proprietorship

Limited Liability Company

Partnership

Limited Liability Partnership

Union

Government Agency

*Name of the representative of the parties who established or maintain the Plan:*

Other: \_\_\_\_\_

The following affiliated employers will adopt this ERISA Wrap Plan as participating Employers (if there is more than one, or if any Affiliated Employers adopt this ERISA Wrap Plan after the execution of this Adoption Agreement, please attach a list of such Affiliated Employers to this Adoption Agreement):

N/A

Name of Affiliated Employer(s): \_\_\_\_\_

### Is this a controlled group (company owned by another company)?

N/A

Name of company owned by: \_\_\_\_\_

## SECTION 2 - EMPLOYER INFORMATION

**Primary Contact:** *(For contact regarding contracts, legal documents, daily administration, invoicing and plan renewal)*

Name \_\_\_\_\_ Title: \_\_\_\_\_

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

**Additional day-to-day Contact if applicable:**

Name \_\_\_\_\_ Title: \_\_\_\_\_

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

**Lead Broker/Consultant Contact:**

Name \_\_\_\_\_ Firm Name: \_\_\_\_\_

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

**General Agent Contact:**

Name \_\_\_\_\_ Firm Name: \_\_\_\_\_

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

## PLAN SETUP INFORMATION / ARRANGEMENT OPTIONS

On the line below, enter the 3-digit plan number (sometimes called the health and welfare plan number) that the employer or plan administrator assigned to the plan. Sterling needs this information so that we can assign a unique plan number to each plan we create for employers. Government agencies use the plan number in conjunction with the Employer Identification Number (EIN) as a 12-digit plan identification number and will appear in your plan documents generated by Sterling. PLEASE NOTE: You cannot duplicate or otherwise reuse a plan number previously assigned to any of the plan sponsor's other benefit plans, including a terminated benefit plan. Having an accurate plan number is critical for IRS Form 5500 filing purposes (if required). Once you have selected a unique 3-digit plan number, continue to use it for that plan for all future government agency filings. Health and Welfare Plan Numbers should begin with Plan Number 501 and increase with each subsequent Plan.

If your company has been filing separate Form 5500s for each of your plan benefits in the absence of an ERISA Wrap Plan and now intends to file as one Plan, the Wrap Plan should be assigned the next Plan Number in the sequence.

Health & Welfare Plan Number: \_\_\_\_\_

**Total number of employees in your company:** \_\_\_\_\_

Please Note: It is your responsibility to notify Sterling if your company size increases to 20 employees or 50 employees prior to your next Plan renewal period, so that we may add newly applicable COBRA or FMLA language to your Plan Documents.

**Total number of benefit eligible employees in your company:** \_\_\_\_\_

If you had 100 or more employees enrolled on the first day of any prior benefit policy, a Form 5500 filing would be required. Please confirm the status of these reports.

- |   |  |
|---|--|
| <input type="checkbox"/> No Form 5500s required                           | <input type="checkbox"/> Required Form 5500s are in process with another vendor  |
| <input type="checkbox"/> All required Form 5500s have been filed to date  | <input type="checkbox"/> Form 5500s have not been filed, please provide guidance |
| <input type="checkbox"/> Required Form 5500s are in process with Sterling |  |

All prior Plans with a Plan Number that will no longer be filing annual Form 5500s will need to file a Form 5500 Final Return electronically with the Department of Labor. This Final Return alerts the DOL that the agency should no longer expect the employer to submit any future filings under those Plan Numbers.

**Do you want Sterling to prepare this final filing for Plan Numbers that will no longer be in use?**

Yes, and I understand that an additional fee will apply  
Please specify the plan numbers that will no longer be in use: \_\_\_\_\_

No, I do not want Sterling to provide this service.

**Do you want Sterling to prepare and file IRS Form 5500 for the Wrap Plan?**

If this Wrap plan will enroll 100 or more employees, a Form 5500 filing will be required. To determine if your Plan meets this requirement, you will pool all employees across all affiliate companies, if applicable, and, counting each employee only once, determine if 100 or more employees were enrolled in one or more of the underlying policies.

- No filing necessary - less than 100 employees enrolled in the Plan
- Sterling will file the Form 5500
- Another vendor will file the Form 5500 or we will file it in-house

**Plan Name:**

- [Company Name] Health and Welfare Plan
- Preferred Custom Plan Name: \_\_\_\_\_

**Effective Date with Sterling:** \_\_\_\_\_

Is this an existing Plan which is currently active?     Yes     No

If yes, Original Effective Date: \_\_\_\_\_

Plan Year: \_\_\_\_\_ to \_\_\_\_\_

**Note:**

- New Plans: Plan Years cannot exceed 12 months. If the first Plan Year will be less than 12 months (short Plan Year), the following Plan Year will begin the day after the last day of the short Plan Year and continue for 12 months unless otherwise indicated at the time of renewal.
- Existing Plans: If the Plan is currently active, please indicate the current Plan Year dates.  
**The Plan will be restated as of the effective date with Sterling.**

# ACA ELIGIBILITY AND MEASUREMENT PERIOD INFORMATION

## Does your Plan need a procedure for determining which Employees are FTEs?

Are you an Applicable Large Employer (or an "ALE") under the Affordable Care Act? (Please review the IRS Affordable Care Act guidance [click here](#) for more information on how to determine if your company meets the definition of an Applicable Large Employer)

Yes       No

Do you have variable hour employees? (a variable hour employee is defined as: a new employee where, based on the facts and circumstances on the employee's start date, it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week)

Yes       No

- If you are not an ALE, you are not required to complete this section. Please skip to PLAN SPONSOR/EMPLOYER CONTACTS on page 5.
- If your medical benefits contract contains the required language of the plan's ACA eligibility criteria, you are not required to complete this section. Please skip to PLAN SPONSOR/EMPLOYER CONTACTS on page 5.
- If you do not employ variable hour employees, you are not required to complete this section. Please skip to PLAN SPONSOR/EMPLOYER CONTACTS on Page 5.

## NEW EMPLOYEES

How many months will the Initial Measurement Period be? (at least 3 and no more than 12) \_\_\_\_\_

When will the Initial Measurement Period Start? \_\_\_\_\_

Date of Hire       First Full Payroll       First Day of the Month       Other

Define when the Initial Measurement Period will start: \_\_\_\_\_

How long will the Initial Stability Period be? \_\_\_\_\_

## EXISTING EMPLOYEES - MONTHLY MEASUREMENT METHOD

Will an Employee's FTE status be determined by counting their hours of service for each calendar month?

Yes - All Employees       Yes - Specified Employees       No

Will a salaried Employee's FTE status be determined using the monthly measurement method?

Yes       No

Will an hourly Employee's FTE status be determined using the monthly measurement method?

Yes       No

Will "other" Employee's FTE status be determined using the monthly measurement method?

Yes       No

Specify the "other" Employees whose FTE status be determined using the monthly measurement method. \_\_\_\_\_

**EXISTING EMPLOYEES - LOOK-BACK MEASUREMENT METHOD**

Will an Employee’s FTE status be determined by using the look-back measurement method?

Yes - All Employees                       Yes - Specified Employees                       No

Will a salaried Employee’s FTE status be determined using the look-back measurement method?

Yes     No

Will an hourly Employee’s FTE status be determined using the look-back measurement method?

Yes     No

Will “other” Employee’s FTE status be determined using the look-back measurement method?

Yes     No

Specify the “other” Employees whose FTE status be determined using the look-back measurement method. \_\_\_\_\_

How long will the Standard Measurement Period be? \_\_\_\_\_

When will the Standard Measurement Period start? \_\_\_\_\_

When will the Standard Measurement Period end? \_\_\_\_\_

How long will the Standard Stability Period be? \_\_\_\_\_

When will the Standard Stability Period start? \_\_\_\_\_

When will the Standard Stability Period end? \_\_\_\_\_

**REHIRED EMPLOYEES**

When will Employees who were FTEs, have not had a break in service, and who are still in the **same** Stability Period as when they terminated service resume participation in the Plan? (e.g., date of hire)

\_\_\_\_\_

When will Employees who were FTEs, have not had a break in service, and who are in a **different** Stability Period as when they terminated service resume participation in the Plan? (e.g., date of hire)

\_\_\_\_\_

**PLAN SPONSOR/EMPLOYER CONTACTS**

**DESIGNATION OF PLAN ADMINISTRATOR:**

The plan administrator is designated by the terms of the plan document. If an administrator is not designated, the administrator is the plan sponsor. *In a single employer plan, the plan administrator is the plan sponsor/employer.* Other entities like TPAs, service providers (such as Sterling Administration), or insurance companies that may have administrative responsibilities are not ERISA plan administrators.

Plan Sponsor                                       Committee appointed by Plan Sponsor

Other, please provide: \_\_\_\_\_

**THE PLAN ADMINISTRATOR HAS THE SAME ADDRESS AND CONTACT INFORMATION AS THE PLAN SPONSOR/EMPLOYER.**

Yes  No

If No, please provide: \_\_\_\_\_

The agent of legal service for the plan is the  President of the Board  Other

If Other (for example, Managing Director, LLC Member, Sole Proprietor, Owner, etc.) please provide:

\_\_\_\_\_

The agent for legal service's contact information is  same as the Plan Sponsor/Employer  
 same as plan administrator  Other

If Other, please provide: \_\_\_\_\_

Is the Plan funded by a trust?  Yes  No

If Yes, please provide: \_\_\_\_\_

The trustee's contact information is  same as the Plan Sponsor/Employer  same as plan administrator  Other

If Other, please provide: \_\_\_\_\_

## SUBSIDIARY CONTRACTS

**Describe the contracts that should be incorporated into the Wrap Plan as Subsidiary Contracts.**

Option 1:  All health and welfare benefits of the plan sponsor subject to ERISA

Option 2:  Only the following health and welfare benefits:

\_\_\_\_\_

Option 3:  All health and welfare benefits of the plan sponsor subject to ERISA except:

### DOES THE PLAN PROVIDE ANY OF THE FOLLOWING INSURED BENEFITS?

BENEFIT	YES	NO
Group Health Plan		
Group Dental Plan		
Group Vision Plan		
Disability Plan		
Group Life Insurance Plan		
Group Accident Plan		
Pre-Paid Legal Services Plan		
Business Travel Accident Plan		
Health FSA Plan		
Wellness Plan		
Employee Assistance Plan		
Another type of plan:		
Specify the other type of plan included in the Wrap Plan:		

## ADMINISTRATIVE ELECTIONS

Is the Plan maintained pursuant to one or more collective bargaining agreement?

Yes  No

Indicate whether claims language should appear in the Summary Plan Description

Yes  No

**If Yes, Does claims language apply to any of the following benefits?**

BENEFIT	YES	NO
Group Health Plan		
Health FSA Plan		
Wellness Plan		
Employee Assistance Plan		
Another type of plan:		
Specify the other type of plan included in the Wrap Plan:		

Are any of the health and welfare benefits encompassed in the Plan Grandfathered?  Yes  No

Are any of the health and welfare benefits encompassed in this Plan non-Grandfathered and self-administered?  Yes  No

If any health and welfare benefits encompassed in this Plan and non-Grandfathered and self-administered, Sterling may provide you with the following required notices. Please indicate which notices you wish to receive, if any. (Please note that additional fees apply for providing these non-Grandfathered plan notices)

- Notice of adverse benefits determination
- Notice of final adverse benefits determination
- None





## PLAN NOTICES

Please provide me with the following forms and notices:

CHIPRA Annual Notice       QMCSO Procedures       COBRA Notice

*(Not applicable if you have a contracted COBRA vendor)*

## INVOICING & ACH SET-UP

Payment of the initial fee must be received by Sterling to finalize processing. To pay your initial fee invoice for this service, Sterling will initiate debit entries from the account you list below. By providing the information below, you are authorizing Sterling and/or Bancorp Bank (debit card processor) to initiate entries to your checking/savings accounts at the financial institution listed below and, if necessary, initiate adjustments for any transactions credited/debited in error. All entries are related to this service your company has established with Sterling. This authority will remain in effect until Sterling is notified by you in writing to cancel it in such time as to afford Sterling and the financial institution named below a reasonable opportunity to act on it. You must attach a copy of a voided check to this application as part of this process:

Financial Institution Name: \_\_\_\_\_

Financial Institution Routing Number: \_\_\_\_\_

Account Name for Debits to Pay for this Service: \_\_\_\_\_

## APPLICATION AGREEMENT / SIGNATURE

We, the undersigned employer, affirm the accuracy of the information we have provided on this application and further affirm that such information may be relied upon for the preparation of this service by Sterling and may be used for other related purposes.

We also acknowledge that we have received and reviewed the Administrative Services Agreement, (the "Agreement") provided with this application. We affirm that the Agreement is incorporated here by reference and constitutes a part of this Application.

**PLEASE NOTE:** There is a \$50 per hour charge for client requested changes to Plan documents after initial set-up.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_

Employer: \_\_\_\_\_

Print Name: \_\_\_\_\_ Title: \_\_\_\_\_

Signature: \_\_\_\_\_

# ADMINISTRATIVE SERVICES AGREEMENT

THIS ADMINISTRATIVE SERVICES AGREEMENT (“Agreement”), effective the first day of your plan year is by and between Sterling Health Services, Inc. (“Sterling”), with principal business and mailing address at 1000 Broadway, Suite 250, Oakland, CA 94607, and your corporation. For purposes of this agreement the term YOUR CORPORATION will refer to the name listed on page one of the ‘Employer Application’.

## WITNESSED THAT:

WHEREAS, YOUR CORPORATION, in the interest of obtaining ERISA Health and Welfare benefit plan document preparation services and/or Preparation and Filing of IRS Form 5500 and related documents, is desirous of entering into this Agreement with Sterling; WHEREAS, Sterling is desirous of delivering and providing qualified and competent ERISA Wrap plan document preparation services and/or IRS Form 5500 preparation and filing services (“Service” or “Services”) to YOUR CORPORATION, as these services are more fully identified in this Agreement; and NOW, THEREFORE, in return for the promises contained in this Agreement, and for other good and valuable consideration, the parties, intending to be legally bound, mutually agree as follows:

### 1. TIME OF PERFORMANCE.

- a. Your corporation and Sterling shall provide the Services required under this Agreement during the Term as defined in Section 11 (and thereafter to the limited extent provided in Section 11), unless this Agreement is sooner terminated as provided in this Agreement.

### 2. INDEPENDENT CONTRACTOR STATUS AND RESPONSIBILITIES.

- a. In the performance of the Services required by this Agreement, each party shall be an independent contractor with the authority and responsibility to control and direct its own performance and the details of the work and Services required of such party under this Agreement; however, each party shall have a general right to review the Services provided by the other to determine whether, in the reasonable opinion of the first party, the Services being performed by the other are in accordance with the provisions of this Agreement. All persons hired or used by each party shall be that party’s employees and agents and the hiring party shall ensure that such persons are trained, qualified, and appropriately licensed to provide Services under this Agreement. Each party shall be responsible for the accuracy, completeness, and adequacy of any and all work and Services performed by its employees and agents and shall ensure that all applicable licensing and operating requirements of federal, state, county, and municipal governments, and all applicable accreditation and other standards of quality generally accepted in the field of such party’s activities are complied with and satisfactorily met. Furthermore, each party intentionally, voluntarily, and knowingly assumes the sole and entire liability to its employees, agents, and other persons for all loss, damage, or injury caused by its employees and agents in the course of their employment or engagement. Participation by a party in the performance of Services under this Agreement shall not constitute nor be construed as employment with the other party and shall not entitle a party or its employees, agents, or subcontractors to vacation, sick leave, retirement, or other benefits afforded employees of the other party. Each party shall be responsible for payment of applicable income, social security, and any other federal, state, county, or municipal taxes and fees.

### **3. INSURANCE.**

- a. Sterling shall obtain, maintain, and keep in force throughout the time of performance of Services under this Agreement, and shall cause its employees and agents to obtain, maintain, and keep in force throughout the time of performance of Services under this Agreement, all insurance coverage appropriate to such party's business and the Services provided under this Agreement, including liability coverage and workers' compensation coverage issued by an insurance company or indemnity company authorized to conduct business in the state of such party's incorporation. Upon a party's request, the other party shall provide documents sufficient to demonstrate compliance with the requirements of this Section 3.

### **4. INDEMNIFICATION.**

- a. Each party (the "indemnifying party") shall indemnify, defend, and hold harmless the other party and the other party's officers, directors, employees, and agents, (each of the foregoing hereinafter referred to as an "indemnified party") from and against any and all actions, liabilities, claims, suits, damages, liens, judgments, losses, fines, penalties, costs, and expenses (including reasonable attorneys' fees of counsel selected by the indemnified party and costs) arising out of or from (a) the acts or omissions of the indemnifying party or the indemnifying party's officers, directors, employees, agents, or subcontractors occurring during the indemnifying party's performance under or in connection with this Agreement, or (b) breach of this Agreement by the indemnifying party or the indemnifying party's officers, directors, employees, agents, or subcontractors. The indemnifying party's obligation to indemnify the indemnified party and its officers, directors, employees, and agents shall survive the expiration or termination of this Agreement for any reason.

### **5. SUBCONTRACTORS AND ASSIGNMENTS.**

- a. Neither party shall subcontract, delegate, assign, or otherwise transfer any part of or all of the Services to be performed under this Agreement without the prior written approval of the other party. Furthermore, no assignment of claims for money due or to become due to Sterling under this Agreement shall be effective unless the assignment of such claims is first approved in writing by Sterling.
- b. Subject to any provisions of this Agreement restricting assignment or transfer, this Agreement shall be binding upon and shall inure to the benefit of the parties to this Agreement and their respective legal representatives, successors, and permitted subcontractors and assigns. This Agreement shall not be enforceable by or give rise to rights of any other third parties.

### **6. CONFLICTS OF INTEREST.**

- a. Each party represents that it presently has no interest, and promises that it shall not acquire any interest, direct or indirect, that would substantially conflict with or jeopardize its performance of Services under this Agreement.

### **7. PROHIBITED DISCRIMINATION.**

- a. With respect to this Agreement, each party shall comply with all applicable federal and state laws prohibiting discrimination against any person on the grounds of race, color, national origin, religion, creed, sex, age, disability, or on any other grounds proscribed under applicable state or federal law.

## **8. COMPLIANCE WITH ALL LAWS.**

- a. Each party represents and warrants that it has and shall maintain, and that its employees, agents, and subcontractors shall have and maintain, all licenses, accreditations, and approvals that are customary to its business or that are necessary to provide Services under this Agreement. Each party shall observe and comply, and shall cause its employees, agents, and subcontractors to observe and comply, with all laws, ordinances, rules, and regulations of the federal, state, county, or municipal governments, now in force or which may hereinafter be in force.

## **9. CONFIDENTIALITY OF BUSINESS INFORMATION.**

- a. Each party acknowledges that this Agreement, and all materials and information concerning the other party's business and operations, including, but not limited to, a party's billing and fees, employees, legal disputes, policies, procedures, and all documents and reports regarding or prepared by a party (other than those in the public domain), and any other information regarding the provision of services by, or the administration and operation of, a party (collectively, "Confidential Information"), are commercially valuable and confidential. Each party and each party's employees and agents shall hold the other party's Confidential Information in strict confidence, shall not provide, disclose, or otherwise make available any such information to any third party, and shall not use such information for any purposes other than performance in accordance with this Agreement, without the prior written approval of the other party, unless otherwise required by law.

## **10. COPYRIGHTS AND PATENTS.**

- a. Sterling shall have complete ownership, title, and right in and to all materials, discoveries, or inventions, both finished and unfinished, which are developed, prepared, assembled, or conceived by Sterling pursuant to this Agreement. No summary, report, chart, graph, table, study, or other document, or discovery, invention, or development produced in whole or in part by Sterling under this Agreement shall be the subject of an application for copyright, trademark, or patent by or on behalf of YOUR CORPORATION or YOUR CORPORATION 's officers, employees, agents, or subcontractors without prior written authorization from Sterling.

## **11. TERM; RENEWAL; TERMINATION.**

- a. Unless earlier terminated as provided in this Section 11, this Agreement shall be effective for a term of one (1) year from the Effective Date. Thereafter, this Agreement will be renewed automatically for successive one (1) year terms commencing on the first anniversary of the Effective Date and renewing annually on that date ("Renewal Date"), unless one party gives the other written notice of non-renewal at least thirty (30) days prior to the Renewal Date.
- b. If either party breaches this Agreement, the non-breaching party may terminate this Agreement upon thirty (30) days prior written notice to the breaching party; provided, however, that such termination notice shall not be effective if the breaching party promptly seeks to cure such breach, diligently pursues cure, and does cure such breach within the thirty (30) day period following the date of the notice, or a reasonable longer period if the breach cannot reasonably be cured within such time. Notwithstanding the foregoing, either party may terminate this Agreement immediately upon written notice to the other if: (a) the other party fails to possess any license, accreditation, or approval necessary to its business or to provide the Services under this Agreement, or (b) fails to have and maintain the insurance required under Section 3 of this Agreement, or (c) the party seeking termination reasonably concludes that the other party may

pose an imminent threat to the orderly administration of the terminating party's operations, or (d) the other party commits any act that reasonably may impair the reputation of the party seeking termination.

- c. In the event of termination or expiration of this Agreement for any reason, all obligations of the parties to each other shall terminate immediately, provided, however, that:
- d. Upon request of YOUR CORPORATION or Sterling, Services under this Agreement shall continue for such period (not exceeding thirty (30) days) as is reasonably necessary to transfer the provision of the Services to another service provider.
- e. The parties shall settle all outstanding matters related to this Agreement, including financial obligations as to payment or otherwise, in good faith and in accordance with this Agreement.
- f. Each party shall promptly return to the other party all Confidential Information in its possession relating to the other party.
- g. The obligations of the parties set forth in Section 4 (Indemnification), Section 9 (Confidentiality of Business Information) and this Section 11 (Term; Renewal; Termination) shall survive the expiration or termination of this Agreement.
- h. Despite expiration or termination of this Agreement for any reason, neither party shall be relieved of liability to the other party or to third parties for its performance of this Agreement during the Term.

## **12. MODIFICATION OF AGREEMENT.**

- a. Any modification, alteration, or change to this Agreement shall be made only by written supplemental agreements executed by authorized representatives of the parties.

## **13. WAIVERS.**

- a. It is expressly understood and agreed that no waiver granted by a party of a breach or default by the other party of any of the provisions of this Agreement shall constitute or be construed in any manner as a waiver of the provision or of the right by the non-breaching party to enforce the same as to any other or further violation by the other party. Similarly, no failure or delay on the part of a party in exercising any right, power, or privilege under this Agreement, and no course of dealing between the parties shall operate as a waiver thereof; nor shall any single or partial exercise of any right, power, or privilege under this Agreement by either party preclude any other or further exercise thereof or the exercise of any other right, power, or privilege.

## **14. PERSONNEL RECRUITMENT.**

- a. Each party agrees that at no time during the Term of this Agreement or during any extension or renewal thereof, and for a period of one (1) year thereafter, shall it contact any employee of the other party or any affiliate thereof for the purpose of employing, hiring, or otherwise interfering with the employment relationship between such employee and his/her employer or any affiliate thereof without the prior written approval of the employing party, nor shall either party, directly or indirectly, for itself or on behalf of or in connection with any other person, firm, partnership, corporation, or association, solicit, hire, or entice away any employee from his/her employer or any affiliate thereof.

**15. FORCE MAJEURE.**

- a. Should the performance of this Agreement by YOUR CORPORATION and/or Sterling be prevented or delayed by an act of God, war, civil insurrection, fire, flood, storm, strikes, lockouts, or by any law, regulation or order of any federal, state, county, or municipal authority, or by any other cause beyond the reasonable control of YOUR CORPORATION and/or Sterling, as the case may be, such party's performance to the extent it is so prevented or delayed shall be excused, provided that the party diligently attempts to perform to the extent it is not so prevented or delayed. If any such event occurs, the nonperforming party shall make reasonable efforts to notify the other party of the nature of any such condition and the extent of the delay.

**16. INVALID PROVISIONS.**

- a. If any provision of this Agreement or any other document contemplated hereby is rendered illegal, invalid, or unenforceable by any judicial decision, legislative action or regulation, or other administrative ruling, whether federal or state, such provision shall be fully severable and:
  - i. This Agreement and any other document contemplated hereby shall be construed and enforced as if such illegal, invalid, or unenforceable provision had never comprised a part hereof or thereto;
  - ii. The remaining provisions of this Agreement and any other document contemplated hereby that reasonably can be given effect apart from that which is invalidated shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision; and
  - iii. The parties shall in good faith negotiate and substitute a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and still be legal, valid, and enforceable. If the parties cannot, within fifteen (15) days, agree on an amendment to the Agreement to cure such illegal, invalid, or unenforceable provision, either party may terminate this Agreement upon thirty (30) days prior written notice to the other party, or sooner if required by law.

**17. CAPTIONS AND HEADINGS.**

- a. In this Agreement, the captions and headings of paragraphs and/or subparagraphs are inserted for convenience, reference, and identification purposes only, and shall not control, define, limit, or affect any provision in this Agreement.

**18. NUMBER AND GENDER.**

- a. Whenever the singular is used herein, it shall include the plural where appropriate, and vice versa; and words of any gender in this Agreement shall include each gender where appropriate.

**19. JURISDICTION; VENUE.**

- a. In the event of any litigation relating to matters within the scope of this Agreement, the prevailing party on any claim or counterclaim shall be entitled to its costs and reasonable attorneys' fees. In the event of any such litigation, the parties to this Agreement agree that the courts of the State of California will have exclusive jurisdiction, the venue therefore shall be in Alameda County, California and that all matters at issue and all questions concerning the interpretation of this Agreement

shall be decided and construed in accordance with California law, excluding the choice of law rules thereof. The parties agree that Alameda, California shall be deemed to be a convenient forum, and that no legal action or other legal proceeding relating to this Agreement shall be initiated in any other forum.

## **20. CONSTRUCTION.**

- a. Each party hereto agrees that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in the construction or interpretation of this Agreement.

## **21. ADDITIONAL DOCUMENTS AND ACTIONS.**

- a. Each party agrees to execute and deliver or cause to be executed and delivered such agreements, instruments, and documents, and to take such actions as the other party reasonably requests to the extent such agreements, instruments, documents, and actions are necessary for the purpose of evidencing or implementing the transactions contemplated by this Agreement.

## **22. NOTICES.**

- a. Any notice or communication given under this Agreement shall be in writing, and delivered (i) in person, or (ii) by United States mail, registered or certified, return receipt requested, and postage prepaid, or (iii) by facsimile, with a copy sent by United States mail, registered or certified, and postage prepaid, or (iv) by a recognized overnight carrier (e.g., Federal Express), postage prepaid, addressed to the other party at the address listed below or to such other address as a party may notify the other party. All notices and communications shall be deemed to have been duly given (a) upon receipt if delivered in person, (b) three (3) business days after having been deposited in the mail as set forth above, (c) on the same day as sent if delivered by facsimile with a copy sent by mail as set forth above, or (d) one (1) business day after having been delivered to a recognized overnight carrier.

If to Sterling, to:  
Vice President of Sales  
P.O. Box 71107  
Oakland, CA 94612  
Phone: 800-617-4729

## **23. EXECUTION.**

- a. This Agreement may be executed by the parties in counterparts, all of which taken together will be deemed one and the same instrument.

## **24. DISPUTES.**

- a. In the event of any dispute arising under or relating to this Agreement, either party may request an "executive review" with respect to the dispute. Each party shall designate the appropriate person, such as its chief executive officer or its chief operating officer, as the designated executive reviewer. Either party may request executive consultation between the two executive reviewers with respect to any dispute. Any dispute not resolved by agreement of such executive reviewers to the satisfaction of both parties within thirty (30) days of the executive review may be referred to arbitration as provided below.

## **25. DISPUTES AND ARBITRATION.**

a. If any controversy, dispute, or claim arises between the parties with respect to this Agreement, including, without limitation, disputes concerning compensation, the parties shall make good faith efforts to resolve such matters informally. If the dispute or claim is not resolved to the satisfaction of either or both parties, then such matter shall be settled exclusively by arbitration under the Commercial Arbitration rules of the American Arbitration Association then in force. Such arbitration may be initiated by either party by serving a written demand on the other party stating the substance of the controversy and the contention of the party requesting arbitration. The American Arbitration Association shall appoint an arbitrator who shall be a fit and impartial person. The award rendered by the arbitrator shall include costs and expenses, including, without limitation, reasonable attorneys' fees, to the prevailing party and shall be final and binding on both parties. The fees and costs of the arbitrator and related expenses for arbitration shall be borne by the non-prevailing party. If the arbitrator determines that neither party has clearly prevailed, then the parties shall bear equally the fees and costs of the arbitration.

## **26. REMEDIES.**

a. Any remedies which the parties may have pursuant to this Agreement or by law shall be cumulative. The parties agree that if a party fails to comply with the terms and conditions of this Agreement, the harm to the other party may not be fully compensable in money damages and accordingly, the parties agree that neither party shall oppose an application by the other party seeking specific performance of any and all provisions of this Agreement or enjoining the breaching party from continuing to commit any breach, to the full extent permitted by law.

## **27. WARRANT OF AUTHORITY.**

a. Each party represents and warrants that the individual executing this Agreement on behalf of such party has authority to do so, and thereby to bind the party.