

STATE OF TEXAS

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COUNTY OF TRAVIS

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**EXPERT WITNESS CONTRACT**

**Between**

**TEXAS BOARD OF NURSING**

**And**

The Texas Board of Nursing, hereinafter referred to as the "Board", and \_\_\_\_\_, hereinafter referred to as Witness, hereby make and enter into this contract for the mutual consideration set forth below as provided for in Tex. Gov't. Code §2151.005.

**I.**

The Witness agrees to provide to the Board expert consulting services and testimony in various disciplinary proceedings brought pursuant to TEX. OCC. CODE §301.452. The Witness will provide such services to the extent specifically requested by the Board on an as needed basis. No provision of this contract shall be construed as mandating performance under this contract by the Witness, if the Witness is unavailable, unable, or unwilling to perform the service requested.

**II.**

All information prepared by Witness is the work product of the Board and is subject to disclosure or non-disclosure pursuant to the Texas Rules of Civil Procedure and Texas Rules of Evidence. The Witness agrees to keep all information to which it is privy under this contract confidential, privileged and protected from disclosure without the prior consent of the agency. Further, any software, research, reports studies, data, photographs, negatives or other documents, drawings or materials prepared by the Witness in the performance of its obligations under this contract shall be the exclusive property of the State of Texas and all such materials shall be delivered to the State by the Witness upon completion, termination, or cancellation of this contract. The Witness may, at his or her own expense, keep copies of all its writings for its personal files. The Witness shall not use, willingly allow, or cause to have such materials used for any purpose other than the performance of Witness's obligations under this contract without the prior written consent of the Board.

Notwithstanding any provisions of this contract to the contrary, the Witness understands that the Board will comply with the Texas Public Information Act, Texas Government Code, Chapter 552 as interpreted by judicial opinions and opinions of the Attorney General of the State of Texas. The Board agrees to notify the Witness in writing within a reasonable time from receipt of a request for information related to the Witness' work under this contract. The Witness will cooperate with the Board in the production of documents responsive to the request. The Board will make a determination whether to submit a Public Information Act request to the Attorney General. The Witness will notify the Board's General Counsel within twenty-four (24) hours of receipt of any third party requests for information. The Witness is required to make any information created or exchanged with the state pursuant to this contract, and not otherwise excepted from disclosure under the Texas Public Information Act, available in an electronic format, if practicable, that is accessible by the public, at no additional charge to the state. If this

is not practicable, the Witness is required to make any information created or exchanged with the state pursuant to this contract, and not otherwise excepted from disclosure under the Texas Public Information Act, available in a paper format that is accessible by the public at no additional charge to the state.

### III.

The Witness's payment structure shall be as follows:

**Hourly Rate for Pre-Trial Services.** The hourly rate for the Witness's services shall be seventy-five dollars (\$75.00) per hour for pre-trial consulting and other tasks necessary to prepare a consulting report or testimony for a contested case. These tasks may include record review, preparation of an expert report, consultation with Board Staff, and preparation for testimony.

**Hourly Rate for Trial and Testimony.** The hourly rate for the Witness's services shall be one hundred twenty-five dollars (\$125.00) per hour for deposition and hearing testimony. All time that the Witness is required to be present at the State Office of Administrative Hearings during a contested case proceeding is considered testimony for purposes of this contract.

**Expenses.** Travel and per diem expenses, if any, shall be reimbursed according to State of Texas Comptroller Guidelines. The Board will also reimburse for travel to any Board of Nursing training workshops according to State of Texas Comptroller Guidelines.

**Compensation Limits.** The total price of this contract is capped at three thousand five hundred dollars (\$3,500.00) per contested case, and ten thousand dollars (\$10,000.00) per year, unless specifically approved by the Executive Director of the Board of Nursing.

The Witness agrees to keep documentation and receipts related to his performance under this contract. The parties stipulate and agree that the total amount due to Witness for all services performed under this contract shall be the amount set forth in this contract. The parties further acknowledge and agree that nothing in this contract will be interpreted to create an obligation or liability in excess of the funds currently appropriated to the Board during this biennium.

### IV.

Payment will be made within thirty (30) days of services rendered and after Witness has submitted to the Board a signed invoice attesting to the days and hours worked, the subject matter of the work, and expenses incurred. Expenses are to be itemized and copies of all available receipts must be provided prior to payment.

### V.

The offer of this contract is an official act of the Board, or its designee, the Executive Director, who has been empowered and authorized to act on behalf of the Board in respect to this contract.

### VI.

The term of this contract shall become effective upon the signature of the Executive Director of the Board and continue until August 31, 2017. This contract may be canceled at any time by mutual

consent. In addition, either party to this contract may cancel it by the giving of at least thirty (30) days notice in writing to the other party whereupon this contract will be canceled upon the expiration of the thirty (30) day (or longer) period after receipt of the notice of cancellation. Upon mutual contract of the parties, this contract may be extended for up to one year on August 31, 2017.

If the Witness fails to provide the goods or services contracted for according to the provisions of the contract, or fails to comply with any terms or conditions of the contract, the Board may, upon written notice of default to the Witness immediately terminate all or any part of the contract. Termination is not an exclusive remedy, but will be in addition to any other rights and remedies as provided in equity, by law or under the contract. The Board may exercise any other right, remedy, or privilege which may be available to it under applicable law of the state and any other applicable law or may proceed by appropriate court action to enforce the provisions of the contract. The exercise of any of the foregoing remedies will not constitute a termination of the contract unless the Board notifies the Witness in writing prior to the exercise of such remedy. The Witness shall be liable for all costs and expenses, including court costs, incurred by the Board with respect to the enforcement of any of the remedies listed herein.

In the event that the contract is terminated for any reason, or upon its expiration, the Board shall retain ownership of all associated work products and documentation obtained from the Witness under the contract.

## VII.

The Witness is not an employee of the Board, and as such is responsible for payment of any federal taxes to be paid to the federal government attributable to the payments made under this contract, and is, furthermore, not eligible for any fringe benefits due state employees. All obligations of the Board are subject to the availability of legislative appropriations. The Witness acknowledges that the ability of the Board to make payments under the contract is contingent upon the continued availability of funds. The Witness further acknowledges that funds may not be specifically appropriated for the contract and the Board's continual ability to make payments under the contract is contingent upon the funding levels appropriated to the Board. The Board will use all reasonable efforts to ensure that such funds are available. The Witness agrees that if future levels of funding for the Board are not sufficient to continue operations without any operational reductions, the Board, in its discretion, may terminate the contract or a pending order under the contract, either in whole or in part. In the event of such termination, the Board will not be considered to be in default or breach under the contract, nor shall it be liable for any further payments ordinarily due under the contract, nor shall it be liable for any damages or any other amounts which are caused by or associated with such termination. The Board shall make best efforts to provide reasonable written advance notice to the Witness of any such contract or order termination. In the event of such a termination, the Witness shall, unless otherwise mutually agreed upon in writing, cease all work immediately upon the effective date of termination, either on the particular order if an order is being terminated, or the contract, if the contract is being terminated. The Board shall be liable for payments limited only to the portion of work the Board authorized in writing and which the Witness has completed, delivered to the Board, and which has been accepted by the Board. All such work shall have been completed, per the contract requirements, prior to the effective date of termination.

### VIII.

The Witness warrants that, to the best of his/her knowledge, there are no state or federal laws which would prevent him/her from entering into this contract. The Witness represents and warrants that neither Witness nor any firm, corporation, partnership, or institution represented by Witness, or anyone acting for such firm, corporation or institution has violated the antitrust laws of the State of Texas under Tex. Bus. & Com. Code, Chapter 15, or the federal antitrust laws.

### IX.

The Witness shall indemnify and hold harmless the State of Texas and customers, and/or their officers, agents, employees, representatives, contractors, assignees, and/or designees from any and all liability, actions, claims, demands, or suits, and all related costs, attorney fees, and expenses arising out of, or resulting from any acts or omissions of the witness or its agents, employees, subcontractors, order fulfillers, or suppliers of subcontractors in the execution or performance of the contract. The defense shall be coordinated by the Witness with the Office of the Attorney General when Texas state agencies are named defendants in any lawsuit and the Witness may not agree to any settlement without first obtaining the concurrence from the Office of the Attorney General. The Witness and the Board agree to furnish timely written notice to each other of any such claim.

The Witness shall indemnify and hold harmless the State of Texas and customers, and/or their employees, agents, representatives, contractors, assignees, and/or designees from any and all third party claims involving infringement of united states patents, copyrights, trade and service marks, and any other intellectual or intangible property rights in connection with the performances or actions of the Witness pursuant to this contract. The Witness and the Board agree to furnish timely written notice to each other of any such claim. The Witness shall be liable to pay all costs of defense, including attorneys' fees. The defense shall be coordinated by the Witness with the Office of the Attorney General when Texas state agencies are named defendants in any lawsuit and the Witness may not agree to any settlement without first obtaining the concurrence from the Office of the Attorney General.

The Witness shall have no liability under this section if the alleged infringement is caused in whole or in part by: (i) use of the product or service for a purpose or in a manner for which the product or service was not designed, (ii) any modification made to the product without the Witness' written approval, (iii) any modifications made to the product by the Witness pursuant to the Board's specific instructions, (iv) any intellectual property right owned by or licensed to the Board, or (v) any use of the product or service by customer that is not in conformity with the terms of any applicable license contract.

If the Witness becomes aware of an actual or potential claim, or the Board provides the Witness with notice of an actual or potential claim, the Witness may (or in the case of an injunction against the Board, shall), at the Witness' sole option and expense; (i) procure for the Board the right to continue to use the affected portion of the product or service, or (ii) modify or replace the affected portion of the product or service with functionally equivalent or superior product or service so that the Board's use is non-infringing.

The Witness agrees and acknowledges that during the existence of this contract, the Witness shall

be entirely responsible for the liability and payment of the Witness' and the Witness' employees' taxes of whatever kind, arising out of the performances in this contract. The Witness agrees to comply with all state and federal laws applicable to any such persons, including laws regarding wages, taxes, insurance, and workers' compensation. The Board and/or the state shall not be liable to the Witness, its employees, agents, or others for the payment of taxes or the provision of unemployment insurance and/or workers' compensation or any benefit available to a state employee or employee of another governmental entity customer.

The Witness agrees to indemnify and hold harmless the Board, the State of Texas and/or their employees, agents, representatives, contractors, and/or assignees from any and all liability, actions, claims, demands, or suits, and all related costs, attorneys' fees, and expenses, relating to tax liability, unemployment insurance and/or workers' compensation in its performance under this contract. The Witness shall be liable to pay all costs of defense, including attorneys' fees. The defense shall be coordinated by the Witness with the Office of the Attorney General when Texas state agencies are named defendants in any lawsuit and the Witness may not agree to any settlement without first obtaining the concurrence from the Office of the Attorney General. The Witness and the Board agree to furnish timely written notice to each other of any such claim.

The Witness acts in the capacity of an independent contractor under this contract. The Witness will indemnify and hold the Board harmless from and against all claims arising out of the Witness's performance including, but not limited to, the use of automobiles and/or other means of transportation. The Witness will indemnify and hold harmless the state of Texas, its officers and employees, and the Board, its officers and employees for any claims or damages that arise from the disclosure by the Witness of information held by the Board.

#### X.

The dispute resolution process provided for in Texas Government Code, Chapter 2260 shall be used by the Board and the Witness to resolve any dispute arising under the contract. The dispute resolution process provided for in Chapter 2260 shall be used, as further described herein, to attempt to resolve a claim for breach of contract asserted by the Witness under the Contract. If the Witness' claim for breach of contract cannot be resolved by the parties in the ordinary course of business, it shall be submitted to the negotiation process provided in Chapter 2260. To initiate the process, the Witness shall submit written notice, as required by Chapter 2260, to the Deputy Comptroller or his or her designee and to the Board's General Counsel. Compliance by the Witness with Chapter 2260 is a condition precedent to the filing of a contested case proceeding under Chapter 2260.

The contested case process provided in Chapter 2260 is the Witness' sole and exclusive process for seeking a remedy for an alleged breach of contract by the Board if the parties are unable to resolve their disputes as described above. Compliance with the contested case process provided in Chapter 2260 is a condition precedent to seeking consent to sue from the Legislature under Chapter 107, Civil Practices and Remedies Code. Neither the execution of the contract by the Board nor any other conduct of any representative of the Board relating to the contract shall be considered a waiver of sovereign immunity to suit. For all other specific breach of contract claims or disputes under the contract, the Board and the

Witness shall first attempt to resolve them through direct discussions in a spirit of mutual cooperation. If the parties' attempts to resolve their disagreements through negotiations fail, the dispute will be mediated by a mutually acceptable third party to be chosen by the Board and the Witness within fifteen (15) days after written notice by one them demanding mediation under this section. The Witness shall pay all costs of the mediation unless the Board in its sole good faith discretion, approves its payment of all or part of such costs. By mutual contract, the Board and the Witness may use a non-binding form of dispute resolution other than mediation. The purpose of this section is to reasonably ensure that the Board and the Witness shall, in good faith, utilize mediation or another non-binding dispute resolution process before pursuing litigation. The Board's participation in, or the results of, any mediation or other non-binding dispute resolution process under this section or the provisions of this section shall not be construed as a waiver by the Board of (1) any rights, privileges, defenses, remedies or immunities available to the Board as an agency of the State of Texas or otherwise available to the Board; (2) the Board termination rights; or (3) other termination provisions or expiration dates of the contract.

Notwithstanding any other provision of the contract to the contrary, unless otherwise requested or approved in writing by the Board, the Witness shall continue performance and shall not be excused from performance during the period any breach of contract claim or dispute is pending under either of the above processes; however, the Witness may suspend performance during the pendency of such claim or dispute if the Witness has complied with all provisions of Section 2251.051, Texas Government Code, and such suspension of performance is expressly applicable and authorized under that law.

The venue of any suit brought for any breach of the contract is fixed in any court of competent jurisdiction in Travis County, Texas, and all payments shall be due and payable in Travis County, Texas.

#### **XI.**

In accordance with Section 403.055(h) of the Texas Government Code, the Witness agrees that any payments due to the Witness under this contract will be first applied toward any debt and/or back taxes the Witness owes the State of Texas. Payments will be so applied until such debts and taxes are paid in full. The Witness agrees that any payments due under this contract will be applied towards any debt, including but not limited to delinquent taxes and child support that is owed to the State of Texas. This clause does not apply if federal law requires payment to be made to the Witness for the services, and may not apply if federal law conditions the receipt of the money for this service to the State on the basis of payment being made to the Witness.

#### **XII.**

It is agreed and understood that the contract may be amended only upon written contract between the Board and the Witness, but in no case will the contract be amended so as to make it conflict with the laws of the State of Texas.

#### **XIII.**

Pursuant to Section 2262.154 of the Texas Government Code, the state auditor may conduct an audit or investigation of the Witness or any other entity or person receiving funds from the state directly under this contract or indirectly through a subcontract under this contract. The acceptance of funds by the

Witness or any other entity or person directly under this contract or indirectly through a subcontract under this contract acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. Under the direction of the legislative audit committee, the Witness or other entity that is the subject of an audit or investigation by the state auditor must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit. The Witness will ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through the Witness and the requirement to cooperate is included in any subcontract it awards. The Witness further agrees to cooperate fully with the State Auditor's Office in the conduct of the audit or investigation, including providing all records requested. The Witness will ensure that this clause concerning the State Auditor's Office's authority to audit state funds and the requirement to cooperate fully with the State Auditor's Office is included in any subcontracts it awards, should subcontracting be authorized. Additionally, the State Auditor's Office shall at any time have access to and the rights to examine, audit, excerpt, and transcribe any pertinent books, documents, audit documentation, and records of the Witness relating to this contract.

#### XIV.

Pursuant to Tex. Gov't Code § 2155.441, the Witness represents and warrants that it will buy Texas products and materials for use in providing the services authorized herein when such products and materials are available at a comparable price and in a comparable period of time when compared to non-Texas products and materials.

#### XV.

Neither Witness nor the Board shall be liable to the other for any delay in, or failure of performance caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance until after the causes of delay or failure have been removed provided the non-performing party exercises all reasonable due diligence to perform. Force majeure is defined as acts of God, war, fires, explosions, hurricanes, floods, failure of transportation, or other causes that are beyond the reasonable control of either party and that by exercise of due foresight such party could not reasonably have been expected to avoid, and which, by the exercise of all reasonable due diligence, such party is unable to overcome. Each party must inform the other in writing, with proof of receipt, within three (3) business days of the existence of such force majeure, or otherwise waive this right as a defense.

#### XVI.

Effective September 1, 2006 state agencies and institutions of higher education shall procure products which comply with the State of Texas Accessibility requirements for Electronic and Information Resources specified in 1 TAC Chapter 213 when such products are available in the commercial marketplace or when such products are developed in response to a procurement solicitation. If applicable, the Witness shall provide DIR with the URL to its Voluntary Product Accessibility Template (VPAT) for reviewing compliance with the State of Texas Accessibility requirements (based on the federal standards established under Section 508 of the Rehabilitation Act), or indicate that the product/service accessibility information is available from the General Services Administration "Buy Accessible Wizard" (<http://www.buyaccessible.gov>). If applicable, Witnesses not listed with the "Buy Accessible Wizard" or supplying a URL to their VPAT must provide DIR with a report that addresses the same accessibility

criteria in substantively the same format. Additional information regarding the "Buy Accessible Wizard" or obtaining a copy of the VPAT is located at <http://www.section508.gov/>.

#### XVII.

If the Witness defaults on the contract, the Board reserves the right to cancel the contract without notice. The defaulting Witness will not be considered in future contracts for the same type of work, unless the specification or scope of work significantly changed. The period of suspension will be determined by the agency based on the seriousness of the default.

#### XVIII

For the purposes of this contract, the term "Work" is defined as all reports, statistical analyses, work papers, work products, materials, approaches, designs, specifications, systems, documentation, methodologies, concepts, research, materials, intellectual property or other property developed, produced, or generated in connection with this contract. All work performed pursuant to this contract is made the exclusive property of the Board. All right, title and interest in and to said property shall vest in the Board upon creation and shall be deemed to be a work for hire and made in the course of the services rendered pursuant to this contract. To the extent that title to any such work may not, by operation of law, vest in the Board, or such work may not be considered a work made for hire, all rights, title and interest therein are hereby irrevocably assigned to the Board. The Board shall have the right to obtain and to hold in its name any and all patents, copyrights, registrations or such other protection as may be appropriate to the subject matter, and any extensions and renewals thereof. The Witness must give the Board and/or the State of Texas, as well as any person designated by the Board and/or the State of Texas, all assistance required to perfect the rights defined herein without any charge or expense beyond those amounts payable to Witness for the services rendered under this contract.

The Witness shall maintain and retain supporting fiscal and any other documents relevant to showing that any payments under this contract funds were expended in accordance with the laws and regulations of the State of Texas, including but not limited to, requirements of the Comptroller of the State of Texas and the State Auditor. The Witness shall maintain all such documents and other records relating to this contract and the State's property for a period of seven (7) years after the date of submission of the final invoices or until a resolution of all billing questions, whichever is later. The Witness shall make available at reasonable times and upon reasonable notice, and for reasonable periods, all documents and other information related to the "Work" as defined in this section of the contract. The Witness and the subcontractor, if any, shall provide the State Auditor with any information that the State Auditor deems relevant to any investigation or audit. The Witness must retain all work and other supporting documents pertaining to this contract, for purposes of inspecting, monitoring, auditing, or evaluating by the Board and any authorized agency of the State of Texas, including an investigation or audit by the State Auditor.

The Witness shall cooperate with any authorized agents of the State of Texas and shall provide them with prompt access to all of such State's work as requested. The Witness's failure to comply with this section shall constitute a material breach of this contract and shall authorize the Board and the State of Texas to immediately assess appropriate damages for such failure.

This contract is full and complete on its face, has been read by all parties, and no terms or conditions exist outside those acknowledged and accepted herein by the parties whose signatures appear below. The Witness may not assign any of its rights or delegate any of its obligations under this contract. Any assignment or delegation attempted by the Witness in violation of this clause will be void and ineffective for all purposes.

For the faithful performance of the terms of this contract, the parties hereto execute this contract in their respective capabilities on the dates indicated.

TEXAS BOARD OF NURSING

WITNESS

By:



By:

Katherine A. Thomas, MN, RN, FAAN  
Executive Director for the  
Texas Board of Nursing  
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Suite 3-460  
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Date:

6/1/16

Date:

01 June 2016