

II. FACTS APPLICABLE TO ALL CLAIMS

5. The State is seeking to redress significant and ongoing harm caused by IBM's failed promises and material breach of a Master Services Agreement entered into between the parties on December 27, 2006 ("MSA" or the "Contract"). Less than three years into the 10-year Contract, and despite having received more than \$437,000,000 in payments, IBM performed so deficiently that FSSA was left with no choice but to terminate the MSA and its relationship with IBM. Although the cost in time and resources was great, FSSA was left with virtually nothing of value from IBM's failed performance, and indeed is now faced with expending hundreds of millions of dollars in re-programming and eventually entirely replacing IBM's failed systems, restructuring procedures and client services, and reengineering IBM's "Modernized" system. FSSA's damages are significant and growing.

A. FSSA, Indiana's Largest State Agency, Serving The Citizens Of Indiana.

6. FSSA is the largest state agency in Indiana, operating more than 170 public assistance programs.

7. FSSA serves over one million low-income individuals and families, senior citizens, people with mental illness, people with addictions, and people with physical or developmental disabilities.

8. FSSA is divided into primary care divisions, including: The Division of Family Resources ("DFR"); The Office of Medicaid Policy and Planning; The Division of Aging; The Division of Disabilities and Rehabilitative Services; and The Division of Mental Health and Addiction.

9. Many of FSSA's most important functions are housed in DFR, including child care, Refugee Assistance Program, and Indiana Manpower and Comprehensive Training programs.

10. Most importantly, DFR administers the State's public assistance and welfare programs, such as: Temporary Aid to Needy Families ("TANF"); Medicaid; Food Stamps (SNAP); and Healthy Indiana Program ("HIP").

11. In 2005 and 2006, FSSA's Public Assistance Application Process relating to these programs was cumbersome, slow, inconvenient, and prone to errors. Specific problems included: dissatisfied clients, high error rates, inappropriate delays, ineffective performance in reducing TANF caseload, inconsistent application of rules, regulations and policy, and fraud.

12. The system was not effectively helping clients become economically self-sufficient and it was slow and inconvenient for clients who needed the benefits of State and Federal public assistance programs.

B. Outsourcing, RFI, And RFP Process

13. To resolve the inefficiencies and inaccuracies associated with the system as it existed in 2005, the State and FSSA elected to outsource administration of the primary programs offered through DFR, including: TANF, SNAP, and Medicaid.

14. The outsourcing process included publishing several versions of a Request for Information ("RFI") and later a Request for Proposal ("RFP") to seek a viable outsourcing partner. The final RFI was published in 2005, followed by the RFP in early 2006 (RFP 6-58).

15. The purpose of the RFI was to gather information from vendors concerning potential solutions to FSSA's service offering and performance issues. The information would then be re-packaged and published in an RFP.

16. IBM responded to the State's RFI proclaiming to be experienced and proficient in designing, implementing, and managing technology-based systems for the administration of public service programs.

17. In its response, IBM proposed a Modernized system that included moving away from FSSA's client-based, face-to-face system to a task-based, centralized system, emphasizing IBM technology. IBM boasted of its success in such systems and assured FSSA that the solution would solve FSSA's performance problems.

18. IBM, as architect of the proposed system, specifically represented, among other things:

Any 'good' organization can offer a 'good' solution, but only a quality organization can effectively deliver on its promises time and time again. . . . Our rigorous quality management approach has been tested in similar efforts and continues to yield positive results for our customers and our individual companies. The HCSS [IBM Coalition] team's quality management solution increases data integrity, promotes high-quality performance across the organization, and guides HCSS towards timely delivery of services to clients throughout Indiana.

[IBM, RFI Response, Jan. 3, 2006, at 45.]

HCSS delivers timely and accurate services. Federal and State timeliness standards are built into our business flow. A variety of tools such as data broker and error-prone profile software assist us to provide timely and accurate information to the State Eligibility Manager who makes the final eligibility decision for Food Stamps and Medicaid.

[*Id.* at 35.]

At the heart of the HCSS solution is the Service Center. One 10-minute phone call to an Indiana Service Center replaces today's general practice of traveling to a county office

[*Id.* at 30.]

Dramatic changes render many features of the old model of service delivery obsolete. Applications can be initiated through a wide variety of methods, including a simple telephone call to the HCSS Service Center. . . .

* * *

The Coalition recognizes that many State employees find themselves trapped in an inefficient system and are unable to provide the creative, helpful services to fellow citizens that they want to provide. By specializing work within our Service Centers and at our IMPACT Centers, we remove many of the historic limitations

that exist. Our team of highly skilled and trained professionals is not only allowed, but is required to treat each client with the compassion, respect and dignity that they deserve.

[*Id.* at 34.]

The HCSS team's document management solution leverages the latest in technology to efficiently manage the more than two million paper documents per month currently generated in the State's eligibility program. Most importantly, our solution reduces the number of times clients are required to submit documentation to the State. Documents are submitted one time, to one address/location, streamlining the application process for clients and reducing the administrative burden on the State.

[*Id.* at 38.]

Highly-trained HCSS team employees specialize in particular areas of expertise, allowing both high-quality work and maximum productivity. As such, State employees required to make final eligibility decisions are freed from the arduous data gathering task and are able to concentrate on review and validation of information presented to them by HCSS and the applicant/client. This more efficient services solution allows the State and HCSS to perform the eligibility process with fewer personnel than are utilized in the current system. Indiana now has the opportunity to reallocate many existing FSSA employees to other agencies in need of their expertise.

[*Id.* at 53].

19. From the responses to the RFI's, FSSA prepared RFP 6-58.

20. The purpose of RFP 6-58 was to seek specific financial and operational proposals and ultimately secure a partner to assist FSSA in modernizing the Public Assistance Application Process.

21. Responses to the RFP were due on March 15, 2006. Both IBM and Accenture submitted bids.

22. After conducting initial analysis of the submissions of the bidders (particularly as it related to cost), on May 1, 2006, FSSA issued its request for a Best and Final Offer ("BAFO") based on a set of uniform criteria for both bidders.

23. On May 9, 2006, IBM submitted its BAFO, and on May 15, 2006, FSSA accepted IBM's bid.

24. Based on IBM's BAFO, through oral representations from IBM (including through its Vice-President Public Sector, Brian Whitfield, and others), and through written information provided by IBM throughout the RFI/RFP process, FSSA concluded that partnering with IBM provided the best option to achieve the State's desired goal of modernization.

25. In reliance on IBM's representations, FSSA believed the IBM solution would significantly improve the State's record in reforming welfare and would significantly reduce errors in the Public Assistance Application Process. FSSA also believed, based on IBM representations, that IBM would provide better client service, reduce process and eligibility determination errors, improve timeliness, improve FSSA's welfare-to-work record, and mitigate instances of fraud. FSSA also believed, based on IBM's representations, that IBM would effectively manage the workforce.

26. Consistent with its response to the State's RFI's, the modernization proposal submitted by IBM was highlighted by a centralized, statewide electronic filing system that would serve as a wrap-around system for ICES (DFR's current system for maintaining client records).

27. IBM represented that through its system: (1) All information needed for eligibility determinations would be maintained and updated in a central location; (2) Eligibility determinations would uniformly adhere to an established set of rules, and regulations; and (3) Eligibility determinations would be more efficient, would reduce errors, and would be easier to monitor. The IBM solution also emphasized moving away from paper-based records to electronic imaging and processing, which IBM claimed would save time and provide more

reliable records. These improvements would allegedly save time, improve accuracy, and ensure consistency.

28. These promised improvements did not happen.

29. During the RFP process, IBM provided inaccurate estimates of financial information critical to acceptance of the proposal, including the costs and fees of establishing the Modernized system.

C. Contract Negotiations With IBM

30. On May 18, 2006, the Governor appointed a review committee composed of inter-agency executives (“Review Committee”) to work with FSSA and the Indiana Department of Administration to complete the review and negotiation process connected with RFP 6-58.

31. Formal negotiations with IBM of the MSA began near the time of the appointment of the Review Committee, and continued over the next six months. Negotiations became more concentrated over the summer months leading into the fall of 2006.

32. As MSA negotiations were completed in late October and early November 2006, the Review Committee finalized its recommendation, which it presented to the Governor on November 22, 2006.

33. A public hearing was held on December 8, 2006, regarding the MSA.

34. The final Contract was executed by the parties on December 27, 2006.

D. Terms And Scope Of The MSA

35. The MSA comprises more than 600 pages of contract terms, schedules, attachments, and appendices, and specifically obligated IBM to aggressively rollout and manage an effective, comprehensive and sustained Modernized eligibility system statewide, achieving full functionality (“Steady State”) by May 30, 2008.

36. The process for amending the MSA was accomplished through change orders as well as formal contract amendments. During the course of the MSA, 110 change orders and four amendments were submitted and executed by the parties.

37. A true and accurate copy of the MSA, including schedules, attachments, appendices, and amendments, is attached as Exhibit A to this Complaint.

38. Section 1.1 of the MSA set out the policy objectives, which IBM was obligated to adhere to:

The overarching policy objectives of the Modernization Project and this Agreement are (i) to provide efficient, accurate and timely eligibility determinations for individuals and families who qualify for public assistance, (ii) to improve the availability, quality and reliability of the services being provided to Clients by expanding access to such services, decreasing inconvenience and improving response times, among other improvements, (iii) to assist and support Clients through programs that foster personal responsibility, independence and social and economic self-sufficiency, (iv) to assure compliance with all relevant Laws, (v) to assure the protection and integrity of Personal Information gathered in connection with eligibility determination, and (vi) to foster the development of policies and procedures that underscore the importance of accuracy in eligibility determinations, caseload integrity across all areas of public assistance and work and work-related experience for Clients in the program.

[Ex. A, §1.1(1); *see also id.* §1.1(2).]

39. IBM acknowledged in the MSA the public importance of its services to FSSA:

Vendor recognizes that (i) the Services to be performed under this Agreement are vital to the State and its citizens who currently are and in the future will be legally eligible for and reliant upon the assistance available under the Programs and must be continued without interruption and (ii) upon Termination, a Successor must be able to continue to provide the Services in as seamless a transition from Vendor as possible.

[Ex. A, §1.1(5).]

40. IBM promised through the MSA that it would conduct its services to the State at a specific level of performance:

Vendor will ensure that the Services will be performed and delivered in a manner that (i) meets or exceeds the required levels of performance, including the Performance Standards specified in or pursuant to this Agreement, (ii) is effective, efficient and courteous to the Clients, and (iii) uses the Commercially Reasonable Efforts to support the State’s achievement of its policy objectives.

[Ex. A, § 3.8.1; *Id.*, Appx. 1, Glossary, at 4 (defining “Commercially Reasonable Efforts” as “taking commercially reasonable steps and performing in such a manner as a well managed entity would undertake with respect to a matter in which it was acting in a determined, prudent, businesslike and reasonable manner to achieve a particular result”).]

41. The MSA required adherence to “all covenants, obligations, representations and warranties”; “[p]erformance in accordance with and compliance with the Modernization Project work plans, schedules, and milestones agreed to by the Parties”; “[p]erformance of the Services in accordance with all applicable requirements of this Agreement, including the Performance Standards set forth in Schedule 10 [Performance Standards]”; “[s]atisfactory results of Audits by FSSA”; “[t]imeliness, completeness, and accuracy of required reports”; “[d]etermination by FSSA of (i) Vendor’s satisfactory performance of the Services and the Delegated Activities, and (ii) Vendor’s satisfactory oversight and management of the Subcontractors”; and “Vendor’s efforts to assist FSSA in achieving the Policy Objectives.” [Ex. A, § 3.8.2; *see also id.*, § 3.9.3, Schedule 10, at 3 (provides four “categories of Performance Standards under the MSA, all of which are associated with specific monetary consequences, including: Service Levels; Key Performance Indicators; Critical Transition Milestones; Federal Penalties”).]

(1) Performance Standards

42. The MSA, through its express terms, schedules, and incorporated documents (including policy and operations manuals), also sets criteria and standards for IBM’s delivery and performance of key tasks and responsibilities, including data gathering, timeliness, and

accuracy of application processing under each of the key service categories, including TANF, Medicaid, and Food Stamps

43. Each of these performance criteria is detailed throughout the MSA and supporting documents.

44. Although not the only critical item of importance to FSSA, timely processing of applications is a recurring theme in the MSA and supporting documents.

45. IBM was obligated to “. . . provide efficient, accurate and timely eligibility determinations for individuals and families who qualify for public assistance, . . . [and] improve response times . . . , [in] compliance with all relevant [Federal and State] Laws, . . .” [Ex. A, § 1.1(1).]

46. As contemplated in the MSA, Federal and State Laws dictate overall timeliness for TANF, Medicaid, and Food Stamps determinations. *See* 42 C.F.R. § 435.911(a) (determinations must occur no later than 90 days for Medicaid disability applicants); 42 C.F.R. § 435.911(b) (determinations must occur no later than 45 days for all other Medicaid applicants); 7 C.F.R. § 273.2(g) (food stamp determinations must occur no later than 30 days following the date of application); 470 IAC § 10.3-2-3(c) (TANF applications must be approved or denied within 30 days).

47. Section 4.2.4 of Schedule 10 of the MSA, Program Specific KPIs [Key Performance Indicators], further defines timeliness of performance.

A subset of the monthly Case Samples selected for the Service Levels for these Programs will be utilized to report on and determine compliance with these Program-specific KPIs. . . .

Figure 7 Program Specific KPIs

Key Performance Indicator (KPI)	Performance Standard Metric	Liquidated Damage
Food Stamp Case Actions	Vendor recommendations to the State for final eligibility action on 99% of the Food Stamp Cases in any month must be placed in the appropriate State work queue no later than 3 business days prior to the established Federal and State time guidelines.	\$5,000 per month in which this KPI is not met. Beginning September 1, 2008. (CO-64, 06-30-08)
Medicaid Case Actions	Vendor recommendation for final eligibility action on 99% of the Medicaid Case Actions in any month must be placed in the appropriate State work queue no later than 3 business days prior to the established Federal and State time guidelines.	\$5,000 per month in which this KPI is not met. Beginning September 1, 2008. (CO-64, 06-30-08)
Medicaid Disability Applications	99% of all Medicaid Disability applications with all available supporting documentation must be placed in the appropriate queue for the Office of Medicaid Policy and Planning (OMPP) State’s Medical Review Team (MRT) within 30 days of Application Date (excluding client or provider delay days as defined in 42 CFR 435.911(c) (1) and (2) .	\$5,000 per month if this KPI is not met. Beginning September 1, 2008. (CO-64, 06-30-08)
TANF Case Actions	Vendor recommendation to the State for final eligibility action on 99% of the TANF Case Actions must be placed in the appropriate State work queue no later than 3 business days prior to the established Federal and State time guidelines.	\$5,000 per month if this KPI is not met. Beginning September 1, 2008. (CO-64, 06-30-08)

48. Timeliness standards were also detailed in FSSA’s multivolume As-Is Procedures Manual and Policy Manual, which were both incorporated into the Contract. [See, e.g., Ex. A, §3.6.3.] These Manuals describe in detail FSSA procedures and operational standards for processing applications for public assistance programs. [See, e.g., As-Is Procedures Manual §2.11.01 (general rules for processing applications); *id* § 2.11.01, 2.12.01, and 2.12.02 (setting Food Stamp application timeliness guidelines); *id.* § 2:12.03 (Containing Medicaid and TANF timelines); *id.* § 2.3.01 (setting up delay codes for when applications are not processed within State or Federally required time frames); *see also* Policy Manual.]

49. Schedule 3, § 1.0 further provides: “The Vendor solution will be designed to provide: . . . A reduction in time required to process applications upon receipt of required

documentation[;] A reduction in errors that occur during processing”; *see also id.* § 3.1.4 Quality Management (“The Vendor will manage quality aggressively, embracing the total quality management philosophy across every level of the enterprise.); *see also id.*, Appx. VII, §4.1, Quality Management Plan (noting “[t]he Coalition’s QM approach supports the program goal of improving Client service by meeting and improving the timeliness and error rate of case decisions, meeting performance measures, and providing the Client with easier access to services.); *id.* § 5.1 (establishing Transition Key Performance Indicator metrics: “TANF Timeliness: the percent of TANF Applications completed within the then-current Federal timeframes; Food Stamps Timeliness: the percent of Food Stamp Applications completed within the then-current Federal timeframes; Medicaid Timeliness: the percent of Medicaid Applications completed within the then-current Federal timeframes; Food Stamps Application Volume: the percent of variance of Food Stamp Applications processed (per office and in the aggregate) as compared to the same period the previous year.); *id.* § 6-2.

50. By the execution of the MSA, IBM and its coalition of Subcontractors knew the condition of FSSA’s public assistance and welfare programs, understood the vital importance of these issues to the State, understood the extent of the performance outages, understood FSSA’s objectives in entering into the relationship, understood the specific performance criteria associated with tasks and responsibilities, and warranted that it could cure FSSA’s performance issues.

(2) Termination Provisions

51. The MSA also specifies the circumstances under which the State could terminate the MSA for cause:

- (1) The State may terminate this Agreement, in whole or in part, for cause in any of the following circumstances:

- (A) a breach by Vendor of this Agreement which is material considering this Agreement as a whole occurs which cannot reasonably be cured by Vendor within thirty (30) days after delivery of the Termination Notice (the “Notice Period”);
- (B) a breach by Vendor of this Agreement which is material considering this Agreement as a whole occurs which can reasonably be cured by Vendor within the Notice Period but which has not been cured within the Notice Period unless Vendor (i) has submitted to the State within the Notice Period a Corrective Action Plan to cure the breach within sixty (60) days after the date Vendor receives notice of the breach from the State (the “Extended Cure Period”), (ii) proceeds diligently according to such Plan, and (iii) cures the breach within the Extended Cure Period (in which case the State’s termination shall become effective when Vendor fails to perform any one of steps (i), (ii), or (iii); or
- (C) a series of breaches of Vendor’s obligations, none of which individually, constitutes a breach of this Agreement as a whole, but which, in view of Vendor’s history of breaches, whether or not cured, collectively constitute a breach of this Agreement as a whole, provided that the State’s notice to Vendor shall be provided within a maximum of three (3) months after the last such breach upon which the State bases its termination. For the purposes of clarity, the cure periods set forth in Sections 16.3.1(1)(A) and 16.3.1(1)(B), as appropriate, shall apply to a notice given under this Section 16.3.1(1)(C) as to any breach for which a cure period has not previously been provided.

[Ex. A, § 16.3.1(1).]

E. Modernization Pilot And Roll-Out Of The Modernization System

52. The IBM Modernization Project had a two-phase transition plan. Although functionally independent, the two phases began concurrently.

53. The initial focus of “Phase One – Transition” was on employee transfer and procedural training activities that supported the transferring of personnel and the required operational changes. “Phase Two – Transformation” encompassed the design, development, testing, acceptance and implementation of the Service Centers and enabling technologies across the State. Phase II consisted of four regions. The original Steady State achievement date (*i.e.*,

the date by which IBM was to have completed the roll-out of Modernized services in all 92 counties) was May 30, 2008.

54. During Phase 1, which began in March of 2007, the focus was on recruiting and transferring affected State employees, communicating with clients about the upcoming changes, training staff on the “As-Is” business processes, and increasing self-sufficiency activities with clients.

55. During this phase, approximately 1,500 FSSA employees were transferred to the IBM Coalition.

56. Phase 2 was piloted in a Region 1 rollout and was to be modified and enhanced in rollouts to subsequent regions.

57. The initial time line for Region 1 called for the pilot rollout to occur in the 12-County Grant Region on October 20, 2007; however, due to performance and operations delays, the pilot was delayed.

58. The State finally began pilot testing the new system on October 29, 2007 in the 12-county region (containing approximately 10% of the State’s total caseload). Region 1 consisted of Grant, White, Cass, Miami, Wabash, Carroll, Howard, Tipton, Madison, Delaware, Blackford and Randolph Counties.

59. FSSA began to see performance problems with IBM’s Modernized system very early in the Region 1 rollout. FSSA suggested delaying further roll out until the performance outages could be cured.

60. IBM, however, assured FSSA that if the Region 2 rollout were implemented, IBM would recognize some efficiencies and economies of scale that would improve performance.

61. Based on IBM's assurance, FSSA divided Phase 2 into two regions (Phase 2A and Phase 2B) and agreed to let the rollout continue.

62. On March 24, 2008, FSSA and IBM began the Phase 2A rollout. Region 2A consisted of Clark, Clay, Crawford, Dearborn, Floyd, Fountain, Greene, Harrison, Jackson, Jefferson, Jennings, Lawrence, Martin, Monroe, Ohio, Orange, Owen, Parke, Putnam, Ripley, Scott, Sullivan, Switzerland, Vermillion, Vigo, Warren, and Washington Counties.

63. On May 19, 2008, FSSA began to roll out the balance of Phase 2 (Region 2B). Region 2B consisted of 20 additional counties and two more mini-service centers, adding an additional 10% of the State caseload to the Modernized system. Region 2(B) consists of Allen, Adams, Daviess, DeKalb, Dubois, Gibson, Huntington, Jay, Knox, Kosciusko, Noble, Perry, Pike, Posey, Spencer, Steuben, Vanderburgh, Warrick, Wells, and Whitley Counties.

64. With the Phase 2A and 2B rollout, the Modernized delivery model was expanded by 27 additional counties in southern and western Indiana.

F. Delaying Rollout And IBM's Performance Outages

65. The rollout (even of Regions 1 and 2) was delayed multiple times in 2007 and 2008 because of performance concerns, among other things.

66. By January 1, 2009, only 59 of Indiana's 92 counties were transitioned to the Modernized Public Assistance Application Process, falling far short of the original project roll-out plan.

67. While 64% of the counties were using the Modernized IBM system by January 2009, those counties only represented 47.6% of the State's caseload. In fact, the rollout had not been achieved for the most populous Indiana counties that had the most troublesome issues with the application processes, including Marion (Indianapolis), Tippecanoe (Lafayette), St. Joseph (South Bend), and Lake (Gary-East Chicago region).

68. Because of significant shortfalls, FSSA delayed the rollout to address performance problems.

69. This delay was supported by the Federal Government, which demanded a corrective action plan from FSSA because of the performance outages.

70. In a letter to the then Secretary of FSSA, the United States Department of Agriculture (“USDA”) noted:

[B]ased on an analysis of the most recent QC [Quality Control] and State collected data, FNS [Food and Nutrition Services] remains concerned with the State’s application processing timeliness rate and the State’s ability to deliver food stamp benefits to eligible households in a timely manner . . . FNS expects FSSA to realize measurable improvement in the area of application processing timeliness before the State proceeds with any additional roll-out of the modernization project because the timeliness of application processing is a critical component of quality program access/customer service. . . . FNS requires that States falling below 90 percent compliance have a State level corrective action plan indicating actions to be taken immediately, and pursued until the upper level of the confidence interval reaches 95 percent. . . . FNS would expect to see this plan and evidence of improvement in this area of administering the Food Stamp Program prior to the next rollout phase

71. In January 2009, FSSA permanently halted the rollout until the Modernized environment could show consistent and needed improvement. Lingering issues included lost documents, significant errors, and untimely processing of applications.

72. The lingering issues with the rollout were again documented by subsequent letters from the USDA.

G. IBM’s Ongoing Deficient Performance And Corrective Action Plan

73. The specific performance deficiencies of IBM’s Modernization System are multifaceted, encompassing client concerns and system failures relating to timeliness and various errors in application processing.

74. IBM's deficient performance was documented in multiple ways, including through documents generated internally by IBM and by First Data, FSSA's Operational Verification and Validation (OV&V) vendor.

75. On March 13, 2009, the Secretary of FSSA sent a letter to IBM requesting that a Corrective Action Plan ("CAP") be put in place by the end of the month to address the multiple performance deficiencies. The letter stated:

The State of Indiana has raised with IBM multiple issues with the Modernization Project that need to be addressed immediately and believes that it is in the best interest of the State and IBM to enter into a Corrective Action Plan as contemplated by Section 15.4.1 of the Master Services Agreement. The issues that need to be addressed at this time are listed in Schedule 1 attached to this letter. We request that IBM agree with the State to develop Corrective Action Plans for these issues. If so, these shall be submitted by IBM to the Secretary of the Indiana Family and Social Services Administration, on or before March 31, 2009. This request for a Corrective Action Plan does not constitute a waiver of any other remedy that the State of Indiana may have at law or in equity with regard to these or any other issues.

Each of these issues has been addressed as part of the Governance Plan, including in communications at the project manager level. The State has also taken other actions to assist in addressing these issues. Some of these have also been brought to our attention by FNS and CMS, are subject to federal oversight and could lead to federal sanctions if not addressed and corrected in a timely manner.

76. The letter was sent in accordance with MSA § 15.4.1, which provides for a CAP as a remedy "to correct or resolve a breach" of the MSA.

77. Included with the letter was a list of 36 categories of deficiencies. This was followed by a second demand from the Secretary of FSSA on April 28, 2009, where FSSA reiterated the need for a CAP:

Some of IBM's responses are helpful. However, many of them are incomplete, non-responsive, insufficient or otherwise unsatisfactory. This seems to imply that IBM has not fully appreciated the depth of the State's concerns about the status of the Modernization Project and the Coalition's failure to achieve expected performance objectives in the modernized regions, ongoing failures in the As-Is regions and failure to make satisfactory progress on the overall implementation of the Modernization Project.

78. In May of 2009, an IBM Global Business Services team completed a 12-week, end-to-end assessment of the Modernization Project to determine ways to improve client access, improve the quality of work and timeliness of application determinations for TANF, SNAP, and Medicaid, and increase the IMPACT Work Participation Rate.

79. The 360-degree review resulted in 430 findings of performance deficiencies, such as poor staff training, significant backlog, and problems with timeliness and accuracy, and resulted in 200 recommendations including short-term, long-term and general program enhancements.

80. Because of the scope and extent of the deficiencies, IBM's CAP proposal was over 360 pages long, and was accompanied by a 53-page spreadsheet of action items for it and its Subcontractors to perform, which were developed around FSSA's identified 36 areas of concern.

81. The CAP also divided action items into 22 Quick Wins ("QWs") to address and improve common issues among several CAP areas. The QWs were action items and tasks designed to improve operational performance and metrics within a 90-day period.

82. The CAP items and QWs primarily related to data gathering and timeliness, which were essential to all-around improvement of the IBM-led modernization program. The 36 CAP items included:

- 1) Excessive wait times at Local Offices;
- 2) Incorrectly categorized imaged documents (Examples of categories: Income, Resource, Expenses);
- 3) Failure to attach non-indexed documents to cases;
- 4) High turnover of staff in Modernized and As Is regions;
- 5) Inaccurate and Incomplete data gathering;
- 6) Scheduling problems;
- 7) Failure to meet Temporary Assistance to Needy Families Work Participation Rate;
- 8) Exceeding target rate for procedure errors in processing Medicaid Long-Term cases;

- 9) Exceeding target rate for procedure errors in processing Other Medicaid cases;
- 10) Exceeding target rate for procedure errors in processing TANF cases;
- 11) Exceeding target rate for procedure errors in processing Food Stamp cases;
- 12) Clients not receiving mailed correspondence;
- 13) Imaged documents not organized by Assistance Groups;
- 14) Inadequate staffing at Service Center to investigate/recover fraud claims;
- 15) Poor communication of Operations Information to all staff;
- 16) Unresolved Help Desk (Netfor) Tickets;
- 17) Inappropriate tasks sent to FSSA Queues;
- 18) Training for New Hire Eligibility Specialist (ES) not developed;
- 19) System assigned due dates in WFMS for Coalition tasks not always appropriate;
- 20) Incorrect communication to clients;
- 21) Full IMPACT services not being delivered in all As-Is counties;
- 22) Correspondence issues with 2032 Pending letters;
- 23) WFMS Stability Problems;
- 24) WFMS Availability Metrics Issue;
- 25) Untimely processing of changes and alerts;
- 26) Untimely processing of Healthy Indiana Plan (HIP) applications;
- 27) Excessive duration between the date of application and the date of appointment;
- 28) Untimely identification of Request for Appeal documents and untimely processing of benefit reinstatements;
- 29) Untimely Expedited Food Stamp Processing;
- 30) Failure to send Food Stamp tasks for final eligibility action within the targeted time frame;
- 31) Failure to send Medical Disability Applications for final eligibility action within the targeted time frame;
- 32) Failure to send Medicaid tasks for final eligibility action within the targeted time frame;
- 33) Failure to send TANF tasks for final eligibility action within the targeted time frame;
- 34) As-Is Volume and Timeliness;
- 35) Failure to process applications in a timely manner; and
- 36) Overdue redeterminations.

83. The 90-day CAP period began on July 1, 2009 – the day the CAP was finalized – and ended on September 30, 2009.

84. The CAP, even if successful, would not have brought IBM into full compliance with the MSA, but at least would have showed a positive trend in performance,

H. IBM's Continued Deficient Performance During The CAP.

85. Overall performance by IBM during the 90-day CAP period relative to the key metrics associated with, among other things, timeliness and data gathering, did not improve.

86. In fact, both CMS (Federal Center for Medicare and Medicaid Services) and FNS (Federal Food and Nutrition Services) continued to express their dissatisfaction with the performance of the IBM model and the impact it was having on Indiana clients.

87. Reports and correspondence generated by IBM itself confirm its failure to satisfactorily complete the CAP.

88. For example, in a September 2, 2009 presentation, IBM admitted that it was failing to meet important contractual performance measures. A chart prepared by IBM describes the target performance measures, the corresponding CAP items, and IBM's actual performance. Items such as overall timeliness, average call response time, procedure variance rates (*i.e.*, data entry errors), work participation rate, and SNAP error rates were all well short of the target measures.

89. IBM also admitted, through written documentation, that it had missed the average call response time for the prior 17 months.

90. First Data also generated a Monthly Status Report in October 2009 listing 23 outstanding high-priority issues, tying them to CAP items. All had been outstanding for at least 90 days, and all but two had been outstanding for more than 235 days (essentially all of 2009). There were also five outstanding high-priority risks and all had been outstanding for at least 90 days (the CAP period).

91. Performance did not significantly improve in October of 2009. Performance metrics for October 2009 indicated that counties Modernized by IBM substantially lagged behind the non-Modernized counties, as well as trailed the system's performance prior to privatization.

I. IBM's Deficient Performance Throughout The Life Of The MSA

92. IBM's performance failures throughout the life of the MSA are emphasized in comparing the Modernized counties with the As-Is (non-Modernized) counties. The most basic means to make this comparison is with timeliness of disposition of client applications within Federal and State guidelines.

93. The As-Is counties from November 2007 through December 2009 performed very close to, and even exceeded in some months, baseline timeliness data taken from prior to the transfer of FSSA employees to the IBM Coalition.

94. In contrast, IBM's Modernized counties performed significantly below their baseline data and well below the As-Is counties. Also, the performance of the Modernized counties did not improve during the three months of the CAP (July – September 2009).

95. Moreover, after IBM was terminated and the State assumed management, the Modernized counties achieved their best timeliness percentage in at least a year and a half.

96. Similar trends are seen in other key performance criteria, including with application backlog.

97. IBM knew that reducing the backlog would reduce its timeliness metrics, because a timeliness measure was never recorded if an application was never processed. Thus, to keep its timeliness measure artificially high (even though it was still very deficient), the backlog of applications was not properly dealt with by IBM throughout the life of the MSA.

98. In fact, staff from the As-Is counties had to be re-assigned to assist the Modernized counties, and additional employees and outside vendors were ultimately hired to proactively address the Modernized counties' backlog.

99. Also, the backlog was significantly larger in the Modernized counties during the MSA because of IBM's failures. There were only two significant declines in the Modernized

counties' backlog, and both occurred when IBM and FSSA spent considerable additional resources to address the problem. When the backlog was first targeted in late 2008 and early 2009, it quickly rose again once it no longer became a priority for IBM.

100. The backlog levels in the Modernized counties have stabilized since IBM was terminated.

101. Another vivid example of IBM's deficient performance is in the number of appeals from benefits decisions filed in the Modernized counties from January 2006 through March 2010. The dramatic rise in appeal numbers in these regions corresponds almost exactly to the rollout of the Modernized System, and the similarly dramatic decline in appeals at the end of 2009 and 2010 closely corresponds to FSSA's announcement of the termination of the MSA.

102. Upon information and belief, a major cause of the dramatic rise in appeals in the Modernized counties was that IBM Coalition workers were so far behind in processing applications that they would often recommend denial of an application to make their timeliness numbers look better, but then would tell the applicant to appeal the decision. While the appeal was pending, the Coalition workers would actually process the application and benefits would be granted before the hearing date. As a result, approximately 75% of these appeals were resolved through no-shows, adjusting actions, or as voluntary dismissals by the applicants.

103. IBM's contracts with its Subcontractors are also important. IBM would hold its Subcontractors to significantly less-stringent performance standards than it contracted for with FSSA, causing further intentional breach.

104. For example, one of FSSA's primary complaints with IBM was the slow call response times in Modernized counties; however, IBM had contracted with a Subcontractor for far less stringent standards than it was being held to by FSSA.

105. Although FSSA was holding IBM's response time to two minutes, IBM was holding its Subcontractor to seven minutes. Also, the MSA uses the appropriate standard of response time, measured from operator pick up, while IBM's Subcontract contains the word "each" before pick up so that it was seven minutes for each time the call was picked up (even if it had been transferred and put on "hold" in the interim).

106. Upon information and belief, IBM set up some of its Subcontracts this way (in ways that would knowingly violate standards set by FSSA), because it was cheaper for IBM to pay the fines to the State than to perform as promised.

107. Thus, IBM's performance was in breach of the MSA from the start – indeed, IBM does not appear to have ever intended to comply with its performance standards under the MSA.

108. Moreover, throughout the course of the MSA, IBM regularly submitted reports, charts, and other information containing false and/or misleading information concerning IBM's performance.

109. For example, IBM purposely submitted reports on telephone response time that IBM knew applied an incorrect metric, intending for the information to mislead FSSA as to its performance.

110. IBM also intentionally omitted backlog cases from its timeliness reports in an effort to mislead FSSA as to its performance of application dispositions.

J. Hoosiers Affected By IBM's Performance

111. The clear impact of IBM's failed performance can be seen in how it affected the everyday lives of Indiana citizens most in need of FSSA's services.

112. Unfortunately, accounts of individuals and families who have suffered at the hands of IBM's system are numerous.

113. For example, one Hoosier citizen was denied Medicaid benefits because she missed her scheduled recertification interview while she was in the hospital suffering from terminal cancer. This individual apparently called IBM's call center to let them know her circumstances, but her Medicaid benefits were cut off anyway.

114. The cut off of Medicaid benefits resulted in the individual having trouble paying rent for her apartment and significantly affected her sustainability on her limited income. It became worse when she lost food stamps as well.

115. Another example is denial of benefits to a deaf individual when she was unable to comply with IBM's requirement that she have a telephone interview. The alleged damage caused to the client because of the delay in granting her benefits resulted in a lawsuit.

116. In another example, IBM Coalition employees terminated Medicaid benefits for a nun who missed a telephone interview when it was scheduled during mass on a Holy Day recognized by the Catholic Church when she had to play the organ. She reportedly attempted six times to call the Call Center to alert the IBM Coalition of the issue but was unable to get through, so she sent a fax to the IBM Coalition explaining the issue. The telephone interview was not rescheduled, however, because the fax was not timely processed by the IBM Coalition and the individual had her Medicaid benefits terminated for failure to cooperate. This resulted in an appeal and several months of procedural wrangling that could have been avoided. Seven months after her initial interview, the issue still was not resolved.

117. The number of individuals and families hurt by IBM's failures and apparent disregard for the clients they are obligated to serve is significant.

118. As clarified in the MSA, FSSA's primary obligation is to serve Hoosiers most in need. Despite its assurances otherwise, IBM significantly hindered FSSA's ability to meet that obligation.

K. Federal Penalties And Lawsuits

119. IBM's deficient performance has also subjected the State to a series of Federal sanctions and lawsuits and will likely continue to do so.

120. On June 26, 2009, FNS notified the State that its SNAP/food stamps error rate for FY 2008 exceeded national performance measures and if this continued for a second year that the State would be fined (the fine for FY 2009, upon information and belief, is expected to be between \$1 million and \$2 million).

121. Moreover, FSSA has been named in multiple pending lawsuits for the ongoing problems with Indiana's welfare administration system and is under multiple consent decrees with which FSSA is attempting to comply.

122. FSSA is also defending three contempt proceedings as a result of IBM's deficient performance.

123. IBM's Modernization Project has been criticized several times by courts and/or found to not be in compliance with the law. FSSA is entitled to contribution and indemnification from IBM in these lawsuits.

L. Termination Of The MSA

124. At the conclusion of the CAP, FSSA determined that IBM's modernization services had not achieved the goals it set out to accomplish and that IBM had failed, and was continuing to fail, to fulfill contractual obligations.

125. By not performing its responsibilities pursuant to MSA terms and obligations, IBM materially breached the MSA.

126. As a result, the State terminated the MSA.

127. The termination was delivered in a letter from FSSA on October 15, 2009.

128. The letter specified the basis for the termination and referenced applicable Contract provisions as required by the MSA. The letter set the effective termination date as December 14, 2009.

M. Post-Termination Of IBM

129. After termination of the MSA, FSSA implemented a hybrid modernization system to replace the IBM system and accomplish what IBM originally promised to perform.

130. The hybrid system was piloted in the Vanderburgh (Evansville) region beginning in January 2009. The hybrid system will eventually replace both the Modernized and As-Is systems across the State.

N. Contract Price and IBM's Handsome Profit Margin

131. The total contract price of the MSA for the 10-year term began at \$1,175,223,600 but increased to \$1,374,859,809 with the constant submission of change orders by IBM.

132. Through January 31, 2010, the State had paid IBM \$437,550,488 in incremental payments for services to be performed under the MSA.

133. While failing to perform its contractual obligations, IBM recognized a significant profit for the three-year period the MSA was in effect.

134. FSSA had no choice but to delay the Modernized rollout, and IBM was repeatedly asking FSSA for additional money through change orders to "fix" the system.

135. Upon information and belief, for the three-year period, IBM was achieving higher-than-projected profit margins at the same time that its Modernized System was floundering.

O. Close-Out Costs And Assignment Of Subcontracts

1. Deferred Fees

136. IBM has made a claim for more than \$43,000,000 in Deferred Fees under MSA § 16.6.6(3)(F) that IBM is not entitled to, given that the MSA was terminated for cause, and separately because such a payment would constitute an unenforceable penalty.

137. The MSA contains a provision for close out payments to the vendor in the instance of a termination of the MSA for convenience. The initial areas covered by early termination close out payments (“ETCOP”) in the MSA included: (1) Vendor’s undepreciated or unamortized equipment costs; (2) Vendor’s undepreciated or unamortized software licenses; (3) Vendor’s early lease termination charges; (4) Vendor’s unamortized leasehold improvements; and (5) Vendor’s other reasonable and necessary Project-related costs for which Vendor has not recouped the cost of its investment under this Agreement. [MSA § 16.6.6.]

138. A sixth category of ETCOP was added to the MSA which eventually became known as Deferred Fees.

139. At the time of its introduction, this category of ETCOP was labeled “Placeholder for Vendors & Subcontractors’ financial engineering.”

140. On October 15, the bare-bones Schedule 24 was provided to FSSA by IBM for inclusion in the MSA, with no supporting documentation or calculations. For a termination for convenience in FY 2010, the amount owed according to Schedule 24 was \$43,416,738.

141. On October 19, the parties created the term “Deferred Fees” to distinguish between the fees in Schedule 24 and the Service Level Adjustments in Schedule 10.

142. The final version of Section 16.6.6 of the MSA provides:

- (1) In the event of a Termination of this Agreement for any reason (other than a Termination by expiration), the State shall pay Vendor, to the extent applicable, the charges set forth in

Sections 16.6.6(2) and 16.6.6(3)(F) below. In the event of a Termination of this Agreement for any reason (other than on expiration or upon a Termination as set forth in Sections 16.3.1, 16.3.4(2), 16.3.4(3), or 16.5, in any of which events, Vendor shall not be entitled to Early Termination Close Out Payments, . . .

* * *

- (3) (F) Vendors and its Subcontractors' unamortized balance of the Deferred Fees, as set forth in Schedule 24 [Deferred Fees].

143. No information or documentation was provided by IBM that would explain the make-up or calculation of Deferred Fees.

144. A primary purpose of MSA § 16.6.6(3)(F) was to deter the State from terminating the MSA.

145. The amounts listed in Schedule 24 bear no rational relation to work that was actually performed by IBM or damages allegedly suffered by IBM.

146. IBM admitted in internal communications and in communications with FSSA that Deferred Fees were not owed if the contract was terminated for cause and that the amounts listed in Schedule 24 were not a true measure of damages.

2. Assignment Of Subcontracts

147. IBM has also made demand for payment of assignment of Subcontract fees contained in MSA §14.8.1.

148. On or about October 2, 2006, the parties incorporated into MSA § 14.8.1 a sliding, arbitrary scale of payments to IBM if the State accepted assignment of a subcontract.

149. Section 14.8.1(3) provides:

In the event the State exercises its right to accept assignment of one or more Subcontracts pursuant to this Section 14.8, the State shall not be required to pay to Vendor the Early Termination Close Out Payments that are directly attributable to the performance of such assigned Subcontract(s), but, instead for each

Subcontract assigned to the State, the State shall pay Vendor the following upon the applicable Services Termination Date:

- (A) if the replaced Subcontractor is ACS, . . . Ten Million Dollars (\$10,000,000), if the applicable Services Termination Date is within Contract Years one through seven . . .
- (B) for each assigned Subcontract with a Key Subcontractor (other than ACS) and each other assigned Primary Subcontract (other than those Subcontracts with an aggregate contract value of less than Five Million Dollars (\$5,000,000)), Five Million Dollars (\$5,000,000) . . .

provided, however, that the provisions of this Section 14.8.1(3) shall not apply if all the Services contained within an applicable Subcontract are terminated by the State pursuant to Sections 16.3.1, 16.3.4(2), or 16.3.4(3), . . .

150. Like MSA § 16.6.6(3)(F), and as confirmed by IBM correspondence, the amounts listed in Section 14.8.1(3) bear no rational relation to work that was actually performed by IBM or any damages allegedly suffered by IBM.

151. The amounts described in MSA § 14.8.1(3) are not related, or proportionate, to the amount left to be paid by IBM on the subcontracts, the value of the subcontracts, or the net present value of the profits IBM will earn under the subcontracts.

152. As admitted by IBM, through internal correspondence, these amounts are arbitrary and serve no other purpose than to discourage termination of the MSA and are an unenforceable penalty.

P. Damages

153. As a direct and proximate result of IBM's material breach of the MSA, the State has incurred significant costs and suffered hundreds of millions of dollars in economic injury,

including direct and consequential damages, out-of-pocket expenses, liquidation damages, penalties, compensatory damages, fees, costs, and expectation and reliance damages.

COUNT I – BREACH OF CONTRACT

154. The State incorporates Paragraphs 1 - 153 as if fully stated herein.

155. The State and IBM are parties to the MSA, which is valid and enforceable. The State performed its obligations under the MSA.

156. Through the MSA, IBM agreed, among other things, to implement an efficient and effective Modernized Public Assistance Application Processing system to the entire state of Indiana, to perform according to agreed performance standards and specifications, to achieve client satisfaction, to reduce errors and improve timeliness, and to effectively manage FSSA's applicable caseload.

157. IBM failed to roll out the Modernized system to the entire State by the agreed date, implementing the Modernized service in just 59 of Indiana's 92 counties.

158. IBM failed to achieve its promise of improving timeliness, accuracy, and client satisfaction and failed to meet established performance measures.

159. In the counties where IBM rolled out the Modernized system, performance standards fell significantly below the non-Modernized counties, fell below the counties' performance prior to the roll-out, and was below Federal and State guidelines.

160. The State provided IBM the opportunity to cure its defective performance through the CAP; however, IBM failed to satisfy the requirements of the CAP.

161. IBM has failed to cure its deficient performance.

162. IBM's acts, omissions, and deficient performance constitute a material breach of the MSA.

163. The State has suffered, and will continue to suffer, substantial damages as a direct and proximate result of IBM's breach of the MSA.

COUNT II – BREACH OF EXPRESS WARRANTY

164. The State incorporates Paragraphs 1 - 163 as if fully stated herein.

165. IBM expressly warranted through the MSA and supporting documents, among other things, that it would significantly reduce errors and improve timeliness in the Public Assistance Application Process, would provide better client service, would reduce process and eligibility determination errors, would mitigate instances of fraud, would ensure that eligibility determinations uniformly adhere to an established set of rules and regulations, would ensure that determinations would be more efficient and easier to monitor, would achieve agreed performance standards and metrics, would achieve compliance with Federal and State guidelines, would implement a quality assurance program for the system, and would ensure the Modernized system would save time, improve accuracy, and ensure consistency.

166. IBM has breached these warranties and failed to deliver services as warranted.

167. The State has been damaged by IBM's breach of these warranties.

COUNT III – UNJUST ENRICHMENT

168. The State incorporates Paragraphs 1 - 167 as if fully stated herein.

169. The State has conferred a measurable benefit to IBM, including payment of \$437,550,488 to IBM as of January 31, 2010.

170. The State has received minimal value for the benefit conferred to IBM, and indeed is now faced with expending hundreds of millions of dollars in re-programming and

entirely replacing IBM's failed systems, in restructuring procedures and client services, and in reengineering IBM's Modernized system.

171. It would be unjust for IBM to retain the benefit conferred upon it by the State.

172. Accordingly, the State is entitled to recover the benefits it conferred upon IBM under the theory of unjust enrichment.

COUNT IV – DECLARATORY JUDGMENT: DEFERRED FEES

173. The State incorporates Paragraphs 1 - 172 as if fully stated herein.

174. A controversy exists between the State and IBM concerning the application of, and IBM's right of recovery under, MSA § 16.6.6, specifically as it relates to the payment of Early Termination Closeout Payments, including Section 16.6.6(3)(F) Deferred Fees.

175. Based on the express terms of MSA § 16.6.6(1), IBM is not entitled to any Early Termination Close Out Payments ("ETCOP") under MSA § 16.6.6(3), including the Deferred Fees referenced in Section 16.6.6(3)(F), if the State terminated the MSA for cause.

176. The second sentence of MSA § 16.6.6(1) expressly provides that the ETCOP in MSA § 16.6.6(3), including Deferred Fees under MSA § 16.6.6(3)(F), are only due for a termination of the MSA "other than on expiration or upon a Termination as set forth in Sections 16.3.1 . . . in any of which events, *Vendor shall not be entitled to Early Termination Close Out Payments . . .*" (MSA § 16.6.6(1) (emphasis added).)

177. After IBM failed to improve its performance, including through the 90-day CAP, FSSA properly terminated the MSA pursuant to MSA § 16.3.1, as expressly set forth in its Notice of Termination. In which case, per the plain language of MSA § 16.6.6(1), ETCOP under MSA § 16.6.6(3), which includes the Deferred Fees, is not available.

178. When harmonized with the section as a whole, the first sentence of MSA § 16.6.6(1) supports this position. The first sentence provides, “In the event of a Termination of this Agreement for any reason (other than a Termination by expiration), the State shall pay Vendor, *to the extent applicable*, the charges set forth in Sections 16.6.6(2) and 16.6.6(3)(F) below.” (emphasis added)

179. The “to the extent applicable” plain language is a cross-reference to, and is further defined by, the second sentence of MSA §16.6.6(1).

180. Pursuant to Rule 57 of the Indiana Rules of Trial Procedure and Ind. Code § 34-14-1-1 *et seq.*, the Court should declare the rights and obligations of the parties with respect to the payment of Early Termination Close Out Payments, including Deferred Fees, under the MSA.

181. Specifically, the Court should declare that, pursuant to the express terms of MSA § 16.6.6, IBM is not entitled to payment of any ETCOP, including Section 16.6.6(3)(F) Deferred Fees, if it finds that the MSA was terminated for cause.

COUNT V – DECLARATORY JUDGMENT:
UNENFORCEABLE PENALTY PROVISIONS

182. The State incorporates Paragraphs 1 - 181 as if fully stated herein.

183. A controversy exists between FSSA and IBM concerning the enforceability of MSA § 16.6.6(3)(f) and MSA § 14.8.1(3) as penalty provisions.

184. The total amount allegedly owed by the State under MSA § 14.8.1(3) for the assignment of subcontracts is \$40 million (\$10 million for assignment of ACS, and \$5 million each for the assignment of Arbor, Haverstick, Interactive Intelligence, Phoenix, PostMasters, and RCR).

185. The total amount allegedly owed by the State under MSA § 16.6.6(3)(f) is \$43,416,738.

186. The amounts described in MSA § 16.6.6(3)(f) and MSA § 14.8.1(3) are not enforceable under Indiana law.

187. The amounts of potential recovery under these two provisions of the MSA bear no rational relation to work that was actually performed by IBM or any damages allegedly suffered by IBM. They serve no other purpose than to discourage termination of the MSA.

188. The amounts described in MSA § 16.6.6(3)(F) and MSA § 14.8.1(3) are arbitrary and not tied to any actual work or loss suffered by IBM.

189. As penalty provisions, and not liquidated damages, these provisions are unenforceable under Indiana Law.

190. Pursuant to Rule 57 of the Indiana Rules of Trial Procedure and Ind. Code § 34-14-1-1 *et seq.*, the Court should declare the rights and obligations of the parties with respect to the enforceability of MSA § 16.6.6(3)(F) and MSA § 14.8.1(3).

191. Specifically, the Court should declare that both provisions are unenforceable penalty clauses, and that, at such, IBM is not entitled to payment under the respective provisions, regardless of the basis for Termination.

COUNT VI – INDEMINICATION

192. The State incorporates Paragraphs 1 - 191 as if fully stated herein.

193. The State has incurred, or will incur, losses through third-party lawsuits and through the assessments of Federal penalties because of IBM's acts, omissions, and wrongful conduct.

194. To the extent FSSA or the State incurs Federal penalties or liability for any lawsuit brought as a result of, or proximately caused by, the implementation of the Modernized system, such liability and incurrence is derivative of, and should be absorbed by, IBM.

195. IBM's wrongful conduct and breach of the MSA is the direct and proximate cause of the loss incurred by FSSA, including damages, costs, and fees.

196. The State has a right of relief under MSA § 17.2.1 and common law for indemnification for IBM's wrongful conduct.

WHEREFORE, Plaintiff prays for judgment in its favor and against IBM in an amount sufficient to compensate it for its damages, costs, interest, for an award of treble damages under Ind. Code § 34-24-3-1, prejudgment interest, attorneys' fees, declaratory judgment, and all other just and proper relief.

Respectfully submitted,

John R. Maley [Atty. No. 14300-89]
Peter J. Rusthoven [Atty No. 6247-98]
J. Curtis Greene [Atty No. 25600-29]
Patrick W. Price [Atty No. 25058-49)]
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: 317.236.1313
Facsimile: 317.231.7433
E-mail: jmaley@btlaw.com
prusthoven@btlaw.com
cgreene@btlaw.com
pprice@btlaw.com

Counsel for Plaintiff, State of Indiana