

**Agreement for the Establishment of the IBM INFORMATION TECHNOLOGIES
INNOVATION CENTER Within the BUFFALO INFORMATION TECHNOLOGIES
COMPLEX**

This agreement ("Agreement"), entered into as of September 15, 2013 ("Effective Date"), is by and among The Research Foundation of State University of New York ("Foundation") on behalf of the College of Nanoscale Science and Engineering ("CNSE") of the State University of New York, with an office located at 257 Fuller Road, Albany, New York, 12203 and International Business Machines Corporation, a New York corporation with its principal office located at 2070 Route 52, Hopewell Junction, New York 12533 ("IBM") each referred to herein individually as "Party" or together as "Parties".

WHEREAS the Parties entered into a non-binding Memorandum of Understanding on June 11, 2013 ("MOU") concerning the establishment of an IBM innovation center ("IITC") within the Buffalo Information Technologies ("IT") Complex ("BITC");

WHEREAS, under the leadership of Governor Andrew Cuomo, New York State has led the U.S. in multi-billion dollar strategic investments in high technology programs that cover the entire spectrum of clean energy, medical, smart grid and nanotechnology industry needs, from long-term innovative research and development, to workforce development and education, to product prototyping and commercialization;

WHEREAS, Governor Andrew Cuomo's comprehensive job creation and economic growth agenda for New York State provides strategic investments for job creation in emerging high-tech industries across New York State and fosters critical partnerships between State government, the private sector and New York State's top-flight universities and research institutions, as demonstrated recently by the commitment and growth of CNSE, together with its public and private university and industry partners;

WHEREAS, IBM is a global technology leader in the nanoelectronics applications, including leading edge high-end logic devices, and the information technologies (IT) software and hardware products of the 21st century that enable customers to develop and successfully commercialize critical nanoelectronics solutions, from research and development to volume production;

WHEREAS, IBM acknowledges that CNSE is a critical enabling component in maintaining and bolstering New York State's position as a leader in clean energy, nanomedicine, and nanotechnology, and recognizes the mutual benefit that can be attained by: collaborating with CNSE to bring to the State of New York new research, development, and business investments from the various sectors of the nanoelectronics industry; and (ii) fostering critical partnerships among the Parties and the public and private sectors; and

WHEREAS, the Research Foundation and CNSE further recognize IBM as a valuable collaborator and partner in the development and deployment of current and future IT innovations and solutions, including domestically delivered IT applications development and maintenance solutions.

NOW THEREFORE, for good and valuable consideration, the parties hereby agree as follows:

Wherefore, the Parties agree as follows:

1.0 Definitions

- 1.1 "Advisory Committee" shall mean a committee made up of Representatives of the Parties and selected additional Members as further defined in Section 4.6 hereof.
- 1.2 "Change of Control" shall mean one transaction or a series of transactions which result in a third party obtaining, directly or indirectly, (i) all or a majority of the assets of, or (ii) Control of, a Party.
- 1.3 "Confidential Information" shall have the meaning set forth in Schedule A hereto.
- 1.4 "Control" shall mean the power to direct the affairs of any individual, corporation, partnership, joint venture, trust, business association, governmental entity or other entity by reason of ownership of voting stock, by asset acquisition, by contract or otherwise.
- 1.5 "Fiscal Year" shall have the meaning described in Section 4.8 hereof.
- 1.6 "Governing Board" shall have the meaning described in Section 4.2 hereof.
- 1.7 "Governing Board Representative" shall mean the employee or designee of each Party designated by such Party to serve on the Governing Board as its representative as described in Section 4.2 hereof.
- 1.8 "IITC Computing Capacity" shall mean the computing capacity available using the IITC Infrastructure.
- 1.9 "IITC Director" shall mean the executive director of IITC (as defined below).
- 1.10 "IITC Facility" shall have the meaning set forth in Section 2.4 hereof.
- 1.11 "IITC Infrastructure" shall mean the computing assets described under Section 2.6 hereof and the infrastructure support services described under Section 2.5 hereof. For clarity, IITC Infrastructure includes IITC Procured Software once installed.

- 1.12 "IITC Procured Software" shall mean the software and associated services procured by Foundation for installation in the IITC (as defined below) pursuant to the Sales Agreements.
- 1.13 "Intellectual Property" shall mean all patents, utility models, and any other patent instruments (including applications, divisionals, continuations, reexaminations, and reissues); copyright and mask work rights; and trade secrets, trademark or trade name rights; all to the extent owned or licensable, now or hereafter, by a Party hereto.
- 1.14 "Member" shall mean: (i) each Party and (ii) any person or entity being provided limited access to the IITC Infrastructure at IITC Facilities through a Membership Agreement.
- 1.15 "Membership Agreement" shall have the meaning set forth in Section 5.2 hereof.
- 1.16 "Non-Member Participant(s)" or "NMP" shall mean any person or entity, other than another Member, working with a Member on a Program.
- 1.17 "Operating Costs" shall mean (a) costs and expenses associated with the utilities, insurance as referred in Section 12.4 hereof, maintenance (other than maintenance included in the of purchase of the IITC Procured Software), allocable overhead costs and operation of the IITC Infrastructure, (b) overhead expenses, annual facility lease fees, and operating costs of the IITC Facilities that can be reasonably allocated to the management and operation of the IITC Facilities, (c) operating personnel expenses, and (d) consumables, including consumables used in IITC Infrastructure setup, calibration and performance monitoring. Operating Costs do not include (1) construction costs, (2) costs and expenses for each Party's research personnel for conducting Programs, (3) other costs and expenses unique to a specific Program or Programs, which costs and expenses described in (2), and (3) will be paid for by the respective Party for whose direct benefit they are incurred, and (4) depreciation.
- 1.18 "Operational Date" shall mean the date on which the initial IITC Infrastructure is installed and operational to conduct Programs within the scope of the IITC (as defined below).
- 1.19 "Program(s)" shall mean research, development and deployment programs performed by one or more Members using the IITC Computing Capacity.
- 1.20 "Representative(s)" shall mean a Party's employees or designees.
- 1.21 "Reserved Computing Capacity" shall mean the portion of IITC Computing Capacity whose use is under the control of an individual Member.
- 1.22 "Sales Agreement(s)" shall mean the stand alone agreements between IBM and Foundation listed in Exhibit A and any amendments or supplements thereto.

- 1.23 "Subsidiary" or "Subsidiaries" shall mean a corporation, company or other entity: (i) more than fifty percent (50%) of whose outstanding shares or securities (representing the right to vote for the election of directors or other managing authority) are, now or hereafter, owned by or under the Control of, directly or indirectly, a Party hereto, but such corporation, company or other entity shall be deemed to be a Subsidiary only so long as such ownership or Control exists; or (ii) which does not have outstanding shares or securities, as may be the case in a partnership, joint venture or unincorporated association, but more than fifty percent (50%) of whose ownership interest representing the right to make the decisions for such corporation, company or other entity is now or hereafter, owned by or under the Control of, directly or indirectly, a Party, but such corporation, company or other entity shall be deemed to be a Subsidiary only so long as such ownership or Control exists.
- 1.24 "Technical Scope" shall have the meaning set forth in Section 2.3 hereof.
- 1.25 "Term" shall have the meaning set forth in Section 10.1 hereof.
- 1.26 "Telephonic Participation" shall mean participation either by telephone or videoconference or any other combination of technology to allow the participant to communicate.

2.0 ESTABLISHMENT OF IITC

- 2.1 **Establishment of the IBM Information Technology Innovation Center ("IITC").** IBM and CNSE shall establish the IITC at facilities provided by Foundation in consultation with IBM within the Buffalo Information Technologies Complex ("BITC"), which facilities are further defined in Section 2.4.
- 2.2 **Vision of IITC.** The Parties intend to establish the IITC as an R&D and business partnership and economic resource within the State of NY for the development and deployment of IBM's current and future IT innovations and solutions, including domestically delivered IT applications development and maintenance solutions.

2.3 **Technical Scope of IITC.** The technical areas of research activities at the IITC (the "Technical Scope") shall be as defined in this paragraph. IITC would focus on:

- Creating an innovative public-private sector partnership that models the IBM Innovation Centers to foster economic development and private sector job creation in the greater Buffalo area and across New York.
- Recruiting and providing full time employment to qualified candidates from the NYS University (SUNY) and private university systems.
- Providing cost-effective, high quality IT solutions to New York's public sector entities.
- Offering cost-effective, NY-based technology solutions to private sector companies.
- Establishing an IBM-CNSE incubation center for "smarter solutions" and "smarter cities," such as integrated health and human services, enterprise business analytics, and enterprise asset management.
- Developing, demonstrating, and deploying current and future IT innovations and solutions, including domestically delivered IT applications development and maintenance solutions.
- Helping to attract to the greater Buffalo area a critical mass of IT solution providers and software developers needed to establish at the Buffalo Information Technology Complex a premier global ecosystem.

The Governing Board may make changes to the Technical Scope and any such changes shall be documented in an amendment to this Agreement.

2.4 **Physical facility for IITC.** The physical facility for the IITC shall be owned or operated by or on behalf of Foundation and the facility or portion thereof (based on IBM's needs) shall be assigned to the exclusive use of IBM for a minimum of the earlier of (1) seven (7) years from the Operational Date or (ii) eight (8) years from the Effective Date. The facility and infrastructure will be mutually agreed by the Parties and shall be in accordance with IBM's specifications to house IBM's operations in Western New York. The cost of the facility and fit-up of the facility, including equipment, and appropriate operating expenses, will not exceed \$25 Million, including any capital expenses associated with any electrical utilities, communications utilities infrastructure, security or maintenance. Foundation will provide the use of the Facility to IBM at rental rates to be agreed between the Parties. The facility shall be reasonably accessible to all Parties during normal IITC business hours to support the IITC including (1) appropriate facilities with appropriate infrastructure for the IITC Infrastructure and (2) office space necessary and appropriate to execute Projects. The foregoing is hereinafter referred to as "IITC Facilities".

- 2.5 **IITC Infrastructure and support services.** Foundation shall arrange for and oversee the providing of the IITC computing assets (as described under Section 2.6), electrical utilities, communications utilities infrastructure, security, maintenance, custodian services, cooling and heating and other operational services reasonably necessary for the IITC Infrastructure and the habitation and intended use of such IITC Facilities under this Agreement. The cost of these services, excluding the cost of Foundation's contributions under Section 3.1.2, shall be included as part of the IBM rental rates as per Section 2.4.
- 2.6 **IITC Computing Assets Procurement.** Foundation shall procure for the benefit of the IITC the IITC Procured Software described in the Sales Agreements. The Sales Agreements are attached in Exhibit A. Procurement of additional hardware, software and services from IBM shall be as mutually agreed by the Parties and governed by the Sales Agreements. Procurement of any portion of the fully operational IITC Infrastructure not purchased from IBM shall be subject to the review of the Governing Board.
- 2.7 **Approvals.** Foundation shall obtain all approvals, permits, and documentation needed to facilitate construction and operation of the IITC Facilities. Foundation shall obtain all environmental and safety approvals and authorizations necessary to perform the Programs in IITC Facilities in Buffalo, New York and will, upon request, advise IBM of progress made with respect to obtaining such approvals and authorizations.
- 2.8 **Guidelines.** Foundation shall, in consultation with IBM, provide Members and Non-Member Participants documents setting forth all IITC Facility use and visitation guidelines applicable to such Members' Representatives, non-resident and resident, at IITC Facilities. All such guidelines shall become effective only upon approval of the Governing Board.

3.0 CONTRIBUTIONS TO IITC

- 3.1 **Base funding.** The base funding from Foundation and IBM for IITC during the Term shall be as set forth in this Section 3.1:

3.1.1 **IBM Contribution.** IBM shall provide the following:

- (a) **Headcount.** IBM commits to working with CNSE to establish, within a financially viable and fiscally competitive business model, the IITC, with an employment of 500 high tech jobs from IBM and its partners, suppliers, and contractors in Buffalo over the period of 7 years after creation of the IITC. IBM further commits to create an IBM-CNSE strategic public-private partnership with the SUNY Higher Education system to: (i) develop and deploy current and future IT innovations and solutions, and (ii) enhance the quality of

education for IT-related disciplines and introduce a steady pipeline of job opportunities for graduates. Subject to business and contract conditions, retention of the foregoing positions is a part of the employment goal during the contract term.

- (b) **Operational Investments.** IBM further agrees to certain operational levels of investments (i.e., salaries, IT enablement, leasing of the facility) over the lesser of (i) seven (7) years from the Operational Date or (ii) eight (8) years from the Effective Date consistent its employment goal under Section 3.1.1(a). Such operational levels of investments will be described in the Annual Budget.
- (c) **Cash Equivalent Contributions.** Consistent with its operations at IITC, IBM commits to providing the resources it determines are necessary such as know how, intellectual property, systems or software.
- (d) In no case shall any of IBM's contribution under Section 3.1.1 be due before the Operational Date, except as may be mutually agreed by the Parties in writing.

3.1.2 Foundation Contribution. Within one (1) year from the Effective Date, Foundation, on behalf of CNSE, commits to generate \$55 Million in funding from the State of New York to be administered through Foundation, to provide funding for the IITC Facility and related capital acquisitions, in accordance with IBM's specifications to house the IITC in Western New York, as follows:

- (a) **IITC Procured Software.** Foundation, on behalf of CNSE, agrees it will acquire IITC Procured Software for \$30M from IBM pursuant to the Sales Agreements identified in Exhibit A. The Sales Agreements are attached as Exhibit A.
- (b) **IITC Facility.** New York State funding will also be administered through Foundation to equip the IITC Facility with equipment, including the IITC Infrastructure necessary for IBM's operations in Western New York. Such equipment will be owned by Foundation and assigned to the exclusive use of IBM for a minimum of seven (7) years from the Operational Date. The cost of the IITC Facility and fit-up of the IITC Facility (including equipment but excluding IITC Procured Software) and associated Foundation operating expenses will not exceed \$25 Million. Foundation will provide the use of the Facility to IBM at rental rates to be agreed by the Parties in a separate lease agreement.
- (c) **Support of Workforce.** Foundation commits to working jointly with

IBM to recruit, locate, and train the workforce in Western New York necessary to staff the facility with 500 high tech jobs. It is anticipated that grant funding will be available to fund the workforce development on a per employee basis. Foundation commits to work with IBM to pursue such grant funding. Such funding will be above and beyond the amounts in Sections 3.1.2(a) and 3.1.2(b) above. Foundation further commits to working jointly with IBM to identify sources of funding to support the recruitment of workforce within an operating business model that is financially viable and fiscally competitive, including competitive labor rates on a per employee basis..

3.1.3 Funding Sources. The Parties agree to work together, and with CNSE, to identify sources of funding for R&D in Western New York. Such funding will be generated from public and private funding sources. Furthermore, IBM will use good faith efforts to assist in the production of materials to be used for Foundation's efforts under 3.1.2 to generate funding from the State of New York and, subject to a reasonable level of effort and to state lobbying guidelines, to participate in those efforts.

3.2 No IP Contribution Obligation. This Section 3.0 shall not create any obligation for any Party to contribute Intellectual Property or licenses under Intellectual Property.

3.3 No further funding obligation. Except for the foregoing Section 3.1, the Parties shall have no other funding obligations for IITC.

4.0 MANAGEMENT OF IITC

4.1 Governance. This Section 4.0 sets forth the management principles for the IITC and Programs. For avoidance of doubt, IBM shall have sole discretion over its own activities conducted in the IITC Facility and shall have no responsibility for activities conducted at the Buffalo Information Technology Complex outside of the IITC Facility.

4.2 Governing Board. The Governing Board is hereby established. It shall implement general policies for the IITC, approve the IITC operating budget proposed by the IITC Director in accordance with Section 4.8 below, approve any changes of the Technical Scope, and assist in the recruitment and approval of additional Members and other participants.

4.2.1 Governing Board Members. The Governing Board shall consist of two Representatives of each Party. These four individuals are the Governing

Board Members. Selection of the individual representatives from each Party hereto shall be within the discretion of that Party. The Governing Board's chairman shall be elected from among Governing Board members. A Party may unilaterally change its Governing Board Representative by providing ten (10) days advance written notice to the other Governing Board Members.

4.2.2 Meetings & Decisions. The Governing Board shall hold meetings on at least a quarterly basis or more frequently as may be decided by the Governing Board. In addition to any duties specified in the body of this Agreement, the Governing Board shall have the responsibilities as defined in Exhibit C. Except as indicated in Section 4.2.3 below, all decisions of the Governing Board shall be by simple majority vote of all Governing Board Members and must be documented in Governing Board minutes. A quorum shall consist of at least one member of IBM and Foundation. In the case of a tie vote any proposed motion shall fail. Governing Board Members may vote by proxy. A Governing Board Member may participate via Telephonic Participation with all rights and privileges.

4.2.3 IBM & Foundation Unanimity Requirement. Notwithstanding Section 4.2.2, the agreement of the all Governing Board Representatives shall be necessary for:

- (a) Acceptance of new Members;
- (b) Acceptance of a Non-IBM Member's NMPs under Section 5.3 hereof;
- (c) Modification of the Technical Scope.

4.3 Annual Report. The IITC Director shall be responsible for the production of a regular annual report providing status and any material information regarding IITC. The Parties shall review the report with respect to matters they have knowledge of and request any necessary changes to enable the IITC Director to ensure that the Report is accurate and complete. This report shall be made available to senior executives of the Parties of at least the level of Vice President or other comparable level as defined by each Party.

4.4 Dispute Resolution. Any disputes not resolvable by the IITC Director shall be referred by the IITC Director to the Governing Board for resolution. In the event the Governing Board cannot reach agreement within thirty (30) calendar days thereafter, the dispute will be referred in writing to the senior executives of the Parties, who shall discuss and meet in person, if necessary, in order to negotiate a resolution to the dispute.

4.5 IITC Director. With the advice and recommendations of the Governing Board, IBM shall appoint a director (the "IITC Director") who shall be responsible for the basic management of IITC and the IITC Infrastructure. The IITC Director shall oversee all

operational staff at IITC. The IITC Director shall oversee collectively the delivery and installation and operation of the IITC Infrastructure, ordering of any other equipment for the IITC, and disbursements to cover Operating Costs. The IITC Director shall also promote the success of IITC by securing new Members, proposing new Programs, and keeping the IITC Infrastructure up to date. Further duties of the IITC Director are articulated in this Agreement and in Exhibit D hereof. The Governing Board may also recommend further duties.

- 4.6 **Advisory Committee.** Each Party shall designate a Representative ("Advisory Committee Representative") to participate in the Advisory Committee, in addition to the IITC Director. Members may also provide additional Advisory Board Representatives in accordance with their respective Membership Agreements. Advisory Committee's purpose shall be to advise and assist the IITC Director and Governing Board in making decisions in the matters in front of them or to propose new ways to meet the objectives and the operation methods for the IITC. The IITC Director shall chair the Advisory Committee. In the absence of the IITC Director, the remaining members of the Advisory Committee shall select the Chair. The Advisory Committee shall hold meetings on a regular basis as decided by the IITC Director. Each Member having an Advisory Committee Representative may unilaterally change its Advisory Committee Representative by providing ten (10) days advance written notice to the other Members.
- 4.7 **Communication from IITC Director** The IITC Director shall communicate regularly with the Governing Board concerning matters affecting the operation of IITC. He or she shall provide reports no less than twice a year.
- 4.8 **Annual Budget.** Annually, and prior to October 1 preceding the start of the Fiscal Year, the IITC Director shall propose to the Governing Board a budget of the Operating Costs for the following year. No such annual budget will compel a Party to make contributions in excess of those described in Section 3.0. The Fiscal Year of the IITC shall be from January 1 to December 31 for each year that the IITC is in operation. The Governing Board may approve or reject the proposed budget in a timely fashion and in no event later than December 1 preceding the start of the Fiscal Year. The IITC Director shall only use IITC funds in accordance with the approved budget. The IITC Director shall report quarterly to the Governing Board the total receipts and expenditures against the budget. At any Party's request (but not more than once per year), the IITC Director shall conduct an internal audit of the Operating Cost of IITC. The incremental cost of such an audit will be considered part of the Operating Cost of IITC
- 4.9 **Additional Resources.** Notwithstanding and in addition to budgeted purchases and expenditures, the IITC Director may determine that purchasing additional computational systems beyond the IITC Infrastructure and/or for upgrades to the IITC Infrastructure, as well as other tools and equipment not listed in Exhibit A may be necessary to support the scope of Programs consistent with the goals of IITC as set forth in Sections 2.2 and 2.3 hereof (collectively referred to as "Additional Resources"). However, notwithstanding any such determination of necessity, any

funding of such Additional Resources is outside the scope of the contributions defined in Section 3.0 hereof, and shall only be by mutual written and signed agreement of the Parties, which agreement may stipulate a credit against the Parties contribution obligations under this Agreement if a Party funds or otherwise provides any such Additional Resource.

5.0 ADDITIONAL MEMBERS, NON-MEMBER PARTICIPANTS, AND NYS USERS

5.1 Additional Members. Any Party may propose the addition of a new Member to IITC. Such proposal shall be presented to the Governing Board for review and decision. The Governing Board shall accept or reject such proposed new Member based on factors such as the state of the Programs, contribution to IITC to be provided by such new Member(s), the need of IITC for additional funds, and the ability of such proposed Member to meet the goals of IITC.

5.2 Membership Agreement. Any proposed Member must execute a written agreement ("Membership Agreement") with IBM, which shall contain financial contribution terms, intellectual property and confidentiality terms and other terms approved by the Governing Board. The IITC Director shall be responsible for administering and enforcing such Membership Agreements with each additional Member.

5.3 Non-Member Participants. A non-Party Member wishing to bring in an NMP must provide the Governing Board written notice of its intent at least thirty (30) days prior to such NMP engaging in any activities at IITC. Subject to Section 4.2.3 hereof, any non-IBM Member shall be permitted to have a Non-Member Participant ("NMP") participate with such Member in one or more Programs utilizing some portion of such Member's Reserved Computing Capacity.

5.3.1 Party NMPs. Notwithstanding Section 5.3 hereof, Foundation may contract with an NMP to work with Foundation on Programs without the consent of the Governing Board if such NMP is an academic institution or New York state government entity. Any Party may bring an objection to an NMP to the Governing Board for resolution.

6.0 MANAGEMENT OF IITC COMPUTING CAPACITY

6.1 Schedule. The IITC Director will establish the schedule for allocation of IITC Computing Capacity on a monthly basis, subject to the Reserved Computing Capacity allocations agreed to in Section 6.2. For each month, such schedule will be given prior to the beginning of such month to each Member. Any portion of the IITC Computing Capacity that is assigned to a Member and is unused shall be deemed to be lost by such Member. The IITC Director may designate certain time each month as unavailable for computation for purposes of system maintenance and updates. Such time will not be considered as part of the IITC Computing

Capacity. If it is estimated that such time of any year in the five year Term, exceeds 5% the Parties will assess the cause, applicable insurance, the extent of damage to a particular Party and the Governing Board shall make an equitable determination as to appropriate compensation. IBM shall be given priority over other Members with respect to scheduling of IITC Computing Capacity.

6.2 **Allocation.** The allocation of the Reserved Computing Capacity shall be agreed by the Parties in writing prior to the Operational Date. IBM's Reserved Computing Capacity must be reasonable and sufficient in order for IBM to execute its activities under this Agreement.

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6.4 **Lost Computing Capacity.** In the event that equipment problems result in lost IITC Computing Capacity, the IITC Director will first proportionally allocate any unallocated IITC Computing Capacity to Members to achieve the percentage allocation set forth above. If, however, a Member does not receive its proportional share of IITC Computing Capacity in the month lost, IITC Computing Capacity to such Member will be recovered over the next two (2) month period and such lost IITC Computing Capacity shall be deducted from the total IITC Computing Capacity available for allocation to all other Members. Any conflicts with regard to IITC Computing Capacity will be resolved by the Governing Board.

6.5 **Inter-Member Transfer.** Nothing in this Agreement shall restrict transfer of Reserved Computing Capacity among Members, provided that the IITC Director is given prior written notice.

7.0 USE OF IITC COMPUTING CAPACITY; IITC PROGRAMS

7.1 **Use of IITC Computing Capacity.** Each Member may use its Reserved Computing Capacity as follows:

7.1.1 IBM may use its Reserved Computing Capacity with or without any of its NMPs at IBM's sole discretion within the Technical Scope.

7.1.2 Foundation may use its Reserved Computing Capacity with or without any of its NMPs at Foundation's sole discretion within the Technical Scope.

7.1.3 Each Member not a Party may use IITC Computing Capacity in accordance with its Membership Agreement.

7.2 **Joint Programs.** Members shall not engage in any joint Programs (i.e., where the Members would jointly participate in research and/or development) without a separate signed written agreement which shall govern Intellectual Property created

under such joint Program. Such separate signed written agreement will supersede the terms of Section 8 with respect to the joint Program to which it pertains.

8.0 INTELLECTUAL PROPERTY OWNERSHIP AND LICENSES

- 8.1 **IP Ownership.** Each Party shall own any and all Intellectual Property conceived or created solely by its Representatives in the course of carrying out a Program. Any Intellectual Property jointly conceived or created by Representatives of two or more Members in the course of carrying out a joint Program shall be jointly owned by the Parties in accordance with applicable law and licensable by any owning Party without accounting to or permission from the other owning Party(s).
- 8.2 **Member Rights and Licenses for Intellectual Property from Programs.** Each Member other than IBM and Foundation shall have certain license rights to Intellectual Property created or conceived in Programs as more fully set forth in their respective Membership Agreements.
- 8.3 Except as expressly provided elsewhere in this Section 8.0, no other license is granted in this Agreement either expressly, or by implication, estoppel or otherwise.

9.0 CONFIDENTIALITY AND PUBLICITY

- 9.1 Schedule A hereto shall govern the disclosure and treatment of Confidential Information under this Agreement.
- 9.2 **Publicity.** Press releases, public announcements, and any publicity regarding the Agreement or the relationship among the Parties must be approved by the Parties in writing prior to any press release, public announcement, or other publicity by any Party, excluding any non-public communication that is internal to any individual Party or the IITC. Any public use by any Party of the names or logos associated with another Party requires the prior written consent of that other Party.
- 9.3 Notwithstanding the foregoing, Membership Agreements or agreements concerning Joint Programs as described in Section 7.2 may contain confidentiality provisions which will supersede the provisions of this Section 9 in case of conflict.

10.0 TERM AND TERMINATION

- 10.1 **Term.** The term of this Agreement shall extend for the earlier of (i) seven (7) years from the Operational Date or (ii) eight (8) years from the Effective Date ("Term"). Prior to the end of the Agreement term, the Parties agree to negotiate in good faith whether or not to extend this Agreement, with reinvestment and other contributions from the Parties. In the event Foundation decides to extend any use of the IITC Facility or IITC Infrastructure beyond the term of this contract, IBM must be offered the right to continue IITC participation beyond this contract's term under an

investment and use arrangement to be agreed upon by the Parties. Any mutually agreed to extension of this Agreement shall be set forth in a written signed amendment to this Agreement.

10.2 **Material Breach.** If a Party becomes a breaching Party ("Breaching Party") by materially breaching its obligations hereunder, then the other Party ("Non-Breaching Party") each may terminate this Agreement in a written notice enumerating Breaching Party's breach(s) or default(s), provided however that within thirty (30) calendar days after the date upon which the notice was sent, the Breaching Party shall be entitled to cure any of the breaches and events of default identified in the notice. If at the end of the 30-day cure period, any of the identified breaches or defaults has not been cured, the Non-Breaching Party may terminate the Agreement and all obligations of the Non-Breaching Party contained herein, effective immediately, without additional notice or additional act by the Non-Breaching Party. Notwithstanding the above, if the Breaching Party commences to cure the identified breaches or defaults within the 30-day cure period, but is unable to reasonably complete within such period, the Breaching Party may upon written request to non-Breaching Party prior to the end of the original cure period (including an explanation of how such cure would be achieved), have an additional 30-day cure period to complete the cure. Each Party reserves the right to withhold funds or seek damages related to a material breach under this Agreement that goes uncorrected. For the avoidance of doubt, nothing in the Sales Agreements shall adversely affect any Party's obligations, rights and remedies under this Agreement.

10.3 **Default.** In the event that a Party engages in or suffers any of the following events of default:

- (a) becomes insolvent, is dissolved or liquidated, has a petition in bankruptcy, reorganization, dissolution or liquidation or similar action filed by or against it, is adjudicated as bankrupt, or has a receiver appointed for its business;
- (b) has all or a substantial portion of its capital stock or assets expropriated or attached by any government entity;
- (c) makes an assignment for the benefit of creditors;
- (d) is subject to property attachment, court injunction, or court order materially affecting its ability to honor its obligations under this Agreement; or
- (e) suffers a Change of Control;

then such Party ("Breaching Party") shall promptly notify the other Party ("Non-Breaching Party") in writing that such an event has occurred, and the Non-Breaching Party may terminate the Agreement and all obligations of the

Non-Breaching Party contained herein in a written notice enumerating the event(s) of default.

- 10.4 **Effect of Termination upon Breach or Default.** In the event the Agreement is terminated due to a breach or default enumerated in Sections 10.2 or 10.3, respectively, subject to the limitation of liability provisions set forth in Section 12.2 hereof, the Non-Breaching Party may pursue any and all other remedies in law or in equity against the Breaching Party.
- 10.5 **Failure of New York State funding.** If New York State funding commitment is not secured by Foundation in accordance with Section 3.1.2, then any Party may terminate this Agreement with no liability whatsoever.

11.0 REPRESENTATIONS / WARRANTY / LIABILITY

- 11.1 Except as may be set forth in any other signed, written agreements, all information (including but not limited to, Intellectual Property arising out of the Programs and Confidential Information), items, and services (if any), except for the facilities and/or services related thereto specified in Sections 2.4, 2.5 and 2.6 hereof, provided by THE PARTIES hereunder are provided ON AN "AS-IS" BASIS without warranty of any kind. THE FOREGOING WARRANTIES BY THE PARTIES ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES EXPRESS OR IMPLIED INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR PARTICULAR PURPOSE AND ANY WARRANTY OF NON-INFRINGEMENT OF THIRD PARTY INTELLECTUAL PROPERTY RIGHTS.

12.0 LIMITATION OF LIABILITY / INSURANCE

- 12.1 The Parties agree that any liability or obligations under this Agreement shall not include any special, punitive, indirect, incidental or consequential damages, even if a Party has been made aware of the possibility of such damages..
- 12.2 In no event shall any Party's (or its respective Subsidiaries') aggregate liability to any other Party (for direct damages or otherwise) in connection with any claim or claims relating to or arising under this Agreement exceed the amount of Two Million United States dollars (\$2,000,000), regardless of the form of action. This limitation shall not apply to (i) breach of the obligations set forth in Sections(s) 2.4, 2.5, 2.6, 3.1.2, 8.0, 9.0, 12.3 and 12.4; or (ii) death, personal injury or physical damage to real property or tangible personal property resulting from a Party's actions under this Agreement, including that of its employees, agents or subcontractors.

12.3 Each Party shall secure and maintain (or cause to be secured and maintained) adequate workers' compensation insurance coverage in respect of all its employees participating in the Program in accordance with the applicable laws of the State of New York. Each Party shall maintain (or cause to be secured and maintained) for the benefit of the other Party, annual comprehensive general public liability insurance (or a combination of commercial general liability insurance, self-insurance and/or umbrella liability insurance) with a combined single limit per occurrence of not less than \$15 Million, and an aggregate limitation of not less than \$15 Million, which insurance covers bodily injury, disease and death and property damage (including, to the extent such insurance is reasonably available therefor, environmental damage), and which applies to any such liabilities the Parties may have to each other under this Agreement. Foundation will name IBM as an additional insured. IBM will name the Foundation, and CNSE, as additional insureds. Purchase and maintenance of such insurance shall in no way be interpreted as relieving either Party of any of its responsibilities or liabilities hereunder, and each Party may carry, at its expense, such additional insurance amounts and coverage as it deems necessary. In no event shall any such insurance be cancelled without prior written notice by the insured Party's insurance carrier to the other Party.

12.4 Foundation shall secure and maintain or cause to be secured and maintained insurance for the IITC Facilities, the IITC Infrastructure and/or other IITC-related tools and equipment located at the IITC Facilities against the following risks, with the costs of all such IITC-related insurance to be considered Operating Costs and shall provide IBM with a certificate of insurance evidencing the following:

- (a) Loss or damage by fire, vandalism and malicious mischief, earthquake (if available at commercially reasonable rates) and extended coverage perils commonly known as "Special Risk," and all physical loss perils normally included in such Special Risk insurance, including, but not limited to, sprinkler leakage, in an amount not less than ninety percent (90%) of the then full replacement cost thereof (as defined in subsection (e) below).
- (b) Loss or damage by explosion of steam boilers, pressure vessels or similar apparatus, now or hereafter installed at the IITC Facilities.
- (c) Claims for personal injury or property damage under a policy of commercial general public liability insurance with a combined single limit per occurrence in respect of bodily injury, disease and death and property damage (including, to the extent such insurance is reasonably available therefore, environmental damage) of \$15 Million, and an aggregate limitation of \$15 Million, which insurance shall include contractual liability insurance.

- (d) During such time as Foundation is constructing any IITC-related improvements, (i) workers' compensation insurance and employers' liability insurance and (ii) a completed operations endorsement to the commercial general liability insurance policy referred to above.
- (e) For purposes of this Section 12.4, the term "full replacement cost" means the actual replacement cost of the applicable property or tools or equipment, less exclusions provided in the standard form of fire insurance policy. The insurance provided for in this Section 12.4 may be brought within the coverage of a so-called blanket policy or policies of insurance that are carried and maintained by the Foundation.

13.0 COMPLIANCE WITH LAWS, REGULATIONS AND RULES

- 13.1 Each Party agrees to promptly comply with all applicable laws, rules, regulations and orders of the United States Government, New York State and of any other duly constituted governmental authority having jurisdiction over such Party, to the extent applicable to activities under this Agreement. Each Party agrees that unless authorized by applicable government license or regulation, including but not limited to U.S. authorization, both parties will not directly or indirectly export or re-export, at any time, any technology, software and/or commodities furnished or developed under this or any other, Agreement among the Parties, or its direct product, to any prohibited country (including release of technology, software and/or commodities to nationals, wherever they may be located, of any prohibited country) as specified in applicable export, embargo, and sanctions regulations.
- 13.2 It is the intent and understanding of each Party that this Agreement is consistent with State and Federal law. If through mistake, oversight, or otherwise, any such provision is not contained herein, or, is not contained herein in correct form, this Agreement shall, upon the application of any Party promptly be amended so as to comply with State and Federal laws.
- 13.3 Each Party represents that it has, or will have in place, established procedures and/or agreements with its employees or others, including subcontractors, whose services the Party may require, sufficient to enable such employees or others to comply with all the provisions of this Agreement. Each Party shall be responsible for the selection and screening of its employees who will be assigned to work on the Programs.

14.0 APPLICABLE LAW / NOTICES

- 14.1 This Agreement will be governed by and interpreted exclusively under the laws of the State of New York, without regard to its choice of law rules. The Parties will comply with all applicable federal, state and local laws and regulations with respect to this Agreement. In case of any dispute concerning or arising out of this

Agreement that cannot be resolved by the Parties in good faith, such dispute shall be finally settled and venue shall be exclusively held in any appropriate state or federal court in the State of New York. Each Party consents to exclusive jurisdiction and venue of such courts.

- 14.2 Any written notice or communication required to be made or given to any Party hereto, pursuant to this Agreement, will be deemed to have been sufficiently given on the date of delivery if sent by a means providing reliable confirmation of delivery, such as by facsimile or via reputable air courier service, and addressed as set forth below, or to such other address as is designated by written notice given to the other Parties:

In the case of Foundation:

Dean Fuleihan
Research Foundation Operations Manager
College of Nanoscale Science and Engineering
257 Fuller Road
Albany, New York 12203

In the case of IBM:

Michael O'Rourke
CTO and VP, Architecture and Technology
IBM Software Group
2073 Lawrence Dr.
De Pere , WI , 54115-9106

With copy to:

IBM Corporation
Drop 92B
2070 Route 52
Hopewell Junction, NY 12533
Attn: Legal Dept.

Facsimile No.: (845) 892-5358

15.0 FREEDOM TO CONTRACT

Nothing in this Agreement shall limit the right of any Party, alone or with others, to design, develop, make, procure, market and/or maintain products and/or services, or engage in any other research and development activities, alone or with others, now or in the future, which may constitute competitive alternatives in the field of the technologies related to this Agreement.

16.0 MISCELLANEOUS

- 16.1 Nothing contained in this Agreement shall be construed as conferring any right to use in advertising, publicity or other promotional activities any name, trade name, trademark or other designation of any Party hereto (including any contraction, abbreviation or simulation of any of the foregoing).
- 16.2 If any Party is rendered wholly or partially unable by Force Majeure to carry out its obligations under this Agreement, and if that Party gives prompt written notice, including a reasonable description of such Force Majeure, to the other Party, the notifying Party shall be excused from performance of its obligations hereunder during the continuance of any inability so caused, but for no longer period. Such cause shall be remedied by the notifying Party as far as possible with reasonable speed and effort, but no Party shall have any obligation to settle any labor dispute. For the purposes of this Agreement, "Force Majeure" shall mean Acts of God, labor disputes, acts of public enemies or terrorists, war, other military conflicts, blockades, insurrections, riots, epidemics, quarantine restrictions, landslides, lightning, earthquake, fires, conflagration, storms, floods, washouts, arrests, civil disturbances, restraints by or actions of any governmental body (including export or security restrictions on information, material, personnel, equipment or otherwise), industry-wide shortages, industry-wide unavailability and any other acts or events whatsoever, whether or not similar to the foregoing, not within the control of the Party claiming excuse from performance, which by the exercise of the diligence and reasonable efforts that Party shall not have been able to overcome or avoid. If the notifying Party cannot remedy the Force Majeure situation and resume satisfactory performance within ninety (90) days after delivery of the notice, the other Party may at its option immediately terminate this Agreement with respect to such Party.
- 16.3 If any term or provision of this Agreement or the application thereof to any Party hereto or set of circumstances shall, in any jurisdiction and to any extent, be finally held to be invalid or unenforceable, such term or provision shall only be ineffective as to such jurisdiction, and only to the extent of such invalidity or unenforceability, without invalidating or rendering unenforceable any other terms or provisions of this Agreement or under any other circumstances, so long as the remainder of this Agreement still effectuates the essential purposes of this Agreement. The failure of a Party to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver or deprive that Party of the right to insist later on adherence thereto, or thereafter to insist upon strict adherence to that term

or any other term of this Agreement. To be effective, any waiver must be in a writing signed by an authorized representative of the Party granting such waiver.

- 16.4 The headings in this Agreement are intended solely for convenience of reference and shall be given no effect in the construction or interpretation of this Agreement. The terms "herein", "hereof", "hereunder" and any similar terms used in this Agreement refer to this Agreement and all references to "this Agreement" refer to this instrument and the Exhibits hereto, as amended from time to time. The terms "including" or "include" shall mean "including, without limitation", or "include, without limitation".
- 16.5 Each Party shall bear its own costs and expenses (including those for its attorneys, accountants, bankers, advisers or other agents or representatives) incident to the preparation, negotiation, execution and delivery of this Agreement and the performance of its obligations hereunder, except to the extent that any such costs and expenses are treated as allocable Operating Costs under this Agreement.
- 16.6 Each Party shall be responsible for all tax matters, issues or obligations related to the employment of its employees or agents or to the presence of its personal property in any taxing jurisdiction.
- 16.7 To the extent permitted by law, during the term of this Agreement and for one (1) year after the termination thereof, each Party agrees to not, without the prior written permission of the other Party, directly or indirectly solicit for employment purposes any Personnel of the other Party. The foregoing does not preclude general (i.e., non-targeted) recruitment advertising. In addition, to the extent permitted by law, during the term of this Agreement and for one (1) year after termination thereof, each Party agrees that neither shall hire Personnel of the other Party with essential technical knowledge or skill without the prior written permission of the other Party. "Personnel" shall mean a Party's Representatives allocated to the Programs and "Representative(s)" shall mean a Party's employees and employees of a Party's Wholly Owned Subsidiaries.
- 16.8 Except for assignment in connection with the transfer of all or substantially all of a Party's business or assets relating to this Agreement, no Party may assign all or any part of this Agreement or any of its rights, privileges or obligations hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. Any assignment made in violation of this Section 16.8 shall be void *ab initio*.
- 16.9 No amendment or modification of this Agreement shall be valid or binding upon the Parties unless in a writing executed by both Parties.
- 16.10 Except as otherwise provided for in this Agreement, neither the provisions of this Agreement nor anything done pursuant to this Agreement shall create any partnership, any employer-employee relationship or any agency relationship between the Parties and the Parties are otherwise independent contractors relative

to each other. In executing the terms and conditions of this Agreement, the Parties agree to act in a manner consistent with commercially reasonable business practices under the circumstances.

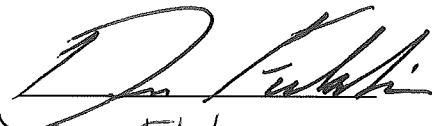
- 16.11 Nothing in this Agreement shall obligate a Party to institute any action or suit against third parties for infringement of any of its patents, or to defend any action or suit brought by a third party which challenges or concerns the validity of any of its patents. Nothing in this Agreement shall grant any Party the right to institute any action or suit against third parties for infringement of the other Parties' patents. Nothing in this Agreement shall obligate any Party, or any of its Subsidiaries, to file any patent application, or to secure any patent or patent rights, or to maintain any patent in force. No amendment or modification of this Agreement shall be valid or binding upon the Parties unless made in writing and signed on behalf of the Parties by their respective duly authorized Representatives.
- 16.12 Sales of all portions of the IITC Procured Software and/or the IITC Infrastructure made by IBM to Foundation shall be governed by the relevant Sales Agreement(s); otherwise, this Agreement, together with the Exhibits and Schedule hereto, is the complete and exclusive statement of the agreement of the Parties in respect of the subject matter described in this Agreement and shall supersede all prior and contemporaneous agreements, communications, representations, and understandings, either oral or written, among the Parties or any officers, agents or representatives thereof.
- 16.13 This Agreement may be signed in one or more counterparts, each of which shall be deemed to be an original and all of which when taken together shall constitute the same Agreement. Any signed copy of this Agreement made by photocopy, facsimile or PDF Adobe format shall be considered an original.

[Signature page follows]

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives as follows:

**The Research Foundation of State
University of New York**

**International Business Machines
Corporation**

By: 
Name: Dean Foleihan
Title: Research Foundation Operations
Manager
Date: 9/16/13

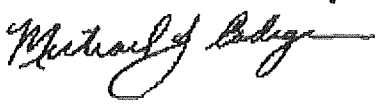
By: 
Name: Michael J Cadigan
Title: GM IBM Microelectronics STG
Date: 9 - 14 - 13

EXHIBIT A:

Sales Agreements*

Sales Agreement 0824201103, entered into between the Parties on June 30, 2013

* The Sales Agreements are a free-standing set of documents that do not form part of this Agreement

EXHIBIT B

INTENTIONALLY LEFT BLANK

Execution Version – IBM / CNSE Confidential

EXHIBIT C

Governing Board Responsibilities

In the event of any conflict between the items below and the body of the Agreement, the body of the Agreement shall control.

1. Review and approve:
 - a. Extensions to the IITC Technical Scope,
 - b. The template for all IITC Member agreements.
 - c. Addition of Members to IITC,
 - d. Addition of Non-member subject to Section 5.3,
 - e. IITC Annual Operating Budget, and
 - f. Changes to the IITC Access Time guidelines.
2. Hold meetings on a quarterly basis or more frequently as deemed necessary by the Governing Board.
3. Establish a regular annual review process with appropriate senior executives of the Parties (as defined by each Party).
4. Conduct quarterly meetings with the IITC Director to review IITC operations, technical programs, and other issues.
5. Interview the candidate for IITC Director
6. Policy and regulation advisement to the IITC Director

EXHIBIT D

IITC Director Responsibilities

In the event of any conflict between the items below and the body of the Agreement, the body of the Agreement shall control.

1. Serve as the executive director (responsible for the day-to-day operation) of the IITC
2. Oversee collectively the delivery, and installation and operation of the IITC Infrastructure.
3. Monitor progress against the Target Implementation Date, and report any discrepancies to the Governing Board
4. Promote the success of IITC by securing new Members, proposing new Programs, and keeping the IITC Infrastructure up to date.
5. Chair the Advisory Committee.
6. Communicate regularly with the Governing Board concerning matters affecting the operation of IITC.
7. Present an annual budget of the Operating Costs to the Governing Board for approval.
8. Use IITC funds in accordance with the approved budget.
9. Report quarterly to the Governing Board the total receipts and expenditures against the budget.
10. Establish the schedule for allocation of IITC Computing Capacity on a monthly basis, subject to the Reserved Computing Capacity allocations agreed to in Section 6.2.
11. Designate as needed certain time each month as unavailable for computation for purposes of system maintenance and updates.
12. In the event that equipment problems result in lost IITC Computing Capacity proportionally allocate IITC Computing Capacity to Members and NYS Users to achieve the percentage allocation set forth in Section 6.2.
13. Other duties as assigned by IBM.

SCHEDULE A

Purpose

Each of the Parties may disclose and receive Confidential Information (defined below) from the other Party, for the limited purpose of exchanging such information as necessary to establish and operate the IITC (hereinafter referred to as "Purpose").

Disclosure of Confidential Information

"Confidential Information" shall mean all information that is maintained in confidence by a Party ("Owning Party") and is disclosed to or obtained by the other Party in connection with and during the Term of this Agreement, including, but not limited to, information that relates to such Owning Party's past, present or future research, development, manufacturing, or business activities. Either Party ("Disclosing Party") may disclose its confidential information to the other Party ("Receiving Party") orally, in writing or by other media or transfer of materials including graphic, photographic, recorded, prototype, sample, or other tangible or permanent form clearly and obviously marked "confidential" or "proprietary". Electronic information will be adequately marked if the container is marked and if a proprietary legend displays when the information runs on a computer system and when the information is printed from its data file.

When disclosed orally, Disclosing Party shall identify the information as confidential at the time of such disclosure, with subsequent written confirmation to Receiving Party within thirty (30) days of such disclosure indicating the date and type of information disclosed. All restrictions provided herein regarding use and/or disclosure shall apply during such thirty-day period.

Protecting confidential information

Receiving Party will retain Disclosing Party's Confidential Information in confidence for three (3) years from the date of disclosure. Receiving Party will not disclose, disseminate, or publish any of Disclosing Party's Confidential Information to any person except employees or agents of Receiving Party on a need to know basis. Receiving Party shall ensure that such employees or agents shall be bound by terms at least as protective as the terms of this Schedule A. Each Party warrants that employees or agents shall comply with the terms of this Schedule A. Upon the termination or expiration of this Agreement, the Parties shall confer regarding the status of Confidential Information disclosed and/or created under this Agreement.

All right, title and interest in patents, copyrights, trademarks, data, designs, drawings, blueprints, tracings, plans, layouts, specifications, formulae and any and all other Confidential Information which are furnished to the Receiving Party shall be and remain the exclusive property of the Disclosing Party. The Parties recognize and agree that nothing contained in Agreement shall be construed as granting any property rights, by implication, license or otherwise, to any Confidential Information of the other Party disclosed pursuant to the Agreement, or to any invention or any patent, copyright, trademark, or other intellectual property.

Each Party agrees to not make, use, sell, offer for sale, or have made, any product or service based upon the Confidential Information provided to it without executing an agreement authorizing such use. Each Party further agrees not to reproduce in any form (except as required to accomplish the Purpose set forth in this Schedule A), analyze, modify, reverse engineer, decompile, create other works from, or disassemble the Confidential Information disclosed to it or any samples of tangible materials included therein.

The Party receiving Confidential Information under this Agreement shall be held to the same standard of care in protecting such information as the Receiving Party normally employs to preserve and safeguard its own Confidential Information of similar kind.

Exclusions; Required Disclosure

Receiving Party's obligations regarding Disclosing Party's Confidential Information shall not apply to information (a) that was already known to Receiving Party prior to the disclosure of such information to Receiving Party by Disclosing Party, (b) that is or becomes publicly available through no act or fault of Receiving Party, (c) that is rightfully received by Receiving Party from a third-party having no obligation of confidentiality to Disclosing Party, or (d) that is independently developed by Receiving Party.

In the event the Receiving Party is required by law, regulation, or court order to disclose any of the Disclosing Party's Confidential Information, the Receiving Party will notify the Disclosing Party in writing prior to making such disclosure in order to facilitate the Disclosing Party seeking a protective order or other appropriate remedy from the appropriate legal body. The Receiving Party further agrees that if the Disclosing Party is not successful in precluding the requesting legal body from reviewing the Confidential Information, it will furnish only that portion of the Confidential Information which is legally required and will exercise all reasonable efforts to obtain reliable assurances that confidential treatment will be accorded the Confidential Information.