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**Re: Salesforce.com Canada Corporation ats The HSE Group of Companies Inc.
Court File # CV-17-572927**

Please see attached.

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CASSELS BROCK
LAWYERS

May 23, 2017

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file # 47427-2

Dear Counsel:

**Re: Salesforce.com Canada Corporation ats The HSE Group of Companies Inc.
Court File # CV-17-572927**

We enclose herewith our Statement of Defence and Counterclaim, which is served upon you pursuant to the *Rules of Civil Procedure*.

Yours truly,
Cassels Brock & Blackwell LLP


Christopher Selby

CS/sh
Enclosure

cc: Robert B. Cohen
cc: Client

Court File No. CV-17-572927

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

THE HSE GROUP OF COMPANIES INC.

Plaintiff

- and -

SALESFORCE.COM CANADA CORPORATION

Defendant

STATEMENT OF DEFENCE AND COUNTERCLAIM

1. The Defendant, Salesforce.com Canada Corporation ("**Salesforce**"), admits the allegations contained in paragraphs 3 and 31 of the Statement of Claim.
2. Salesforce denies the allegations contained in paragraphs 4-26, 28-30, and 32 of the Statement of Claim, except as admitted below, and further denies that the Plaintiff, The HSE Group of Companies Inc. ("**HSE**"), is entitled to the relief claimed in paragraphs 1 and 33 of the Statement of Claim.
3. The Defendant, Salesforce.com Canada Corporation, has no knowledge in respect of the allegations contained in paragraphs 2 and 27 of the Statement of Claim, except as admitted below.

The Order Forms and the Master Services Agreement

4. For the period from February of 2016 through March of 2017, HSE purchased various products and services from Salesforce pursuant to the terms of Salesforce order

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forms (a) Q-00473346 (the "**First Order Form**"); (b) Q-00626191 (the "**Second Order Form**"); and (c) Q-00630067 (the "**Third Order Form**" and collectively with the First Order Form and Second Order Form, the "**Order Forms**"), and an online Master Subscription Agreement (the "**Master Subscription Agreement**").

5. Pursuant to the Second Order Form, HSE and Salesforce agreed that certain products and services purchased by HSE pursuant to the First Order Form would be replaced with certain other products and services specified in the Second Order Form. Pursuant to the Third Order Form, HSE and Salesforce agreed that certain products and services which HSE had already purchased would be replaced with certain other products and services specified in the Third Order Form. The Order Forms and the Master Subscription Agreement are referred to herein collectively as the "**Contract**".

6. The Order Forms were duly executed by HSE, submitted to Salesforce, and are legally binding in accordance with their terms. The Order Forms specifically provide that upon execution of same by HSE, HSE agreed to and was therefore legally bound by the terms of the Master Subscription Agreement, along with the Order Forms. The preamble to the Master Subscription Agreement expressly provides that the Master Subscription Agreement forms part of the Contract, as follows:

BY ACCEPTING THIS AGREEMENT, EITHER BY CLICKING A BOX INDICATING YOUR ACCEPTANCE OR BY EXECUTING AN ORDER FORM THAT REFERENCES THIS AGREEMENT, YOU AGREE TO THE TERMS OF THIS AGREEMENT. IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY AND ITS AFFILIATES TO THESE TERMS AND CONDITIONS, IN WHICH CASE THE TERMS "YOU" OR "YOUR" SHALL REFER TO SUCH ENTITY AND ITS AFFILIATES. IF YOU DO NOT HAVE SUCH AUTHORITY, OR IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS, YOU MUST NOT ACCEPT THIS AGREEMENT AND MAY NOT USE THE SERVICES. [emphasis added]

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7. Section 14.3 of the Master Subscription Agreement contains a provision (the "**Entire Agreement Clause**") which clearly states that the Master Subscription Agreement supersedes all prior and contemporaneous agreements or representations (whether written or oral) by Salesforce to HSE and that any subsequent amendments thereto had to be in writing and either signed or accepted electronically in order to be legally binding. More specifically, the Entire Agreement clause states as follows:

14.3 Entire Agreement and Order of Precedence. This Agreement is the entire agreement between You and Us regarding Your use of Services and Content and supersedes all prior and contemporaneous agreements, proposals or representations, written or oral, concerning its subject matter. Except as otherwise provided herein, no modification, amendment, or waiver of any provision of this Agreement will be effective unless in writing and signed by the party against whom the modification, amendment or waiver is to be asserted. The parties agree that any term or condition stated in Your purchase order or in any other of Your order documentation (excluding Order Forms) is void. In the event of any conflict or inconsistency among the following documents, the order of precedence shall be: (1) the applicable Order Form, (2) this Agreement, and (3) the Documentation. (**emphasis added**)

8. Accordingly, even if Salesforce did make any oral representations or written representations to HSE (as alleged at paragraphs 5 and 23 of the Statement of Claim), which allegations are denied. Salesforce denies that any such representations form part of the Contract or are legally binding, as a consequence of the Entire Agreement Clause.

9. Salesforce further denies the existence of any implied conditions relating to fitness for purpose, merchantability, or otherwise, of the Salesforce products and services sold to HSE. In fact, section 9.3 of the Master Subscription Agreement expressly provides that Salesforce specifically disclaims any such warranties, as follows:

9.3. Disclaimer. EXCEPT AS EXPRESSLY PROVIDED HEREIN, NEITHER PARTY MAKES ANY WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND EACH PARTY SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTIES OF MERCHANTABILITY

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OR NON-INFRINGEMENT, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW. CONTENT AND BETA SERVICES ARE PROVIDED "AS IS," EXCLUSIVE OF ANY WARRANTY WHATSOEVER. [emphasis added]

10. Contrary to the allegations at paragraphs 11 and 12 of the Statement of Claim, Salesforce denies that HSE was required to accept the terms of the Master Subscription Agreement. Rather, HSE agreed to purchase the Salesforce products and services pursuant to the Order Forms and HSE, therefore, agreed to be bound by the terms of the Master Subscription Agreement.

Salesforce Complies with the Master Services Agreement

11. Contrary to the allegations at paragraphs 14-16 and 21-22 of the Statement of Claim, Salesforce pleads that it delivered the required products and performed the required services in accordance with the Contract. HSE has alleged no facts whatsoever in support of its allegation that the Salesforce products were not properly delivered, installed, or configured for HSE or that Salesforce did not perform the purchased services and "fell well short of its obligations". Salesforce puts HSE to the strict proof of those allegations.

12. In response to paragraph 22 of the Statement of Claim, Salesforce specifically denies that HSE's purchase of the Salesforce products and services included any agreement by Salesforce to install or configure any software for HSE pursuant to the Contract and puts HSE to strict proof thereof.

13. In any event, even if Salesforce failed to deliver its products and services to HSE in accordance with the Contract, which Salesforce denies, section 6.1 of the Master Subscription Agreement expressly provides that HSE is obligated to pay the fees in the

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Order Forms based on its purchase of the Salesforce products and services, and not on HSE's actual usage thereof, as follows:

6.1. Fees. You shall pay all fees specified in all Order Forms. Except as otherwise specified herein or in an Order Form, (i) fees are based on Services and Content subscriptions purchased and not actual usage, (ii) payment obligations are non-cancelable and fees paid are non-refundable, and (iii) quantities purchased cannot be decreased during the relevant subscription term. [emphasis added]

14. Accordingly and in the alternative to paragraphs 11 and 12 above, Salesforce pleads that, even if the Salesforce products were not properly delivered, installed, or configured for HSE or that Salesforce did not perform the purchased services in accordance with the Contract, which is denied, HSE is still contractually obligated to pay Salesforce all fees owing pursuant to the Contract and no basis exists at law for which Salesforce could be required to repay to HSE any fees paid to Salesforce by HSE pursuant to the Contract.

Salesforce not Responsible for Any Amount Paid to Figure8 or HSE Administrator

15. Contrary to the allegations set out in paragraphs 13 and 24-26 of the Statement of Claim, Salesforce pleads that it is not in any way responsible at law for the products and services which HSE alleges were to be provided to HSE by Figur8 Cloud Solutions ULC ("**Figur8**") or for any payment made by HSE to Figur8 in respect of those products and services. Salesforce puts HSE to the strict proof of such allegations.

16. In fact, section 5.1 of the Master Subscription Agreement (the "**Third Party Clause**") states that Salesforce bears no responsibility whatsoever for products or services provided by third parties related to the Salesforce products and services, as follows:

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5.1. We or third parties may make available (for example, through a Marketplace or otherwise) third-party products or services, including, for example, Non-SFDC Applications and implementation and other consulting services. Any acquisition by You of such products or services, and any exchange of data between You and any Non-SFDC provider, product or service is solely between You and the applicable Non-SFDC provider. We do not warrant or support NonSFDC Applications or other Non-SFDC products or services, whether or not they are designated by Us as "certified" or otherwise, unless expressly provided otherwise in an Order Form.

17. Furthermore and contrary to paragraph 25 of the Statement of Claim, Salesforce pleads that at all relevant times, Figure8 was an independent contractor, rather than an agent, partner, or joint venturer of Salesforce, and, therefore, Salesforce is not responsible for any amounts paid to Figur8 by HSE or for any acts or omissions of Figur8.

18. Contrary to paragraphs 27 and 28 of the Statement of Claim, Salesforce pleads that it is not, in any way responsible for any alleged losses arising in connection with an HSE "Salesforce administrator", including for any amounts paid by HSE in respect thereof.

19. In any event, Salesforce denies having made any representations to HSE related to the provision of services to HSE by Figure8 or HSE's "Salesforce administrator". Even if Salesforce did make any representations to HSE, as alleged at paragraphs 5 and 23 of the Statement of Claim, which allegations are denied, Salesforce denies that any such representations form part of the Contract or are legally binding, as a consequence of the Entire Agreement Clause.

No Unjust Enrichment

20. Contrary to paragraph 30 of the Statement of Claim, Salesforce pleads that a claim of unjust enrichment is not available to HSE. The sum of \$170,000 was paid by HSE for

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the partial purchase of the Salesforce Services pursuant to the Contract. Accordingly, Salesforce denies that Salesforce has been enriched by that payment and that there was a corresponding deprivation suffered by HSE. Moreover, the terms of the Contract provide a juristic reason in favour of Salesforce.

No Damages

21. If it is found that Salesforce breached the Contract or was unjustly enriched, Salesforce denies that HSE has suffered any corresponding damages.

22. Salesforce pleads that the damages claimed by HSE are excessive or remote.

23. Salesforce pleads that HSE has failed to mitigate its alleged damages, or alternatively, has successfully done so, in whole or in part.

24. Salesforce, therefore, asks that this action be dismissed as against it with costs on a substantial indemnity basis.

COUNTERCLAIM

25. Salesforce counterclaims against HSE for:

- (a) liquidated damages in the amount of US \$491,230.69, or damages in Canadian currency sufficient to purchase that amount in accordance with section 121 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, for breach of contract;
- (b) damages for breach of the Contract in such amount as this Honourable Court determines is owing;

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- (c) prejudgment and postjudgment interest in accordance with the terms of the Contracts, defined below;
- (d) in the alternative to (c) above, prejudgment and postjudgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (e) the costs of this counterclaim on a substantial indemnity basis, plus all applicable taxes; and
- (f) such further and other relief as this Honourable Court may deem just.

26. Salesforce adopts the definitions of the capitalized terms set out in the Statement of Defence above and repeats and relies upon the allegations contained therein.

27. Salesforce provided the goods and services to HSE in accordance with the terms of the Contract and rendered invoices to HSE in accordance with their terms. In particular, Salesforce properly rendered the following invoices: (a) 10009451 dated March 12, 2017; (b) 9223105 dated November 1, 2016; and (c) 8527829 dated June 9, 2016 (collectively, the "**Invoices**") to HSE, each of which was payable in thirty (30) days.

28. Despite repeated requests and demands, HSE has refused, neglected or otherwise failed to pay the balance owing pursuant to the Invoices duly rendered by Salesforce, plus interest, in breach of HSE's obligations pursuant to the Contract.

29. The total outstanding amount of the Invoices owing by HSE to Salesforce pursuant to the Contract after deducting payment already made by HSE to Salesforce, is US

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\$491,230.69, plus interest calculated in accordance with the express terms of the Contract.

30. Salesforce requests that the trial of the counterclaim proceed at the same time or immediately following the trial of the main action, or as otherwise directed by the trial judge.

May 23, 2017

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THE HSE GROUP OF COMPANIES INC.
Plaintiff

and SALESFORCE.COM CANADA CORPORATION
Defendant

Court File No. CV-17-572927

**ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO**

STATEMENT OF DEFENCE

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