

## Subcontractor Agreement

THIS SUBCONTRACTOR AGREEMENT (this "Agreement") is entered into as of the \_\_\_ day of \_\_\_\_\_, 20\_\_\_, by and between DataFile Technologies, LLC ("Business Associate") and \_\_\_\_\_ ("Subcontractor").

WHEREAS, the Business Associate and the Subcontractor have entered into an agreement for Subcontractor to provide services in which the Business Associate will disclose certain Protected Health Information to the Subcontractor or the Subcontractor may create or receive Protected Health Information for or on behalf of the Business Associate; and

WHEREAS, Business Associate and Subcontractor acknowledge that each has obligations in their respective roles as Business Associate and Subcontractor under the American Recovery and Reinvestment Act of 2009, Public Law No. 111-005, Part I, Title XIII, Subpart D, Sections 13401-13409 ("ARRA"), as well as the applicable guidance documents and additional regulations issued under ARRA by the U.S. Department of Health and Human Services ("HHS"), and, with respect to security breaches by non-covered entities, by the U.S. Federal Trade Commission ("FTC").

WHEREAS, pursuant to the HIPAA Privacy Security Rules and ARRA, all Business Associates of Covered Entities and their Subcontractors must agree in writing to certain mandatory provisions regarding the uses, disclosures, and safeguards relating to PHI; and

WHEREAS, this Agreement sets forth the terms and conditions upon which the Business Associate will disclose Protected Health Information to the Subcontractor or will allow the Subcontractor to create or receive Protected Health Information for, or on behalf of, the Business Associate.

NOW, THEREFORE, in reliance on the mutual covenants and promises contained herein, the parties hereto hereby agree as follows:

1. **Services.** The Business Associate and the Subcontractor have executed, and may in the future execute, Agreements ("Engagement") pursuant to which the Subcontractor services to Business Associate that requires the use or disclosure of Protected Health Information ("Services"). Except as expressly provided herein or as otherwise Required by Law, the Subcontractor may only use or disclose the Protected Health Information for the purpose of providing the Services. The Subcontractor expressly agrees that any and all uses or disclosures of the Protected Health Information by the Subcontractor will be done in accordance with the terms of this Agreement and the provisions of all applicable federal and state laws and regulations, including without limitation, the HIPAA Privacy and Security Rules.
2. **Obligations of the Subcontractor.**
  - a. **Permitted Uses and Disclosures.** Subcontractor is permitted or required to use or disclose Protected Health Information it creates or receives for or from Provider only as follows:
    - i. **Functions and Activities on Provider's Behalf.** Subcontractor is permitted to use and disclose Protected Health Information it creates or receives for or from Provider as required to fulfill its obligations under its contract(s) with Provider.

- ii. Subcontractor's Operations. Subcontractor may use Protected Health Information it creates or receives for or from Provider as necessary for Subcontractor's proper management and administration or to carry out Subcontractor's legal responsibilities. Subcontractor may disclose such Protected Health Information as necessary for Subcontractor's proper management and administration or to carry out Subcontractor's legal responsibilities only if:
  - a) The disclosure is required by law; or
  - b) Subcontractor obtains reasonable assurance, evidenced by written contract, from any person or organization to which Subcontractor will disclose such Protected Health Information that the person or organization will:
    - (1) Hold such Protected Health Information in confidence and use or further disclose it only for the purpose for which Subcontractor disclosed it to the person or organization or as required by law; and
    - (2) Notify Subcontractor (who will in turn promptly notify Provider) of any instance of which the person or organization becomes aware in which the confidentiality of such Protected Health Information was breached.
- b. Prohibition on Unauthorized Use or Disclosure. Subcontractor will neither use nor disclose Protected Health Information it creates or receives for or from Provider or from another Subcontractor of Provider, except as permitted or required by this Addendum or as required by law or as otherwise permitted in writing by Provider.
- c. Information Safeguards. The Subcontractor agrees to implement administrative, physical, and technical safeguards as required by 45 C.F.R. §§ 164.308, 164.310, and 164.312 that reasonably and appropriately protect the confidentiality, integrity and availability of the electronic protected health information that it creates, receives, maintains, or transmits on behalf of the Business Associate. Subcontractor will document and keep these safeguards current.
- d. Policies and Procedures. Subcontractor agrees to implement policies and procedures and maintain documentation as required by 45 C.F.R. § 164.316;
- e. Compliance with Privacy Rules and Business Associate's Privacy Policies and Procedures. Subcontractor agrees to comply with
  - i. All requirements of the HIPAA Privacy Rules in 45 C.F.R. §§ 160-164 as if Subcontractor were a "Business Associate" directly subject to those regulations
  - ii. Applicable State law not preempted by the HIPAA Privacy Rules; and
  - iii. Business Associate's HIPAA Privacy Policies.

- f. Sub-Contractors and Agents. Subcontractor will ensure that any agent, including without limitations any subcontractor or employee, to whom the Subcontractor provides any Protected Health Information received from the Business Associate, or created or received by the Subcontractor for or on behalf of the Business Associate, agrees to the same restrictions as apply through this Agreement to the Subcontractor with respect to the Protected Health Information, including the implementation of administrative, physical, and technical safeguards to reasonably and appropriately protect electronic protected health information. Notwithstanding the foregoing, the Subcontractor shall only disclose that Protected Health Information to such agents as is reasonably necessary to perform the Engagement or to fulfill a specific function required or permitted under this Agreement.
- g. Access, Amendment and Accounting. Subcontractor Agrees
- i. To provide access, within fifteen (15) days of receipt of written request from Business Associate, to Protected Health Information to the requesting Individual who is the subject of the information for inspection and copying pursuant to 45 CFR 164.524;
  - ii. To make amendments of Protected Health Information and incorporate such amendments, if applicable, that Business Associate directs or agrees to in accordance with 45 CFR 164.526 within ten (10) days; and
  - iii. To provide an accounting of disclosures to Business Associate or to requesting Individual in accordance with 45 CFR 164.528 within fifteen (15) days.
- h. Mitigation and Reporting of Violation. Subcontractor agrees
- i. to mitigate, to the extent practicable, any harmful effects of which the Subcontractor becomes aware that arise out of the use or disclosure of Protected Health Information by the Subcontractor that is in violation of this Agreement;
  - ii. to report to the Business Associate any use or disclosure of Protected Health Information not specifically permitted by this Agreement of which it becomes aware, including unauthorized uses or disclosures related to protected health information of another Business Associate with whom it is a Subcontractor;
- i. Notification of Breach. Subcontractor will promptly notify the Business Associate of any security incident or breach of unsecured protected health information;
- i. The Subcontractor will provide the notification to the Business Associate within 48 hours of the discovery of a breach;
  - ii. A breach is treated as discovered on the first day which the breach is known to the Subcontractor or, through reasonable diligence, would have been known to the Subcontractor. A breach is known by the Subcontractor if it is known, or would have been known, to any person, other than the person committing the breach, who is an employee, officer, or other agent of the Subcontractor;
  - iii. The notification to the Business Associate will include the identification of each individual whose unsecured protected health information has been or is

reasonably believed to have been accessed, acquired, used, or disclosed during the breach;

- iv. Subcontractor will also provide the Business Associate with additional information including a description of what happened including the date of breach and date of discovery; a description of the type of Protected Health Information involved; steps the individual should take to protect themselves; and steps taken by the Subcontractor to investigate, mitigate, and protect the breach. This information will be provided with the Subcontractor's initial notice or promptly after, as information becomes available;

- j. Inspection of Books and Records. Upon five (5) days notice from the Business Associate and during all regular business hours of the Subcontractor, or at such times and upon such terms as the Secretary may require, Subcontractor will make available to the Business Associate or the Secretary all internal practices, books and records, including but not limited to policies and procedures relating to the use and disclosure of Protected Health Information received from, or created or received by the Subcontractor from or on behalf of, the Business Associate necessary to allow the Secretary to determine whether the Business Associate is in compliance with the Privacy Rules;

3. **Obligations of the Business Associate.** The Business Associate shall notify the Subcontractor of:

- a. any limitation(s) in its Notice of Privacy Practices required by 45 C.F.R. 164.520, to the extent that such limitation(s) may affect the Subcontractor's use or disclosure of the Protected Health Information;
- b. any changes in, or revocation of, permission by an Individual to use or disclose Protected Health Information, to the extent that such change or revocation may affect the Subcontractor's use or disclosure of Protected Health Information; and
- c. any restriction(s) on the use or disclosure of Protected Health Information that the Business Associate has agreed to in accordance with 45 C.F.R. 164.522, to the extent that such restriction(s) may affect the Subcontractor's use or disclosure of Protected Health Information.

4. **Permissible Requests of the Business Associate.** The Business Associate shall not request that the Subcontractor use or disclose any Protected Health Information in any manner that would not be permissible under the HIPAA Privacy Rules if done by the Business Associate.

5. **Term and Termination.**

- a. Term. This Agreement shall be effective as of the date first set forth above and shall terminate when Services are no longer provided by Subcontractor pursuant to the Engagement.
- b. Termination by the Business Associate for Cause. If the Subcontractor breaches this Agreement, the Business Associate, in its sole discretion, may:
  - i. provide the Subcontractor written notice that the Subcontractor has breached this Agreement and provide the Subcontractor an opportunity to cure the breach to the satisfaction of the Business Associate within ten (10) days, after which time

this Agreement and all of the Engagements shall be automatically terminated if the breach is not cured;

- ii. immediately terminate this Agreement and the Engagement if the Subcontractor has breached a material term of this Agreement and cure is not possible; or
  - iii. if neither termination nor cure are feasible, the Business Associate shall report the violation to the Secretary.
- c. Termination by the Subcontractor. So long as any Engagement by and between the Business Associate and the Subcontractor shall exist, the Subcontractor shall have no right to terminate this Agreement.
- d. Automatic Termination. This Agreement will automatically terminate, without any further action by the parties hereto, at such time as there are no longer any Engagement by and between the parties hereto.
- e. Effect of Termination.
- i. Upon termination of this Agreement for any reason, the Subcontractor shall return or destroy all Protected Health Information received from the Business Associate, or created or received by the Subcontractor for or on behalf of the Business Associate within sixty (60) days of the termination of this Agreement. This provision shall apply to all Protected Health Information that is in the possession of any subcontractor or agent of the Subcontractor. The Subcontractor shall retain no copies of the Protected Health Information for its records.
  - ii. In the event that the Subcontractor believes that returning or destroying the Protected Health Information is not feasible, within thirty (30) days of any termination hereof the Subcontractor shall provide written notice to the Business Associate setting forth the conditions that the Subcontractor believes make return or destruction of the Protected Health Information not feasible. Within five (5) business days of its receipt of such notice from the Subcontractor, the Business Associate shall determine whether, in its sole discretion, the return or destruction of the Protected Health Information is not feasible, and provide written notice to the Subcontractor of its decision. Subcontractor agrees to continue any and all protections, limitations and restrictions contained in this agreement to Subcontractor's use and/or disclosure of any protected health information retained after the termination of the agreement, and to limit any further uses and/or disclosures to the purposes that make the return or destruction of the protected health information infeasible.

6. **Miscellaneous.**

- a. Any reference made herein to any provision of law or regulation shall be a reference to such section as in effect and as same may be amended from time to time.
- b. This Agreement may not be amended except in a writing signed by both parties hereto. Both parties hereto agree that this agreement shall be amended to comply with any and all state or federal laws, rules or regulations, including without limitation any future laws, rules or regulations.

- c. Any ambiguity in this Agreement shall be resolved to permit the parties hereto to comply with the HIPAA Privacy Rules.
- d. This Agreement and all rights and obligations hereunder shall be binding upon and shall inure to the benefit of the respective successors and assigns of both parties hereto.
- e. The respective rights and obligations of the Subcontractor set forth in this Agreement shall survive any termination of this Agreement.
- f. All notices which are required to be given hereunder shall be in writing and shall be deemed to have been duly given (a) when delivered personally, (b) the next business day following the day on which the same has been delivered prepaid to a nationally recognized overnight courier service, or (c) three (3) days after sending by registered or certified mail, postage prepaid, return receipt requested, in each case to the address first set forth above to the attention of the person signing below, or to such other person at such other address as the party may designate, by giving notice.
- g. In the event that any provision of this Agreement is adjudged by any court of competent jurisdiction to be void or unenforceable, all remaining provisions hereof shall continue to be binding on the parties hereto with the same force and effect as though such void or unenforceable provision had been deleted.
- h. No failure or delay in exercising any right, power or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or remedy hereunder preclude any other further exercise thereof or the exercise of any other right, power or remedy. The rights provided hereunder are cumulative and not exclusive of any rights provided by law.
- i. Agreement and the Engagement constitute the entire agreement between the parties hereto relating to the subject matter hereof, and supersede any prior or contemporaneous verbal or written agreements, communications and representations relating to the subject matter hereof.
- j. This Agreement shall be governed, construed and interpreted in accordance with the laws of the State of Kansas without regard to such state's conflict of law's provisions.
- k. This agreement may be signed in two or more counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same instrument. A copy of this Agreement bearing a facsimile signature shall be deemed to be an original.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed as of the date first set forth above.

BUSINESS ASSOCIATE

SUBCONTRACTOR

BY: \_\_\_\_\_

BY: \_\_\_\_\_