

BUSINESS ASSOCIATE AGREEMENT

This BUSINESS ASSOCIATE AGREEMENT (the "Business Associate Agreement") entered into by and between ("Client") _____

_____ located at _____

_____ and WellSpan Employee Assistance Program ("EAP"), a Pennsylvania not-for-profit corporation located at 1803 Mt. Rose Ave., Suite B5, York PA 17403, (collectively, the "Parties") is effective as of _____, 2010 (the "Agreement Effective Date").

WHEREAS, the Parties have executed an agreement or agreements under which EAP provides certain services to Client including, but not limited to, any amendments or contract supplements referencing any agreement(s) (singly, the "Agreement" and collectively the "Agreements").

WHEREAS, HIPAA, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and the federal HIPAA privacy and security regulations promulgated pursuant thereto and codified at 45 C.F.R. parts 160 and 164 (the "Privacy Rule") and 45 C.F.R. parts 160, 162, and 164 (the "Security Rule") (collectively referred to as the "HIPAA Regulations"), may require certain entities covered by the HIPAA Regulations to place certain provisions in their agreements with third parties who come into contact with certain patient health information;

WHEREAS, the Parties have determined that it is in their respective interests to comply with said rules and now desire to amend the Agreement(s) as of the Business Associate Agreement Effective Date on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual exchange of promises set forth herein, Client and EAP agree to the following terms:

Except as defined herein or otherwise required by the context herein, all capitalized terms used in this Business Associate Agreement have the meaning set forth in the Agreement(s). Any provisions in the Agreement(s) relating to the confidentiality of information are hereby stricken and replaced with the following:

1. CONFIDENTIALITY.

- a. **Confidential Information.** Each party (the "*Discloser*") may disclose to the other party (the "*Recipient*") certain non-public information relating to the Discloser's business, including, but not limited to, technical, marketing, financial, personnel, planning, medical records, PHI (as defined below) and other information that may or may not be marked confidential, which the Recipient should reasonably know to be confidential given the nature of the information and the circumstance of disclosure, and/or that derives independent value from not being generally known to the public ("*Confidential Information*"). Confidential Information of each party shall also include the terms of this Agreement,

but not the existence and general nature of this Agreement. Confidential Information will not include any information:

- i. lawfully obtained or created by the Recipient independently of, and without use of, Discloser's Confidential Information and without breach of any obligation of confidence; or
 - ii. that is in or enters the public domain without breach of any obligation of confidence.
- b. **Use and Disclosure.** Except as expressly permitted by this Agreement, the Recipient will:
 - i. not disclose, transfer, dispose of, reproduce, or make Discloser's Confidential Information available to any third party, directly or indirectly, except with the prior consent of the Discloser and except (i) to the employees or contractors of the Recipient to the extent that they need to know that Confidential Information for the purpose of performing the Recipient's obligations under this Agreement in accordance with its terms, and who are bound by confidentiality terms with respect to that Confidential Information no less restrictive than those contained in this Agreement; or (ii) as required to be disclosed by law, to the extent required to comply with that legal obligation, provided that the Recipient will promptly notify the Discloser of such obligation in such a manner that allows the Discloser a reasonable opportunity to secure the protection of such Confidential Information;
 - ii. use the Discloser's Confidential Information only for the purpose of performing Recipient's obligations under this Agreement; and
 - iii. use all reasonable care in handling and securing the Discloser's Confidential Information, and employ all reasonable data security measures that the Recipient ordinarily uses with respect to its own proprietary information of similar nature and importance, which shall in no event be less than a commercially reasonable degree of care and security.
- c. **Return of Confidential Information.** The Recipient will return to the Discloser, and destroy or erase all of the Discloser's Confidential Information in tangible form, upon the expiration or termination of this Agreement, and the Recipient will promptly certify in writing to the Discloser that it has done so.

2. HIPAA BUSINESS ASSOCIATE OBLIGATIONS.

Definitions

“Compliance Date” refers to the date upon which Client is required to be in compliance with the applicable HIPAA Regulation.

“Designated Record Set” means a group of records maintained by or for Client that are the medical records and/or billing records of individuals maintained by or for the Client; the enrollment, payment, claims adjudication and case or medical management record systems maintained by or for the Client; or used, in whole or in part, by or for the Client to make decisions about individuals.

“Electronic Protected Health Information” (ePHI) shall have the same meaning as the term

“Individually Identifiable Health Information” means individually identifiable health information as defined at 45 C.F.R. § 160.103.

“Protected Health Information” or “PHI” means Individually Identifiable Health Information (transmitted or maintained in any form or medium) received from, or created or received by EAP on behalf of, Client.

All capitalized terms used herein that are not otherwise defined have the meanings ascribed in the HIPAA Regulations.

3. RESPONSIBILITIES OF THE PARTIES WITH RESPECT TO PROTECTED HEALTH INFORMATION.

- a. **Responsibilities of EAP.** With regard to PHI, as of the Compliance Date set forth under the applicable HIPAA Regulations, EAP agrees as follows:
 - i. EAP recognizes that, as of February 18, 2010: (i) the administrative, physical, and technical standards and implementation specifications of the HIPAA security rule (45 CFR Sections 164.308, 164.310, 164.312, and 164.316) shall apply to EAP in the same manner that they apply to a Covered Entity, (ii) EAP may use and disclose Client’s PHI only if such use or disclosure is in compliance with each applicable requirement of the HIPAA privacy rule’s Business Associate Contract standard [Sec. 164.504(e)] and all other applicable provisions of the HITECH Act, and (iii) EAP acknowledges that civil and criminal penalties for violation of the HIPAA security and privacy regulations shall apply to Business Associates.
 - ii. EAP will use and/or disclose the PHI only as permitted or required by this Agreement, in accordance with its terms, or as required by law; and will comply with all other relevant sections of the HIPAA Regulations as the same may be amended from time to time.

- iii. EAP will not use, disclose or transmit PHI for re-disclosure in any manner that would violate the requirements of the HIPAA Regulations.
- iv. At all times during this Agreement, EAP's use and disclosure of PHI is subject to the minimum necessary standards set forth in the HIPAA Regulations. EAP will only use and disclose the PHI that is minimally necessary to perform its obligations under this Agreement or as required by law.
- v. EAP will implement and maintain administrative, physical, and technical safeguards that reasonably and appropriately protect the privacy and security of PHI including, but not limited to, safeguards necessary to ensure that: (i) PHI is not used or disclosed by EAP except as is permitted or required in this Agreement or under the law; (ii) access to PHI is limited to authorized personnel of EAP; (iii) EAP's security systems and procedures meet the regulatory standards promulgated by the United States Department of Health and Human Services for security of protected health information; and (iv) the confidentiality, integrity and availability of PHI is protected in accordance with the standards and implementation specifications set forth under the Security Rule. EAP shall promptly notify Client of any material change to any aspect of its privacy and security safeguards.
- vi. EAP will not transmit PHI over the Internet or any other insecure or open communication channel unless such information is encrypted using encryption standards generally accepted in the health care community and in compliance with the HIPAA Regulations, unless otherwise agreed to by the parties. If EAP stores or maintains PHI in encrypted form, EAP will, promptly at Client's request, provide Client with the key or keys to decrypt such information.
- vii. EAP will report to Client any use or disclosure of PHI of which EAP becomes aware that is not permitted by this Agreement (including, but not limited to any Security Incidents).
- viii. EAP will mitigate, to the extent practicable, any harmful effect known to EAP that is the result of, or arises from, EAP's unauthorized use or disclosure of PHI.
- ix. To the extent EAP is permitted to utilize an agent or subcontractor to perform any of its obligations under this Agreement, EAP will require all such subcontractors and agents that receive or use, or have access to, PHI under the Agreement to agree, in writing, to the same restrictions and conditions on the use and/or disclosure of PHI that apply to EAP pursuant to this Agreement.

- x. Upon request, EAP will make available its internal practices, books and records relating to the use and disclosure of PHI the Secretary of HHS, or the Secretary's designee, for purposes of determining Client's compliance with applicable HIPAA Regulations, and upon reasonable notice, shall afford Client the right and opportunity to review EAP's records relating to EAP's use and disclosure of PHI.
 - xi. EAP will provide to Client such information in EAP's possession as is reasonably requested by Client and necessary to enable Client to respond to a request by an individual for an accounting of the disclosures of the individual's PHI in accordance with HIPAA.
 - xii. If EAP maintains any PHI in a Designated Record Set, EAP agrees to (1) provide such PHI to Client in the time and manner requested by Client in writing, (2) to make amendments to such PHI in accordance with the Privacy Rule, and (3) evaluate and respond to requests to restrict disclosure of PHI and confidential communications.
 - xiii. If EAP believes it has a legal obligation to disclose any PHI, it will notify Client as soon as reasonably practical after it learns of such obligation, and in any event within a time sufficiently in advance of the proposed release date such that Client's rights would not be prejudiced, as to the legal requirement pursuant to which it believes the PHI must be released. If Client objects to the release of such PHI, EAP will allow Client to exercise any legal rights or remedies EAP might have to object to the release of the PHI, and EAP agrees to provide such assistance to Client, at Client's expense, as Client may reasonably request in connection therewith.
 - xiv. Upon request, EAP shall make available to the Client access to or copies of documentation regarding EAP's safeguards for PHI.
 - xv. EAP agrees to conduct standard transactions consistent with 45 C.F.R. Part 162 for or on behalf of the Client to the extent such standard transactions are required in the course of EAP's performing services under the Agreements and this amendment. Further, EAP will require any subcontractor or agents involved with the conduct of such standard transactions to comply with each applicable requirement of 45 C.F.R. Part 162.
- b. **Responsibilities of Client.** Client agrees to obtain any consent or authorization that may be required by HIPAA, or applicable state law, prior to furnishing EAP with PHI. Client agrees to timely notify EAP, in writing, of any arrangements between Client and the individual that is the subject of PHI that may impact in any manner the use and/or disclosure of that PHI by EAP under this Agreement.

4. EFFECT OF REGULATORY CHANGES ON RESPONSIBILITIES OF THE PARTIES.

- a. EAP and Client acknowledge that the HITECH provisions of the American Recovery and Reinvestment Act of 2009, P.L. 111-05, contains several provisions that will apply to the parties and their relationship as the provisions of P.L. 111-05 take effect during the term of the Agreement. The parties agree that from time to time they may amend this Business Associate Agreement to account for changes in the applicable law or regulations arising out of P.L. 111-05 and that, on and after the Agreement Effective Date, such then applicable provisions of P.L. 111-05 or its applicable implementing regulations shall be incorporated by reference into this Business Associate Agreement by operation of law.
- b. The Parties agree to amend or modify this Agreement as necessary, to comply with any applicable regulatory revisions or to better serve the Parties' business practices.
- c. To the extent that any relevant provision of HIPAA or other applicable law concerning the privacy or security of PHI is enacted or materially amended in a manner that changes the obligations of Client or EAP that are embodied in term(s) of this Agreement, the Parties agree to negotiate in good faith and take such action as necessary to bring performance under this Agreement into compliance with the HIPAA Regulations or other applicable law, including without limitation, amending or modifying this Agreement and/or, to the extent applicable, updating or otherwise modifying the Software. If, after negotiating in good faith, the parties are unable to mutually agree on an appropriate compliance methodology or approach, Client may unilaterally terminate this Agreement, if it determines in good faith that such course of action is the only reasonable approach under the circumstances to enable Client to comply with the HIPAA Regulations or other applicable law.
- d. All amendments to this Agreement shall be in writing and signed by the party against whom enforcement is sought.

5. PERMITTED USES AND DISCLOSURES OF PROTECTED HEALTH INFORMATION.

- a. **Permitted Uses and Disclosures of PHI by EAP.** Except as specified below, EAP may only access, duplicate or otherwise use or disclose PHI as necessary to perform its obligations under the Agreement, provided that such use or disclosure would not violate HIPAA if done by Client. All other uses or disclosures not authorized by this Agreement are prohibited. Unless otherwise permitted by this Agreement, EAP will not permit the disclosure of any PHI to any person or entity other than such of its employees, agents or subcontractors who must have access to the PHI in order for EAP to perform its obligations under this Agreement and who

agree to keep such PHI confidential as required by this Agreement. Unless otherwise limited herein, EAP may:

- i. use the PHI in its possession for its proper management and administration and to fulfill any legal responsibilities of EAP.
 - ii. disclose the PHI in its possession to a third party for the purpose of EAP's proper management and administration or to fulfill any legal responsibilities of EAP, provided that (i) the disclosures are required by law, or (ii) EAP has received from the third party reasonable assurances regarding the confidential handling of such PHI as required under HIPAA (including, but not limited to, assurances such PHI will be held confidentially and only used or further disclosed as required by law or for the purpose for which it was disclosed to such third party).
 - iii. aggregate the PHI obtained by EAP as a business associate, provided that Client has authorized the aggregation and the purpose of such aggregation is to provide Client with data analyses relating to the Health Care Operations of Client.
- b. Ownership of PHI. As between Client and EAP, Client holds all right, title and interest in and to the PHI, and EAP does not hold, and will not acquire by virtue of this Agreement or by virtue of providing any services or goods to Client, any right, title or interest in or to the PHI or any portion thereof. Except as specified in paragraph (c) above or as otherwise agreed to in writing by the parties, EAP will have no right to compile and/or distribute statistical analyses and reports utilizing aggregated data derived from the PHI or any other health and medical data obtained from Client unless such data is de-identified.

6. **TERM & TERMINATION OF AGREEMENT.**

- a. **Term.** This Business Associate Agreement shall remain in effect for so long as EAP continues to maintain PHI or perform in its capacity as a Business Associate to Client.
- b. **Termination.** Client or EAP may immediately terminate the Agreement if it determines that the other party has violated a material term of this Business Associate Agreement or any other applicable privacy or confidentiality laws or regulations. Alternatively, Client or EAP may provide the other party with prompt written notice of an alleged material breach and afford the other party an opportunity to cure the alleged breach. Failure to cure the material breach within thirty (30) days of receipt of notice is grounds for the immediate termination of this Agreement.
- c. **Alternative to Termination.** In the event that Client or EAP elects to continue this Agreement in full force notwithstanding Client or EAP's

material breach, Client or EAP may require the other party to: (a) exercise all reasonable efforts to retrieve any improperly used or disclosed PHI; (b) establish and adopt additional reasonable practices, policies and/or procedures to assure that PHI is not used or disclosed in violation of this Agreement; (c) comply with all reasonable requests by Client or EAP to demonstrate future compliance with the Agreement; and/or (d) take such other actions as Client or EAP may reasonably request.

- d. **Return of PHI.** Upon the expiration or termination of this Agreement, for any reason, EAP will promptly return to Client, or at Client's sole option destroy, any PHI in the possession or control of EAP or any agent or subcontractor of EAP, retain no copies of such PHI, and provide Client with certification of such return or destruction, and, unless otherwise expressly agreed to in writing, any right or license which EAP has to use the PHI will terminate immediately upon such expiration or termination of the Agreement. If Client or EAP determines that the destruction or return of the PHI is not reasonably feasible, the protections contained in this Agreement will continue to apply to any retained PHI, and any further use or disclosure of such PHI by EAP, its agents or subcontractors, is limited solely to those purposes that made the return or destruction of such PHI infeasible.

7. RIGHT TO INJUNCTIVE RELIEF.

EAP expressly acknowledges and agrees that the breach, or threatened breach, by it of any provision of this Business Associate Agreement may cause Client to be irreparably harmed and that Client may not have an adequate remedy at law. Therefore, EAP agrees that upon such breach, or threatened breach, Client will be entitled to seek injunctive relief to prevent EAP from commencing or continuing any action constituting such breach without having to post a bond or other security and without having to prove the inadequacy of any other available remedies. Nothing in this paragraph will be deemed to limit or abridge any other remedy available to Client at law or in equity.

8. INDEMNIFICATION.

EAP shall indemnify, defend and hold harmless Client and its affiliates, officers, directors, employees, and agents (the "Indemnified Party or Parties") from and against any and all actual and threatened losses, liabilities, damages, claims and all related costs and expenses (including reasonable legal fees and costs of litigation, settlement, judgment, interest, fines and penalties) ("Losses") arising from or in connection with the acts or omissions of EAP's employees, agents or contractors in connection with this Business Associate Agreement, including, without limitation, Losses sustained by third parties that may at any time be incurred by Client to the extent based upon allegations that EAP materially breached any of the terms and conditions of this Business Associate Agreement.

Client shall cooperate with EAP, at EAP's expense, in defending or settling such claim and the Indemnified Party may participate in the defense of any such claim through counsel of its choice at its own expense. EAP will defend at its expense, any action brought against the Indemnified Party related to any matter covered by the indemnification hereinbefore provided, and will pay any costs (including reasonable attorneys' fees) and damages incurred by or finally awarded against the Indemnified Party in such action or constituting a settlement of such claim.

9. NO THIRD PARTY BENEFICIARIES.

EAP may not assign this Business Associate Agreement without the prior written consent of Client. Nothing in this Business Associate Agreement shall confer upon any person other than the Parties and their respective successors or assigns, any rights, remedies, obligations, or liabilities whatsoever.

10. CONFLICTS.

Except as otherwise modified by this Business Associate Agreement, all other terms and conditions of the Agreement(s) shall remain in full force and effect; however, in the event of a conflict between the terms of the Agreement(s) and this Business Associate Agreement, the terms of this Business Associate Agreement shall control.

11. COMPLIANCE CERTIFICATION.

The authorized representative of EAP, whose signature appears below, hereby certifies and warrants that EAP is presently in compliance with the terms of this Business Associate Agreement and that EAP shall maintain its compliance with all applicable HIPAA requirements for the duration of the obligation giving rise to this Business Associate Agreement.

IN WITNESS WHEREOF, the Parties have caused this Business Associate Agreement to be executed by their duly authorized representatives.

(Client Name) _____

WellSpan Employee Assistance Program

By: _____

By: James G. Cochran

Title: _____

Title: VP and COO South Central Preferred

Date: _____

Date: _____