

HIPAA BUSINESS ASSOCIATE AGREEMENT

This HIPAA BUSINESS ASSOCIATE AGREEMENT (the "Agreement") is entered into by and between **FDS, Inc.**, a Delaware Corporation (the "Business Associate"), and _____ {**Covered Entity's Name**}, a _____ {**State of Formation and Entity Type**} (the "Covered Entity"), to be effective as of the ____ day of _____ 20__ (the "Effective Date"), and is made a part of the Service Agreement (as hereinafter defined). Covered Entity and Business Associate may sometimes be referred to herein collectively as, the "Parties", and individually as, a "Party".

RECITALS

WHEREAS, Covered Entity has, or wishes to have, a business relationship with Business Associate that is memorialized in the Service Agreement (as hereinafter defined), pursuant to which Business Associate may be considered a "business associate" (as defined in 45 CFR §160.103) of Covered Entity; and

WHEREAS, the nature of the contractual relationship between Covered Entity and Business Associate involves the Use (as hereinafter defined) and/or Disclosure (as hereinafter defined) of PHI (as hereinafter defined); and

WHEREAS, Covered Entity and Business Associate desire to enter into this Agreement for the purpose of ensuring compliance with the standards and requirements applicable to the specific services provided under the Service Agreement which have been adopted into law as of the Effective Date of this Agreement, and are set forth in the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, as codified at 42 U.S.C. § 1320d ("HIPAA"), including all pertinent regulations set forth in Title 45, Parts 160 and 164 of the Code of Federal Regulations ("CFR") issued by the U.S. Department of Health and Human Services ("HHS"), as amended by Subtitle D of the Health Information Technology for Economic and Clinical Health Act of 2009, as codified at 42 U.S.C.A. prec. § 17901 (the "HITECH Act"), part of the American Recovery and Reinvestment Act of 2009 ("ARRA"), 42 U.S.C. §§ 17921, 17931-17932 and 17934, and any current and future regulations promulgated under HIPAA or the HITECH BA Provisions (as hereinafter defined) (collectively, the "Regulations").

NOW THEREFORE, in consideration of the mutual covenants contained herein, which are made a contractual part hereof, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. Definitions.

- a. Regulatory Citations. A reference in this Agreement to a section in the Privacy Rule, Security Rule and HITECH Act means that section as in effect or as amended.
- b. Terms. Unless otherwise provided for herein, all terms used but not otherwise defined in this Agreement shall have the same meaning ascribed in the HIPAA Rules (as hereinafter defined).
 - (1) Affiliate. "Affiliate" means any individual or entity directly or indirectly controlling, controlled by, or under common control with, another individual or entity.
 - (2) Agent. "Agent" shall have the meaning as determined in accordance with the federal common law of agency.
 - (3) Breach. "Breach" shall have the same meaning as the term "breach", and subject to the same exceptions, set forth at in CFR § 164.402.
 - (4) Breach Notification Rule. "Breach Notification Rule" the Standards for Notification in the Case of Breach of Unsecured Protected Health Information published by HHS at 45 CFR part 164, subpart D under HIPAA, as amended by the HITECH Act, and as may be amended from time to time (the "Breach Notification Rule").
 - (5) Business Associate. "Business Associate" shall generally have the same meaning ascribed to the term "business associate" at 45 CFR §160.103, and in reference to the business associate party to this Agreement, shall mean collectively, whether one or more, the Business Associate named on page 1 of this Agreement.
 - (6) Covered Entity. "Covered Entity" shall generally have the same meaning ascribed to the term "covered entity" at 45 CFR § 160.103, and in reference to the covered entity party to this Agreement, shall mean the Covered Entity named on page 1 of this Agreement.

- (7) Data Aggregation. "Data Aggregation" shall have the same meaning as the term "data aggregation" in 45 CFR §164.501.
- (8) Designated Record Set. "Designated Record Set" shall have the same meaning as the term "designated record set" in 45 CFR §164.501.
- (9) Disclosure. "Disclosure" and "Disclose" shall have the same meaning given to the term "disclosure" in 45 CFR §160.103.
- (10) Electronic Health Record. "Electronic Health Record" shall have the same meaning as the term in Section 13400 of the HITECH Act.
- (11) Electronic Protected Health Information or e-PHI. "Electronic Protected Health Information" or "e-PHI" shall have the same meaning given to such term in 45 CFR § 160.103, limited to the information transmitted or maintained by Business Associate in electronic form, format or media, on behalf of Covered Entity pursuant to this Agreement and the Service Agreement. For purposes of this Agreement, the term "e-PHI" will be used when only Electronic Protected Health Information is being referenced.
- (12) Enforcement Rule. "Enforcement Rule" shall mean the rules and regulations set forth at 45 CFR Part 160, Subpart D, as amended by the HITECH Act, and as may be amended from time to time.
- (13) Health Care Operations. "Health Care Operations" shall have the same meaning as the term "health care operations" in 45 CFR §164.501.
- (14) HIPAA Rules. "HIPAA Rules" shall mean the Privacy Rule, Security Rule, Breach Notification Rule, and Enforcement Rule, as amended by the HITECH Act, and as may be amended from time to time.
- (15) HITECH BA Provisions. "HITECH BA Provisions" shall mean those provisions of the HITECH Act imposing requirements on Business Associates with respect to privacy, security and breach notification, together with any regulations adopted by the Secretary of HHS to implement the HITECH Act provisions regulating Business Associates.
- (16) Individual. "Individual" shall have the same meaning as the term "individual" in 45 CFR §160.103 and shall include a person who qualifies as a personal representative in accordance with 45 CFR §164.502(g).
- (17) Marketing. "Marketing" shall have the meaning ascribed to the term "marketing" in 45 CFR § 164.501.
- (18) Minimum Necessary Provisions. "Minimum Necessary Provisions" shall mean those provisions of the Privacy Rule set forth in §164.502(b) and §164.514(d).
- (19) Privacy Rule. "Privacy Rule" shall mean the Standards for Privacy of Individually Identifiable Health Information published by HHS at 45 CFR Parts 160 and 164, Subparts A and E, as amended by the HITECH Act, and as may be amended from time to time.
- (20) Protected Health Information or PHI. "Protected Health Information" or "PHI" shall have the same meaning as the term "protected health information" in 45 CFR § 160.103, limited to the information created, received, maintained or transmitted by Business Associate from, or on behalf of, Covered Entity. Any reference to "Protected Health Information" or "PHI" in this Agreement shall include "e-PHI".
- (21) Required By Law. "Required By Law" shall have the same meaning as given to such term in 45 CFR §164.103.

- (22) Secretary. "Secretary" shall mean the Secretary of the Department of Health and Human Services or his or her designee.
- (23) Security Incident. "Security Incident" shall have the same meaning as the term "security incident" in 45 CFR §164.304.
- (24) Security Rule. "Security Rule" shall mean the Standards for Security of Electronic Protected Health Information at 45 CFR Parts §160 and §164, Subparts A and C, as amended by the HITECH Act, and as may be amended from time to time.
- (25) Service Agreement. "Service Agreement" shall mean, collectively, whether one or more, any and all contracts, agreements or documented other arrangements now existing, or hereafter entered into, between Covered Entity and Business Associate, pursuant to which Business Associate has agreed to provide certain products and/or services to Covered Entity and, in connection with such products and/or services, may be required to access, create, receive, transmit, maintain, Use or Disclose PHI for, or on behalf of, Covered Entity.
- (26) Subcontractor. "Subcontractor" shall mean a person or entity, whether foreign or domestic, to whom Business Associate delegates a function, activity or service, other than in the capacity of a member of Business Associate's Workforce, as defined at 45 CFR §160.103.
- (27) Subject Matter. "Subject Matter" shall mean the Parties' compliance with the standards and requirements for privacy and security of the PHI governed by this Agreement in accordance with the applicable provisions of the HIPAA Rules and HITECH BA Provisions.
- (28) Unsecured Protected Health Information or Unsecured PHI. "Unsecured Protected Health Information" or "Unsecured PHI" shall have the same meaning ascribed to the term "unsecured protected health information" in 45 CFR § 164.402.
- (29) Use. "Use" shall have the same meaning ascribed to the term "use" in 45 CFR § 160.103.
- (30) Workforce. "Workforce" shall have the same meaning ascribed to the term "workforce" in 45 CFR § 160.103.

2. Permitted Uses and Disclosures by Business Associate.

- a. General Use and Disclosure. Except as otherwise limited by this Agreement, Business Associate may Use and Disclose PHI as necessary to enable Business Associate to perform its functions, activities and services for, or on behalf of, Covered Entity and otherwise fulfill its obligations provided for herein and in the Service Agreement, or as otherwise consented to by the Covered Entity, provided that such Use or Disclosure would not violate the Privacy Rule or the privacy rules set forth in the HITECH BA Provisions, if done by Covered Entity, except for the specific Uses and Disclosures set forth below. All other Uses and Disclosures by Business Associate not authorized by this Agreement, or by specific instruction of Covered Entity, are prohibited.
- b. Permitted Uses. Except as otherwise limited in this Agreement, Business Associate may Use PHI for the proper management and administration of Business Associate or to carry out the legal responsibilities of Business Associate, or as otherwise Required by Law.
- c. Permitted Disclosures. Business Associate shall not Disclose PHI except for the purpose of performing the Business Associate's obligations under the Service Agreement or this Agreement. Business Associate may Disclose PHI for the proper management and administration of the Business Associate, provided that such Disclosures are Required By Law, or Business Associate obtains reasonable assurances from the person to whom the PHI is Disclosed that (i) the PHI will be held confidentially as provided pursuant to this Agreement, (ii) Used or further Disclosed only as Required By Law or for the purpose for which it was Disclosed to the person; and (iii) Business Associate will be notified of any Breach of confidentiality of the PHI.

- d. Data Aggregation. Except as otherwise limited in this Agreement, Business Associate may Use PHI to provide Data Aggregation services to Covered Entity as permitted by 45 CFR §164.504(e)(2)(i)(B).
 - e. Re-creation of Information. Except as otherwise limited in this Agreement, Business Associate may Use PHI to create information that is not individually identifiable health information (“De-identified Information”), consistent with the standards set forth at 45 CFR § 164.514(a) – (c). Pursuant to 45 CFR §164.502(d)(2), De-Identified Information does not constitute PHI and is not subject to the terms, conditions and requirements of this Agreement.
3. Obligations and Activities of Business Associate. Business Associate covenants and agrees to the following:
- a. Appropriate Safeguards. Business Associate agrees to implement and maintain reasonable and appropriate safeguards, consistent with the size and complexity of Business Associate’s business operations involving PHI, as necessary to prevent Use or Disclosure of the PHI other than as provided for by this Agreement. With respect to the e-PHI, Business Associate agrees to (i) implement and maintain reasonable and appropriate security standards and administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of the ePHI in accordance with the standards and requirements applicable to Business Associate set forth at 45 CFR § 164.306 [security standards], 45 CFR § 164.308 [administrative safeguards], 45 CFR § 164.310 [physical safeguards] and 45 CFR § 164.312 [technical safeguards], and (ii) comply with the applicable policies and procedures and documentation requirements of the Security Rule set forth at 45 CFR § 164.316, as necessary to prevent Use or Disclosure of the PHI other than as provided for by this Agreement.
 - b. Business Associate’s Subcontractor(s). Business Associate agrees to ensure that any Subcontractor of Business Associate, to whom it Discloses PHI, agrees, in writing, to the same restrictions and conditions that apply through this Agreement to Business Associate with respect to such PHI. In the event Business Associate creates, receives, stores, maintains or transmits e-PHI on behalf of Covered Entity, Business Associate shall require its Subcontractor(s) to implement, use and maintain the security standards and safeguards set forth in Section 3.a above with respect to e-PHI. Covered Entity understands and agrees that there may be certain circumstances in which Business Associate may enlist the services of a Subcontractor or Agent located outside the United States. Covered Entity further stipulates and agrees that, notwithstanding anything to the contrary contained herein or in the Service Agreement, in no event shall any use of any such Agent or Subcontractor, or transfer or exportation of any PHI beyond the borders of the United States, be considered a violation of this Agreement.
 - c. Obligations and Activities of Business Associate.
 - (1) Discovery and Knowledge. For purposes of this Agreement, a Breach or Security Incident shall be treated as discovered by Business Associate as of the first day on which the Breach or Security Incident is known to the Business Associate or, by exercising reasonable diligence, would have been known to, or suspected by, Business Associate. For purposes of this Agreement, Business Associate shall be deemed to have knowledge of a Breach or Security Incident if the Breach or Security Incident is known, or by exercising reasonable diligence, would have been known, to any person, other than the person committing the Breach or Security Incident, who is an employee, officer or other Agent of Business Associate (determined in accordance with the federal common law of agency).
 - (2) Unauthorized Uses or Disclosures. Business Associate agrees to report to Covered Entity any Use or Disclosure of PHI not provided for by, or in violation of, this Agreement of which Business Associate becomes aware, in accordance with the requirements of the Breach Notification Rule and HITECH BA Provisions. Any notice required by this Section 3.c.(2) may be made either orally or in writing by calling or faxing the Covered Entity’s designated privacy officer (“Covered Entity’s Privacy Official”) at the telephone and facsimile numbers provided for below.
 - (3) Security Incidents. Business Associate agrees to report to Covered Entity, any Security Incident involving Unsecured PHI, of which Business Associate becomes aware, in the time and manner prescribed by the Breach Notification Rule and HITECH BA Provisions. Any notice required by this

Section 3.c.(3) may be made either orally or in writing by calling or faxing the Covered Entity's Privacy Official at the telephone and facsimile numbers provided for below.

- (4) Breach Notification to Covered Entity. Business Associate shall notify Covered Entity within ten (10) business days following Business Associate's discovery of any Breach of Unsecured PHI. The notice required by this Section 3.c.(4) shall include, to the extent possible, the identification of each Individual whose Unsecured PHI has been, or is reasonably believed by Business Associate to have been, accessed, acquired, Used or Disclosed during the Breach of Unsecured PHI. Any notice required by this Section 3.c.(4) may be made either orally or in writing by calling or faxing the Covered Entity's Privacy Official at the telephone and facsimile numbers provided for below.
 - (5) Reporting Other Breach Information. In compliance with 45 CFR §164.410(c)(2), Business Associate agrees to provide Covered Entity with any other available information that the Covered Entity is required to include in its notification to an affected Individual under 45 CFR § 164.404(c), within ten (10) business days following Business Associate's discovery of any Breach of Unsecured PHI, or promptly thereafter as any such information becomes available to Business Associate.
 - (6) Mitigation. Business Associate agrees to maintain adequate procedures for mitigating, to the extent practicable, any harmful effect that is known to Business Associate, and use reasonable efforts to mitigate additional losses, resulting from a Breach of Unsecured PHI, Security Incident involving Unsecured PHI or any Use or Disclosure of PHI not provided for by, or in violation of, this Agreement, such as (i) promptly obtaining reasonable assurance from the recipient pursuant to a confidentiality agreement, that the PHI will not be further Used or Disclosed or will otherwise be destroyed, and (ii) applying appropriate sanctions against employees, Workforce members and Subcontractors of Business Associate who violate Business Associate's established security policies and procedures.
 - (7) Notification to Individuals. It is the sole responsibility of the Covered Entity to notify, respond to and/or otherwise communicate directly with any Individual or other third party entitled to receive notice any Breach, Security Incident or unauthorized Use or Disclosure pursuant to the HIPAA Rules or HITECH BA Provisions.
 - (8) Cooperation With Covered Entity. Business Associate agrees to cooperate with Covered Entity, to the extent required by the HIPAA Rules and HITECH BA Provisions, as reasonably necessary to enable Covered Entity to fulfill the requirements of the Breach Notification Rule and HITECH BA Provisions.
- d. Access to PHI. Within fifteen (15) days following Business Associate's receipt of a written request from Covered Entity, Business Associate agrees to provide access to PHI in a Designated Record Set, during Business Associate's normal business hours, to Covered Entity, as necessary to enable Covered Entity to satisfy its obligations under 45 CFR § 164.524 and Section 13405(c) of the HITECH Act or, to the extent Required by Law, as directed by Covered Entity, to an Individual, where Business Associate is the only holder of an applicable Designated Record Set, or controls access to PHI in an Electronic Health Record, or stored electronically in any format, pursuant to the Individual's right of access arising under 45 CFR § 164.524. The provisions of this Section 3.d. do not apply if Business Associate or its Subcontractors, if any, have no PHI in a Designated Record Set of Covered Entity.
- e. Governmental Access to Records. Upon Business Associate's receipt of reasonable notice and prior written request, Business Associate agrees to make available, during normal business hours and at Business Associate's offices, all internal practices, books, records, agreements, policies and procedures relating to the Use of and Disclosure of PHI to the Secretary, for purposes of the Secretary determining Covered Entity's compliance with the Privacy Rule, subject to, attorney-client and any other applicable legal privileges. Covered Entity hereby agrees to reimburse Business Associate for all costs and expenses arising in connection with Business Associate's compliance with this Section 3.e.
- f. Minimum Necessary. When requesting, Using or Disclosing PHI, the Parties shall make reasonable efforts to limit any such request, Use or Disclose to the minimum necessary to accomplish the intended purpose of the

request, Use or Disclosure in accordance with, and subject to any applicable exceptions prescribed by, the Minimum Necessary Provisions.

- g. Amendments of PHI. If, and to the extent that, Business Associate, its Agent or Subcontractor, if any, maintains PHI contained in a Designated Record Set of Covered Entity, within a reasonable amount of time following Business Associate's receipt of a written request from Covered Entity to amend an Individual's PHI contained in the Designated Record Set (but in no case later than forty-five (45) calendar days from Business Associate's receipt of such request), Business Associate agrees to provide, or cause its Subcontractors or Agents to provide, such information (or copies thereof) to Covered Entity for amendment, and Business Associate shall incorporate, or cause its respective Agent or Subcontractor to incorporate, any such amendment, as required by 45 CFR § 164.526. Covered Entity shall be responsible for receiving and addressing requests from Individuals for amendment(s) and coordinating such requests with Business Associate. In no event shall Business Associate be responsible for receiving and addressing requests directly from an Individual for amendment on behalf of the Covered Entity. Furthermore, Covered Entity will be responsible for making all determinations regarding the grant or denial of an Individual's request for amendment, and Business Associate is under no obligation to make and will make no such determinations.
- h. Accounting of Disclosures. Business Associate agrees to document such Disclosures of PHI and information related to such Disclosures as would be required for Covered Entity to respond to a request by an Individual for an accounting of Disclosures of PHI in accordance with 45 CFR § 164.528. Business Associate agrees to maintain any such Disclosure record to the extent, and for the duration, required by 45 CFR § 164.528. Business Associate further agrees to provide a copy of its record of Disclosure to Covered Entity within a reasonable amount of time following Business Associate's receipt of a written request from Covered Entity, but in no case later than forty-five (45) calendar days from Business Associate's receipt of such request. Covered Entity shall be responsible for receiving and addressing requests from Individuals for an accounting of Disclosures and coordinating such requests with Business Associate. In no event shall Business Associate be responsible for receiving and addressing requests directly from an Individual for an accounting of Disclosures on behalf of the Covered Entity. Furthermore, Covered Entity will be responsible for making all determinations regarding the grant or denial of an Individual's request for accounting of Disclosures, and Business Associate is under no obligation to make and will make no such determinations. Covered Entity acknowledges and agrees that the first accounting of Disclosures requested by an Individual within any twelve (12) month period will be provided by Business Associate free of charge, but Business Associate has the right to charge Covered Entity for the cost and expense of additional accountings requested by the same Individual.
- i. Individual Requests. Except as otherwise provided for in this Agreement, in the event Business Associate or any Subcontractor, Agent or Affiliate of Business Associate receives an access, amendment, accounting of Disclosure, or other similar request or inquiry directly from an Individual, Business Associate agrees to redirect the Individual to the Covered Entity and forward the request to the Covered Entity within a reasonable amount of time following Business Associate's receipt of the same, but in any event within any applicable timeframe required by the Regulations.
- j. Good Faith. The Parties hereby stipulate and agree that (i) Business Associate shall not be liable for any action taken or omitted by it in good faith except to the extent that a court of competent jurisdiction determines that Business Associate's gross negligence or willful misconduct was the primary cause of any loss to Covered Entity, or any one of them; (ii) Business Associate may make Disclosures of PHI to, and may execute any of its powers and perform any of its duties under this Agreement and any Service Agreement directly or through its, employees, contractors, auditors, Agents, Subcontractors or attorneys, as necessary to enable Business Associate to fulfill its obligations hereunder and under the Service Agreement, and may consult with counsel, accountants and other skilled persons to be selected and retained by it; and (iii) Business Associate shall not be liable for anything done, suffered or omitted in good faith and without gross negligence by it in accordance with the advice or opinion of any such counsel, accountants or other skilled persons.

4. Obligations and Activities of Covered Entity.

- a. Notice of Privacy Practices. On or before the Effective Date hereof, Covered Entity shall provide Business Associate with a copy of the current notice of privacy practices (the "NPP") produced by Covered Entity in accordance with 45 CFR §164.520. Covered Entity further agrees to notify Business Associate of the provisions

and any limitation(s) in its NPP that may affect Business Associate's Use or Disclosure of PHI. Covered Entity further agrees to provide Business Associate with written notice of any changes to its NPP, at least thirty (30) days prior to any such changes taking effect, and upon request, to provide a copy of its updated NPP. Covered Entity shall reimburse Business Associate for all costs and expenses associated with any additional restrictions or requirements arising as result of such change.

- b. Requested Uses and Disclosures by Covered Entity. In no event shall Covered Entity permit, require or instruct Business Associate to Use or Disclose PHI in any manner that would not be permissible under the Regulations or NPP if done by Covered Entity.
 - c. Business Associate's Reliance. Covered Entity hereby stipulates and agrees that (i) Business Associate is entitled to rely on any instructions, authorizations, approvals or other information (including PHI) furnished to Business Associate by the Covered Entity under this Agreement or any Service Agreement, and (ii) Business Associate shall be under no duty to inquire into or investigate the validity, accuracy or content of any document (including the NPP), notice, instruction, authorization, approval, request or other information (including PHI) furnished to Business Associate by the Covered Entity under this Agreement or any Service Agreement.
 - d. Notice of Changes in Individual's Access or PHI. Covered Entity shall notify Business Associate of any change in, or revocation of, permission by an Individual to Use or Disclose PHI, to the extent that such change or revocation of permission may affect Business Associate's permitted or required Uses or Disclosures of PHI. Covered Entity shall reimburse Business Associate for all costs and expenses associated with any additional restrictions or requirements resulting from any such subsequent change in, or revocation of, permission by an Individual.
 - e. Notice of Restrictions in Individual's Access or PHI. Covered Entity shall notify Business Associate of any restriction to the Use or Disclosure of PHI that Covered Entity has agreed to in accordance with 45 CFR § 164.522, and also notify Business Associate regarding any restrictions that must be honored under Section 13405(a) of the HITECH Act, to the extent that such restriction may affect Business Associate's Use or Disclosure of PHI; provided, however, in no event shall Covered Entity agree to any restriction on the Use or Disclosure of PHI that may materially affect Business Associate's ability to perform, or the cost of performance, under this Agreement or the Service Agreement. The Parties hereby stipulate and agree that any violation by Covered Entity of the terms and provisions of this Section 4.e. shall be considered a material breach of this Agreement forming the basis on which Business Associate may invoke the termination provisions set forth in Section 5.c. below.
 - f. Notice of Modifications to Accounting Disclosures. Covered Entity shall notify Business Associate of any modifications to accounting disclosures of PHI under 45 CFR §164.528, made applicable under Section 13405(c) of the HITECH Act, to the extent that such restrictions may affect Business Associate's Use or Disclosure of PHI.
 - g. Breach Notification. Covered Entity shall be responsible for satisfying all notification and reporting requirements associated with any Breach, Security Incident, unauthorized Use or Disclosure of PHI or any act or omission of Business Associate permitted or required by the Regulations, including, but not limited to any Breach notification required to be delivered to the Secretary of HHS, affected Individuals, law enforcement, media outlets or otherwise; provided, however, in the event Covered Entity intends to circulate any such notices, Covered Entity shall provide Business Associate with advance written notice and a copy of the notice intended for circulation, at least five (5) business days prior to publishing such notice.
5. Continuing Obligations/Termination. During the term of the Agreement, Business Associate and Covered Entity covenant and agree as follows:
- a. Term. The obligations of Business Associate and Covered Entity set forth herein shall commence on the Effective Date and shall terminate upon the expiration or earlier termination of the last remaining Service Agreement or business relationship involving PHI in effect between the Parties, and only after all PHI provided by Covered Entity to Business Associate, or created or received by Business Associate on behalf of Covered Entity, is destroyed or returned to Covered Entity, or if it is infeasible to return or destroy PHI, the terms of this Agreement are extended to cover such information and survive termination of this Agreement.

- b. Termination for Cause. Either Party may immediately terminate this Agreement and the portion of the Service Agreement relating to PHI, upon written notice to the other Party, if either Party determines that the other Party has breached a material term of this Agreement; provided, however, the non-breaching Party shall provide the breaching Party with prior written notice and an opportunity for the breaching Party to cure the breach or end any violation, to the reasonable satisfaction of the non-breaching Party, within thirty (30) days of the breaching Party's receipt of such written notice. In the event the material breach or violation remains uncured for more than thirty (30) days following the breaching Party's receipt of such written notice, the provisions of the Service Agreement relating to PHI and this Agreement shall terminate effective as of the 31st day following the non-breaching Party's receipt of the written notice described herein.
- c. Immediate Termination. In the event of a breach of a material term of this Agreement is not capable of being cured, the non-breaching Party may immediately terminate this Agreement and sever all business relationships with the breaching Party which involve the use and/or disclosure of PHI; provided, however, termination of this Agreement shall not take effect until the non-breaching Party has secured termination of the last remaining business relationship of the Parties involving the Use and/or Disclosure of PHI.
- d. Effect of Termination.
 - (1) Except as provided in this Section 5.d., upon termination of this Agreement for any reason, Business Associate shall return or destroy all PHI created or received by Business Associate on behalf of Covered Entity. This provision shall apply to PHI that is in the possession of any Subcontractor of Business Associate. Business Associate shall retain no copies of the PHI.
 - (2) In the event that Business Associate determines that returning or destroying the PHI is infeasible, Business Associate shall provide to Covered Entity notification of the conditions that make return or destruction infeasible. Business Associate shall extend the protections of this Agreement to such PHI and limit further Uses and Disclosures of such PHI to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such PHI. Any such extended protections, limitations and restrictions shall apply to PHI maintained by any Subcontractors of Business Associate for whom return or destruction of PHI is determined to be infeasible. To the extent Business Associate is required to convert or store PHI upon termination of this Agreement, Covered Entity agrees to reimburse Business Associate for all costs and expenses incurred in connection with any such conversion or storage.
 - (3) The provisions of this Section 5.d. shall survive termination of this Agreement.

6. **LIMITATION OF LIABILITY.** THE PARTIES HEREBY STIPULATE AND AGREE TO THE FULLEST EXTENT ALLOWED BY LAW, AS FOLLOWS:

- a. Due to the nature of the services being provided by Business Associate to Covered Entity, in no event shall Business Associate be liable for any claim, loss, correction, damage, or expense caused by Business Associate's performance or failure to perform hereunder, which is not reported by the Covered Entity within thirty (30) days of such performance or failure to perform;
- b. In no event shall either Party or its respective parent, subsidiary, Affiliate, successor or assign be liable for indirect, special, consequential or punitive damages (including loss of profits, loss of data, or damage to business), even if that Party has been advised of the possibility of such damages;
- c. Neither Party shall be deemed to be in default of any provisions of this Agreement or be liable to the other Party or to any third party for any delay, failure in performance, or interruption of performance resulting directly or indirectly from acts of God, war, insurrection, riot, strikes, civil disturbance, interruption of electrical power or communications, or other causes beyond the control and without the fault of negligence of a Party; and
- d. Liability of Business Associate in any and all categories and for any and all causes arising out of this Agreement or out of any services performed under the Service Agreement shall not in the aggregate exceed the

total monthly service charges paid to Business Associate by the specific Covered Entity seeking recovery during the preceding twelve (12) month period.

7. No Third Party Beneficiaries. Nothing express or implied in this Agreement is intended to confer, nor shall anything herein confer, upon any person or entity other than Covered Entity, Business Associate, and their respective successors or assigns, any rights, remedies, obligations or liabilities whatsoever.
8. Severability. In the event that any provision of this Agreement is determined by a court of competent jurisdiction to be unlawful, void or unenforceable, this Agreement shall not be unlawful, void or unenforceable thereby, but shall continue in effect and be enforced as though such provision was omitted.
9. General Provisions.
 - a. Amendment. The Parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary for Covered Entity and Business Associate to comply with the HIPAA Rules and HITECH Act. This Agreement shall be changed, modified or amended only by an instrument in writing signed by a duly authorized representative of each of the Parties, effective as of the date stipulated therein and attached hereto.
 - b. Survival. The respective rights and obligations of Business Associate and Covered Entity set forth in Section 5.d. ("Effect of Termination") and Section 7 ("No Third Party Beneficiaries") shall survive the termination of this Agreement.
 - c. Interpretation. Any ambiguity in this Agreement shall be resolved to permit Covered Entity and Business Associate to comply with the HIPAA Rules and the HITECH BA Provisions. Should there be any conflict between the language of this Agreement and any other agreement entered into between the Parties, the language and provisions of this Agreement shall control and prevail unless the Parties specifically refer in a subsequent written agreement to this Agreement by its title and date and specifically state that the provisions of the later written agreement shall control over this Agreement.
 - d. Governing Law.
 - (1) This Agreement and the rights of the Parties shall be governed by, and construed in accordance with, Federal law as it pertains to the Subject Matter, and shall be governed by and construed in accordance with the laws of the State of Texas as it pertains to contract formation and interpretation, without giving effect to its conflict of laws. The Parties agree that any appropriate state court sitting in Tarrant County, Texas or any Federal Court sitting in the Northern District of Texas, shall have exclusive jurisdiction of any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.
 - (2) Each Party irrevocably consents to the jurisdiction of such courts, and irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such suit, action, or proceeding in any such court and further waives the right to object, with respect to such suit, action, or proceeding, that such court does not have jurisdiction over such Party.
 - e. Assignment. The Parties agree that either may assign this Agreement to any parent, subsidiary, Affiliate or successor in interest (including a successor in interest to substantially all the assets of the assigning Party). Except as noted, neither Party may assign this Agreement, absent written consent of the other Party, which shall not be unreasonably withheld. Any attempted assignment without such consent shall be void.
 - f. Notices. Except as otherwise provided for in this Agreement, all notices, requests, demands or other communications required or permitted hereunder shall be in writing, and shall be deemed to be given by (i) personal delivery, (ii) expedited delivery service with proof of delivery, or (iii) United States mail, postage prepaid, registered or certified mail, return receipt requested, sent to the intended addressee at the addresses set forth at the bottom of this Agreement, or at such other address furnished in writing by either Party to the other Party, and will be deemed to have been received either, in the case of personal delivery, as of the time of personal delivery, in the case of expedited delivery service, as of the date of first attempted delivery at the

address and in the manner provided herein, or in the case of mail, upon deposit in a depository receptacle under the care and custody of the United States Postal Service.

- g. Facsimile. The signature of any Party on this Agreement, or any subsequent amendment thereto, transmitted by way of a facsimile machine shall be considered for all purposes as an original signature. Any such faxed Agreement or amendment shall be considered to have the same binding legal effect as an original Agreement or amendment. At the request of any party, the faxed Agreement or amendment shall be re-executed by each signatory Party in an original form.
- h. Entire Agreement. With regard to the Subject Matter, this Agreement supersedes prior or contemporaneous representations, discussions, agreements, arrangements and understandings between the Parties.

REMAINDER OF PAGE INTENTIONALLY LEFT BLANK
(Signatures appear on following page)

IN WITNESS WHEREOF, each of the undersigned has caused this Agreement to be executed by its duly authorized representative as of the date first above written.

COVERED ENTITY (please see attached list for multiple sites)

Signature

Date

Name / Title (PLEASE PRINT)

Mailing Address

City

State

Zip Code

NCPDP #

NPI #

Phone #:

Fax #:

Email Address

Designated Privacy/Security Official

FDS, Inc. (Internal Use Only)

By: _____
Tracy Ward, Chief Administrative Officer

Date: _____

Address:
2601 Scott Avenue, Suite 600
Fort Worth, Texas 76103
Phone: (817) 531-8992
Facsimile: (817) 531-8999
tward@fdsrx.com