# SUBCONTRACTOR Business Associate Agreement

This **SUBCONTRACTOR BUSINESS ASSOCIATE AGREEMENT** (“Agreement”) is entered into as of July 20, 2021 by and between *\_\_\_\_\_(Hospital Name)\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_* (“Business Associate”) and NAME HERE (“Subcontractor BA”) (collectively, the “Parties”).

**WHEREAS**, the Federal Health Insurance Portability and Accountability Act of 1996 and its implementing regulations (45 C.F.R. Parts 160-164) (“HIPAA”) require that a hospital (“Covered Entity”) enter into a business associate agreement with the Business Associate to appropriately safeguard Covered Entity’s protected health information. All PHI received by the Business Associate from Covered Entity is received in order to perform a function or activity on behalf of the Covered Entity which involves individually identifiable health information (“Protected Health Information” or “PHI”); and

 **WHEREAS**, the Health Information Technology for Economic and Clinical Health Act ("HITECH") was adopted as part of the American Recovery and Reinvestment Act of 2009. HITECH imposes requirements on business associates with respect to privacy, security and breach notification and such requirements have been implemented by regulations. These provisions of HITECH and the final regulations applicable to business associates are collectively referred to as the "HITECH BA Provisions"; and

**WHEREAS,** the Business Associate has entered into contracts with Covered Entities that require Business Associate to comply with its requirements under HITECH BA Provisions; and

 **WHEREAS**, pursuant to HITECH BA Provisions, the Business Associate is required to enter into a subcontractor business associate agreement with all its contractors, agents and related and/or unrelated third parties that perform a function or activity on behalf of the Business Associate that involves individually identifiable health information; and

 **WHEREAS**, the Parties desire to ensure the privacy of Protected Health Information in the performance of the services described in the Agreement.

 **NOW, THEREFORE**, for and in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

**ARTICLE I. DEFINED TERMS**

 Capitalized terms used in this Agreement and not otherwise defined herein shall have the meanings set forth in HIPAA, which definitions are hereby incorporated by reference.

**ARTICLE II. Obligations and Activities of
SUBCONTRACTOR Business Associate**

**(a) Use or Disclosure of PHI.** Subcontractor BA shall not use or further disclose PHI other than as permitted or required by this Agreement or as Required by Law.In conducting its functions and activities involving the use and disclosure of PHI under this Agreement, Subcontractor BA agrees to make reasonable efforts to limit the use and disclosure of PHI to the minimum necessary to accomplish the intended purpose of the use or disclosure and as permitted or required by this Agreement or as Required by Law.

**(b) Compliance with Applicable Law.** Subcontractor BA hereby acknowledges and agrees to comply with the HITECH BA Provisions and with the obligations of a Business Associate as proscribed by HIPAA and HITECH. Parties each further agree that the provisions of HIPAA and HITECH that are required to be incorporated in a business associate agreement are incorporated into this Agreement between Parties as if set forth in this Agreement in their entirety.

 **(c) Safeguards.**  Subcontractor BA agrees to implement appropriate administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of the PHI that it creates, receives, maintains or transmits on behalf of the Business Associate. Subcontractor BA shall document and keep these security measures current and available for inspection, upon request. Subcontractor BA’s security measures must be consistent with HITECH and HIPAA’s security regulations, Title 45, Part 164 of the Code of Federal Regulations (commonly referred to as the “Security Rule”), and any other implementing regulations issued to preserve the integrity and confidentiality of and to prevent non-permitted or violating use or disclosure of PHI created or received for or on behalf of the Covered Entity.

 **(d) Reporting of Unauthorized Access or Disclosure.** Subcontractor BA agrees to report to Business Associate any security and/or any use or disclosure of PHI not provided for by this Agreement within five (5) working days of becoming aware of such security incident and/or unauthorized use or disclosure. For purposes of this requirement, a security incident does not include inconsequential incidents that occur on a frequent basis, such as scans or “pings” that are not allowed past Subcontractor BA’s firewall.

**(i)** Such report shall include: (1) a description of all circumstances surrounding the security incident or unauthorized use or disclosure; and (2) the PHI used or disclosed in violation of this Agreement.

**(ii)** Subcontractor BA shall cooperate as requested by Business Associate in order to ascertain any additional facts surrounding the security incident or unauthorized use or disclosure.

**(e) Presumption of Breach.** Any acquisition, access, use or disclosure of PHI in a manner not permitted under the HIPAA privacy Rule is presumed to be a Breach. Subcontractor BA shall notify Business Associate of any such impermissible access, acquisition, use or disclosure, including the following information in such notice:

1. A brief description of how the impermissible access, acquisition, use or disclosure occurred and how and when it was discovered.
2. A description of whether Unsecured PHI was involved in the impermissible access, acquisition, use or disclosure.
3. The steps Subcontract BA is taking to further investigate the Unauthorized Use or Disclosure, to mitigate losses, and to protect against further impermissible access, acquisition, use or disclosure.

In addition, Subcontractor BA shall cooperate in making any required notification to individuals in the case of a Breach as determined by Business Associate.

**(f) Mitigation.** Subcontractor BA agrees to mitigate, to the extent practicable, any harmful effect that is known to Subcontractor BA of a use or disclosure of PHI by Subcontractor BA in violation of the requirements of this Agreement.

**(g) Reimbursement for Breach.** Any breach of this Agreement, Unauthorized Use or Disclosure, Security Incident or Breach involving PHI for which the Subcontractor BA is solely or primarily responsible, Subcontractor BA will reimburse Business Associate all costs and losses, including, without limitation: fines or settlement amounts owed to a state or federal government agency; the cost of any notifications to Individuals or government agencies; credit monitoring for affected individuals for a one year period (if reasonable and appropriate under the circumstances); or other mitigation steps taken by Business Associate to comply with HIPAA or state law.

**(h) Documentation of Disclosures.** Subcontractor BA agrees to document such disclosures of PHI and information related to such disclosures as would be required for Business Associate to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with 45 C.F.R. §164.528.

**(i) Accounting of Disclosures.** Subcontractor BA agrees to provide to Business Associate in a time and manner mutually acceptable to Parties, information collected in accordance with Section 2(f) (“Documentation of Disclosures”) of this Agreement, to permit Business Associate to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with 45 C.F.R. §164.528.

1. If Business Associate requests that Subcontractor BA furnish an accounting of disclosures of PHI made by Subcontractor BA regarding an individual during the six (6) years prior to the date on which the accounting was requested, then Subcontractor BA shall, within ten (10) days of such request, make available to Business Associate such information as is in Subcontractor BA 's possession and is required for Business Associate to make the accounting required by 45 C.F.R. §164.528.
2. At a minimum, Subcontractor BA shall provide Business Associate with the following information: (i) the date of the disclosure, (ii) the name of the entity or person who received the PHI, and if known, the address of such entity or person, (iii) a brief description of the PHI disclosed, and (iv) a brief statement of the purpose of such disclose which includes an explanation of the basis for such disclosure.

**(j) Individual Requests for Access.** In the event any individual requests access to PHI directly from Subcontractor BA, Subcontractor BA shall forward such request to Business Associate within two (2) days and take no direct immediate action on any such request. The Business Associate shall consult with the Covered Entity regarding the request and all access to PHI as requested by any individual shall be solely the responsibility of the Covered Entity.

**(k) Third Party Assurances.** Subcontractor BA agrees to ensure that any agent, including a subcontractor, to whom it provides PHI received from, or created or received by Subcontractor BA on behalf of Business Associate agrees in writing to the same restrictions and conditions that apply through this Agreement to Subcontractor BA with respect to such information.

 **(l) Security Rule.** Subcontractor BA shall comply with the applicable provisions of the Security Rule at 45 C.F.R. Part 164 Subpart C.

**ARTICLE III. Permitted Uses and Disclosures
by SUBCONTRACTOR Business Associate**

 **(a) Services for or on Behalf of Covered Entity.** Except as otherwise limited in this Agreement, Subcontractor BA may use or disclose PHI to perform functions, activities, or services for, or on behalf of, Business Associate as specified in the Agreement, provided that such use or disclosure would not violate the Privacy Rule if done by Business Associate.

**(b) Management of Subcontractor BA.** Except as otherwise limited in this Agreement, Subcontractor BA may use PHI for the proper management and administration of the Subcontractor BA or to carry out the legal responsibilities of the Subcontractor BA.

**(c) Data Aggregation.** Except as otherwise limited in this Agreement, Subcontractor BA may use PHI to provide Data Aggregation services to Business Associate as permitted by 45 C.F.R. §164.504(e)(2)(i)(B).

**(d)** **Reasonable Assurances**. Subcontractor BA may disclose PHI for the proper management and administration of Subcontractor PHI if such disclosure is Required by Law or if Subcontractor BA receives written consent from Business Associate.

**ARTICLE IV. Obligations of Business Associate**

**(a) Minimum Necessary Disclosure.** Business Associate shall make reasonable efforts to provide to Subcontractor BA only the minimum PHI necessary to accomplish the services set forth in the Agreement.

 **(b) Safeguards by Business Associate.** Business Associate agrees to implement appropriate administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of the PHI that it transmits to the Subcontractor BA in accordance with the standards and requirements of HIPAA until such PHI is received by Subcontractor BA.

**(b) Provision of Direct Access.** To minimize risks from transmission and external storage of data, Business Associate agrees to provide internal access to data whenever possible. This includes offering an on-site computer or virtual machine with access to the necessary data sources accessible via secure VPN or other remote method.

**ARTICLE V. Permissible Requests by Business Associate**

 Except as otherwise permitted by this Agreement, Business Associate shall not request Subcontractor BA to use or disclose PHI in any manner that would not be permissible under the Privacy Rule if done by Business Associate.

**ARTICLE VI. Term and Termination**

**(a) Term.** The Term of this Agreement shall be effective upon the effective date of the Agreement between the Parties to which this Agreement relates, and, except for the rights and obligations set forth in this Agreement specifically surviving termination, shall terminate upon the termination of the Agreement executed between the Parties.

**(b) Termination for Cause.** In addition to any termination provisions otherwise set forth in the Agreement, upon Business Associate’s knowledge of a material breach by Subcontractor BA, Business Associate shall either:

**(i)** Provide an opportunity for Subcontractor BA to cure the breach or end the violation and terminate this Agreement and the Agreement if Subcontractor BA does not cure the breach or end the violation within the time specified by Business Associate; or

**(ii)** Immediately terminate this if either party has breached a material term of this Agreement and cure is not possible.

**(c) Effect of Termination.**

**(i)** Except as provided in paragraph (ii) below of this section, upon termination, for any reason, of this Agreement executed between the Parties, Subcontractor BA shall return or destroy all PHI received from Business Associate or created or received by Subcontractor BA on behalf of Business Associate. This provision shall apply to PHI that is in the possession of subcontractors or agents of Subcontractor BA. Subcontractor BA shall retain no copies of the PHI.

**(ii)** In the event that Subcontractor BA determines that returning or destroying the PHI is infeasible, Subcontractor BA shall provide to Business Associate notification of the conditions that make return or destruction infeasible Subcontractor BA 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 Subcontractor BA maintains such PHI.

**(d) Remedies for Breach of Contract**. In the event of an actual or threatened breach by Subcontractor BA of this Agreement, Business Associate shall be entitled to an injunction restraining and enjoining Subcontractor BA from violating the applicable section of this Agreement. Nothing in this Agreement or the Agreement shall be construed as prohibiting Business Associate from pursuing any other remedies available to Business Associate for such breach or threatened breach, including the recovery of damages from Subcontractor BA, and no remedy shall be considered exclusive. Subcontractor BA agrees to be responsible for and pay for any costs and expenses incurred by Business Associate, including court costs and reasonable attorneys’ fees, if Business Associate successfully enforces the terms of this Article VI(d).

**(e)** **No Waiver.** Neither the failure or any delay on the part of the Business Associate to exercise any right, remedy, power or privilege under this Agreement will operate as a waiver thereof, nor will any single or partial exercise of any right, remedy, power or privilege with respect to any occurrence be construed as a waiver of such right, remedy, power or privilege with respect to any other occurrence.

**ARTICLE VII. Miscellaneous**

##  (a) Regulatory References. A reference in this Agreement to any HIPAA or HITECH regulation or a section in the Privacy Rule means the respective section or regulation as in effect or as may be later amended.

**(b) Amendment.** The Parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary for Business Associate to comply with the requirements of HIPAA and the HITECH BA Provisions.

**(c) Survival.** The respective rights and obligations of Subcontractor BA under Article VI (c) and Article VII (f), (g), and (i) of this Agreement shall survive the termination of this Agreement and any Agreements or addendums executed between the Parties.

**(d) Interpretation.** Any ambiguity in this Agreement shall be resolved to permit Business Associate to comply with the Privacy Rule.

**(e) Conflicts and Governing Law.** To the extent that there is any conflict between the provisions of this Agreement and the Agreement, the provisions of this Agreement shall control. The Agreement shall be governed by and construed and interpreted in accordance with the laws of the State of Colorado. To the extent that Colorado law is more stringent than Federal law regarding privacy issues, then Colorado law shall control, unless such Colorado law is expressly preempted by the Federal law.

**(f) Response to Subpoenas.** In the event that Subcontractor BA receives a subpoena or similar notice or request from any judicial, administrative or other party arising out of or in connection with this Agreement, including, but not limited to, any unauthorized use or disclosure of PHI or any failure in Subcontractor BA’s security measures, Subcontractor BA shall promptly forward a copy of such subpoena, notice or request to Business Associate and afford Business Associate the opportunity to be a part of the decision-making with regard to the subpoena including but not limited to responding to the subpoena.

**(g) Cooperation.** Notwithstanding subsection (f) above, Parties shall cooperate in good faith in all respects in connection with any request by a federal or state governmental authority for additional information and documents or any governmental investigation, complaint, action or other inquiry. Parties agree to reasonably assist, including, to testify as witnesses in the event that any litigation or administrative proceedings are commenced against a Party except where the other Party is named as an adverse Party.

**(h) Indemnity; Insurance.** In addition to any indemnification provisions otherwise set forth in the Agreement, Subcontractor BA hereby agrees that it will indemnify and hold harmless Business Associate and any Business Associate affiliate, trustee, officer, director, employee, volunteer or agent from and against any claim, cause of action, liability, damage, cost or expense, including attorneys’ fees and court or proceeding costs, arising out of or in connection with any unauthorized use or disclosure of PHI or any failure in security measures affecting Health Information or any other breach of the terms of this Agreement by Subcontractor BA or any person or entity under Subcontractor BA’s control. Throughout the term of this Agreement, Subcontractor BA shall maintain general liability insurance sufficient to cover any liabilities arising from Subcontractor BA’s indemnification obligations.

In addition to any indemnification provisions otherwise set forth in the Agreement, Business Associate hereby agrees that it will indemnify and hold harmless Subcontractor BA and any person or entity under Subcontractor BA’s control from and against any claim, cause of action, liability, damage, cost or expense, including attorneys’ fees and court or proceeding costs, arising out of or in connection with any unauthorized use or disclosure of PHI or any failure in security measures affecting Health Information or any other breach of the terms of this Agreement by Business Associate or any Business Associate affiliate, trustee, officer, director, employee, volunteer or agent. Throughout the term of this Agreement, the Business Associate shall maintain general liability insurance sufficient to cover any liabilities arising from Business Associate’s indemnification obligations.

**(i) Ownership of Protected Health Information**. Subcontractor BA acknowledges and agrees that all Information provided to Subcontractor BA by Business Associate on behalf of Covered Entity or created or received by Subcontractor BA on behalf of Business Associate or Covered Entity, shall be owned exclusively by Business Associate and/or Covered Entity.

 **(j) Relationship of the Parties**. The relationship of Business Associate and Subcontractor BA is that of independent contractors. All acts performed by Subcontractor BA shall be deemed to be performed in its capacity as an independent contractor.

**(k) Assignment**. This Agreement shall not be assigned by Subcontractor BA without the prior written consent of Business Associate.

**(l) Notices.** All notices to be made under his Agreement must be given in writing and will be deemed to have been given if personally delivered or sent by confirmed facsimile transmission, certified or registered mail with return receipt requested or email. Notice may be provided by phone, provided written notice is subsequently provided within ten (10) days, or through such other form or format as mutually agreed upon by the Parties.

**(m) Severability.** If any provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, such provision shall be deemed severed from the Agreement and the remainder of the provision will remain in full force and effect.

 **IN WITNESS WHEREOF,** the Parties have executed this Agreement in multiple originals as of the last date written below.

**Business Associate:**

Recipient Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_

Position/Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Phone Number: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Email: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

SIGNATURE:

DATE: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Subcontractor Business Associate:**

Recipient Name: \_

Position/Title: \_\_\_ \_\_\_\_

Phone Number: \_\_\_\_\_\_

Email: \_\_ \_\_\_

SIGNATURE:

DATE: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_