

BUSINESS ASSOCIATE AGREEMENT

This Business Associate Agreement (this “Agreement”), effective as of the last date of signature below, and is by and between Wasabi Technologies LLC (“Wasabi”) and the entity set forth below (“Customer”).

RECITALS

Customer is either a “covered entity” or a “business associate” of a covered entity, as such terms are defined under HIPAA. Customer and Wasabi have entered into an agreement (a “Service Agreement”) pursuant to which Wasabi may receive, use, obtain, access, transmit or create ePHI from or on behalf of Customer in the course of providing certain cloud storage and related services (the “Services”) for Customer. Wasabi does not receive, use, obtain, access, transmit or create PHI from or on behalf of Customer.

The purpose of this Business Associate Agreement is to specify the Parties’ respective obligations pertaining to such ePHI under the Privacy and Security Rules, as amended by the HITECH Act. The Parties hereby agree as follows:

1. DEFINITIONS

1.1 **Capitalized Terms.** Unless otherwise specified in this Agreement, all capitalized terms used in this Agreement not otherwise defined in this Agreement have the meanings established for purposes of the Health Insurance Portability and Accountability Act of 1996 and its implementing regulations (collectively, “HIPAA”) and the HITECH Act, as each is amended from time to time.

1.2 **“The HITECH Act”** shall mean Subtitle D of the Health Information Technology for Economic and Clinical Health Act provisions of the American Recovery and Reinvestment Act of 2009, 42 U.S.C. §§17921-17954, and any and all references in this Agreement to sections of HITECH shall be deemed to include all associated existing and future implementing regulations, when and as each is effective.

1.3 **“Breach”** shall mean the acquisition, access, use or disclosure of PHI or ePHI in a manner not permitted by the Privacy Rule that compromises the security or privacy of the PHI or ePHI as defined, and subject to the exceptions set forth, in 45 C.F.R. 164.402.

1.4 **“Electronic Protected Health Information” or (“ePHI”) and “Protected Health Information” (or “PHI”)** shall have the meaning defined in 45 C.F.R. § 160.103, and are limited to the PHI/ePHI received from, or received or created on behalf of, Customer by Wasabi pursuant to performance of the Services.

1.5 **“Privacy Rule”** shall mean the federal privacy regulations issued pursuant to the Health Insurance Portability and Accountability Act of 1996, as amended from time to time, codified at 45 CFR Parts 160 and 164 (Subparts A & E).

1.6 **“Security Rule”** shall mean the federal security regulations issued pursuant to the Health Insurance Portability and Accountability Act of 1996, as amended from time to time, codified at 45 CFR Parts 160 and 164 (Subparts A & C).

1.7 **“Unsecured ePHI”** shall mean ePHI that is not rendered unusable, unreadable, or indecipherable to unauthorized individuals through the use of a technology or methodology specified by the Secretary (e.g., encryption).

2. RESPONSIBILITIES OF WASABI

With regard to its use and/or disclosure of ePHI, Wasabi agrees as follows:

(a) **Permitted Uses and Disclosures.** Wasabi may use and/or disclose ePHI only as necessary to provide the Services, as permitted or required by this Agreement, and in compliance with each applicable requirement of 45 C.F.R. § 164.504(e) or as otherwise required by law. Wasabi may disclose ePHI to, and permit the use of ePHI by, its employees, contractors, agents, or other representatives only to the extent directly related to and necessary for the performance of the Services. Disclosure of ePHI to and use of ePHI by subcontractors, agents, or other representatives is also subject to Section (d) below. Wasabi will not use or disclose ePHI in a manner (i) inconsistent with Customer’s obligations under the Privacy Rule, or (ii) that would violate the Privacy Rule if disclosed or used in such a manner by Customer.

(b) **Safeguards for the Protection of ePHI.** Wasabi shall implement and use administrative, physical and technical safeguards reasonably and appropriately designed to (i) prevent use or disclosure of ePHI, other than as permitted or required by this Agreement; (ii) protect the confidentiality, integrity, and availability of the ePHI that Wasabi creates, receives, maintains, or transmits on behalf of the Customer; and (iii) comply with the Security Rule requirements set forth



in 45 C.F.R. §§ 164.308, 164.310, 164.312, and 164.316. Implementation of the security standards should at a minimum be in alignment with Department of Health & Human Services Security Rule guidance material.

(c) Reporting and Mitigating the Effect of Unauthorized Uses and Disclosures and Security Incidents.

Wasabi shall:

(i) without unreasonable delay, and no later than 60 days from the discovery, report to Customer: (A) any use or disclosure of ePHI not provided for by this Agreement of which it becomes aware in accordance with 45 CFR § 164.504(e)(2)(ii)(C); and/or (B) any Security Incident of which it becomes aware in accordance with 45 CFR § 164.314(a)(2)(C).

(ii) without unreasonable delay, and no later than 60 days from the discovery, report to Customer any Breach. The notification shall include, to the extent possible, and shall be supplemented on an ongoing basis with: (A) the identification of all individuals whose Unsecured ePHI was or is believed to have been involved, (B) all other information reasonably requested by Customer to enable Customer to perform and document a risk assessment in accordance with 45 C.F.R. Part 164 subpart D with respect to the incident to determine whether a Breach of Unsecured ePHI occurred, and (C) all other information reasonably necessary to provide notice to individuals, HHS and/or the media, all in accordance with the security breach notification requirements set forth in 45 C.F.R. Parts 160 & 164 subparts A, D, & E.

(iii) establish and implement procedures or other reasonable efforts for mitigating, to the extent practicable, any harmful effects arising from any improper use and/or disclosure of ePHI and to minimize the potential for such a breach to re-occur.

(d) Subcontractors, Agents, and Representatives. Wasabi shall require all of its subcontractors and agents that create, receive, maintain, or transmit ePHI to agree, in writing, to equivalent restrictions and conditions on the use and/or disclosure of ePHI that apply to Wasabi.

(e) Records Access. Wasabi shall make available its internal practices, books, and records relating to the use and disclosure of ePHI to the Secretary for purposes of determining Customer's compliance with the Privacy Rule.

(f) Requirements Pertaining to Individuals.

(i) Access. Wasabi shall, to the extent the Services allow, provide access to Customer, within thirty (30) days of receiving a written request from Customer, to ePHI in a Designated Record Set about an Individual, or when and as directed by Customer, directly to an Individual, all in accordance with the requirements of 45 C.F.R. § 164.524. Provided, however, that in the event that Wasabi, in connection with the Services, uses or maintains ePHI of or about an Individual, then Wasabi shall provide an electronic copy (at the request of, and in the reasonable time and manner requested by, Customer) of the ePHI, to Customer or, when and as directed by Customer, directly to an Individual or a third party designated by the Individual, all in accordance with 42 U.S.C. § 17935(e) as of its Compliance Date.

(ii) Amendment. Wasabi shall, to the extent the Services allow, and to the extent that the ePHI in Wasabi's possession constitutes a Designated Record Set, make available, within thirty (30) days after a written request by Customer, ePHI for amendment and incorporate any amendments, as directed by Customer, all in accordance with 45 C.F.R. § 164.526.

(iii) Accounting of Disclosures. Wasabi shall document, and within thirty (30) days after receiving a written request from Customer, make available, information necessary for Customer to make an accounting of disclosures of ePHI about an Individual or, when and as directed by Customer, make that information available directly to an Individual, all in accordance with 45 C.F.R. § 164.528 and in accordance with the requirements for accounting for disclosures made through an Electronic Health Record in 42 U.S.C. 17935(c).

(iv) Requests to Wasabi. Wasabi shall notify Customer in writing within ten (10) business days after its receipt directly from an Individual of any request for an accounting of disclosures, access to or amendment of ePHI as contemplated in Sections 2(f).

(g) Prohibited Uses.

(i) Wasabi shall not directly or indirectly receive remuneration in exchange for any ePHI as prohibited by 45 CFR § 164.502(a)(5)(ii).

(ii) Wasabi shall not make or cause to be made any communication about a product or service that is prohibited by 45 CFR § 164.508(a)(3).

(iii) Wasabi shall not make or cause to be made any written fundraising communication that is prohibited by 45 CFR § 164.514(f)

(h) Domestic Data Storage and Use. Neither Wasabi, nor any agent or subcontractor to whom Wasabi provides ePHI, may transmit or export Customer's ePHI beyond the borders of the United States of America for any purpose or permit anyone located outside the borders of the United States of America access to Customer's PHI.

3. RESPONSIBILITIES OF CUSTOMER

Customer hereby agrees:

(i) to limit the Uses and Disclosures of ePHI to Wasabi to the minimum necessary to accomplish the services Wasabi is performing for Customer and shall exercise reasonable discretion in determining what constitutes the minimum amount necessary.

(ii) that the Uses and Disclosures of the ePHI by Wasabi pursuant to this Agreement are, at the time of execution and throughout the term of this Agreement will be, consistent with the form of notice of privacy practices (the "Notice") that Customer provides to individuals pursuant to 45 C.F.R. § 164.520;

(iii) to notify Wasabi, in writing and in a timely manner, of any arrangements permitted or required of Customer under 45 C.F.R. parts 160 and 164 that may impact in any manner the Use and/or Disclosure of the ePHI by Wasabi under this Agreement including, but not limited to, restrictions on Use and/or Disclosure of the ePHI as provided for in 45 C.F.R. § 164.522 agreed to by Customer, and to hold Wasabi harmless from the financial impact of any such agreement by Customer;

(iv) to obtain any consent or authorization that may be required under HIPAA or state law prior to furnishing the ePHI to Wasabi; and

(v) make all requests for Disclosure of the ePHI and not allow third parties to contact Wasabi to request the Disclosure of the ePHI on Customer's behalf. The Parties acknowledge and agree that upon receipt of such a request from Customer, and with Customer's approval, Wasabi may Disclose the ePHI to the third party.

4. TERM, TERMINATION AND COOPERATION

4.1 Term. This Agreement will become effective on the date last signed below (the "Effective Date"). Unless terminated sooner pursuant to this Section, this Agreement shall concurrently with any Service Agreement to provide Services to Customer and will terminate without any further action of the Parties upon the termination of any such agreement(s).

4.2 Termination

(a) If either Party knows of a pattern of activity or practice of the other Party that constitutes a material breach or violation of this Agreement then the non-breaching Party shall provide written notice of the breach or violation to the other Party that specifies the nature of the breach or violation. The breaching Party must cure the breach or end the violation on or before thirty (30) days after receipt of the written notice. In the absence of a cure reasonably satisfactory to the non-breaching Party within the specified timeframe, or in the event the breach is reasonably incapable of cure, then the non-breaching Party may terminate this Agreement (and, as appropriate, any related agreement pertaining to the Services).

(b) If Customer knows of a pattern of activity or practice by subcontractors, agents, or other representatives of the Wasabi that constitutes a material breach or violation of this Agreement then Customer shall provide written notice of the breach or violation to Wasabi that specifies the nature of the breach or violation. Wasabi must cure the breach or end the violation on or before thirty (30) days after receipt of the written notice. In the absence of a cure reasonably satisfactory to Customer within the specified timeframe, or in the event the breach is reasonably incapable of cure, then Customer may terminate this Agreement (and, as appropriate, any related agreement pertaining to the Services).

4.3 Effect of Termination or Expiration. Upon the expiration or termination for any reason of this Agreement, Wasabi shall return or destroy all ePHI, to the extent allowable by the Services, including all ePHI in possession of Wasabi's agents or subcontractors. To the extent return or destruction of the ePHI is not feasible, Wasabi shall notify Customer in writing of the reasons return or destruction is not feasible, Wasabi shall extend any and all protections, limitations and restrictions contained in this Agreement to Wasabi's use and/or disclosure of any ePHI retained after the expiration or termination of this Agreement, and shall limit any further uses and/or disclosures solely to the purposes that make return or destruction of the ePHI infeasible.

4.4 Cooperation. Each Party shall cooperate in good faith in all respects with the other Party 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. With reasonable notice, Customer may request documentation from Wasabi to confirm compliance with this Agreement.

5. INSURANCE

Wasabi will maintain reasonable insurance with respect to its obligations, as determined in Wasabi's discretion, and provide proof of such insurance from time to time as reasonably requested by Customer.

6. LIMITATION OF LIABILITY

Neither Party shall be liable to the other party for any incidental, consequential or punitive damages of any kind or nature, whether such liability is asserted on the basis of contract, tort (including negligence or strict liability), or otherwise, even if the other Party has been advised of the possibility of such loss or damages, and the limitations of liability set forth in the Services Agreement shall apply to this Agreement, and are hereby incorporated by reference.

7. MISCELLANEOUS

7.1 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the state under which the Service Agreement is governed. In the event that the Service Agreement is silent as to governing law and venue, this Agreement shall be governed by and construed in accordance with the laws of the state of Delaware, without regard to the conflicts of law provisions thereof. The parties waive any right to trial by jury with respect to any action or litigation arising out of or related to this Agreement. However, if any controversy, dispute or claim arises between the Parties with respect to this Agreement, the Parties shall make good faith efforts to resolve such matters informally.

7.2 Construction of Terms. To the extent they are not clear, the terms of this Agreement shall be construed to allow for compliance by Customer with HIPAA and HITECH.

7.3 Third Party Beneficiaries. Nothing in this Agreement shall be construed to create any third party beneficiary rights in any person.

7.4 Independent Contractor. The Parties are and shall remain independent contractors throughout the term. Nothing in this Agreement shall be construed to constitute the Parties as partners, joint venturers, agents or anything other than independent contractors.

7.5 Survival. Termination of this Agreement shall not relieve either Party of any obligation of such Party accrued prior to such termination hereunder.

7.6 Amendments; Waiver. This Agreement constitutes the entire agreement between the Parties with respect to its subject matter. It may not be modified, nor will any provision be waived or amended, except in a writing duly executed by the Parties. A waiver with respect to one event will not be construed as continuing, or as a bar to or waiver of any right or remedy as to subsequent events.

7.7 Notices. Any legal notice to be given under this Agreement to a Party shall be made via U.S. Mail, commercial courier or hand delivery to such Party at its address given below. Any such notice shall be deemed given when so delivered to or received at the proper address.