

## **Business Associate Agreement**

This Business Associate Agreement (“BA Agreement”) is effective as of the date you (“Covered Entity” “you” or “Subscriber”) entered into the Subscriber Agreement with Park Avenue Capital, LLC, d/b/a “MaxMD” (“MaxMD” or “Business Associate”) for the Service described therein (the “Agreement”), and this BA Agreement is made a part of, and incorporated into, the Agreement.

### **Recitals:**

WHEREAS, the Service provides for the secure transmission of Protected Health Information (as defined below); and

WHEREAS, the Privacy Rule and Security Rule require Covered Entity and Business Associate to enter into a written contract containing satisfactory assurances that the Business Associate will appropriately safeguard Protected Health Information;

NOW THEREFORE, in consideration of the mutual promises set forth herein, and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties hereby agree as follows.

### **1. Definitions.**

The following terms shall have the meanings set forth in this Article 1:

“**BA Agreement**” means this Business Associate Agreement between Subscriber and MaxMD.

“**Breach Notification Rule**” has the meaning set forth in 45 CFR Part 164, Subpart D.

“**Breach**” has the same meaning as the term “breach” in 45 CFR § 164.402.

“**Business Associate**” means MaxMD.

“**Covered Entity**” means Subscriber.

“**CFR**” shall mean the Code of Federal Regulations.

“**Disclosure of PHI**” means the release, transfer, provision of, access to, or divulging in any other manner, of PHI outside the entity holding the information per 45 CFR § 160.103.

“**Electronic Protected Health Information**” or “**ePHI**” shall have the same meaning given to the term “electronic protected health information” in 45 CFR § 160.103, and is limited in this BA Agreement to the ePHI created, transmitted, maintained or received by Business Associate from or on behalf of Subscriber.

“**HIPAA**” means, collectively, the Health Insurance Portability and Accountability Act of 1996, HITECH, and the regulations promulgated thereunder, as each may be amended from time to time.

“**HITECH**” means the Health Information Technology for Economic and Clinical Health Act provisions of the American Recovery and Reinvestment Act of 2009.

“**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).

“**Privacy Rule**” means the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Part 160 and Part 164, Subparts A and E.

“**Protected Health Information**” or “**PHI**” has the same meaning as the term “protected health information” in 45

CFR § 160.103, and is limited in this Agreement to the PHI created, transmitted, maintained or received by Business Associate from or on behalf of Subscriber and shall also include ePHI.

**“Required by Law”** has the same meaning as the term “required by law” in 45 CFR § 164.103.

**“Secretary”** means the Secretary of the Department of Health and Human Services or his designee.

**“Security Incident”** has the same meaning as the term “security incident” in 45 CFR § 164.304.

**“Security Rule”** means those requirements set forth in 45 CFR Part 164, Subpart C.308, 164.310, 164.312, 164.314, and 164.316

**“Unsecured PHI”** has the same meaning as “unsecured protected health information” in 45 CFR § 164.402.

**“Use of PHI”** means the sharing, employment, application, utilization, examination, or analysis of PHI within an entity that maintains such information per 45 CFR § 160.103.

Capitalized terms not otherwise defined in this BA Agreement shall have the same meanings as those terms have in the Privacy Rule, Breach Notification Rule, Security Rule, HIPAA, or the Agreement; provided, however, that if any such capitalized term defined in this BA Agreement conflicts with a definition given for such term in the Privacy Rule, Breach Notification Rule, Security Rule or HIPAA, then the definition given for such term in the Privacy Rule, Breach Notification Rule, Security Rule or HIPAA (as applicable) shall govern.

## **2. Obligations and Activities of Business Associate.**

- A. Business Associate agrees not to Use or to Disclose PHI other than as permitted or required by the Agreement or this BA Agreement or as permitted or Required by Law.
- B. Business Associate agrees to use appropriate and reasonable safeguards designed to prevent unauthorized Use or Disclosure of PHI other than as provided for by the Agreement or this BA Agreement. In particular, Business Associate agrees to comply with the Privacy Rule and Security Rule with respect to all ePHI transmitted by or on behalf of Subscriber through the Service.
- C. Business Associate provides many mechanisms by which Covered Entity can safeguard PHI, which, when properly utilized by Covered Entity, are designed to ensure compliance with the provisions of the Privacy Rule and the Security Rule. Business Associate may, upon request, advise Covered Entity as to appropriate measures Covered Entity could take with respect to Business Associate’s services to better ensure compliance with the Privacy Rule and the Security Rule. However, Covered Entity agrees and understands that the Covered Entity is independently responsible for HIPAA compliance for the privacy and security of its PHI, including ePHI, in its possession or control or that it receives from outside sources.
- D. Business Associate agrees to use commercially reasonable efforts to mitigate, to the extent reasonably practicable, any harmful effect that is known to Business Associate of an unauthorized Use or Disclosure of PHI by Business Associate or its agents or subcontractors in violation of the requirements of this BA Agreement or HIPAA.
- E. Business Associate agrees to ensure that any agent, including a subcontractor, to whom it provides PHI agrees to substantially the same restrictions and conditions that apply to Business Associate under this BA with respect to PHI.
- F. To the extent applicable, all PHI maintained by Business Associate for Covered Entity will be available to Covered Entity in a time and manner that reasonably allows Covered Entity to comply with the requirements under 45 CFR § 164.524. Business Associate shall not be obligated to provide any such information directly to any Individual or person other than Covered Entity.

- G. Business Associate agrees to document unauthorized Disclosures of PHI and information related to such unauthorized Disclosures for accounting purposes as required under 45 CFR § 164.528, but only to the extent that (i) Business Associate is actually aware of such unauthorized Disclosures and (ii) such unauthorized Disclosures are of the type of disclosures subject to documentation for accounting under 45 CFR § 164.528.
- H. Covered Entity or an Individual may request that Business Associate make an amendment to PHI which is maintained by Business Associate, if any. Business Associate and Covered Entity must agree to the form of amendment and amendment implementation timeline prior to Business Associate's making any amendment to such PHI.
- I. Business Associate agrees to make its internal practices, books, and records, including policies and procedures relating to the Use and Disclosure of PHI received from Covered Entity, or created or received by Business Associate on behalf of Covered Entity, available to the Secretary within 30 days of a verified request or as directed by the Secretary, for purposes of the Secretary's determining Covered Entity's or Business Associate's compliance with the Privacy or Security Rules.
- J. Business Associate maintains a Health Information Breach Investigation and Response Policy and Procedure ("Breach Policy") which sets forth Business Associate's policies and procedures for investigating, responding to and reporting Breaches of unsecured PHI in compliance with HIPAA and other applicable laws and regulations. In accordance with such Breach Policy, Business Associate will, upon discovery of a Breach, investigate and assess the potential impact of the Breach (including any affected individuals), mitigate to the extent possible known harm to affected individuals, and determine whether notification to affected individuals, the Secretary or other persons is required under the Breach Notification Rule. If Business Associate determines that notification to affected individuals, the Secretary or other persons is required under the Breach Notification Rule, Business Associate shall notify Subscriber of the Breach without unreasonable delay and in any event within thirty (30) days following discovery of the Breach. Business Associate shall also provide Subscriber with 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 and any other available information that Subscriber is required to include in notification to affected individuals under the Breach Notification Rule. Such information will be provided at the time of notification of Subscriber of the Breach or promptly thereafter as information becomes available. In addition, Business Associate shall (i) take prompt action to implement a corrective action plan to address any deficiencies which are within the Business Associate's actual control; and (ii) take such further actions pertaining to such Breach due to a default by Business Associate as may be required by HIPAA or other applicable law. To the extent such Breach is caused by breach of Business Associate's obligations under this BA Agreement, Business Associate agrees to pay the costs of investigation, notification, and provision of consumer protections such as credit monitoring for a period of one (1) year following notification, subject to the limitations of liability set forth in the Agreement.

### **3. Permitted Uses and Disclosures by Business Associate.**

Except as otherwise limited in this BA Agreement or by HIPAA or the Agreement:

- A. Business Associate may use or disclose PHI to perform functions, activities or services for, or on behalf of, Subscriber or its Authorized Users provided that such use or disclosure would not violate the Privacy Rule or Security Rule if done by Subscriber.
- B. Business Associate may use PHI for the proper management and administration of Business Associate and to carry out the legal responsibilities of Business Associate and its obligations under the Agreement. Business Associate may Disclose PHI for the proper management and administration of Business Associate and to carry out the legal responsibilities of Business Associate provided that: (i) such Disclosure is

Required by Law or reasonably necessary to carry out its obligations under the Agreement; or (ii) Business Associate obtains reasonable assurances from the person to whom the PHI is disclosed that it will be held confidentially and used or further disclosed only as required by law or for the purposes for which it was disclosed to the person and the person will notify Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached.

- C. Business Associate may use PHI to report violations of law to appropriate federal and state authorities consistent with 45 CFR § 164.502(j)(1).

#### **4. Obligations of Covered Entity.**

- A. Subscriber is responsible for independently complying with the Privacy Rule and the Security Rule and shall use Business Associate's products and services in a manner that complies with HIPAA and other applicable law. Subscriber shall notify Business Associate of any limitation(s) in its notice of privacy practices in accordance with 45 CFR § 164.520 to the extent that such limitation may affect Business Associate's Use or Disclosure of PHI.
- B. Subscriber shall notify Business Associate of any changes in, or revocation of, any permission by an Individual to Use or Disclose PHI to the extent that such changes may affect Business Associate's Use or Disclosure of PHI.
- C. Subscriber shall notify Business Associate of any restriction on the Use or Disclosure of PHI that Subscriber has agreed to in accordance with 45 CFR § 164.522, and HITECH § 13405(a) to the extent that such restriction may affect Business Associate's Use or Disclosure of PHI.
- D. Subscriber shall not request Business Associate to Use or Disclose PHI in any manner that would not be permissible under HIPAA or other applicable law if done by any of them.
- E. Subscriber agrees not to use Business Associate's services for the transmission or storage of ePHI except for the classes and types of ePHI meeting the definition of ePHI in Section 1 of this BA Agreement.

#### **5. Term and Termination.**

- A. **Term.** This BA Agreement shall be effective as of the Effective Date and shall terminate when the requirements of Section 5.D. below are satisfied. This BA Agreement shall automatically terminate upon termination of the Agreement.
- B. **Termination for Cause by Covered Entity.** Upon Subscriber's knowledge of a material breach of this Agreement by Business Associate, Subscriber shall provide an opportunity for Business Associate to cure the breach. If Business Associate does not cure the breach within 30 days from the date that Subscriber provides notice of such breach to Business Associate, then, from and after the end of the thirty (30) day cure period, Subscriber shall have the right to immediately terminate this Agreement upon written notice to Business Associate.
- C. **Termination by Business Associate.** This BA Agreement may be terminated by Business Associate upon 60 days prior written notice to Subscriber in the event that Business Associate believes that the requirements of any law, legislation, consent decree, judicial action, governmental regulation or agency opinion, enacted, issued, or otherwise effective after the date of this BA Agreement and applicable to PHI or to this BA Agreement, cannot be met by Business Associate in a commercially reasonable manner and without significant additional expense.

**D. Effect of Termination.** Except as set forth in this Section D, upon termination of this BA Agreement for any reason, within 90 days of the request of Subscriber, Business Associate shall make available or destroy all PHI received from Subscriber in its possession or created or received by Business Associate on behalf of Subscriber and in Business Associate's possession. Business Associate shall not retain any copies of the PHI. This shall apply to PHI that is in the possession of subcontractors or agents of Business Associate. If Business Associate determines that returning or destroying the PHI is infeasible or not commercially practical, Business Associate shall, within ten (10) business days, provide to Subscriber written notification of the conditions that make return or destruction infeasible or impractical. In such case, Business Associate shall extend the protections of this Agreement to such PHI and limit further use and disclosures of such PHI to only those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such PHI.

## **6 Miscellaneous.**

- A. Regulatory References.** A reference in this BA Agreement to a section in HIPAA shall be a reference to such section currently in effect, as may be updated, amended or modified from time to time.
- B. 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 to comply with the requirements of HIPAA and all subsequent laws and regulations bearing on the subject matter of this Agreement.
- C. Survival.** The respective rights and obligations of Business Associate under Section 5.D. of this BA Agreement shall survive the termination of this BA Agreement.
- D. Interpretation.** Any ambiguity in this BA Agreement shall be resolved to permit Covered Entity and Business Associate to comply with HIPAA. In the event of a conflict between the terms of this Agreement and the Agreement, the terms of this BA Agreement shall control.
- E. Notice.** All notices, requests, consents and other communications hereunder will be in writing, will be addressed to the receiving party's address set forth in or designated pursuant to the Agreement and in the manner set forth therein.
- F. Severability.** If any portion or provision of this BA Agreement is, to any extent, declared illegal or unenforceable by a duly authorized court having jurisdiction, then the remainder of this BA Agreement, or the application of such portion or provision in circumstances other than those as to which it is so declared illegal or unenforceable, will not be affected thereby, and each portion and provision of this BA Agreement will be valid and enforceable to the fullest extent permitted by law.
- G. No Waiver of Rights, Powers and Remedies.** No failure or delay by a Party hereto in exercising any right, power or remedy under this BA Agreement, and no course of dealing between the parties hereto, will operate as a waiver of any such right, power or remedy of the party. The election of any remedy by a party hereto will not constitute a waiver of the right of such party to pursue other available remedies.
- H. Governing Law.** This BA Agreement will be governed by and construed in accordance with the laws of the State \_\_\_\_\_ of \_\_\_\_\_ Delaware.

**Entire Agreement.** This BA Agreement and the terms of the Agreement set forth the entire understanding of the parties with respect to the subject matter set forth herein and supersedes all prior agreements, arrangements and communications, whether oral or written, pertaining to the subject matter hereof.

- I. Counterparts.** This BA Agreement may be executed by facsimile signature and in any number of

counterparts, each of which shall be an original, and all such counterparts shall together constitute but one in the same agreement.

- J. **Independent Contractors.** The parties are independent contractors and nothing in this BA Agreement creates or is intended to create an agency relationship.
- K. **No Third Party Beneficiaries.** Nothing express or implied in this BA Agreement conveys or is intended to convey any rights, remedies, obligations or liabilities to any party other than Subscriber or Business Associate or their respective successors or assigns.