

## **ESO SUBSCRIPTION AGREEMENT**

This ESO Subscription Agreement (this “**Agreement**”) is entered into as of \_\_\_\_\_ (“**Effective Date**”), by and between ESO Solutions, Inc., a Texas corporation (together with its controlled subsidiaries, “**ESO**”), having its principal place of business at 2803 Manor Rd, Austin, TX 78722, and \_\_\_\_\_ (“**Customer**”), having its principal place of business at \_\_\_\_\_. This Agreement consists of these terms and conditions (the “**General Terms & Conditions**”) below, the Business Associate Agreement, and any Order (as defined below) executed by the parties, including any attachments to such Order.

The purpose of this Agreement is to establish the terms and conditions under which Customer may purchase certain technology products and/or services as described in an Order or other document signed and agreed to by the parties. Therefore, in consideration of the covenants, agreements, and promises set forth below, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties, intending to be legally bound, hereby agree as follows.

### **GENERAL TERMS AND CONDITIONS**

**1. DEFINITIONS.** Capitalized terms not otherwise defined in this Agreement have the meanings below:

“**Customer Data**” means information, data and other content in electronic form that is submitted, posted, or otherwise transmitted by or on behalf of Customer through the Software.

“**De-identified Data**” means Customer Data which (i) if PHI, has been deidentified in accordance with HIPAA, or (ii) if not PHI, which has had all personally identifiable information removed, as well as the names and addresses of Customer and any of its Users and/or Customer’s clients, and in each case as a consequence is neither PHI nor identifiable to or by Customer.

“**Deliverable**” means software, report, or other work product created pursuant to an Order.

“**Documentation**” means the Software’s user guides and operating manuals.

“**Feedback**” refers to any suggestion or idea for improving or otherwise modifying ESO’s products or services.

“**Integrated Service**” means a third-party hardware, software, service, website, or data that is integrated with (or interoperates) with a service. Nonexclusive examples of Integrated Services include third-party computer-aided dispatch (CAD), cardiac monitors and third-party billing software.

“**Intellectual Property**” means trade secrets, copyrightable subject matter, patents and patent applications, and other proprietary information, activities, and any ideas, concepts, innovations, inventions and designs.

“**Licensed Software**” means the executable, object code version of software that ESO provides to Customer for its use and installation on Customer’s own equipment. For the avoidance of doubt, Licensed Software does not include SaaS.

“**Order**” means a document addressing the order of a specific set of products or services which is executed by authorized representatives of each party. An Order may be (a) an ESO sales form or “Quote”, (b) a Statement of Work, or (c) an addendum or other writing which is attached or which the parties intend to be incorporated by reference into this Agreement. For the avoidance of doubt, unilateral purchase orders and other similar documents do not constitute an Ordering Document.

“**Outage**” means Customer is unable to access SaaS, or such access is materially delayed, impaired or disrupted.

“**Professional Services**” means professional services provided by ESO under a Statement of Work.

“**Protected Health Information**” or “**PHI**” has the meaning set forth in HIPAA. All references herein to PHI shall be construed to include electronic PHI, or ePHI, as that term is defined by HIPAA.

“**SaaS**” means software-as-a-service that ESO hosts (directly or indirectly) for Customer’s use on a periodic subscription basis. For the avoidance of doubt, SaaS does not include Licensed Software.

“**Scheduled Downtime**” means periods when ESO intentionally interrupts SaaS to perform system maintenance or otherwise correct service errors during non-peak hours (except for critical circumstances), typically between midnight and 6 a.m. Central Time on a fortnightly basis.

“**Services**” means the software (whether SaaS or Licensed), professional services, implementation services, support services, training, or other services provided by ESO to Customer under this Agreement, as further described in an applicable Order.

“**Software**” means any ESO computer program, programming or modules specified in the Agreement or any Order. For the avoidance of doubt, SaaS and Licensed Software are collectively referred to as Software.

“**Support Services**” means those services described in Exhibit B.

“**Third-Party Data**” means data not owned by ESO but which is (or access to which is) provided by ESO under an Order (such as fire codes or AAAM AIS codes).

**“Third-Party Service”** means a service not provided by ESO but which is made available by ESO in connection with its Software under an Order.

**“Third-Party Software”** means software not owned by ESO but which is (or access to which is) provided by ESO under an Order.

**“Use Restrictions”** means the restrictions imposed on Customer’s use of Software as described in Section 3.3.

**“User”** means any individual who uses the Software on Customer’s behalf through Customer’s account or passwords.

2. **SOFTWARE ORDERS.** During the Term, Customer may order Software from ESO by signing an appropriate Order. Customer’s license to Licensed Software and its subscription to SaaS are set forth below. Each such Order is incorporated herein by reference.

### 3. LICENSE/SUBSCRIPTION TO SOFTWARE

3.1 Grant of Subscription: SaaS. For SaaS, during the Term Customer may access and use the SaaS, with the access and volume limitations set forth on the applicable Order, subject to Customer’s compliance with the Use Restrictions and other limitations contained in this Agreement. Customer acknowledges and agrees that certain ESO products and services may be subject to additional terms and conditions (**“Product-Specific Terms”**) which may be presented to Customer at the time of execution of this Agreement or upon Customer’s future purchase of such products or services. Product-Specific Terms shall be incorporated into this Agreement by reference through Exhibits appended hereto and shall govern Customer’s use of the applicable product or service in addition to the General Terms and Conditions contained herein.

3.2 Grant of License: Licensed Software. For Licensed Software, during the Term ESO hereby grants Customer a limited, non-exclusive, non-transferable, non-assignable, non-sublicensable, revocable license to copy and use the Licensed Software, in such quantities as are set forth on the applicable Order and as necessary for Customer’s internal business purposes, in each case subject to Customer’s compliance with the Use Restrictions and other limitations and obligations contained in this Agreement.

3.3 Use Restrictions. Except as provided in this Agreement or as otherwise authorized by ESO, Customer has no right to, and shall not: (a) decompile, reverse engineer, disassemble, print, copy or display the Software or otherwise reduce the Software to a human-perceivable form in whole or in part; (b) publish, release, rent, lease, loan, sell, distribute or transfer the Software to another person or entity; (c) reproduce the Software for the use or benefit of anyone other than Customer; (d) alter, modify or create derivative works based upon the Software either in whole or in part; or (e) use or permit the use of the Software for commercial time-sharing arrangements or providing service bureau, data processing, rental, or other services to any third party (including any affiliate not specifically listed in the applicable Order).

3.4 Ownership. The rights granted under the provisions of this Agreement do not constitute a sale of the Software. ESO retains all right, title, and interest in and to the Software, including without limitation all software used to provide the Software and all graphics, user interfaces, logos and trademarks reproduced through the Software, and Feedback, except to the limited extent set forth in this Agreement. This Agreement does not grant Customer any intellectual property rights in the Software or any of its components, except to the limited extent that this Agreement specifically sets forth Customer’s rights to access, use, or copy the Software during the Term. Customer acknowledges that the Software and its components are protected by copyright and other laws.

#### 3.5 Third-Party Data, Software and Services.

3.5.1 ESO neither accepts liability for, nor warrants the functionality, utility, availability, reliability or accuracy of, Third-Party Software or Third-Party Services. The Third-Party Software “EMS1 Academy” and/or “FireRescue1 Academy” and/or “EMS1 & FireRescue1 Academy – Implementation and Configuration” and/or “Learning Management System” and/or “EVALS Implementation” (collectively, **“Education”**) is offered by ESO in collaboration with Lexipol, f/k/a The Praetorian Group. If Customer subscribes to Education, Customer acknowledges and agrees to the terms and conditions of the Praetorian license agreement, located at <https://www.lexipol.com/terms-and-conditions/>, which shall supersede this Agreement as it applies to Customer’s use of Education and any Customer Data stored therein.

3.5.2 Third-Party Data. If Customer (as indicated on an Order) elects to license Third-Party Data, then subject to the terms hereof, ESO hereby grants Customer a non-exclusive, non-sublicensable, and non-transferable license during the Term to use such Third-Party Data via the Software solely for Customer’s internal purposes. Customer will not (i) allow greater access than that set forth in the applicable Order, (ii) disclose, release, distribute, or deliver Third-Party Data, or any portion thereof, to any third party (iii) copy, modify, or create derivative works of Third-Party Data,

(iv) rent, lease, lend, sell, sublicense, assign, distribute, publish, transfer, or otherwise make available Third-Party Data, (v) attempt to output in any form more than 10% of the Third-Party Data or otherwise circumvent the usage limitations included in the Software, (vi) remove any proprietary notices included within Third-Party Data or Software, or (vii) use Third-Party Data in any manner or for any purpose that infringes or otherwise violates any proprietary right of a person, or that violates applicable law. ESO does not warrant the functionality, reliability, accuracy, completeness or utility of Third-Party Data, or accept any liability therefor. Additional terms and limitations applicable to Third-Party Data may be provided on the applicable Order.

- 3.6 Integrated Services and Non-ESO Products Procured by Customer.** If Customer procures any non-ESO Products Customer is responsible for securing the rights for ESO to receive, transmit, process, display, and store all data (“**Integrated Data**”) from and to such Integrated Services to the extent required for ESO to perform its obligations and exercise its rights under this Agreement. ESO’s obligation to support Integrated Services is contingent upon Customer securing such rights. Customer’s failure to secure such rights does not terminate or suspend Customer’s obligation to pay Fees. Customer bears (and shall hold ESO harmless from) all risks associated with access to and use of Integrated Services and Integrated Data. Any Integrated Data made accessible by ESO in or through the Integrated Service is provided on an “as-is” and “as available” basis without any warranty of any kind. Customer acknowledges that ESO is not responsible for and under no obligation to control, monitor or correct Integrated Data; provided, however, ESO reserves the right to take remedial action if any such data violates applicable law or this Agreement, including without limitation, the removal of, or disablement of access to, such data and the Integrated Service. Customer acknowledges that ESO’s ability to deliver each Service is contingent upon Customer or User’s compliance with this Agreement and any applicable third party’s terms of use. Accordingly, if ESO’s performance under this Agreement is prevented or delayed by any act or omission of Customer or its agents, subcontractors, or third-party vendors (other than ESO) (“**Customer Delay**”), ESO shall not be deemed in breach of its obligations under this Agreement or otherwise be liable for any costs or losses of Customer (in each case, to the extent arising directly or indirectly from Customer Delay).
- 3.7 Third Party APIs.** Customer acknowledges that: (i) the nature, type, quality and availability of Integrated Data and Integrated Services may change at any time during the Term, and (ii) features of the Integrated Service that integrate or interoperate with third parties and Integrated Data depend on the continuing availability of such third parties’ respective application programming interfaces (“**APIs**”) for use with the Integrated Service. ESO may update, change or modify the Integrated Services under this Agreement because of a change in, or unavailability of, such Integrated Data or APIs. If any third-party ceases to make its Integrated Data or APIs available on reasonable terms for the Integrated Services, as determined by ESO in its sole discretion, ESO may cease providing access to or support for the affected Integrated Data or Integrated Service without any liability to Customer. Any changes to Integrated Data or APIs, including their availability or unavailability, during the Term does not affect Customer’s obligations under this Agreement or the applicable Order, and Customer will not be entitled to any reduction in fees, refund, credit or other compensation due to any such changes.
- 3.8 Non-ESO Products.** If Customer enables, accesses, uses or otherwise relies upon Third-Party Software or Third-Party Services (collectively, “**Non-ESO Products**”), Customer’s access and use of such Non-ESO Services shall be governed solely by the terms and conditions of such Non-ESO Products. ESO does not endorse, is not responsible or liable for, and makes no representations as to any aspect of such Non-ESO Products, including, without limitation, their content or the manner in which they handle, protect, manage or process data (including Customer Data), or any interaction between Customer and the provider of such Non-ESO Products. ESO cannot guarantee the continued availability of such Non-ESO Product features. Customer irrevocably waives (and shall hold ESO harmless from) any claim against ESO with respect to such Non-ESO Products. ESO is not liable for any damage or loss caused or alleged to be caused by or in connection with Customer’s enablement, access or use of any such Non-ESO Products, or Customer’s reliance on the privacy practices, data security processes or other policies of such Non-ESO Products. Neither the performance nor failure of Non-ESO Products shall terminate or suspend Customer’s obligation to pay Fees, and, if ESO’s performance under this Agreement is prevented or delayed by any act or omission of Customer or its agents, subcontractors, or Non-ESO Products (“**Customer Delay**”), ESO shall not be deemed in breach of its obligations under this Agreement or otherwise be liable for any costs or losses of Customer (in each case, to the extent arising directly or indirectly from Customer Delay).

## **4 HOSTING, SLA & SUPPORT SERVICES**

- 4.1 Hosting & Management.** Customer shall be responsible for hosting and managing any Licensed Software on systems meeting the requirements specified by ESO. ESO shall be responsible for hosting and managing any SaaS.

- 4.2 Service Level Agreement. If Outages (excluding Scheduled Downtime or Outages caused by Customer), results in the service level uptime falling below 99% for any three-month period (the “**Uptime Commitment**”), then Customer may immediately terminate this Agreement, in which case ESO will refund any prepaid, unearned Fees to Customer. This is Customer’s sole remedy for ESO’s breach of the Uptime Commitment.
- 4.3 Scheduled Downtime. ESO will endeavor to provide reasonable (72 hour) notice of Scheduled Downtime to Customer’s Users. Notice of Scheduled Downtime may be provided from within the Software or via email. Scheduled Downtime shall never constitute a failure of performance or Outage by ESO. Notification timelines and the frequency of Scheduled Downtime are subject to the emergence of security concerns outside of ESO’s control.
- 4.4 Support and Updates. During the Term, ESO shall provide to Customer the Support Services, in accordance with Exhibit B, which is incorporated herein by reference. ESO may update and revise its Software, providing reasonable notice in the case of any material diminishment.

## 5 FEES

- 5.1 Fees. In consideration of the rights granted hereunder, Customer agrees to pay ESO the fees for the Software and Professional Services as set forth in the Order(s) (collectively, “**Fees**”). The Fees are non-cancelable and non-refundable, except as expressly provided herein. Customer (or Third-Party Payer, if applicable) shall pay all invoices within 30 days of receipt.
- 5.2 Third-Party Payer. If Customer desires to use a third-party to pay some or all of the Fees on behalf of Customer (a “**Third-Party Payer**”), then (i) each applicable Order will identify such arrangement, (ii) the Third-Party Payer will enter into a written agreement with ESO regarding such arrangement, (iii) Customer may replace the Third-Party Payer by written notice to ESO (provided that no such change shall be made until the then-current Term’s renewal), (iv) references within this Section 5 to Customer’s responsibility for Fees shall be understood to refer to the Third-Party Payer when applicable, and (v) Customer shall remain responsible for payment if the Third-Party Payer does not pay the Fees.
- 5.3 Uplift on Renewal. Fees indicated as recurring fees on the applicable Order (including those for Software) shall increase by 8.75% each year upon renewal.
- 5.4 Taxes and Fees. The Fees are exclusive of all taxes and credit card processing fees, if applicable. Unless and until Customer provides ESO a tax exemption certificate, Customer will be responsible for and will remit (or will promptly reimburse ESO for) all taxes of any kind, including sales, use, duty, customs, withholding, property, value-added, and other similar federal, state or local taxes (other than taxes based on ESO’s income) related to this Agreement.
- 5.5 Appropriation of Funds. If Customer is a city, county or other government entity, Customer may terminate the Agreement at the end of the Customer’s fiscal term if Customer provides evidence that its governing body did not appropriate sufficient funds for the next fiscal year. Notwithstanding the foregoing, this provision shall not excuse Customer from past payment obligations or other Fees earned and unpaid.
- 5.6 Usage Monitoring. Customer is solely responsible for its own adherence to volume and use limitations (or tiers) indicated on the applicable Order. ESO may monitor Customer’s use of the Software, and if Customer’s usage exceeds the level indicated in the applicable Order (an “**Overage**”), Customer shall owe ESO the Fee corresponding to such usage level at a rate no higher than ESO’s then-standard pricing for new customers at an equivalent usage level. ESO may invoice for Overages immediately.

## 6 TERM AND TERMINATION

- 6.1 Term. The term of this Agreement (the “**Term**”) commences on the Effective Date and continues for a period of one year (or any longer period provided in an Order). Thereafter, the Term will renew for successive one-year periods unless written notice is provided at least 60 days prior to the anniversary of the Effective Date.
- 6.2 Termination for Cause. Either party may terminate this Agreement or any individual Order for the other party’s uncured material breach by providing written notice. The breaching party shall have 30 days from receipt to cure such breach to the reasonable satisfaction of the non-breaching party.
- 6.3 Either party may elect to terminate the Agreement or an existing Software subscription at the end of the then-current Term by providing no less than 30 days prior written notice.
- 6.4 Effect of Termination. If Customer terminates this Agreement or any Order as a result of ESO’s material breach, then to the extent Customer prepaid any Fees, ESO shall refund to Customer those prepaid Fees on a pro-rata basis from the

date Customer actually ceases use of the Software. Upon termination of this Agreement or any Order, Customer shall cease all use of the Software subject to this Agreement (or the applicable Order, as the case may be) and delete, destroy or return all copies of the Documentation and Licensed Software in its possession or control, except as required by law. Customer shall remain obligated to pay appropriate Fees at ESO's then-current rates if Customer continues to use or access Software after the termination or expiration of this Agreement. If Customer's Agreement includes a multi-year discount plan with diminishing discounts, and Customer terminates the Agreement prior to the completion of the discount plan, Customer shall promptly pay ESO's invoice recouping such discounts for a maximum of two years prior to the date of termination. Termination of this Agreement is without prejudice to any other right or remedy and shall not release a party from any liability.

- 6.5 Delivery of Data.** ESO will provide Customer its Customer Data in a searchable .pdf format upon request made within 60 days of the expiration or termination of this Agreement. Customer acknowledges that ESO has no obligation to retain Customer Data more than 60 days after expiration or termination of this Agreement.

## **7 REPRESENTATIONS AND WARRANTIES**

- 7.1 Material Performance of Software.** After it is fully implemented (and subject to Customer's adherence to Sections 3.3, 4.1 and 13.4), ESO warrants that the Software will reliably collect, transmit, store and/or permit access to data in compliance with applicable law and industry standards.
- 7.2 Due Authority.** Each party's execution, delivery and performance of this Agreement and each agreement or instrument contemplated by this Agreement is duly authorized by all necessary corporate or government action.
- 7.3 Customer Cooperation.** Customer agrees to use current operating systems and reasonably and timely cooperate with ESO as necessary for the implementation and operation of the Software.

- 8 DISCLAIMER OF WARRANTIES.** EXCEPT AS OTHERWISE PROVIDED IN SECTION 7, ESO DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, PERFORMANCE, SUITABILITY, TITLE, NON-INFRINGEMENT, OR ANY IMPLIED WARRANTY ARISING FROM STATUTE, COURSE OF DEALING, COURSE OF PERFORMANCE, OR USAGE OF TRADE. EXCEPT AS EXPRESSLY PROVIDED IN SECTION 7, CUSTOMER ACCEPTS THE SOFTWARE "AS-IS" AND "AS AVAILABLE."

## **9 CONFIDENTIALITY**

- 9.1 "Confidential Information"** refers to the following items: (a) any document marked "Confidential"; (b) any information orally designated as "Confidential" at the time of disclosure, provided the disclosing party confirms such designation in writing within five business days; (c) the Software and Documentation, whether or not designated confidential; (d) ESO's security controls, policies, procedures, audits, or other information concerning ESO's internal security posture; (e) any other nonpublic, sensitive information reasonably treated as trade secret or otherwise confidential; and (f) Customer Data which does not comprise PHI. Notwithstanding the foregoing, Confidential Information does not include information that: (i) is in the other party's possession at the time of disclosure free of duty of non-disclosure; (ii) is independently developed without use of or reference to Confidential Information; (iii) becomes known publicly, before or after disclosure, other than as a result of the receiving party's improper action or inaction; (iv) is approved for release in writing by the disclosing party; (v) as to ESO, Customer's Feedback; or (vi) is PHI (*which shall be governed by the Business Associate Agreement rather than this Section*).
- 9.2 Nondisclosure.** Each party shall use Confidential Information of the other party solely to fulfill the terms of this Agreement (the "**Purpose**"). Each party shall (a) ensure that its employees or contractors are bound by confidentiality obligations no less restrictive than those contained herein, and (b) not disclose Confidential Information to any other third party without prior written consent from the disclosing party. Without limiting the generality of the foregoing, the receiving party shall protect Confidential Information with the same degree of care it uses to protect its own confidential information of similar nature and importance, but with no less than reasonable care. A receiving party shall promptly notify the disclosing party of any misuse or misappropriation of Confidential Information of which it is aware.
- 9.3 Termination & Return.** With respect to each item of Confidential Information, the obligations of nondisclosure will terminate three years after the date of disclosure; provided that, such obligations related to Confidential Information constituting ESO's trade secrets shall continue so long as such information remains subject to trade secret protection pursuant to applicable law. Upon termination of this Agreement, a party shall return all copies of Confidential Information to the other or certify the destruction thereof.
- 9.4 Retention of Rights.** This Agreement does not transfer ownership of Confidential Information or grant a license thereto.



**9.5 Open Records and Other Laws.** Notwithstanding anything in this Section to the contrary, the parties expressly acknowledge that Confidential Information may be disclosed if such Confidential Information is required to be disclosed by law, a lawful public records request, or judicial order, provided that prior to such disclosure, written notice of such required disclosure shall be given promptly and without unreasonable delay by the receiving party in order to give the disclosing party the opportunity to object to the disclosure and/or to seek a protective order. The receiving party shall reasonably cooperate in this effort. In addition, Customer may disclose the contents of this Agreement solely for the purpose of completing its review and approval processes under its local rules, if applicable.

**10 INSURANCE.** Throughout the Term (and for a period of at least three years thereafter for any insurance written on a claims-made form) ESO shall maintain in effect the insurance coverage described below:

- 10.1** Commercial general liability insurance with a minimum of \$1 million per occurrence and \$1 million aggregate;
- 10.2** Commercial automobile liability insurance covering use of all non-owned and hired automobiles with a minimum limit of \$1 million for bodily injury and property damage liability;
- 10.3** Worker's compensation insurance and employer's liability insurance or any alternative plan or coverage as permitted or required by applicable law, with a minimum employer's liability limit of \$1 million each accident or disease; and
- 10.4** Computer processor/computer professional liability insurance (a/k/a technology errors and omissions) covering the liability for financial loss due to error, omission or negligence of ESO, and privacy and network security insurance ("cyber coverage") covering losses arising from a disclosure of confidential information (including PHI) with a combined aggregate amount of \$1 million.

## **11 INDEMNIFICATION**

**11.1 IP Infringement.** Subject to the limitations in Section 12, ESO shall defend and indemnify Customer from any damages, costs, liabilities, expenses (including reasonable attorney's fees) ("**Damages**") actually incurred or finally adjudicated as to any third-party claim or action alleging that the Software delivered pursuant to this Agreement infringe or misappropriate any third party's patent, copyright, trade secret, or other intellectual property rights enforceable in the applicable jurisdiction (each, an "**Indemnified Claim**"). If Customer makes an Indemnified Claim under this Section or if ESO determines that an Indemnified Claim may occur, ESO may at its option: (a) obtain a right for Customer to continue using such Software; (b) modify such Software to make it a non-infringing equivalent or (c) replace such Software with a non-infringing equivalent. If (a), (b), or (c) above are not reasonably practicable, either party may, at its option, terminate the relevant Order, in which case ESO will refund any pre-paid Fees on a pro-rata basis for such Order. Notwithstanding the foregoing, ESO shall have no obligation hereunder for any claim resulting or arising from (x) Customer's breach of this Agreement; (y) modifications made to the Software not performed or provided by or on behalf of ESO or (z) the combination, operation or use by Customer (and/or anyone acting on Customer's behalf) of the Software in connection with any other product or service (the combination or joint use of which causes the alleged infringement). This Section 11 states ESO's sole obligation and liability, and Customer's sole remedy, for potential or actual intellectual property infringement by the Software.

**11.2 Indemnification Procedures.** Upon becoming aware of any matter which is subject to the provisions of Sections 11.1 (a "**Claim**"), Customer must give prompt written notice of such Claim to ESO, accompanied by copies of any written documentation regarding the Claim received by the Customer. ESO shall compromise or defend, at its own expense and with its own counsel, any such Claim. Customer will have the right, at its option, to participate in the settlement or defense of any such Claim, with its own counsel and at its own expense; provided, however, that ESO will have the right to control such settlement or defense. ESO will not enter into any settlement that imposes any liability or obligation on Customer without the Customer's prior written consent. The parties will cooperate in any such settlement or defense and give each other full access to all relevant information, at ESO's expense.

## **12 LIMITATION OF LIABILITY**

**12.1 LIMITATION OF DAMAGES.** NEITHER ESO NOR CUSTOMER SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, PUNITIVE OR INCIDENTAL DAMAGES, INCLUDING CLAIMS FOR DAMAGES FOR LOST PROFITS, GOODWILL, USE OF MONEY, INTERRUPTED OR IMPAIRED USE OF THE SOFTWARE, AVAILABILITY OF DATA, STOPPAGE OF WORK OR IMPAIRMENT OF OTHER ASSETS RELATING TO THIS AGREEMENT.

**12.2 SPECIFIC LIABILITY.** LIABILITY SHALL BE LIMITED AS FOLLOWS:

- (a) ESO'S OBLIGATIONS UNDER SECTION 11 SHALL BE LIMITED TO \$500,000.

- (b) DAMAGES ARISING FROM A PARTY'S BREACH OF CONFIDENTIALITY OBLIGATIONS (INCLUDING A BREACH OF OBLIGATIONS REGARDING PROTECTED HEALTH INFORMATION), SHALL BE LIMITED TO \$1,000,000.
- (c) DAMAGES ARISING FROM A PARTY'S WILLFUL MISCONDUCT OR CRIMINAL CONDUCT SHALL NOT BE LIMITED.

- 12.3 GENERAL LIABILITY.** EXCEPT AS EXPRESSLY PROVIDED "SPECIFIC LIABILITY," ESO'S MAXIMUM AGGREGATE LIABILITY FOR ALL CLAIMS OF LIABILITY ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT SHALL NOT EXCEED THE FEES PAID BY (OR ON BEHALF OF) CUSTOMER WITHIN THE PRECEDING 12-MONTH PERIOD UNDER THE APPLICABLE ORDER OR EXHIBIT GIVING RISE TO THE CLAIM.
- 12.4** THE FOREGOING LIMITATIONS, EXCLUSIONS, DISCLAIMERS SHALL APPLY REGARDLESS OF WHETHER THE CLAIM FOR SUCH DAMAGES IS BASED IN CONTRACT, WARRANTY, STRICT LIABILITY, NEGLIGENCE, TORT OR OTHERWISE. INsofar AS APPLICABLE LAW PROHIBITS ANY LIMITATION HEREIN, THE PARTIES AGREE THAT SUCH LIMITATION SHALL BE AUTOMATICALLY MODIFIED, BUT ONLY TO THE EXTENT SO AS TO MAKE THE LIMITATION PERMITTED TO THE FULLEST EXTENT POSSIBLE UNDER SUCH LAW. THE PARTIES AGREE THAT THE LIMITATIONS SET FORTH HEREIN ARE AGREED ALLOCATIONS OF RISK CONSTITUTING IN PART THE CONSIDERATION FOR ESO'S SOFTWARE AND SERVICES TO CUSTOMER, AND SUCH LIMITATIONS WILL APPLY NOTWITHSTANDING THE FAILURE OF THE ESSENTIAL PURPOSES OF ANY LIMITED REMEDY AND EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LIABILITIES.
- 12.5** THIS SECTION 12 SHALL SURVIVE EXPIRATION OR TERMINATION OF THE AGREEMENT.

### **13 CUSTOMER DATA & WORK PRODUCT**

- 13.1 Customer Responsibilities.** The Software allows Customer and its Users to enter, document, and disclose Customer Data, and as such, ESO gives no representations or guarantees about the accuracy or completeness of Customer Data (including PHI) entered, uploaded or disclosed by Users through the Software. Customer is solely responsible for any decisions or actions taken involving patient care or patient care management, whether those decisions or actions were made or taken using information received through the Software.
- 13.2 Use of Customer Data.** Unless it receives Customer's prior written consent, ESO shall not grant any third-party access to Customer Data, except (a) subcontractors that are subject to a reasonable nondisclosure agreement or (b) authorized participants in the case of Software designed to permit Customer to transmit Customer Data. ESO may only use and disclose Customer Data to fulfill its obligations under this Agreement or as required by applicable law or legal or governmental authority. ESO shall give Customer prompt notice of any such legal or governmental demand and reasonably cooperate with Customer in any effort to seek a protective order or otherwise contest such required disclosure, at Customer's expense.
- 13.3 De-identified Data.** CUSTOMER ACKNOWLEDGES AND AGREES THAT, NOTWITHSTANDING ANY OTHER PROVISION HEREIN, ESO MAY USE DE-IDENTIFIED DATA FOR INTERNAL AND EXTERNAL PURPOSES (INCLUDING BENCHMARKING AND RESEARCH), PROVIDED THAT ESO WILL NOT SELL DE-IDENTIFIED DATA TO THIRD PARTIES FOR COMMERCIAL USE. Without limiting the foregoing, ESO will own all rights, title and interest in all Intellectual Property of any aggregated and de-identified reports, summaries, compilations, analysis, statistics or other information derived therefrom.
- 13.4 Internet Access.** Customer is solely responsible for obtaining, maintaining, and securing its network connections, and acknowledges such connections are essential to the effective operation of the Software. ESO makes no representations to Customer regarding the reliability, performance or security of any network or service provider not provided or managed by ESO.
- 13.5 Work Product Ownership.** Unless specifically provided in the applicable Statement of Work, in the event Customer hires ESO to perform Professional Services, ESO alone shall hold all right, title, and interest to all proprietary and intellectual property rights of the Deliverables (including, without limitation, patents, trade secrets, copyrights, and trademarks), as well as title to any copy of software made by or for Customer (if applicable). Customer hereby explicitly acknowledges and agrees that nothing in this Agreement or a separate Order gives the Customer any right, title, or interest to the intellectual property or proprietary know-how of the Deliverables.

## 14 GOVERNMENT PROVISIONS

- 14.1 Compliance with Laws.** Both parties shall comply with and give all notices required by all applicable federal, state and local laws, ordinances, rules, regulations and lawful orders of any public authority bearing on use of the Software and the performance of this Agreement (provided that Customer shall be solely responsible for any such notice required to be given to its employees, agents or patients). Customer acknowledges and agrees that it must fully and accurately report discounts or other incentives under this Agreement on any cost reports or other applicable claims for payment submitted under any federal health care program, including but not limited to Medicare and Medicaid, as required by federal law.
- 14.2 Business Associate Agreement.** The parties agree to the terms of the Business Associate Agreement attached as Exhibit C and incorporated herein by reference.
- 14.3 Equal Opportunity.** The parties shall abide by the requirements of 41 CFR 60-1.4(a), 60-300.5(a) and 60-741.5(a), and the posting requirements of 29 CFR Part 471, appendix A to subpart A, if applicable (prohibiting discrimination on the basis of protected veteran status, disability, race, color, religion, sex, sexual orientation, gender identity or national origin).
- 14.4 Excluded Parties List.** ESO agrees to report to Customer if an employee or contractor is listed by a federal agency as debarred, excluded or otherwise ineligible for participation in federally funded health care programs.

## 15 MISCELLANEOUS

- 15.1 Independent Contractors.** The parties are independent contractors. Neither party is the agent of the other, and neither may make commitments on the other's behalf. The parties agree that no ESO employee or contractor is or will be considered an employee of Customer.
- 15.2 Notices.** Notices provided under this Agreement must be in writing and delivered by (a) certified mail, return receipt requested to a party's principal place of business as forth in the recitals on page 1 of this Agreement, (b) hand delivered, (c) facsimile with receipt of a "Transmission Confirmed" acknowledgment, (d) e-mail to a person designated in writing by the receiving party, or (e) delivery by a reputable overnight carrier service. In the case of delivery by facsimile or e-mail, the notice must be followed by a copy of the notice being delivered by a means provided in (a), (b) or (e). The notice will be deemed given on the day the notice is received.
- 15.3 Merger Clause.** In entering into this Agreement, neither party is relying upon any representations or statements of the other that are not fully expressed in this Agreement; rather, each party is relying on its own judgment and due diligence and expressly disclaims reliance upon any representations or statement not expressly set forth in this Agreement. In the event the Customer issues a purchase order, letter or any other document addressing the Software or Services to be provided and performed pursuant to this Agreement, it is hereby specifically agreed and understood that any such writing is for the Customer's internal purposes only, and that any terms, provisions, and conditions contained therein shall in no way modify this Agreement.
- 15.4 Severability.** To the extent permitted by applicable law, the parties hereby waive any provision of law that would render any clause of this Agreement invalid or otherwise unenforceable in any respect. If a provision of this Agreement is held to be invalid or otherwise unenforceable, such provision will be interpreted to fulfill its intended purpose to the maximum extent permitted by applicable law, and the remaining provisions of this Agreement will continue in full force and effect.
- 15.5 Modifications and Amendments.** This Agreement may not be amended except through a written agreement signed by authorized representatives of each party, provided that the Customer agrees that ESO may rely on informal writings (including emails) of Customer's authorized representatives to (i) terminate Software products and services and (ii) approve or ratify rate or tier increases for Software products and services then in use by Customer.
- 15.6 Affiliate Use of Agreement.** Customer may permit its Affiliates to order Services under this Agreement by executing an Order referencing this Agreement. Each such Affiliate shall be deemed a "Customer" solely for purposes of the applicable Order and shall be responsible for compliance with the terms of this Agreement. Unless otherwise stated in the applicable Order, the Affiliate placing the Order shall be solely responsible for payment of all Fees associated with such Order. For purposes of this Agreement, "Affiliate" means any entity that directly or indirectly controls, is controlled by, or is under common control with Customer, where "control" means the possession, directly or indirectly, of the power or authority to legally bind or obligate such entity, or otherwise direct or cause the direction of the management and policies of such entity, whether through ownership of voting securities, by contract, or otherwise.



- 15.7 Force Majeure.** No delay, failure, or default will constitute a breach of this Agreement to the extent caused by acts of war, terrorism, hurricanes, earthquakes, other acts of God or of nature, strikes or other labor disputes, riots or other acts of civil disorder, embargoes, or other causes beyond the performing party's reasonable control (collectively, "**Force Majeure**"). In such event, however, the delayed party must promptly provide the other party notice of the Force Majeure. The delayed party's time for performance will be excused for the duration of the Force Majeure, but if the event lasts longer than 30 days, the other party may immediately terminate the applicable Order.
- 15.8 Marketing.** If requested by ESO, Customer agrees to reasonably cooperate with ESO's preparation and issuance of a public announcement regarding the relationship of the parties.
- 15.9 Waiver & Breach.** Neither party will be deemed to waive any rights under this Agreement except through an explicit written waiver made by an authorized representative. No waiver of a breach of this Agreement will constitute a waiver of any other breach hereof.
- 15.10 Survival of Terms.** Unless otherwise stated, all of ESO's and Customer's respective obligations, representations and warranties under this Agreement which are not, by the expressed terms of this Agreement, fully to be performed while this Agreement is in effect shall survive the termination of this Agreement.
- 15.11 Ambiguous Terms.** This Agreement will not be construed against any party by reason of its preparation.
- 15.12 Governing Law.** This Agreement, any claim dispute or controversy hereunder (a "**Dispute**") will be governed by (i) the laws of the State of Texas, or (ii) if Customer is a city, county, municipality or other governmental entity, the law of state where Customer is located, in each case foregoing without regard to its conflicts of law. The UN Convention for the International Sale of Goods and the Uniform Computer Information Transactions Act will not apply. In any Dispute, each party will bear its own attorneys' fees and costs and expressly waives any statutory right to attorneys' fees.
- 15.13 Sunset.** ESO may discontinue Support Services for Licensed Software upon six months' notice to Customer.
- 15.14 No Class Actions.** NEITHER PARTY SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS BY OR AGAINST OTHER ESO CUSTOMERS OR PURSUE ANY CLAIM AS A REPRESENTATIVE OR CLASS ACTION OR IN A PRIVATE ATTORNEY GENERAL CAPACITY.
- 15.15 Dispute Resolution.** Customer and ESO will attempt to resolve any Dispute through negotiation or by utilizing a mediator agreed to by the parties, rather than through litigation. Negotiations and mediations will be treated as confidential. If the parties are unable to reach a resolution within 30 days of notice of the Dispute to the other party, the parties may pursue all other courses of action available at law or in equity.
- 15.16 Technology Export.** Customer shall not: (a) permit any third party to access or use the Software in violation of any U.S. law or regulation; or (b) export any software provided by ESO or otherwise remove it from the United States except in compliance with all applicable U.S. laws and regulations. Without limiting the generality of the foregoing, Customer shall not permit any third party to access or use the Software in, or export such software to, a country subject to a United States embargo (as of the Effective Date – Belarus, Cuba, Iran, North Korea, Russia, Sudan, and Syria).
- 15.17 Order of Precedence.** In the event of any conflict between this Agreement, Addenda or other attachments incorporated herein, the following order of precedence will govern: (1) the General Terms and Conditions; (2) any Business Associate Agreement; (3) the applicable Order, with most recent Order taking precedence over earlier ones; and (4) any ESO policy posted online, including without limitation its privacy policy. No amendments incorporated into this Agreement after execution of the General Terms and Conditions will amend such General Terms and Conditions unless it specifically states its intent to do so and cites the section or sections amended.
- 15.18 Counterparts.** This Agreement may be executed in one or more counterparts. Each counterpart will be an original, and all such counterparts will constitute a single instrument.
- 15.19 Signatures.** Electronic signatures on this Agreement or on any Order (or copies of signatures sent via electronic means) are the equivalent of handwritten signatures.

**EXHIBIT B**  
**SUPPORT SERVICES**

1. **DEFINITIONS.** Capitalized terms not defined below shall have the same meaning as in the General Terms & Conditions.
  - 1.1. "Enhancement" means a modification, addition or new release of the Software that when added to the Software, materially changes its utility, efficiency, functional capability or application.
  - 1.2. "E-mail Support" means ability to make requests for technical support assistance by e-mail at any time concerning the use of the then-current release of Software.
  - 1.3. "Error" means an error in the Software, which significantly degrades performance of such Software as compared to ESO's then-published Documentation.
  - 1.4. "Error Correction" means the use of reasonable commercial efforts to correct Errors.
  - 1.5. "Fix" means the repair or replacement of object code for the Software or Documentation to remedy an Error.
  - 1.6. "Initial Response" means the first contact by a Support Representative after the incident has been logged and a ticket generated. This may include an automated email response depending on when the incident is first communicated.
  - 1.7. "Management Escalation" means, if the initial Workaround or Fix does not resolve the Error, notification of management that such Error(s) have been reported and of steps being taken to correct such Error(s).
  - 1.8. "Severity 1 Error" means an Error which renders the Software completely inoperative (e.g., a User cannot access the Software due to unscheduled downtime or an Outage).
  - 1.9. "Severity 2 Error" means an Error in which Software is still operable; however, one or more significant features or functionality are unavailable (e.g., a User cannot access a core component of the Software).
  - 1.10. "Severity 3 Error" means any other error that does not prevent a User from accessing a significant feature of the Software (e.g., User is experiencing latency in reports).
  - 1.11. "Severity 4 Error" means any error related to Documentation or a Customer Enhancement request.
  - 1.12. "Status Update" means if the initial Workaround or Fix cannot resolve the Error, notification of the Customer regarding the progress of the Workaround or Fix.
  - 1.13. "Online Support" means information available through ESO's website ([www.eso.com](http://www.eso.com)), including frequently asked questions and bug reporting via Live Chat.
  - 1.14. "Support Representative" shall be ESO employee(s) or agent(s) designated to receive Error notifications from Customer, which Customer's Administrator has been unable to resolve.
  - 1.15. "Update" means an update or revision to Software, typically for Error Correction.
  - 1.16. "Upgrade" means a new version or release of Software or a particular component of Software, which improves the functionality or which adds functional capabilities to the Software and is not included in an Update. Upgrades may include Enhancements.
  - 1.17. "Workaround" means a change in the procedures followed or data supplied by Customer to avoid an Error without substantially impairing Customer's use of the Software.
2. **SUPPORT SERVICES.**
  - 2.1. Customer will provide at least one administrative employee (the "Administrator" or "Administrators") who will handle all requests for first-level support from Customer's employees with respect to the Software. Such support is intended to be the "front line" for support and information about the Software to Customer's Users. ESO will provide training, documentation, and materials to the Administrator to enable the Administrator to provide technical support to Customer's Users. The Administrator will notify a Support Representative of any Errors that the Administrator cannot resolve and assist ESO in information gathering.
  - 2.2. ESO will provide Support Services consisting of (a) Error Correction(s); (b) Enhancements, Updates and Upgrades that ESO, in its discretion, makes generally available to its customers without additional charge; and (c) E-mail Support, telephone support, and Online Support. ESO may use multiple forms of communication for purposes of submitting periodic status reports

to Customer, including but not limited to, messages in the Software, messages appearing upon login to the Software or other means of broadcasting Status Update(s) to multiple customers affected by the same Error, such as a customer portal.

- 2.3. ESO's support desk will be staffed with competent technical consultants who are trained in and thoroughly familiar with the Software and with Customer's applicable configuration. Telephone support and all communications will be delivered in intelligible English.
- 2.4. Normal business hours for ESO's support desk are Monday through Friday 7:00 am to 7:00 pm CT. Customer will receive a call back from a Support Representative after-hours for a Severity 1 Error.
- 2.5. ESO will provide responses to a technology and/or security assessment of reasonable detail (a "Tech Assessment") upon request prior to (or in connection with) implementation. ESO will provide responses to any subsequent Tech Assessments provided that Customer compensates ESO at its then-current and standard consulting rates for all work performed in connection with such Tech Assessments.

**ERROR PRIORITY LEVELS.** Customer will report all Errors to ESO via ESO's Support Request Form link ([New Case Form - ESO](#)) or by telephone (866-766-9471, option #3). ESO shall exercise commercially reasonable efforts to correct any Error reported by Customer in accordance with the priority level reasonably assigned to such Error by ESO.

- 2.6. Severity 1 Error. ESO shall (i) commence Error Correction promptly; (ii) provide an Initial Response within four hours; (iii) initiate Management Escalation promptly; and (iv) provide Customer with a Status Update within four hours if ESO cannot resolve the Error within four hours.
- 2.7. Severity 2 Error. ESO shall (i) commence Error Correction promptly; (ii) provide an Initial Response within eight hours; (iii) initiate Management Escalation within 48 hours if unresolved; and (iv) provide Customer with a Status Update within 48 hours if ESO cannot resolve the Error within forty-eight hours.
- 2.8. Severity 3 Error. ESO shall (i) commence Error Correction promptly; (ii) provide an Initial Response within three business days; and (iii) provide Customer with a Status Update within seven calendar days if ESO cannot resolve the Error within seven calendar days.
- 2.9. Severity 4 Error. ESO shall provide an Initial Response within seven calendar days.
3. **CONSULTING SERVICES.** If ESO reasonably believes that a problem reported by Customer is not due to an Error in the Software, ESO will so notify Customer. At that time, Customer may request ESO to proceed with a root cause analysis at Customer's expense as set forth herein or in a separate SOW. If ESO agrees to perform the investigation on behalf of Customer, then ESO's then-current and standard consulting rates will apply for all work performed in connection with such analysis, plus reasonable related expenses incurred. For the avoidance of doubt, Consulting Services will include customized report writing by ESO on behalf of Customer.
4. **EXCLUSIONS.**
  - 4.1. ESO shall have no obligation to perform Error Corrections or otherwise provide support for: (i) Customer's repairs, maintenance or modifications to the Software (if permitted); (ii) Customer's misapplication or unauthorized use of the Software; (iii) altered or damaged Software not caused by ESO; (iv) any third-party software; (v) hardware issues; (vi) Customer's breach of the Agreement; and (vii) any other causes beyond the ESO's reasonable control.
  - 4.2. ESO shall have no liability for any changes in Customer's hardware or software systems that may be necessary to use the Software due to a Workaround or Fix.
  - 4.3. ESO is not required to perform any Error Correction unless ESO can replicate such Error on its own software and hardware or through remote access to Customer's software and hardware.
  - 4.4. Customer is solely responsible for its selection of hardware, and ESO shall not be responsible the performance of such hardware even if ESO makes recommendations regarding the same.
5. **MISCELLANEOUS.** The parties acknowledge that from time-to-time ESO may update its support processes specifically addressed in this Exhibit and may do so by posting such updates to ESO's website or otherwise notifying Customer of such updates. Customer will accept updates to ESO's support procedures and any other terms in this Exhibit; provided however, that they do not materially decrease the level of Support Services that Customer will receive from ESO. THESE TERMS AND CONDITIONS DO NOT CONSTITUTE A PRODUCT WARRANTY. THIS EXHIBIT IS AN ADDITIONAL PART OF THE AGREEMENT AND DOES NOT CHANGE OR SUPERSEDE ANY TERM OF THE AGREEMENT EXCEPT TO THE EXTENT UNAMBIGUOUSLY CONTRARY THERETO.

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**EXHIBIT C**  
**HIPAA BUSINESS ASSOCIATE AGREEMENT**

Customer and ESO Solutions, Inc. ("Business Associate") agree that this HIPAA Business Associate Agreement is entered into for the benefit of Customer, which is a covered entity under the Privacy Standards ("Covered Entity"). Pursuant to the ESO Subscription Agreement (the "Agreement") into which this HIPAA Business Associate Agreement (this "BAA") has been incorporated, Business Associate may perform functions or activities involving the use and/or disclosure of PHI on behalf of the Covered Entity, and therefore, Business Associate may function as a business associate. Business Associate, therefore, agrees to the following terms and conditions.

1. Scope. This BAA applies to and is hereby automatically incorporated into all present and future agreements and relationships, whether written, oral or implied, between Covered Entity and Business Associate, pursuant to which PHI is created, maintained, received or transmitted by Business Associate from or on behalf of Covered Entity in any form or medium whatsoever.
2. Definitions. For purposes of this BAA, the terms used herein, unless otherwise defined, shall have the same meanings as used in the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), or the Health Information Technology for Economic and Clinical Health Act ("HITECH"), and any amendments or implementing regulations, (collectively "HIPAA Rules").
3. Compliance with Applicable Law. The parties acknowledge and agree that, beginning with the relevant effective date, Business Associate shall comply with its obligations under this BAA and with all obligations of a business associate under HIPAA, HITECH, the HIPAA Rules, and other applicable laws and regulations, as they exist at the time this BAA is executed and as they are amended, for so long as this BAA is in place.
4. Permissible Use and Disclosure of PHI. Business Associate may use and disclose PHI as necessary to carry out its duties to a Covered Entity pursuant to the terms of the Agreement, as required by law, or as permitted by the Agreement. Business Associate may also use and disclose PHI (i) for its own proper management and administration, and (ii) to carry out its legal responsibilities. If Business Associate discloses Protected Health Information to a third party for either above reason, prior to making any such disclosure, Business Associate must obtain: (i) reasonable assurances from the receiving party that such PHI will be held confidential and be disclosed only as required by law or for the purposes for which it was disclosed to such receiving party; and (ii) an agreement from such receiving party to immediately notify Business Associate of any known breaches of the confidentiality of the PHI.
5. Limitations on Use and Disclosure of PHI. Business Associate shall not, and shall ensure that its directors, officers, employees, subcontractors, and agents do not, use or disclose PHI in any manner that is not permitted by the Agreement or that would violate Subpart E of 45 C.F.R. 164 ("Privacy Rule") if done by a Covered Entity. All uses and disclosures of, and requests by, Business Associate for PHI are subject to the minimum necessary rule of the Privacy Rule.
6. Required Safeguards to Protect PHI. Business Associate shall use appropriate safeguards and comply with Subpart C of 45 C.F.R. Part 164 ("Security Rule") with respect to electronic PHI, to prevent the use or disclosure of PHI other than pursuant to the terms and conditions of this BAA.
7. Reporting to Covered Entity. Business Associate shall report to the affected Covered Entity without unreasonable delay: (a) any use or disclosure of PHI not provided for by the Agreement of which it becomes aware; (b) any breach of unsecured PHI in accordance with 45 C.F.R. Subpart D of 45 C.F.R. 164 ("Breach Notification Rule"); and (c) any security incident of which it becomes aware. With regard to Security Incidents caused by or occurring to Business Associate, Business Associate shall cooperate with the Covered Entity's investigation, analysis, notification and mitigation activities, and except for Security Incidents caused by Covered Entity, shall be responsible for reasonable costs incurred by the Covered Entity for those activities. Notwithstanding the foregoing, Covered Entity acknowledges and shall be deemed to have received advanced notice from Business Associate that there are routine occurrences of: (i) unsuccessful attempts to penetrate computer networks or services maintained by Business Associate; and (ii) immaterial incidents such as "pinging" or "denial of services" attacks.
8. Mitigation of Harmful Effects. Business Associate agrees to mitigate, to the extent practicable, any harmful effect of a use or disclosure of PHI by Business Associate in violation of the requirements of the Agreement, including, but not limited to, compliance with any state law or contractual data breach requirements.
9. Agreements by Third Parties. Business Associate shall enter into an agreement with any subcontractor of Business Associate that creates, receives, maintains or transmits PHI on behalf of Business Associate. Pursuant to such agreement, the subcontractor shall agree to be bound by the same or greater restrictions, conditions, and requirements that apply to Business Associate under this BAA with respect to such PHI.
10. Access to PHI. Within five business days of a request by a Covered Entity for access to PHI about an individual contained in a Designated Record Set, Business Associate shall make available to the Covered Entity such PHI for so long as such information is maintained by Business Associate in the Designated Record Set, as required by 45 C.F.R. 164.524. In the event any individual delivers directly to Business Associate a request for access to PHI, Business Associate shall within five (5) business days forward such request to the Covered Entity.

11. Amendment of PHI. Within five business days of receipt of a request from a Covered Entity for the amendment of an individual's PHI or a record regarding an individual contained in a Designated Record Set (for so long as the PHI is maintained in the Designated Record Set), Business Associate shall provide such information to the Covered Entity for amendment and incorporate any such amendments in the PHI as required by 45 C.F.R. 164.526. In the event any individual delivers directly to Business Associate a request for amendment to PHI, Business Associate shall within five business days forward such request to the Covered Entity.
12. Documentation of Disclosures. Business Associate agrees to document disclosures of PHI and information related to such disclosures as would be required for a Covered Entity to respond to a request by an individual for an accounting of disclosures of PHI in accordance with 45 C.F.R. 164.528 and HITECH.
13. Accounting of Disclosures. Within five business days of notice by a Covered Entity to Business Associate that it has received a request for an accounting of disclosures of PHI, Business Associate shall make available to a Covered Entity information to permit the Covered Entity to respond to the request for an accounting of disclosures of PHI, as required by 45 C.F.R. 164.528 and HITECH.
14. Other Obligations. To the extent that Business Associate is to carry out one or more of a Covered Entity's obligations under the Privacy Rule, Business Associate shall comply with such requirements that apply to the Covered Entity in the performance of such obligations.
15. Judicial and Administrative Proceedings. In the event Business Associate receives a subpoena, court or administrative order or other discovery request or mandate for release of PHI, the affected Covered Entity shall have the right to control Business Associate's response to such request, provided that, such control does not have an adverse impact on Business Associate's compliance with existing laws. Business Associate shall notify the Covered Entity of the request as soon as reasonably practicable, but in any event within seven business days of receipt of such request.
16. Availability of Books and Records. Business Associate hereby agrees to make its internal practices, books, and records available to the Secretary of the Department of Health and Human Services for purposes of determining compliance with the HIPAA Rules.
17. Breach of Contract by Business Associate. In addition to any other rights a party may have in the Agreement, this BAA or by operation of law or in equity, either party may: i) immediately terminate the Agreement if the other party has violated a material term of this BAA; or ii) at the non-breaching party's option, permit the breaching party to cure or end any such violation within the time specified by the non-breaching party. The non-breaching party's option to have cured a breach of this BAA shall not be construed as a waiver of any other rights the non-breaching party has in the Agreement, this BAA or by operation of law or in equity.
18. Effect of Termination of Agreement. Upon the termination of the Agreement or this BAA for any reason, Business Associate shall return to a Covered Entity or, at the Covered Entity's direction, destroy all PHI received from the Covered Entity that Business Associate maintains in any form, recorded on any medium, or stored in any storage system. This provision shall apply to PHI that is in the possession of Business Associate, subcontractors, and agents of Business Associate. Business Associate shall retain no copies of the PHI. Business Associate shall remain bound by the provisions of this BAA, even after termination of the Agreement or BAA, until such time as all PHI has been returned or otherwise destroyed as provided in this Section. For the avoidance of doubt, de-identified Customer Data shall not be subject to this provision.
19. Injunctive Relief. Business Associate stipulates that its unauthorized use or disclosure of PHI while performing services pursuant to this BAA would cause irreparable harm to a Covered Entity, and in such event, the Covered Entity shall be entitled to institute proceedings in any court of competent jurisdiction to obtain damages and injunctive relief.
20. Owner of PHI. Under no circumstances shall Business Associate be deemed in any respect to be the owner of any PHI created or received by Business Associate on behalf of a Covered Entity.
21. Safeguards and Appropriate Use of Protected Health Information. Covered Entity is responsible for implementing appropriate privacy and security safeguards to protect its PHI in compliance with HIPAA. Without limitation, it is Covered Entity's obligation to:
  - 21.1. Not include PHI in information Covered Entity submits to technical support personnel through a technical support request or to community support forums. In addition, Business Associate does not act as, or have the obligations of a Business Associate under the HIPAA Rules with respect to Customer Data once it is sent to or from Covered Entity outside ESO's Software over the internet; and
  - 21.2. Implement privacy and security safeguards in the systems, applications, and software Covered Entity controls, configures and connects to ESO's Software.
22. Third Party Rights. The terms of this BAA do not grant any rights to any parties other than Business Associate and the Covered Entity.
23. Signatures. The signatures to the Agreement (or the document evidencing the parties' adoption thereof) indicate agreement hereto and shall be deemed signatures hereof, whether manual, electronic or facsimile.

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