

## BUSINESS ASSOCIATE AGREEMENT

THIS BUSINESS ASSOCIATE AGREEMENT (this “**Agreement**”), effective as of \_\_\_\_\_ (the “**Effective Date**”), is by and between \_\_\_\_\_, a \_\_\_\_\_ (“**Customer**”), and Cap Software, Inc., a Delaware corporation (“**Cap**”). This Agreement supplements and is made a part of the agreement(s) between the parties governing Customer’s use of Cap’s products and services, including Cap’s Terms of Service or any master services, enterprise, or subscription agreement between the parties (collectively, the “**Services Agreement**”, and such products and services, the “**Services**”).

### RECITALS

WHEREAS, Customer is either (i) a “covered entity” or (ii) a “business associate” of one or more covered entities, in each case as such terms are defined under HIPAA (as defined below);

WHEREAS, pursuant to the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996 (the “Act”) and the Health Information Technology for Economic and Clinical Health Act, part of the American Recovery and Reinvestment Act of 2009 (the “HITECH Act”), the Department of Health and Human Services (“HHS”) has promulgated regulations at 45 C.F.R. Parts 160 through 164, including regulations implementing certain privacy requirements (the “Privacy Rule”), certain security requirements regarding electronic media (the “Security Rule”), and certain breach notification requirements (the “Breach Notification Rule”), each as amended from time to time (the Act, the HITECH Act, the Privacy Rule, the Security Rule, and the Breach Notification Rule, collectively, “HIPAA”);

WHEREAS, in connection with Customer’s use of the Services, Cap may create, receive, maintain, or transmit Protected Health Information (as defined below) on behalf of Customer, thus necessitating a written agreement that meets the applicable requirements of the Privacy Rule and the Security Rule; and

WHEREAS, the parties desire to satisfy the foregoing requirements through this Agreement, and otherwise to address related matters regarding HIPAA on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual agreements and undertakings of the parties, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties, intending to be legally bound, hereby agree as follows:

### 1. Definitions.

The following terms shall have the following meanings when used in this Agreement:

- a. “Breach” shall have the same meaning as the term “breach” in 45 C.F.R. § 164.402.
- b. “Covered Entity” shall have the same meaning as the term “covered entity” in 45 C.F.R. § 160.103.
- c. “Designated Record Set” shall have the same meaning as the term “designated record set” in 45 C.F.R. § 164.501.
- d. “Electronic Protected Health Information” or “Electronic PHI” shall mean Protected Health Information that is “electronic protected health information” as defined in 45 C.F.R. § 160.103.

- e. “Individual” shall have the same meaning as the term “individual” in 45 C.F.R. § 160.103 and shall include a person who qualifies as a personal representative in accordance with 45 C.F.R. § 164.502(g).
- f. “Protected Health Information” or “PHI” shall have the same meaning as the term “protected health information” in 45 C.F.R. § 160.103, except limited to the information received by Cap from or on behalf of Customer, or created, maintained, or received by Cap on behalf of Customer, in connection with the Services.
- g. “Required By Law” shall have the same meaning as the term “required by law” in 45 C.F.R. § 164.103.
- h. “Secretary” shall mean the Secretary of HHS or the designee of the Secretary of HHS.
- i. “Security Incident” shall have the same meaning as the term “security incident” in 45 C.F.R. § 164.304.
- j. “Subcontractor” shall have the same meaning as the term “subcontractor” in 45 C.F.R. § 160.103, except limited to any such individual or entity that creates, receives, maintains, or transmits Protected Health Information on behalf of Cap.
- k. “Unsecured Protected Health Information” shall mean Protected Health Information that is “unsecured protected health information” as defined in 45 C.F.R. § 164.402.

Any capitalized term used but not specifically defined herein shall have the same meaning as set forth in 45 C.F.R. Parts 160 and 164, where applicable. The terms “use,” “disclose,” and “discovery,” or derivations thereof, although not capitalized, shall also have the meanings set forth in HIPAA.

## **2. Relationship of the Parties; Applicability.**

- a. Where Customer is a Covered Entity, Cap is a business associate of Customer, and this Agreement governs Cap’s creation, receipt, maintenance, and transmission of PHI on behalf of Customer.
- b. Where Customer is a business associate of one or more Covered Entities, Cap is a Subcontractor of Customer, this Agreement constitutes a subcontractor business associate agreement satisfying 45 C.F.R. §§ 164.502(e)(1)(ii) and 164.308(b)(2), and references in this Agreement to obligations that run to Customer shall include, where applicable and required by HIPAA, Customer’s Covered Entity customers.
- c. This Agreement applies only to the extent Cap creates, receives, maintains, or transmits PHI on behalf of Customer through the Services. This Agreement does not apply to information that does not constitute PHI or to any features or channels that Cap’s documentation or the Services Agreement identifies as not intended for PHI.

## **3. Obligations and Activities of Cap.**

- a. Cap agrees to not use or disclose Protected Health Information other than as permitted or required by this Agreement or as Required By Law.
- b. Cap agrees to use appropriate safeguards, and to comply, where applicable, with Subpart C of 45 C.F.R. Part 164 with respect to Electronic Protected Health Information, to prevent use or disclosure of the Protected Health Information other than as provided for by this Agreement.

c. Cap agrees to report to Customer any use or disclosure of Protected Health Information not provided for by this Agreement of which Cap becomes aware, including, without limitation, Breaches of Unsecured Protected Health Information as required at 45 C.F.R. § 164.410, and any Security Incident of which it becomes aware. The parties acknowledge and agree that this Section 3(c) constitutes notice by Cap to Customer of the ongoing existence and occurrence of attempted but unsuccessful Security Incidents, for which no additional notice to Customer shall be required. Unsuccessful Security Incidents shall include, but not be limited to, pings and other broadcast attacks on Cap's firewall, port scans, unsuccessful log-on attempts, denials of service, and any combination of the above, so long as such incidents do not result, to the extent Cap is aware, in unauthorized access, use, or disclosure of Electronic Protected Health Information.

d. In accordance with 45 C.F.R. §§ 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, Cap agrees to ensure that any Subcontractors that create, receive, maintain, or transmit Protected Health Information on behalf of Cap agree in writing to the same restrictions, conditions, and requirements that apply to Cap under this Agreement with respect to such Protected Health Information.

e. Upon Customer's written request, Cap agrees to make Protected Health Information maintained by Cap in a Designated Record Set, if any, available to Customer as necessary to satisfy Customer's (or the applicable Covered Entity's) obligations under 45 C.F.R. § 164.524. Customer (or the applicable Covered Entity) shall have sole responsibility to make decisions regarding requests for access to Protected Health Information.

f. Upon Customer's written request, Cap agrees to make any amendment(s) to Protected Health Information maintained by Cap in a Designated Record Set, if any, as necessary to satisfy Customer's (or the applicable Covered Entity's) obligations under 45 C.F.R. § 164.526. Customer (or the applicable Covered Entity) shall have sole responsibility to make decisions regarding requests for amendment of Protected Health Information.

g. Cap agrees to maintain and, upon Customer's written request, make available to Customer such information as is in Cap's possession and is required to provide an accounting of disclosures as necessary to satisfy Customer's (or the applicable Covered Entity's) obligations under 45 C.F.R. § 164.528. Customer (or the applicable Covered Entity) shall have sole responsibility to provide any accounting of disclosures to an Individual.

h. To the extent Customer specifically delegates to Cap in writing one or more of Customer's (or the applicable Covered Entity's) obligations under Subpart E of 45 C.F.R. Part 164, Cap agrees to comply with the requirements of Subpart E that apply to Customer (or such Covered Entity) in the performance of such obligations.

i. Cap agrees to make its internal practices, books, and records relating to the use and disclosure of Protected Health Information available to the Secretary for purposes of determining compliance with HIPAA.

#### **4. Permitted Uses and Disclosures by Cap.**

a. Cap may only use or disclose Protected Health Information as necessary to perform the Services and Cap's obligations under the Services Agreement and this Agreement, or as otherwise permitted by this Section 4.

b. Cap may use or disclose Protected Health Information as Required By Law.

- c. Cap agrees to make uses and disclosures of, and requests for, Protected Health Information consistent with the minimum necessary standard in 45 C.F.R. § 164.502(b) and any guidance issued thereunder.
- d. Cap may use Protected Health Information for the proper management and administration of Cap or to carry out the legal responsibilities of Cap.
- e. Cap may disclose Protected Health Information for the proper management and administration of Cap or to carry out the legal responsibilities of Cap, provided the disclosures are Required By Law, or Cap obtains reasonable assurances from the person to whom the information is disclosed that the information will remain confidential and will be used or further disclosed only as Required By Law or for the purposes for which it was disclosed to the person, and the person notifies Cap of any instances of which it is aware in which the confidentiality of the information has been breached.
- f. Cap may use Protected Health Information to provide Data Aggregation services relating to the Health Care Operations of Customer or the applicable Covered Entity as permitted by 45 C.F.R. § 164.504(e)(2)(i)(B).
- g. Cap may use Protected Health Information to de-identify the information in accordance with 45 C.F.R. §§ 164.502(d) and 164.514(a)-(c), and may use and disclose such de-identified information for any lawful purpose.
- h. Cap may not use or disclose Protected Health Information in a manner that would violate Subpart E of 45 C.F.R. Part 164 if done by Customer or the applicable Covered Entity, except for the specific uses and disclosures set forth in Sections 4(d), 4(e), 4(f), and 4(g) above.

## **5. Obligations of Customer.**

- a. Customer shall notify Cap of any limitation(s) in the notice of privacy practices of Customer or the applicable Covered Entity under 45 C.F.R. § 164.520, to the extent that such limitation may affect Cap's use or disclosure of Protected Health Information.
- b. Customer shall notify Cap of any changes in, or revocation of, the permission by an Individual to use or disclose his or her Protected Health Information, to the extent that such changes may affect Cap's use or disclosure of Protected Health Information.
- c. Customer shall notify Cap of any restriction on the use or disclosure of Protected Health Information that Customer or the applicable Covered Entity has agreed to or is required to abide by under 45 C.F.R. § 164.522, to the extent that such restriction may affect Cap's use or disclosure of Protected Health Information. Customer shall not agree to any such restriction that restricts Cap's use or disclosure of Protected Health Information under the Services Agreement or this Agreement unless such restriction is Required By Law or Cap grants its written consent, which consent shall not be unreasonably withheld.
- d. Except with respect to uses and disclosures by Cap under Sections 4(d), 4(e), 4(f), and 4(g) above, Customer shall not request Cap to use or disclose Protected Health Information in any manner that would not be permissible under Subpart E of 45 C.F.R. Part 164 if done by Customer or the applicable Covered Entity.
- e. Customer shall provide Protected Health Information to Cap in compliance with the minimum necessary standard of the Privacy Rule.

f. Customer represents and warrants that it has obtained and will obtain any consents, authorizations, and/or other legal permissions required under HIPAA and other applicable law for the disclosure of Protected Health Information to Cap.

g. Customer is responsible for implementing and appropriately using the security features and access controls available within the Services with respect to Protected Health Information, including workspace and member access controls, sharing settings, and link protection features. Customer shall not include Protected Health Information in fields, features, or communication channels that are not designed to accept it, including support requests, sales inquiries, and marketing forms.

## **6. Term and Termination.**

a. Term. The term of this Agreement shall commence as of the Effective Date and shall terminate upon the earliest of: (i) the termination or expiration of the Services Agreement; (ii) the termination, expiration, or lapse of Customer's subscription to the Cap plan, tier, or add-on that includes this Agreement, if this Agreement is made available as part of a specific plan, tier, or add-on; or (iii) the date a party terminates this Agreement for cause as authorized in Section 6(b).

b. Termination for Cause. Either party (the "Non-Breaching Party") may terminate this Agreement upon written notice to the other party (the "Breaching Party") if the Non-Breaching Party determines that the Breaching Party has violated a material term of this Agreement and the Breaching Party has not cured the breach or ended the violation within thirty (30) days of the Non-Breaching Party providing written notice thereof to the Breaching Party.

c. Obligations of Cap Upon Termination. Upon termination of this Agreement for any reason, Cap shall: (i) retain only that Protected Health Information which is necessary for Cap to continue its proper management and administration or to carry out its legal responsibilities; (ii) upon Customer's written request, return to Customer, or at Customer's election, destroy the remaining Protected Health Information that Cap maintains in any form, except as provided in clause (i) or to the extent retention is required by applicable law; (iii) continue to use appropriate safeguards and comply with Subpart C of 45 C.F.R. Part 164 with respect to Electronic Protected Health Information to prevent use or disclosure of the Protected Health Information, other than as provided for in this Section 6(c), for as long as Cap retains Protected Health Information; (iv) not use or disclose Protected Health Information retained by Cap other than for the purposes for which such Protected Health Information was retained, subject to the same conditions set out in Sections 4(d) and 4(e) above which applied prior to termination; and (v) return to Customer, or, if agreed to by Customer, destroy Protected Health Information retained by Cap when it is no longer needed by Cap for its proper management and administration or to carry out its legal responsibilities.

d. Survival. The obligations of Cap under Section 6(c) of this Agreement shall survive the termination of this Agreement.

## **7. Miscellaneous.**

a. Regulatory References. A reference in this Agreement to a section in the Privacy Rule, the Security Rule, the Breach Notification Rule, or another provision of HIPAA means the provision as in effect or as amended.

b. Amendment. The parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary to comply with the requirements of HIPAA and any other

applicable law. Otherwise, this Agreement may be modified or amended only upon the mutual written agreement of the parties.

c. Interpretation. Any ambiguity in this Agreement shall be resolved to permit compliance with HIPAA. In the event of a conflict between this Agreement and the Services Agreement with respect to the subject matter hereof, the provisions of this Agreement shall control to the extent of such conflict. This Agreement supersedes and replaces any prior business associate agreements between the parties with respect to any actions of Cap after the Effective Date.

d. Governing Law and Disputes. This Agreement shall be governed by the governing law, dispute resolution, and venue provisions of the Services Agreement. If the Services Agreement does not contain such provisions, this Agreement shall be governed by the laws of the State of Delaware, without regard to its conflicts of law principles.

e. Limitation of Liability. In no event shall Cap's and its present and former affiliates', directors', officers', employees', and agents' aggregate liability arising out of or related to this Agreement and/or the Services Agreement, whether in contract, tort, or under any other theory of liability, exceed the amounts actually paid by and due from Customer under the Services Agreement during the twelve (12) month period immediately preceding the date the cause of action arose. In no event shall Cap or its present and former affiliates, directors, officers, employees, or agents have any liability to Customer, any Covered Entity, or any third party for any lost profits, loss of data, loss of use, costs of procurement of substitute goods or services, or for any indirect, special, incidental, punitive, or consequential damages however caused and, whether in contract, tort, or under any other theory of liability, whether or not Cap has been advised of the possibility of such damages. Because some states or jurisdictions do not allow the exclusion or the limitation of liability for consequential or incidental damages, in such states or jurisdictions Cap's liability shall be limited to the maximum extent permitted by law. This Section 7(e) applies in addition to any limitation of liability or exclusion of damages provisions in the Services Agreement; where both apply, the provision providing the greater limitation of Cap's liability shall control. This Section 7(e) shall survive the expiration or earlier termination of this Agreement.

f. No Third-Party Beneficiaries. Nothing express or implied in this Agreement is intended to confer, nor shall anything herein confer, upon any person other than the parties and their respective successors or permitted assigns, any rights, remedies, obligations, or liabilities whatsoever.

g. Independent Contractors. The parties are independent contractors, and nothing in this Agreement shall be construed to create any agency, partnership, joint venture, or employment relationship between the parties.

h. Assignment. Neither party may assign this Agreement except together with a permitted assignment of the Services Agreement, in which case this Agreement shall be deemed assigned to the same assignee.

i. Severability. In the event any provision of this Agreement is rendered invalid or unenforceable under any new or existing law or regulation, or declared null and void by any court of competent jurisdiction, the remainder of the provisions of this Agreement shall remain in full force and effect if it reasonably can be given effect.

j. Waiver. A waiver by either party of a breach or failure to perform under this Agreement shall not constitute a waiver of any subsequent breach or failure.

k. Counterparts; Electronic Signatures. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. Signatures delivered by electronic means (including electronic signature platforms and scanned copies sent by email) are deemed originals for purposes of execution and proof of this Agreement.

l. Notices. Any notice, consent, request, or other communication required or permitted under this Agreement shall be in writing and delivered personally, by nationally recognized overnight courier, or by email (with confirmation of transmission). Notice sent by overnight courier shall be deemed given one (1) business day after it is dispatched, provided that receipt is acknowledged; notice sent by email shall be deemed given on the business day it is sent. All notices shall be addressed as follows:

**If to Cap:**

Cap Software, Inc.  
1111B S Governors Ave, STE 7573  
Dover, DE 19904  
Attention: Legal  
Email: hello@cap.so

**If to Customer:**

Entity Name: \_\_\_\_\_  
Entity Address: \_\_\_\_\_  
Attention: \_\_\_\_\_  
Email: \_\_\_\_\_

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the dates set forth below. The undersigned represent and warrant that they have the authority to bind the respective parties to this Agreement.

**CAP SOFTWARE, INC.**

By: *Richie McIlroy*

Name: Richie McIlroy

Title: CEO

Date: \_\_\_\_\_

**CUSTOMER**

Entity Name: \_\_\_\_\_

By: \_\_\_\_\_

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

Title: \_\_\_\_\_

Date: \_\_\_\_\_