

**WESTERN NEW YORK CLINICAL  
INFORMATION EXCHANGE, INC.  
D/B/A HEALTHeLINK**

**PARTICIPATION AGREEMENT**

Effective \_\_\_\_\_

WESTERN NEW YORK CLINICAL INFORMATION EXCHANGE, INC.  
D/B/A HEALTHeLINK

TABLE OF CONTENTS

- 1. INTRODUCTION. .... 1
  - 1.1 Nature of Organization. .... 1
  - 1.2 Purposes. .... 1
  - 1.3 Description of Services. .... 2
  - 1.4 Change or Termination of Services. .... 2
- 2. DEFINITIONS. .... 2
  - 2.1 Agreement. .... 2
  - 2.2 Authorized Representative. .... 3
  - 2.3 Authorized User. .... 3
  - 2.4 Charter Member. .... 3
  - 2.5 Data Provider. .... 3
  - 2.6 Data Recipient. .... 3
  - 2.7 Effective Date. .... 3
  - 2.8 Healthcare Operations. .... 3
  - 2.9 HEALTHeLINK. .... 3
  - 2.10 HEALTHeLINK Services. .... 3
  - 2.11 HEALTHeLINK System. .... 4
  - 2.12 HIPAA. .... 4
  - 2.13 Operating Committee. .... 4
  - 2.14 National Health Information Network (“NHIN”). .... 4
  - 2.15 Participant. .... 4
  - 2.16 Participant Type. .... 4
  - 2.17 Participant’s Required Hardware and Software. .... 4
  - 2.18 Policies and Procedures. .... 4
  - 2.19 Protected Health Information (“PHI”). .... 4
  - 2.20 Registration Application. .... 5
  - 2.21 Regional Health Information Organization (“RHIO”). .... 5
  - 2.22 State. .... 5
  - 2.23 Treatment. .... 5
- 3. POLICIES AND PROCEDURES. .... 5
  - 3.1 Generally. .... 5

3.2	Development and Dissemination; Amendments.....	5
4.	REGISTRATION REQUIREMENTS.....	5
4.1	Registration Required. ....	5
4.2	Registration by Application. ....	6
4.3	Participant Type. ....	6
4.4	Review of Registration Form Applications. ....	6
4.5	Acceptance of Registration Application. ....	7
4.6	Effect of Policies and Procedures Upon Registration Application. ....	7
4.7	Changes to Policies and Procedures. ....	7
4.8	Request for Reconsideration or Termination Based on Objection to Change. ....	7
4.9	Termination Without Cause. ....	8
4.10	Participant’s Right to Terminate for Breach of Business Associate Agreement. ....	8
4.11	HEALTHeLINK’s Right to Terminate Registration Applications. ....	8
4.12	Effect of Termination. ....	8
4.13	Survival Provisions. ....	8
5.	AUTHORIZED USERS. ....	9
5.1	Identification of Authorized Users. ....	9
5.2	Passwords and Other Security Mechanisms. ....	9
5.3	No Use by Other than Authorized Users. ....	9
5.4	Responsibility for Conduct of Participant and Authorized Users. ....	10
6.	DATA RECIPIENTS’ RIGHTS AND OBLIGATIONS. ....	10
6.1	Grant of Rights. ....	10
6.2	Permitted Uses. ....	10
6.3	Prohibited Uses. ....	10
7.	DATA PROVIDERS’ RIGHTS AND OBLIGATIONS. ....	11
7.1	Grant of Rights by HEALTHeLINK. ....	11
7.2	Provision of Data. ....	11
7.3	Measures to Assure Accuracy of Data. ....	11
7.4	License. ....	12
7.5	Limitations on Use of PHI. ....	12
8.	ACCESS PROVIDED BY HEALTHeLINK. ....	12
8.1	Description. ....	12
8.2	Grant of License. ....	12
8.3	Copying. ....	13
8.4	Modifications; Derivative Work. ....	13
8.5	Third-Party Software and/or Services. ....	13

8.6	Open-Source Software.....	13
8.7	Infringement Indemnity.....	13
9.	CONFIDENTIALITY AND PROTECTED HEALTH INFORMATION.....	14
9.1	Compliance with HIPAA and Policies and Procedures.....	14
9.2	Additional Requirements.....	14
9.3	Business Associate Agreement.....	15
10.	OTHER OBLIGATIONS OF PARTICIPANTS.....	19
10.1	Compliance with Laws and Regulations.....	19
10.2	System Security.....	20
10.3	Software and/or Hardware Provided by Participant.....	20
10.4	Viruses and Other Threats.....	20
10.5	Training.....	21
11.	HEALTHeLINK’S OPERATIONS AND RESPONSIBILITIES.....	21
11.1	Compliance with Policies and Procedures.....	21
11.2	Use of Contractors.....	21
11.3	Training.....	21
11.4	Telephone and/or E-Mail Support.....	22
11.5	Audits and Reports Access Reporting to Participants.....	22
11.6	Operating Committee.....	22
11.7	Addition of New Participants.....	22
12.	FEES AND CHARGES.....	22
12.1	Agreed-Upon Fees.....	22
12.2	Service Fees.....	22
12.3	Changes to Fee Schedule.....	23
12.4	Miscellaneous Charges.....	23
12.5	Payment.....	23
12.6	Late Charges.....	23
12.7	Suspension of Service.....	23
12.8	Taxes.....	23
12.9	Other Charges and Expenses.....	24
13.	PROPRIETARY INFORMATION.....	24
14.	DISCLAIMERS, EXCLUSIONS OF WARRANTIES, AND LIMITATIONS OF LIABILITY.....	24
14.1	Carrier Lines.....	24
14.2	No Warranties; Limitation of Liability.....	24
14.3	Participant’s Actions.....	25

14.4	HEALTHeLINK’s Actions .....	25
14.5	Unauthorized Access; Validation of Data; Lost or Corrupt Data .....	25
14.6	Inaccurate Data .....	25
14.7	Patient Care .....	26
14.8	Limitation of Liability.....	26
15.	INSURANCE.....	26
15.1	Required Coverage.....	26
15.2	Evidence of Coverage .....	26
15.3	Commercial or Self-Insurance .....	27
16.	DISPUTE RESOLUTION.....	27
16.1	Scope.....	27
16.2	Informal Conference .....	27
16.3	Mediation .....	27
16.4	Arbitration.....	27
17.	GENERAL PROVISIONS. ....	28
17.1	Applicable Law .....	28
17.2	Non-Assignability .....	28
17.3	Independent Contractors .....	29
17.4	Third Party Beneficiaries .....	29
17.5	Supervening Circumstances.....	29
17.6	Severability .....	29
17.7	Notices .....	29
17.8	Waiver.....	29
17.9	Schedules and Exhibits .....	30
17.10	Complete Understanding .....	30
17.11	Counterpart Signatures.....	30

**WESTERN NEW YORK CLINICAL INFORMATION EXCHANGE, INC.  
D/B/A HEALTHeLINK PARTICIPATION AGREEMENT**

This Participation Agreement (this “Agreement”) is entered into as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ (the “Effective Date”) by and among Western New York Clinical Information Exchange, Inc. d/b/a HEALTHeLINK, a New York nonprofit corporation, and each of the participating entities whose name and authorized signature appear on the signature page of this Agreement (each, a “Participant” and collectively, the “Participants”).

1. INTRODUCTION.

1.1 Nature of Organization.

Western New York Clinical Information Exchange, Inc. (“HEALTHeLINK”) is a New York nonprofit, public benefit corporation organized and operated exclusively for one or more purposes recognized as exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code of 1986, as amended. The initial Participants are public and private health care providers, payers, and other health related organizations operating in the New York counties of Erie, Niagara, Chautauqua, Orleans, Genesee, Wyoming, Allegany, and Cattaraugus.

1.2 Purposes.

(a) HEALTHeLINK seeks to reduce the cost and improve the quality and efficiency of health care provided by the Participants through the electronic management and exchange of health information acquired or generated by them in providing, paying for, and reporting on patient care items and services. The Participants anticipate that the electronic management and exchange of such information will simultaneously help eliminate unnecessary repeat testing, increase the accuracy of medical diagnoses, improve medical treatment, and improve outcomes for patients.

(b) HEALTHeLINK is one of a developing system of public/private collaboratives designed to function as regional health information organizations (“RHIOs”). RHIOs are intended to facilitate the electronic transmission, storage, and sharing of health information among participating providers of health care services, third-party payers for health care services, and other interested parties in their respective regions in a manner that complies with all applicable laws and regulations, including without limitation those protecting the privacy and security of health information.

(c) HEALTHeLINK supports various recent initiatives directed towards the development of a cooperative, nationwide health information network. HEALTHeLINK applied for and received a grant for Phase I of the Health Care Efficiency and Affordable Law for New Yorkers (HEAL NY) Capital Grant Program, for projects that address health information technology (HIT) (the “HEAL NY Grant”). The HEAL NY Grant was originally awarded to WNYHealthNet, an affiliate of HEALTHeLINK and was reassigned to HEALTHeLINK effective February, 2007. The HEAL NY Grant was awarded for HEALTHeLINK to design and implement projects to develop community-wide clinical data sharing by developing Clinical

Information Data Exchange projects and projects supporting the creation of e-prescriptions (“eRx”) capabilities. HEALTHeLINK may also choose to directly receive funding through grant contracts or awards from private foundations, the federal government, and others in support of its purposes identified in this Agreement.

(d) The initial intent of HEALTHeLINK and each of the Participants under this Agreement is to share information for purposes described in Section 1.3, and for project evaluation purposes relating to the HEAL NY Grant. Specifically, this Agreement is intended to provide a collaborative framework through which (i) the parties can share information for treatment purposes of individuals seeking healthcare; (ii) HEALTHeLINK can conduct its operations as provided in this Agreement; (iii) HEALTHeLINK, with participation from the Participants, can provide information related to data exchange in support of the HEAL NY Grant; and (iv) the parties can use the information for Healthcare Operations purposes. Any expansion beyond the purposes identified in this Section 1.2(d) must be approved by the Operating Committee (see Section 11.6) and the Board of Directors of HEALTHeLINK. Participant authorizes HEALTHeLINK to use and disclose data generated and received for all such approved purposes in accordance with Section 9 herein. Consistent with these purposes, the initial goal of HEALTHeLINK is to receive data from Data Providers (see Section 4.2) and provide access to such data to Data Recipients (see Section 4.2).

### 1.3 Description of Services.

HEALTHeLINK shall establish and operate a health information exchange and record locator service to assist the Participants in locating and sharing patient information (“HEALTHeLINK System”). The HEALTHeLINK System shall provide a mechanism for resolving conflicts among the disparate health information management systems and applications among the Participants. HEALTHeLINK shall make certain information-sharing and related services (“HEALTHeLINK Services”) available to Participants as may be agreed upon between HEALTHeLINK and each Participant in the Participant’s Registration Application described in Section 4 (Registration Required). An initial list of HEALTHeLINK Services to be made available is provided in Schedule 1.3 attached to and hereby incorporated within this Agreement.

### 1.4 Change or Termination of Services.

HEALTHeLINK may choose to participate in a National Health Information Network (“NHIN”) or link with other regional networks in the future, and may change, add, or delete one or more HEALTHeLINK Services, at any time in its sole discretion following sixty (60) days advance written notice to the Participants. Any such decisions must be approved by the Operating Committee described in Section 11.6.

## 2. DEFINITIONS.

### 2.1 Agreement.

The term “Agreement” shall mean this Participation Agreement.

2.2 Authorized Representative.

The term “Authorized Representative” shall mean an individual designated by a Participant to appoint Operating Committee members. The initial Authorized Representative for each Participant is identified on the signature page of this Agreement.

2.3 Authorized User.

The term “Authorized User” shall mean a Participant and individuals, i.e., natural persons, designated by a Participant to access and use the HEALTHeLINK System on behalf of the Participant. See Section 5.1.

2.4 Charter Member.

“Charter Member” shall mean Catholic Health System, Erie County Medical Center Corporation, Excellus Blue Cross/Blue Shield, HealthNow, Independent Health Association, Inc., Kaleida Health and Roswell Park Cancer Institute.

2.5 Data Provider.

The term “Data Provider” shall mean a Participant that is registered and approved to provide information to HEALTHeLINK for use through the HEALTHeLINK System. See Section 7.1.

2.6 Data Recipient.

The term “Data Recipient” shall mean a Participant that is registered and approved to use the HEALTHeLINK System to obtain health information. See Section 6.1.

2.7 Effective Date.

The term “Effective Date” is defined in the opening paragraph of each Participant’s Participation Agreement. The Effective Date for all the initial Participants is November \_\_\_\_\_, 2008.

2.8 Healthcare Operations.

The term “Healthcare Operations” shall have the meaning set forth in 45 CFR 164.501.

2.9 HEALTHeLINK.

The term “HEALTHeLINK” is defined in Section 1.1 and means Western New York Clinical Information Exchange, Inc.

2.10 HEALTHeLINK Services.

The term “HEALTHeLINK Services” is defined in Section 1.3.

2.11 HEALTHeLINK System.

The term “HEALTHeLINK System” is defined in Section 1.3.

2.12 HIPAA.

The term “HIPAA” shall mean the Health Insurance Portability and Accountability Act of 1996 and the regulations promulgated thereunder at 45 CFR Parts 160, 162, and 164 and any amendments thereto.

2.13 Operating Committee.

The term “Operating Committee” is defined in Section 11.6.

2.14 National Health Information Network (“NHIN”).

The term “National Health Information Network” means the National Health Information Network, also known as the National Health Information Infrastructure. See Section 1.4.

2.15 Participant.

The term “Participant” shall mean an organization, physician or physician group registered with HEALTHeLINK and approved to act as a Data Provider and/or as a Data Recipient.

2.16 Participant Type.

The term “Participant Type” shall mean the category of Participants to which a particular Participant is assigned based upon that Participant’s role in HEALTHeLINK System. See Section 4.3.

2.17 Participant’s Required Hardware and Software.

The term “Participant’s Required Hardware and Software” is defined in Section 10.3.

2.18 Policies and Procedures.

The term “Policies and Procedures” shall mean the policies and procedures created and maintained by HEALTHeLINK as described in Section 3 of this Agreement.

2.19 Protected Health Information (“PHI”).

The term Protected Health Information (“PHI”) shall have the meaning ascribed to it by 45 CFR 160.103. The term Protected Health Information shall include Electronic Protected Health Information as defined in 45 CFR 160.103.

2.20 Registration Application.

The term “Registration Application” is defined in Section 4.2 and means the application submitted by an organization that wishes to become a Participant.

2.21 Regional Health Information Organization (“RHIO”).

The term “Regional Health Information Organization” is defined in Section 1.2(b).

2.22 State.

The term “State” shall mean the State of New York.

2.23 Treatment.

The term “Treatment” shall have the meaning ascribed to it by 45 CFR 164.501.

3. POLICIES AND PROCEDURES.

3.1 Generally.

The Policies and Procedures shall apply to the operation of the HEALTHeLINK System, the provision of HEALTHeLINK Services, and the relationships among HEALTHeLINK and Participants. Each Participant agrees to comply with all Policies and Procedures applicable to it.

3.2 Development and Dissemination; Amendments.

HEALTHeLINK is solely responsible for the development of the Policies and Procedures, and may amend, or repeal and replace, the Policies and Procedures at any time through the Operating Committee processes referenced in Section 11.6 (Operating Committee). Each Participant will have rights to request reconsideration of a change and/or terminate its Registration Application as provided in Section 4.8 (Reconsideration or Termination). HEALTHeLINK shall provide written notice to all Participants of any changes to the Policies and Procedures consistent with the notice provisions provided in this Agreement at least thirty (30) days prior to the effective date of the change. However, if the change is required in order for HEALTHeLINK and/or Participants to comply with applicable laws or regulations, HEALTHeLINK may implement the change within a shorter period of time as HEALTHeLINK determines appropriate under the circumstances. HEALTHeLINK shall notify Participants immediately in the event of a change required to comply with applicable laws and regulations. Policies and Procedures will be posted on the HEALTHeLINK website and will be updated from time to time.

4. REGISTRATION REQUIREMENTS.

4.1 Registration Required.

Only organizations registered with HEALTHeLINK as Participants shall be permitted to access HEALTHeLINK System and use HEALTHeLINK Services. A Participant may be

registered as a Data Provider, as a Data Recipient, or as both, as described in this Section. A Participant may be registered to use some or all of HEALTHeLINK Services, as approved pursuant to that Participant's Registration Application.

#### 4.2 Registration by Application.

Before an organization may enter into this Agreement, it must submit a written application for registration ("Registration Application") as described in this Section 4.2. A Registration Application shall include:

(a) The Participant's relevant Participant Type, as described in Section 4.3. ("Participant Type");

(b) Whether the Participant would be a Data Provider, a Data Recipient, or both (subject to options available to the Participant under the Policies and Procedures corresponding to its Participant Type as referenced in Section 4.3 below);

(c) If the Participant is registered as a Data Recipient, which of HEALTHeLINK Services the Participant wishes to use; and

(d) Such other classifications and terms and conditions as HEALTHeLINK may deem appropriate under its Policies and Procedures.

#### 4.3 Participant Type.

Each Participant shall register to participate in one of the following Participant Types:

- (a) Medical practice;
- (b) Laboratory;
- (c) Hospital;
- (d) Pharmacy;
- (e) Payer; or
- (f) Such other types as may be listed in the Policies and Procedures from time to time.

#### 4.4 Review of Registration Form Applications.

HEALTHeLINK shall review each Registration Application, conduct any related evaluation activities, and approve or disapprove each Registration Application in accordance with the Policies and Procedures and as HEALTHeLINK determines in its sole discretion. HEALTHeLINK shall not be required to approve any Registration Application.

#### 4.5 Acceptance of Registration Application.

Upon HEALTHeLINK's acceptance of a Registration Application, which acceptance shall be provided to Participant in writing, that Registration Application shall be considered the Participant's Registration Application and shall be legally binding upon HEALTHeLINK and the Participant as of the effective date of HEALTHeLINK's acceptance. Notwithstanding the foregoing, the Participant shall not be permitted to access HEALTHeLINK System and use HEALTHeLINK Services until it has entered into this Participation Agreement.

#### 4.6 Effect of Policies and Procedures Upon Registration Application.

Each Registration Application shall require that the Participant agree with all applicable provisions of the Policies and Procedures in effect from time to time. HEALTHeLINK may make exceptions to the Policies and Procedures in a Registration Application at HEALTHeLINK's sole discretion, as long as any such exceptions do not otherwise conflict with the terms of this Agreement and are approved through the Operating Committee processes referenced in Section 11.6.

#### 4.7 Changes to Policies and Procedures.

HEALTHeLINK may amend or repeal and replace the Policies and Procedures at any time upon notice to the Participants as provided in Section 3.2 (Development and Dissemination; Amendments). Subject to Section 4.8 below, any such change to the Policies and Procedures shall be legally binding upon HEALTHeLINK and Participants, as of the effective date of the change.

#### 4.8 Request for Reconsideration or Termination Based on Objection to Change.

If a change to the Policies and Procedures described in Section 4.7 affects a material right or obligation of a Participant under that Participant's Registration Application, and the Participant objects to that change, that Participant may, within thirty (30) days following HEALTHeLINK's notice of the change to Participant, (a) make request to the Operating Committee for reconsideration noting the reasons for the Participant's objection; or (b) terminate its Registration Application by giving HEALTHeLINK written notice thereof. The change objected to will not be implemented with respect to the objecting Participant prior to resolution of a requested reconsideration or to the effective date of termination under this section, unless such change was required in order for HEALTHeLINK and/or Participants to comply with applicable laws or regulations.

##### a. Request for Reconsideration.

In the event of a request for reconsideration, the Operating Committee shall review the request for reconsideration within thirty (30) days of its receipt of the request and make a determination thereon. The determination must be finalized and shall be conveyed in writing to the Participant within five (5) business days of becoming final.

b. Termination Based on Objection.

If Participant chooses not to request reconsideration, or is still unsatisfied after reconsideration, it may terminate its Registration Application by giving HEALTHeLINK written notice of termination pursuant to this subsection 4.8. Such termination will be effective upon receipt on the notice.

4.9 Termination Without Cause.

A Participant may terminate its Registration Application at any time without cause by giving thirty (30) days advance written notice of that termination to HEALTHeLINK. A Participant's ability to terminate its Registration Application for cause shall be governed by the Registration Application and the Policies and Procedures.

4.10 Participant's Right to Terminate for Breach of Business Associate Agreement.

Notwithstanding any other provision of this Section 4 to the contrary, if Section 9 (Business Associate Agreement) applies to a Participant's relationship with HEALTHeLINK, the Participant may terminate its Registration Application as set forth in Section 9.3(g).

4.11 HEALTHeLINK's Right to Terminate Registration Applications.

HEALTHeLINK's ability to terminate any Participant's Registration Application for breach or other cause shall be governed by this Agreement, the Registration Application, and the Policies and Procedures. Notwithstanding the foregoing, HEALTHeLINK may terminate this Agreement, and all Registration Applications, upon (a) forty-five (45) days advance written notice (specifying the date of termination) in the event of termination of the HEAL NY Grant for any reason, or (b) one hundred twenty (120) days advance written notice (specifying the date of termination) upon decision of the Board.

4.12 Effect of Termination.

Upon any termination of a Participant's Registration Applications, that party shall cease to be a Data Provider as of the date of termination and/or Data Recipient (as it was registered under such Registration Application) and shall immediately, as the date of termination, lose any and all rights to use HEALTHeLINK System and/or HEALTHeLINK Services. Provisions of this Agreement identified in Section 4.13 (Survival Provisions) and provisions of the Policies and Procedures which survive termination under the terms thereof shall continue to apply to the former Participant and its Authorized Users following termination.

4.13 Survival Provisions.

The following provisions of this Agreement shall survive any termination of a Participant's Registration Application and/or this Agreement: Section 5.4 (Responsibility for Conduct of Participant and Authorized Users), Section 6.3 (Prohibited Uses), Section 7.5 (Limitations of Use of PHI), Sections 8.3 and 8.4 (Copying and Modifications; Derivative Work), Section 9 (Confidentiality and PHI), Section 13 (Proprietary Information), Section 14.7 (Limitation on Liability), and Section 16 (Dispute Resolution). In addition, the obligations

contained in Section 15 for retention of insurance for a certain period of time following termination of this Agreement shall survive as well.

## 5. AUTHORIZED USERS.

### 5.1 Identification of Authorized Users.

Participant shall provide HEALTHeLINK with a list, in a medium and format approved by HEALTHeLINK, identifying all of Participant's "Authorized Users," together with the information and any items required regarding Authorized Users pursuant to the Policies and Procedures and the Participant's Registration Application. This list shall enable HEALTHeLINK to establish a unique identifier for each Authorized User. Participant shall notify HEALTHeLINK of termination of employment or affiliation of an Authorized User of Participant and take such other actions as are required by the Policies and Procedures with respect to such former Authorized User and take steps within its systems and control to ensure that each former Authorized User's access is terminated.

### 5.2 Passwords and Other Security Mechanisms.

Based on the information provided by Participant for its Authorized Users, HEALTHeLINK shall issue a user identifier and other security measures required by HEALTHeLINK from time to time, to each Authorized User. Upon issuance by HEALTHeLINK of a user identifier and other security measures to the Participant, the Authorized User shall be authorized to access HEALTHeLINK System and use HEALTHeLINK Services consistent with the rights of his or her Participant under its Registration Agreement, the Policies and Procedures, and the Authorized User's role(s) for the Participant. If HEALTHeLINK provides the user identifier and any other security measure(s) to the Participant for implementation with Participant's Authorized Users, the Participant shall be responsible for and oversee the implementation and use of the user identifier and any other measures appropriate to the Authorized User. Any violation by an Authorized User of this Agreement, the Participant's Registration Application, or the Policies and Procedures shall be cause for suspension or termination of the Authorized User's access to HEALTHeLINK System and use of HEALTHeLINK Services. Participant shall notify HEALTHeLINK of removal of an Authorized User from its list of Authorized Users as required under the Policies and Procedures. Participant shall take such actions as are required by the Policies and Procedures and within its systems and control with respect to such formerly authorized user to terminate the individual's access to HEALTHeLINK System and HEALTHeLINK Services. Following receipt of notice from the Participant, HEALTHeLINK shall take actions required by the Policies and Procedures and within its systems and control to terminate the individual's access to HEALTHeLINK System and HEALTHeLINK Services.

### 5.3 No Use by Other than Authorized Users.

Participant agrees to restrict access to HEALTHeLINK System and, if applicable, use of HEALTHeLINK Services, to only those Authorized Users identified by Participant to HEALTHeLINK in accordance with Section 5.1.

#### 5.4 Responsibility for Conduct of Participant and Authorized Users.

Participant shall be solely responsible for all acts and omissions of the Participant and jointly and severally liable for all acts and omissions of the Participant's Authorized Users. Participant shall be solely responsible for the acts or omissions of all other individuals who access the HEALTHeLINK System and/or use HEALTHeLINK Services either through the Participant or by use of any password, identifier, mechanism, or log-on received or obtained from the Participant or any of the Participant's Authorized Users, only if such access was obtained as a direct result of the negligence of the Participant or a Participant's Authorized User.

### 6. DATA RECIPIENTS' RIGHTS AND OBLIGATIONS.

#### 6.1 Grant of Rights.

HEALTHeLINK grants to each Data Recipient, and each Data Recipient by entering into this Agreement and its Registration Agreement accepts, a non-exclusive, personal, nontransferable, limited right to access and use, and allow its Authorized Users to access and use, HEALTHeLINK System and HEALTHeLINK Services consistent with the Data Recipient's registration and approval, subject to the Data Recipient's full compliance with this Agreement, the Policies and Procedures, and the Data Recipient's Registration Application. HEALTHeLINK retains all other rights to HEALTHeLINK System and all components thereof. No Data Recipient shall obtain any rights to HEALTHeLINK System except for the limited rights to use HEALTHeLINK System expressly granted by this Agreement, the Registration Application, or the Policies and Procedures.

#### 6.2 Permitted Uses.

A Data Recipient may use HEALTHeLINK System and HEALTHeLINK Services only for the permitted uses described in this Agreement, or in the Policies and Procedures that apply to all Participants or Data Recipients and specifically to the Participant Type under which the Data Recipient is registered pursuant to Section 4.3 (Participant Type).

#### 6.3 Prohibited Uses.

Without limiting the prohibition against any use not permitted under Section 6.2 above, a Data Recipient shall specifically not use or permit the use of HEALTHeLINK System or HEALTHeLINK Services for any prohibited use described in the Participant's Registration Application, the Policies and Procedures, or described below.

##### a. No Services to Third Parties.

Data Recipient agrees to limit its use of HEALTHeLINK System and HEALTHeLINK Services only for the Data Recipient's own account, and shall not allow access to any third parties, except Authorized Users, or use any part of HEALTHeLINK System or HEALTHeLINK Services to provide separate services or sublicenses to any third party, including without limitation providing any service bureau services, data processing services, or equivalent services to an third party.

b. No Use for Comparative Studies.

Data Recipient shall not use the data of other Participants (i) to compare or analyze the performance of other Participants, or (ii) otherwise utilize data of other Participants for purposes not expressly approved under this Agreement.

c. Marketing.

Data Recipient shall not use HEALTHeLINK System or any HEALTHeLINK Services for purposes of marketing health services or products as defined in 45 CFR 164.501.

7. DATA PROVIDERS' RIGHTS AND OBLIGATIONS.

7.1 Grant of Rights by HEALTHeLINK.

HEALTHeLINK grants to each Data Provider, and each Data Provider by entering into this Agreement and its Registration Agreement accepts, a non-exclusive, personal, nontransferable, limited right to have access to and to use, and for its Authorized Users to have access to and to use, HEALTHeLINK System for the purpose of complying with the obligations described in this Section 7 (Data Provider's Obligations), subject to the Data Provider's full compliance with this Agreement, the Policies and Procedures, and the Data Provider's Registration Agreement. HEALTHeLINK retains all other rights to HEALTHeLINK System and all the components thereof. No Data Provider shall obtain any rights to HEALTHeLINK System except for the limited right to use HEALTHeLINK System expressly granted by this Agreement, the Participant's Registration Application, or the Policies and Procedures.

7.2 Provision of Data.

Each Participant may provide the data described in its Registration Application and required by the Policies and Procedures. Each Participant represents and warrants that, to the best of its knowledge, storing data, including without limitation PHI, on HEALTHeLINK System does not violate any rights, including without limitation copyrights, of any third parties. The parties acknowledge that each Participant continues to own its data and that HEALTHeLINK holds the data on behalf of each Participant as a custodian, and has no ownership rights in the data. Notwithstanding, in the event a Participant's participation in the HEALTHeLINK RHIO terminates for any reason, the terminating Participant acknowledges that any Participant who properly accessed any such data in accordance with the terms of this Agreement, may retain such data after termination.

7.3 Measures to Assure Accuracy of Data.

Each Data Provider shall use reasonable efforts to ensure that all data, including without limitation PHI, it provides to HEALTHeLINK System is accurate, free from serious error, reasonably complete, and provided in a timely manner.

#### 7.4 License.

Subject to Section 7.5 (Limitations on Use of PHI), the Data Provider grants to HEALTHeLINK a fully-paid, worldwide, non-exclusive, royalty-free right and license (a) to sub-license and/or otherwise permit other Participants to access through HEALTHeLINK System and use all PHI provided by the Data Provider pursuant to this Agreement, and (b) to use such PHI to carry out HEALTHeLINK's duties under this Agreement, Registration Agreements with Participants, and the Policies and Procedures, including without limitation system administration, testing, problem identification and resolution, management of HEALTHeLINK System, and otherwise as HEALTHeLINK determines is necessary and appropriate to comply with and carry out its obligations under all applicable federal, state and local laws and regulations and grant agreements. HEALTHeLINK shall also have such right and license with respect to data other than PHI submitted by Participants, subject to any express limitations pertaining to such data contained in the Participant's Registration Application or the Policies and Procedures.

#### 7.5 Limitations on Use of PHI/Indemnity.

a. Data, including without limitation PHI, provided by a Data Provider hereunder shall not be used for any purpose other than one permitted under Section 7.4. Without limiting the foregoing, Data Provider shall make no uses of data prohibited by the Policies and Procedures or by applicable law.

b. HEALTHeLINK will defend, indemnify and hold Participant harmless from any fine, penalty, loss, investigation, proceeding or claim resulting from any breach of Participant's Data or any prohibited use of Participant's Data, provided such breach or prohibited use is not caused by the act or omission of Participant.

### 8. ACCESS PROVIDED BY HEALTHeLINK.

#### 8.1 Description.

HEALTHeLINK shall provide to each Participant access to system required to access the HEALTHeLINK System via a web browser in accordance with policies and procedures established by HEALTHeLINK from time to time.

#### 8.2 Grant of License.

HEALTHeLINK grants to each Participant a non-exclusive, personal, nontransferable, limited license to use the system for access to or use of HEALTHeLINK System and, if the Participant is a Data Recipient, for the purpose of obtaining HEALTHeLINK Services. To the extent HEALTHeLINK's license or rights in any software are subject to an agreement with or grant from any third party, the license and rights received by the Participant are expressly subordinate and limited to the extent of such license and rights of HEALTHeLINK received from the third party. If, for any reason, the license or rights of HEALTHeLINK provided by a third party are limited or terminated, the rights of the Participant shall also be so limited or terminated. HEALTHeLINK represents and warrants that it will have an appropriate valid license with such third party and authority to sublicense to Participant. HEALTHeLINK will

notify Participant in writing if any of Participant's rights regarding access is limited or terminated.

### 8.3 Copying.

The Participant shall not, without HEALTHeLINK's prior written consent, copy any of the software.

### 8.4 Modifications; Derivative Work.

Participant shall not modify, reverse engineer, decompile, disassemble, re-engineer or otherwise create or permit or assist others to create or access the HEALTHeLINK System, or to create any derivative works from the HEALTHeLINK System. The Participant shall not modify the HEALTHeLINK System or combine the HEALTHeLINK System with any other software or services not provided or approved by HEALTHeLINK.

### 8.5 Third-Party Software and/or Services.

The HEALTHeLINK System may include certain third-party software and services, which may require that a Participant enter into separate subscription, licensing or other agreements with third-party vendors, or which may be open-source. Each Participant shall execute such agreements approved by the Operating Committee as may be required for the use of such software or services, and to comply with the terms of any license or other agreement held by HEALTHeLINK from third parties, and any open-source or similar licenses, relating to third-party products.

### 8.6 Open-Source Software.

Nothing in the Policies and Procedures shall be construed to limit any use of open-source software in accordance with the applicable open-source software license (if any).

### 8.7 Infringement Indemnity.

#### a. Infringement Indemnity.

HEALTHeLINK will defend any action brought against Participant to the extent that it is based upon a claim that the HEALTHeLINK System or HEALTHeLINK Services, as provided by HEALTHeLINK to Participant under this Agreement and used within the scope of this Agreement, infringe any patent or copyright or misappropriate any trade secret, and will pay any cost, damages and reasonable attorneys' fees attributable to such claim that are awarded against Participant, provided that Participant: (a) promptly notifies HEALTHeLINK in writing of the claim; (b) grants HEALTHeLINK sole control of the defense and settlement of the claim; and (c) provides HEALTHeLINK, at HEALTHeLINK's expense, with all assistance, information and authority reasonably required for the defense and settlement of the claim.

b. Exclusions.

HEALTHeLINK will have no liability for any infringement or misappropriation claim of any kind to the extent it results from: (a) modification of any HEALTHeLINK System product or any HEALTHeLINK Services made by any party other than HEALTHeLINK, if such a claim would have been avoided if the HEALTHeLINK Services or HEALTHeLINK System were not so modified; (b) the combination, operation or use of the HEALTHeLINK System or HEALTHeLINK Services with software, equipment or devices not supplied by HEALTHeLINK, if such a claim would have been avoided if the HEALTHeLINK Services or HEALTHeLINK System were not used in such combination; (c) Participant's failure to use updated or modified HEALTHeLINK System or HEALTHeLINK Services provided by HEALTHeLINK to avoid a claim; or (d) HEALTHeLINK's compliance with designs, plans or specifications furnished by or on behalf of Participant.

c. Sole Remedy.

The foregoing provisions of this Section 8.7 set forth HEALTHeLINK's sole and exclusive obligations, and Participant's sole and exclusive remedies, with respect to infringement or misappropriation of intellectual property rights of any kind.

9. CONFIDENTIALITY AND PROTECTED HEALTH INFORMATION.

9.1 Compliance with HIPAA and Policies and Procedures.

HEALTHeLINK and each Participant shall comply with all applicable standards for the confidentiality, security, and use of PHI under HIPAA, the Policies and Procedures, any related requirements under other applicable federal, state, and local law or under such Participant's own rules and regulations. Participant agrees to report promptly to HEALTHeLINK any serious breach of the confidentiality of the PHI (e.g., a breach which is not an incidental disclosure permitted under 45 CFR 164.502(a)(1)(iii)) of which it becomes aware. HEALTHeLINK, in turn, shall report any breach to affected Participants. The parties acknowledge and agree that any breach of this Section 9.1 by a breaching party will cause irreparable injury and damages to the non-breaching party for which there is no adequate remedy at law, and as to which money damages cannot be readily ascertained. Accordingly, each party hereby consents in such event to the granting of immediate injunctive relief against any continuing breach, without the necessity of posting bond, together with reasonable attorneys fees and costs reasonably incurred in enforcing this provision.

9.2 Additional Requirements.

Each Participant agrees to enforce the confidentiality provisions of this Agreement by appropriately disciplining individuals within each Participant's organization who violate the confidentiality of PHI pursuant to each Participant's respective confidentiality and disciplinary policies. Such discipline may include, but shall not be limited to: warnings; suspensions; termination; or modification, suspension, or revocation of Authorized User or other privileges.

9.3 Business Associate Agreement.

a. Additional Definitions. When used in this Section 9, the following words shall have the meanings set forth below:

i. “Business Associate” shall mean HEALTHeLINK.

ii. “HITECH Act” shall mean the Health Information Technology for Economic and Clinical Health Act, Title XIII of Division A of the American Recovery and Reinvestment Act of 2009, and the regulations promulgated thereunder and any amendments thereto.

iii. “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).

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

v. “Required By Law” shall have the same meaning as the term “required by law” in 45 CFR § 164.103.

vi. “Secretary” shall mean the Secretary of the Department of Health and Human Services or his designee.

vii. “Security Rule” shall mean the Security Standards for Protection of Electronic Protected Health Information at 45 CFR Parts 160 and 164, Subparts A and C.

b. Obligations and Activities of Business Associate.

i. Business Associate shall comply with 45 CFR §§ 164.308, 164.310, 164.312 and 164.316 and relevant provisions of Subtitle D of the HITECH Act and its related regulations, as such provisions and regulations become effective and as applicable to business associates, as defined by 45 CFR § 160.103.

ii. Business Associate agrees to not use or disclose Protected Health Information other than as permitted or required by 45 CFR § 164.504(e), this Agreement or as Required By Law.

iii. Business Associate agrees to use appropriate administrative, technical, and physical safeguards to prevent use or disclosure of Protected Health Information other than as provided for by this Agreement and 45 CFR § 164.504(e).

iv. Business Associate shall implement administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of Electronic Protected Health Information in accordance with 45 CFR Part 164, Subpart C.

v. Business Associate agrees to mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of Protected Health Information by Business Associate in violation of the requirements of this Agreement.

vi. Business Associate agrees to report to each Participant any use or disclosure of its Protected Health Information not provided for by this Agreement, or any security incident involving or impacting its Electronic Protected Health Information, of which it becomes aware. Business Associate also agrees to report to each Participant in writing the discovery of any Breach of its Unsecured Protected Health Information (as those terms are defined in 45 CFR § 164.402) within twenty-four (24) hours of becoming aware of such Breach. Business Associate shall include in such report, or provide to Participant as promptly thereafter as the information becomes available, the identification of each individual whose Unsecured Protected Health Information has been, or is reasonably believed by the Business Associate to have been, accessed, acquired, used or disclosed during such Breach and a brief description of what happened, including the date of the Breach and the date of the discovery of the Breach. Business Associate shall not contact any individuals suspected to be affected by the Breach without prior written approval of Participant.

vii. Business Associate agrees to ensure that any agent, including a subcontractor, to whom it provides Protected Health Information agrees to the same restrictions and conditions that apply through this Agreement to Business Associate with respect to such information.

viii. Business Associate shall ensure that any agent, including a subcontractor, to whom Business Associate provides Electronic Protected Health Information agrees to implement reasonable and appropriate safeguards to protect such Electronic Protected Health Information.

ix. Business Associate agrees to provide access, at the request of a Participant, and in the time and manner reasonably designated by such Participant, to Protected Health Information in a Designated Record Set, to such Participant in order to meet the requirements under 45 CFR § 164.524.

x. Business Associate agrees to make any amendment(s) to Protected Health Information in a Designated Record Set that any Participant directs or agrees to pursuant to 45 CFR § 164.526 at the request of such Participant, and in the time and manner reasonably designated by such Participant.

xi. Business Associate agrees to make internal practices, books, and records, including policies and procedures relating to the use and disclosure of Protected Health Information available to Participant and to the Secretary, in a time and manner designated by the Participant or the Secretary, for purposes of the Secretary determining Business Associate's or Participant's compliance with the Privacy Rule.

xii. Business Associate agrees to document such disclosures of Protected Health Information and information related to such disclosures as would be required for a Participant to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with 45 CFR § 164.528 and relevant provisions of Subtitle D of the HITECH Act and its related regulations.

xiii. Business Associate agrees to provide to Participant, in a time and manner reasonably designated by such Participant, information collected in accordance with Section 9.3(b)(xii) of this Agreement, to permit such Participant to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with 45 CFR § 164.528 and relevant provisions of Subtitle D of the HITECH Act and its related regulations.

c. Permitted Uses and Disclosures by Business Associate.

Except as otherwise limited in this Agreement, Business Associate may use or disclose Protected Health Information to perform functions, activities, or services for, or on behalf of, any Participant as specified in this Agreement, provided that such use or disclosure would not violate the Privacy Rule if done by a Participant or the minimum necessary policies and procedures of Participant.

d. Specific Use and Disclosure Provisions.

i. Except as otherwise limited in this Agreement, Business Associate may use Protected Health Information for the proper management and administration of the Business Associate or to carry out the legal responsibilities of Business Associate.

ii. Except as otherwise limited in this Agreement, Business Associate may disclose Protected Health Information for the proper management and administration of Business Associate, provided that disclosures are Required By Law, or Business Associate obtains reasonable, written assurances from the person to whom the information is disclosed that it will remain confidential and used or further disclosed only as Required By Law or for the purpose for which it was disclosed to the person, and the person notifies Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached.

iii. Except as otherwise limited in this Agreement, Business Associate may use Protected Health Information to provide Data Aggregation services to any Participant as permitted by 45 CFR § 164.504(e)(2)(i)(B).

iv. Business Associate may use Protected Health Information to report violations of law to appropriate Federal and State authorities, consistent with § 164.502(j)(1).

e. Obligations of the Participants.

i. Each Participant shall notify Business Associate of any limitation(s) in its notice of privacy practices of Participant in accordance with 45 CFR § 164.520, to the

extent that such limitation may affect Business Associate's use or disclosure of Protected Health Information.

ii. Each Participant shall notify Business Associate of any changes in, or revocation of, permission by Individual to use or disclose Protected Health Information, to the extent that such changes may affect Business Associate's use or disclosure of Protected Health Information.

iii. Each Participant shall notify Business Associate of any restriction to the use or disclosure of Protected Health Information that such Participant has agreed to in accordance with 45 CFR § 164.522, to the extent that such restriction may affect Business Associate's use or disclosure of Protected Health Information.

f. Permissible Requests by Participant.

No Participant shall request Business Associate to use or disclose Protected Health Information in any manner that would not be permissible under the Privacy Rule if done by such Participant.

g. Term and Termination.

i. Term. The provisions of this Section 9 shall remain in effect with respect to each Participant until all of the Protected Health Information provided by such Participant to Business Associate, or created or received by Business Associate on behalf of such Participant, is destroyed or returned to such Participant, or, if it is not feasible to return or destroy Protected Health Information, protections are extended to such information, in accordance with the termination provisions in this Section.

ii. Termination for Cause. Upon a Participant's knowledge of a material breach by Business Associate of this Section 9, Participant shall either:

1. Provide a reasonable opportunity for Business Associate to cure the breach or end the violation and terminate this Agreement if Business Associate does not cure the breach or end the violation within the time specified by Participant;

2. Immediately terminate this Agreement if Business Associate has breached a material term of this Agreement and cure is not possible; or

3. If neither termination nor cure is feasible, Participant shall report the violation to the Secretary.

iii. Effect of Termination.

1. Except as provided in Section 9.3(g)(iii)(2) hereof, upon termination of this Agreement, for any reason, Business Associate shall return or destroy all Protected Health Information received from Participant, or created or received by Business Associate on behalf of Participant. This provision shall apply to Protected Health Information that is in the possession of subcontractors or agents of Business Associate.

Business Associate shall retain no copies of the Protected Health Information. If Business Associate destroys PHI, Business Associate shall provide a written certification to Participant that such PHI has been destroyed.

2. In the event that Business Associate determines that returning or destroying the Protected Health Information is not feasible, Business Associate shall provide to Participant notification of the conditions that make return or destruction not feasible. Upon written notification that return or destruction of Protected Health Information is not feasible, Business Associate shall extend the protections of this Agreement to such Protected Health Information, including but not limited to the confidentiality and security protections provided for in this Agreement until such time as Participant's Protected Health information is returned to Participant. Notwithstanding anything to the contrary herein, it is hereby acknowledged and agreed that upon termination of this Agreement, it will not be feasible for Business Associate to return or destroy the Protected Health Information due to the nature of the services being provided by Business Associate.

h. Miscellaneous.

i. Regulatory References. A reference in this Section 9.3 to a section in the Privacy Rule or Security Rule means the section as in effect or as amended.

ii. Amendment. The Parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary for Participant to comply with the requirements of the Privacy Rule and the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191.

iii. Survival. The respective rights and obligations of Business Associate under Section 9.3(g)(iii) of this Agreement shall survive the termination of this Agreement.

iv. Interpretation. Any ambiguity in this Section 9.3(g) shall be resolved to permit Participant to comply with the Privacy Rule and the Security Rule. This Section replaces and supersedes any prior Business Associate Agreements between Participant and HEALTHeLINK.

## 10. OTHER OBLIGATIONS OF PARTICIPANTS.

### 10.1 Compliance with Laws and Regulations

Without limiting any other provision of this Agreement or the provisions of a Registration Application or the Policies and Procedures relating to parties' compliance with applicable laws and regulations, each Participant and HEALTHeLINK agree to comply with applicable federal, state, and local laws, ordinances, and regulations relating to its use of HEALTHeLINK System and HEALTHeLINK Services.

## 10.2 System Security

Each Participant and HEALTHeLINK shall implement or cause to be implemented reasonable security measures with respect to HEALTHeLINK System and HEALTHeLINK Services. Each Participant shall also adopt and implement at least the minimum security measures provided in the Policies and Procedures.

## 10.3 Software and/or Hardware Provided by Participant

Each Participant shall be responsible for procuring and maintaining all equipment and software (other than that referenced in Section 8.1) necessary for it to access HEALTHeLINK System, use HEALTHeLINK Services and provide to HEALTHeLINK all information required to be provided by the Participant (“Participant’s Required Hardware and Software”). Each Participant’s Required Hardware and Software shall conform to HEALTHeLINK’s then-current specifications contained in the Policies and Procedures; provided, however, that methods used to achieve conformity may vary. HEALTHeLINK may propose changes to the specifications from time to time and will provide Participants a reasonable opportunity to comment on their ability to implement the proposed changes prior to HEALTHeLINK making a final decision to proceed with the change. If HEALTHeLINK decides to implement the change, it shall provide reasonable prior notice to each Participant affected by the change. As part of the Participant’s obligation to provide Participant’s Required Hardware and Software, the Participant shall be responsible for ensuring that all the Participant’s computers to be used to interface with HEALTHeLINK System are properly configured and maintained, including but not limited to the operating system, web browser(s), and Internet connectivity.

## 10.4 Viruses and Other Threats

i. In providing any data to the HEALTHeLINK System, the Participant shall use reasonable efforts to ensure that the medium containing such data does not include, and that any method of transmitting such data will not introduce, any program, routine, subroutine, or data which will disrupt the proper operation of the HEALTHeLINK System or any part thereof or any hardware or software used by HEALTHeLINK in connection therewith, or which, upon the occurrence of a certain event, the passage of time, or the taking of or failure to take any action will cause the HEALTHeLINK System or any part thereof or any hardware, software, or data used by HEALTHeLINK or any other Participant in connection therewith, to be destroyed, damaged, or rendered inoperable. Participant shall further use reasonable efforts to prevent unauthorized access to its computers used to access the HEALTHeLINK System; which efforts shall include, without limitation, the use of access appropriate identification and security measures and the prompt installation of all software vendor-recommended security updates (subject to Participant’s standard acceptance testing).

ii. In providing the services described in this Agreement, HEALTHeLINK shall use reasonable efforts to ensure that the HEALTHeLINK System will not introduce any program, routine, subroutine, or data which will disrupt the proper operation of the HEALTHeLINK System or Participant or any part thereof or any hardware or software used by HEALTHeLINK or Participant in connection therewith, or which, upon the

occurrence of a certain event, the passage of time, or the taking of or failure to take any action will cause the HEALTHeLINK System or Participant or any part thereof or any hardware, software, or data used by HEALTHeLINK or any Participant in connection therewith, to be destroyed, damaged, or rendered inoperable. HEALTHeLINK shall further use reasonable efforts to prevent unauthorized access to its computers used to access the HEALTHeLINK System; which efforts shall include, without limitation, the use of access appropriate identification and security measures and the prompt installation of all software vendor-recommended security updates (subject to HEALTHeLINK's standard acceptance testing).

#### 10.5 Training

The Participant shall provide appropriate and adequate training to all of the Authorized Users to familiarize them with their obligations pursuant to their use of the HEALTHeLINK System and HEALTHeLINK Services. In addition, Participant represents that it has trained its workforce in the requirements of applicable laws and regulations governing the confidentiality, privacy, and security of health information, including without limitation requirements imposed under HIPAA.

### 11. HEALTHeLINK'S OPERATIONS AND RESPONSIBILITIES.

#### 11.1 Compliance with Policies and Procedures

HEALTHeLINK shall require that all Participants enter into a Registration Application and shall comply with the Policies and Procedures in such form as HEALTHeLINK determines is appropriate.

#### 11.2 Use of Contractors

HEALTHeLINK shall administer the HEALTHeLINK System and HEALTHeLINK Services and may delegate responsibilities related to such to one or more subcontractors. Consistent with its obligations under Section 9, HEALTHeLINK shall obtain written assurances from its subcontractors that only specifically authorized representatives of the subcontractor shall be granted access to the HEALTHeLINK System in connection with the subcontractor's responsibilities. The Participants acknowledge and agree that access to data (including aggregate data) shall be granted to HEALTHeLINK and its subcontractors for purposes of performing HEALTHeLINK's functions and obligations under this Agreement, including without limitation for purposes of complying with grant agreements requirements.

#### 11.3 Training

HEALTHeLINK shall provide training to Authorized Users identified by the Participant to serve as internal trainers for the Participant and thereafter as HEALTHeLINK determines appropriate. Training will include instruction on access and use of HEALTHeLINK System and HEALTHeLINK Services. HEALTHeLINK shall also provide such user manuals and other resources HEALTHeLINK determines appropriate to support the HEALTHeLINK System and HEALTHeLINK Services. HEALTHeLINK will work with each Participant on a training plan for Participant to train new or additional Authorized Users when added by the Participant.

#### 11.4 Telephone and/or E-Mail Support

HEALTHeLINK shall provide, by telephone, e-mail, and/or other means, support and assistance in resolving difficulties in accessing and using the HEALTHeLINK System and HEALTHeLINK Services during hours and on days as provided in the Policies and Procedures.

#### 11.5 Audits and Reports Access Reporting to Participants

Upon request, Participant will be provided with copies of monthly reports relating to operations as prepared by subcontractors. The foregoing summaries shall be provided at no cost. Additional detail about a Participant's own PHI may be obtained by a Participant as made available by HEALTHeLINK under the Policies and Procedures. Other usage and audit trail reports will be delivered as defined in the Policy and Procedures.

#### 11.6 Operating Committee.

(a) **Composition.** HEALTHeLINK shall create and maintain an Operating Committee (the "Operating Committee"), which shall act as a resource to HEALTHeLINK's Board of Directors. The composition of the Operating Committee shall be determined by the Board of Directors of HEALTHeLINK in accordance with the Bylaws of HEALTHeLINK. Actions taken by the Operating Committee must be ratified by the Executive Director of HEALTHeLINK and are subject to amendment or revocation by the Board of Directors of HEALTHeLINK.

(b) **Meetings and Responsibilities of Operating Committee.** The Operating Committee shall meet not less than quarterly to consider and resolve various issues pertaining to HEALTHeLINK System and HEALTHeLINK Services.

#### 11.7 Addition of New Participants

The Participants acknowledge that additional Participants may be added to this Agreement upon approval of the Executive Director of HEALTHeLINK. Subsequent Participants shall be required to execute a counterpart of this Agreement, as it may have been amended from time to time, with an effective date corresponding to the new Participant's Registration Application.

### 12. FEES AND CHARGES.

#### 12.1 Agreed-Upon Fees

The Policies and Procedures and the terms of each Participant's Registration Application with respect to the payment of fees and charges shall apply.

#### 12.2 Service Fees

Unless the Participant's Registration Application provides otherwise, each Participant shall pay to HEALTHeLINK service fees for those HEALTHeLINK Services for which the Participant has registered in accordance with the Policies and Procedures. Although

HEALTHeLINK charges no fees as of the initial effective date of this Agreement, HEALTHeLINK may choose to institute fees for non-Charter Member Participants in the future if approved through the Finance Committee of HEALTHeLINK, the Operating Committee process provided for amendments of the Policies and Procedures and HEALTHeLINK's Board of Directors. Participant shall be given thirty (30) days advance written notice of the institution of fees.

### 12.3 Changes to Fee Schedule

HEALTHeLINK may change its Policies and Procedures related to fees at any time upon thirty (30) days prior written notice to Participants consistent with the provisions of Section 3.2.

### 12.4 Miscellaneous Charges

Unless the Participant's Registration Application provides otherwise, the Participant also shall pay HEALTHeLINK's charges for all goods or services that HEALTHeLINK provides at the Participant's request that are not specified in HEALTHeLINK's then-current Policy and Procedures ("Miscellaneous Charges").

### 12.5 Payment

The Participant shall pay all Service Fees and any Miscellaneous Charges within thirty (30) days following the documented date of mailing of invoice by HEALTHeLINK sent to the Participant's address as shown in HEALTHeLINK's records.

### 12.6 Late Charges

Service Fees and Miscellaneous Charges not paid to HEALTHeLINK within thirty (30) days following the due date are subject to a late charge of five percent (5%) of the amount owed and interest thereafter at the rate of one and one-half percent (1½%) per month on the outstanding balance, or the highest amount permitted by law, whichever is lower.

### 12.7 Suspension of Service

Failure to pay Service Fees and Miscellaneous Charges within thirty (30) days following the due date may result in suspension or termination of the Participant's access to HEALTHeLINK System and/or use of HEALTHeLINK Services. A reconnection fee as contained in the Policies and Procedures or otherwise set by HEALTHeLINK from time to time shall be assessed to re-establish connection after suspension or termination due to non-payment.

### 12.8 Taxes

All Service Fees and Miscellaneous Charges shall be exclusive of federal, state, municipal, or other government excise, sales, use, occupational, or similar taxes existing as of the date of this Agreement or enacted in the future. Participant shall pay any tax (excluding taxes on HEALTHeLINK's net income) that HEALTHeLINK may be required to collect or pay, now or at any time in the future, and that are imposed upon the sale or delivery of items or services provided pursuant to the Policies and Procedures.

## 12.9 Other Charges and Expenses

Participant shall be solely responsible for any other charges or expenses Participant incurs in connection with HEALTHeLINK System or HEALTHeLINK Services, including without limitation, telephone and equipment charges, and fees charged by third-party vendors of products and services.

## 13. PROPRIETARY INFORMATION

HEALTHeLINK and Participant shall comply with the Policies and Procedures and the prohibitions contained in this Agreement with respect to prohibited uses and requirements for non-disclosure of confidential and proprietary information of HEALTHeLINK and Participants. HEALTHeLINK agrees that no aggregate data concerning a Participant's operations (e.g., data on patient volume, charges to patients or third-party payers and similar reimbursement data, or Participants' practice patterns) will be provided to other Participants or published in an identifiable form without the written permission of the identified Participant; provided, however, the Parties understand and agree that certain data, including aggregate data, must be used and provided to HEAL NY for evaluation purposes required under HEAL NY's Grant Agreement with the State of New York that provides funding for the start-up and operations of HEALTHeLINK. All such uses and disclosures must be accomplished in a manner that complies with HIPAA and New York State law, and must be approved by the Operating Committee.

## 14. DISCLAIMERS, EXCLUSIONS OF WARRANTIES, AND LIMITATIONS OF LIABILITY.

### 14.1 Carrier Lines

Participant acknowledges that in connection with use of the HEALTHeLINK System and receipt of HEALTHeLINK Services access to HEALTHeLINK System is to be provided over various facilities and communications lines, and information will be transmitted over local exchange and internet backbone carrier lines and through routers, switches, and other devices (collectively, "carrier lines") owned, maintained, and serviced by third-party carriers, utilities, and internet service providers, all of which are beyond HEALTHeLINK's control. HEALTHeLINK assumes no liability for or relating to the integrity, privacy, security, confidentiality, or use of any information while it is transmitted on the carrier lines, or any delay, failure, interruption, interception, loss, transmission, or corruption of any data or other information attributable to transmission on the carrier lines. Use of the carrier lines is solely at Participant's risk and is subject to all applicable local, state, national, and international laws.

### 14.2 No Warranties; Limitation of Liability.

EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION 14, ACCESS TO HEALTHeLINK SYSTEM, USE OF HEALTHeLINK SERVICES AND THE INFORMATION OBTAINED BY A DATA RECIPIENT PURSUANT TO THE USE OF THOSE SERVICES AND SOFTWARE ARE PROVIDED "AS IS" AND "AS AVAILABLE" WITHOUT ANY WARRANTY OF ANY KIND, EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. IT IS EXPRESSLY AGREED THAT IN NO

EVENT SHALL HEALTHELINK BE LIABLE FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, OR EXEMPLARY DAMAGES, INCLUDING BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUES, LOSS OF USE, OR LOSS OF INFORMATION OR DATA, WHETHER A CLAIM FOR ANY SUCH LIABILITY OR DAMAGES IS PREMISED UPON BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, OR ANY OTHER THEORIES OF LIABILITY, EVEN IF HEALTHELINK HAS BEEN APPRISED OF THE POSSIBILITY OR LIKELIHOOD OF SUCH DAMAGES OCCURRING. HEALTHELINK DISCLAIMS ANY AND ALL LIABILITY FOR ERRONEOUS TRANSMISSIONS AND LOSS OF SERVICE RESULTING FROM COMMUNICATION FAILURES BY TELECOMMUNICATION SERVICE PROVIDERS OR OTHER THIRD PARTIES. THE FOREGOING SHALL NOT APPLY TO A BREACH OF SECTIONS 9 OR 13 OF THIS AGREEMENT.

#### 14.3 Participant's Actions

Participant shall be responsible for any damage to another Participant's computer system, loss of data, and any damage to HEALTHeLINK System caused by Participant, an Authorized User of Participant, or any person using a user ID assigned to Participant or Participant's employees, contractors, subcontractors or agents.

#### 14.4 HEALTHeLINK's Actions

HEALTHeLINK shall be responsible for any damage to Participant's computer system, loss of data and any damage to HEALTHeLINK System caused by HEALTHeLINK or its employees, contractors, subcontractors or agents.

#### 14.5 Unauthorized Access; Validation of Data; Lost or Corrupt Data

HEALTHeLINK is not responsible for unauthorized access to Participant's transmission facilities or equipment by individuals or entities using HEALTHeLINK System or for unauthorized access to, or alteration, theft, or destruction of Participant's data files, programs, procedures, or information through HEALTHeLINK System, whether by accident, fraudulent means or devices, or any other method, except to the extent such resulted from negligent acts or omissions of HEALTHeLINK. Participant is solely responsible for validating the accuracy of all output and reports and protecting Participant's data and programs from loss by implementing appropriate security measures, including routine backup procedures. Participant waives any damages against HEALTHeLINK occasioned by lost or corrupt data, incorrect reports, or incorrect data files, except to the extent such damages resulted from acts or omissions of HEALTHeLINK.

#### 14.6 Inaccurate Data

All data to which access is made through HEALTHeLINK System and/or HEALTHeLINK Services originates from Participants and not from HEALTHeLINK. All such data is subject to change arising from numerous factors, including without limitation, changes to patient health information made at the request of the patient, changes in the patient's health condition, the passage time, and other factors. HEALTHeLINK neither initiates the transmission

of any data nor monitors the specific content of data being transmitted. Without limiting any other provision of the Policies and Procedures, HEALTHeLINK shall have no responsibility for or liability related to the accuracy, content, currency, completeness, or delivery of any data either provided by a Data Provider, or used by a Data Recipient, pursuant to this Agreement or the Policies and Procedures, except to the extent negligent acts or omissions of HEALTHeLINK result in HEALTHeLINK failing to correctly format or display information to Data Recipients as it was received by HEALTHeLINK from Data Providers.

#### 14.7 Patient Care

Without limiting any other provision of the Policies and Procedures, Participant and Participant's Authorized Users shall be solely responsible for all decisions and actions taken or not taken involving patient care, utilization management, and quality management for their respective patients and clients resulting from or in any way related to the use of HEALTHeLINK System or HEALTHeLINK Services or the data made available thereby. No Participant or Authorized User shall have any recourse against, and each hereby waives, any claims against HEALTHeLINK for any loss, damage, claim, or cost relating to or resulting from its own use or misuse of HEALTHeLINK System and/or HEALTHeLINK Services or the data made available thereby, except to the extent such resulted from the acts or omissions of HEALTHeLINK.

#### 14.8 Limitation of Liability

Notwithstanding anything in the Policies and Procedures to the contrary, to the maximum extent permitted by applicable laws, the aggregate liability of HEALTHeLINK, and HEALTHeLINK's officers, directors, employees and other agents, under this Agreement, regardless of theory of liability, shall be limited to one million dollars (\$1,000,000).

### 15. INSURANCE.

#### 15.1 Required Coverage

HEALTHeLINK shall maintain, throughout the term of this Agreement, at its sole expense, the insurance described in Exhibit A, as well as such professional and general liability insurance coverage as it deems reasonable and necessary to insure itself and its officers, directors, and employees against any third party claim or cause of action arising out of the performance of this Agreement. Each Participant shall maintain, throughout the term of this Agreement, at its sole expense, such professional and general liability insurance coverage as it deems reasonable and necessary to insure itself and its officers, directors, and employees against any third party claim or cause of action arising out of the performance of this Agreement. In the event of termination of this Agreement for any reason, HEALTHeLINK and each Participant either shall maintain its insurance coverage called for under this Section for a period of not less than three (3) years, or shall provide an equivalent extended reporting endorsement ("tail policy").

#### 15.2 Evidence of Coverage

HEALTHeLINK and each Participant shall provide proof of such required coverage upon request. In the event of a Participant's failure to provide proof of such continuing coverage

within thirty (30) days following request for such proof from HEALTHeLINK, for Participants other than Charter Members, HEALTHeLINK shall have the right to purchase such coverage and bill Participant for the premium, as well as the right to offset any such premium amounts against any amounts owed to Participant by HEALTHeLINK. Participant shall pay HEALTHeLINK the billed amount within ten (10) days after Participant's receipt of billing.

### 15.3 Commercial or Self-Insurance

The insurance coverage required under this Agreement may be provided through one or more commercial insurance policies through a self insurance fund reasonably satisfactory to HEALTHeLINK, or through a combination of commercial and self-insurance.

## 16. DISPUTE RESOLUTION.

### 16.1 Scope

Any controversy, dispute, or disagreement arising out of or relating to this Agreement, the Policies and Procedures, or any Participant's Registration Application (individually and collectively referred to in this Section 16 as "this Agreement"), or the breach of this Agreement, (referred to in this Section as a "dispute") shall be settled according to the procedure set forth in this Section.

### 16.2 Informal Conference

In the event a dispute arises between or among any of the parties concerning their respective duties and obligations under this Agreement, each party shall be obligated to meet and confer with the other(s) in good faith, on reasonable notice, and at a mutually agreeable location. The parties agree that if any party refuses to participate in such a conference, or if such a conference fails to produce a mutually acceptable resolution of the dispute within fifteen (15) calendar days after the parties' receipt of notice of the dispute, the other party or parties may submit the matter to mediation or arbitration pursuant to this Section.

### 16.3 Mediation

In the event a dispute arises between or among the parties that cannot be settled by informal conference as set forth above, the parties may, on mutual agreement, submit the matter to mediation to be conducted in Erie County, New York. The process for selecting the mediator shall be determined by the mutual written consent of the parties. If the parties fail to agree to a process within ten (10) calendar days from a request, the requesting party may proceed to invoke the arbitration process provided for herein. The consent of any party to such mediation may be withdrawn at any time, without cause.

### 16.4 Arbitration.

(a) In the event a dispute cannot be settled by informal conference or mediation as set forth above, or in the event either party refuses or withdraws consent to mediation, the matter shall be settled by arbitration in Erie County, New York, unless otherwise agreed to by the parties. The process for selecting the arbitrator(s), and the rules for arbitration, shall be

determined by the mutual written consent of the parties. If the parties fail to agree to an arbitrator or panel of arbitrators, or the rules for arbitration within ten (10) calendar days after receipt of a demand for arbitration, the arbitration shall proceed in accordance with the American Health Law Association's (AHLA) Dispute Resolution Rules, except as modified below. Judgment on the award rendered by the arbitrator or panel of arbitrators may be entered in any court of competent jurisdiction. Punitive damages may not be awarded.

(b) Immediately after the filing of the submission or the answering statement or the expiration of the time within which the answering statement is to be filed, the AHLA shall send simultaneously to each party to the dispute an identical list of ten (10) (unless the AHLA decides that a greater number is appropriate) names of persons chosen from AHLA's National Roster of Arbitrators. The parties will attempt to agree on an arbitrator from the submitted list, and if they are able to do so, they will promptly advise the AHLA of their choice. The same person may serve as both mediator and arbitrator only with the consent of all parties.

(c) If the parties are unable to agree on an arbitrator within fifteen (15) calendar days of the date the AHLA transmitted the list, each party to the dispute shall have an additional seven (7) calendar days in which to strike names objected to, number the remaining names in order of preference, and return the list to the AHLA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on each party's list, and in accordance with the designated order of mutual preference, the AHLA shall invite the acceptance of one (1) arbitrator to serve. If the parties fail to agree on any of the persons named within the time specified by AHLA, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AHLA shall appoint a three-person panel of arbitrators from among other members of AHLA's National Roster of Arbitrators. The arbitrator selection process set forth above shall apply regardless of whether there are two or more claimants or two or more respondents involved in the dispute.

(d) Each party shall bear its own costs and expenses, and an equal share of the arbitrators' and administrative fees of arbitration.

## 17. GENERAL PROVISIONS.

### 17.1 Applicable Law

The interpretation of this Agreement, the Policies and Procedures, or any Participant's Registration Application (individually and collectively referred to in this Section 17 as "this Agreement"), and the resolution of any dispute arising under this Agreement, shall be governed by the laws of the State of New York. Venue for any action at law or in equity to interpret or enforce the terms and conditions of this Agreement or to enforce any arbitration award under this Agreement shall lie exclusively in the state or federal courts of Erie County, New York.

### 17.2 Non-Assignability

No benefit or obligation of any party to this Agreement may be assigned or transferred by either party, either voluntarily or by operation of law, without the prior written consent of the

other party, which such party may withhold in its sole discretion. The foregoing shall not apply to an assignment or transfer to any entity merging with, or acquired by Participant.

### 17.3 Independent Contractors

It is mutually understood and agreed that in performing their respective duties and obligations hereunder, the parties hereto are at all times acting as independent contractors with respect to each other. Nothing in this Agreement shall constitute or be construed to create a partnership or joint venture between or among the parties.

### 17.4 Third Party Beneficiaries

There shall be no third party beneficiaries of this Agreement.

### 17.5 Supervening Circumstances

Neither Participant nor HEALTHeLINK shall be deemed in violation of any provision of this Agreement if it is prevented from performing any of its obligations by reason of: (a) severe weather and storms; (b) earthquakes or other natural occurrences; (c) strikes or other labor unrest; (d) power failures; (e) nuclear or other civil or military emergencies; (f) acts of legislative, judicial, executive, or administrative authorities; or (g) any other circumstances that are not within its reasonable control.

### 17.6 Severability

Any provision of this Agreement that shall prove to be invalid, void, or illegal, shall in no way affect, impair, or invalidate any other provision of this Agreement, and such other provisions shall remain in full force and effect.

### 17.7 Notices

Any and all notices required or permitted under this Agreement shall be sufficient if given in writing and hand delivered or sent by United States Certified Mail, postage prepaid, return receipt requested or by overnight delivery service with confirmation of delivery to the address provided by HEALTHeLINK or by the Participant in the Participant's application for registration or such different addresses as a party may designate in writing. Notice given by hand delivery will be effective on delivery. Notice given by Certified Mail or overnight courier will be effective the day after it is mailed or sent. The party giving notice by Certified Mail or overnight courier should retain a postmarked Certified Mail Receipt or equivalent documentation as evidence of the mailing date. A copy of any notice to HEALTHeLINK shall be sent to: Hiscock & Barclay, LLP, 1100 M&T Center, 3 Fountain Plaza, Buffalo, NY 14203, Attn: Herbert J. Glöse, Esq.

### 17.8 Waiver

No provision of this Agreement shall be deemed waived and no breach excused, unless such waiver or consent shall be in writing and signed by the party claimed to have waived or consented. Any consent by any party to, or waiver of a breach by the other, whether expressed or

implied, shall not constitute consent to, waiver of, or excuse for, any other different or subsequent breach.

17.9 Schedules and Exhibits

The schedules referenced in this Agreement are numbered to correspond to the Section or subsection number in which they are first referenced. Such schedules, along with any exhibits thereto, are an essential part of the agreement of the parties, and shall be considered for all purposes a part of this Agreement.

17.10 Complete Understanding

This Agreement, including each Participant's Registration Application and the Policies and Procedures, constitute the entire understanding of the parties, and there are no other written or oral understandings or promises between the parties with respect to the subject matter of any this Agreement other than those contained or referenced herein. In the event of any conflict between the provisions of this Participation Agreement and the provisions of a Registration Agreement or the Policies and Procedures, the terms of this Participation Agreement shall govern. In the event of any conflict between the provisions of a Participant's Registration Application and the Policies and Procedures, the document providing greatest specificity to the issue in question shall control. All modifications or amendments to this Agreement shall be in writing and signed by all parties.

17.11 Counterpart Signatures.

This Agreement may be signed in one or more counterparts, all of which when taken together will constitute one agreement.

**[Signature Page Follows]**

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the dates indicated below.

WESTERN NEW YORK CLINICAL  
INFORMATION EXCHANGE, INC.  
d/b/a HEALTHeLINK

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

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

PARTICIPANT:

\_\_\_\_\_  
(Practice Name)

\_\_\_\_\_  
(Practice Address)

\_\_\_\_\_  
(City, State, Zip Code)

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

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

## **Schedule 1.3**

### **HEALTHeLINK Services**

- e-prescribing to include sending prescriptions, refill notifications, electronically satisfying refill request, patient medication history as made available by Rx Hub, formulary information/compliance for payers participating in HEALTHeLINK.
- Diagnostic data exchange:
  - Lab
  - Radiology
  - ADT
  - Transcribed report
- Critical Clinical Information Exchange
  - EMR to EMR connectivity – ability for disparate EMR’s from different provider facilities to be exchanged
  - Information delivery for Public Health purposes
  - Capture and distribute patient encounter clinical information

**EXHIBIT A**  
**HEALTHeLINK INSURANCE REQUIREMENTS**

1. INSURANCE TO BE MAINTAINED BY HEALTHeLINK

Prior to commencing work under this Agreement, HEALTHeLINK, at its own cost and expense, shall procure and maintain insurance for the coverages listed below, written for not less than the limits specified for each coverage or required by law, whichever is greater, and including the provisions enumerated below:

1.1. Commercial General Liability

Bodily Injury and Property Damage Limit	\$1,000,000	each occurrence
Products/Completed Operations Limit	\$1,000,000	aggregate
Personal Injury & Advertising Injury Limit	\$1,000,000	each person
General Aggregate	\$2,000,000	

Coverage is to apply on an occurrence basis only. No endorsement or modification of this policy limiting the scope of coverage for Contractual Liability, Products/Completed Operations, or Personal Injury shall be permitted. In addition, no designated Premises/Operations limitation shall be permitted.

1.2. Automobile Liability

Owned, Hired and Non-Owned Autos

Combined Single Limit for Bodily Injury & Property Damage	\$1,000,000 each accident
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1.3. Workers' Compensation & Employers' Liability

Statutory coverage complying with the law of each state in which HEALTHeLINK's employees are headquartered or domiciled with Employers' Liability limits of not less than \$100,000 Each Accident and \$100,000 Each Employee for Disease and \$500,000 Policy Limit for Disease, or the minimum level required by HEALTHeLINK's Excess Umbrella Liability insurance company, whichever is greater.

1.4. Excess "Umbrella" Liability

Combined Single Limit for Bodily Injury & Property Damage	\$2,000,000 each occurrence \$2,000,000 aggregate
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Coverage is to apply on an occurrence basis only, in excess of the other Liability coverages required in 1.1, 1.2, and 1.3 above and shall be no more restrictive than such scheduled underlying insurance.

1.5 Technology and Information Errors and Omissions Coverage

\$2,000,000 each wrongful act

Liability for claims from Wrongful Acts (including but not limited to defamation; any form of invasion or infringement of rights of privacy; infringement of title, slogan, trademark, trade name; misuse of intellectual property rights or confidential information; inadvertent transmission of a virus; damage to a third party's computer's system or data; errors, omissions or negligent acts) arising out of services provided under this Participation Agreement.

1.6. Additional Insureds

The Participants and their respective officers, employees and agents shall be named as Additional Insureds under the policies required in 1.1 and 1.4 providing coverage for ongoing operations. The insurance protection afforded to the Participants under such policies shall apply on a primary basis and any insurance (or self-insurance program) maintained by the Participants shall not contribute with the insurance afforded to the Participants as Additional Insureds.

1.7. Financial Rating of Insurers

The insurance companies providing the required coverages shall be licensed to do so in New York State, and shall be rated no lower than "A-" by the most recent Best's Key Rating Guide or Best's Agent's Guide, and shall have a Best's Financial Size Category of not less than VIII, unless otherwise agreed to by the Participants.

1.8. Notice of Cancellation, etc.

Each policy shall be endorsed to provide 30 days advance notice to the Participants of cancellation, non-renewal or material reduction in coverage by the insurer, except in the case of cancellation or termination due to non-payment of premium, in which case only 15 days advance notice shall be required. HEALTHeLINK further agrees to provide Participants with 30 days advance written notice of cancellation, non-renewal or material reduction on the part of HEALTHeLINK with respect to any of the required insurance coverages.

1.9. Deductibles or Self-Insured Retentions

Deductibles or self-insured retentions of up to \$50,000 shall be permitted with the understanding that HEALTHeLINK (and not the Participants) shall be responsible for

such deductible or self-insured retention. Deductibles or self-insured retentions greater than \$50,000 shall require the approval of the HEALTHeLINK Board of Directors.

1.10. General Provisions

1.10.1 *Cross-Liability.* If HEALTHeLINK’s liability policies do not contain the standard ISO separation of insureds provision, or an equivalent clause, such policies shall be endorsed to provide cross-liability coverage.

1.10.2 *Claims-Made Coverage.* For any liability coverages maintained on a claims-made basis, the following provisions apply unless otherwise agreed to by the Participants:

1.10.2.1 If the claims-made coverage terms designate a specific retroactive date, HEALTHeLINK shall maintain a retroactive date which is not later than the earlier of (a) the date of the commencement of the term of this Agreement, or (b) the original coverage retroactive date for HEALTHeLINK’s first claims-made policy for each and every coverage provided on a claims-made basis;

1.10.2.2 For the duration of this Agreement, or any subsequent renewals, if the retroactive date is advanced or if the policy is materially changed, cancelled or not renewed, HEALTHeLINK shall purchase, at its own expense, an extended reporting period endorsement. This endorsement must provide an extended reporting period (“tail” coverage) of three years or the minimum as prescribed by the Insurance Department of the State of New York, whichever is greater;

1.10.2.3 Upon termination of the services provided to any of the Participants by HEALTHeLINK, HEALTHeLINK shall maintain such claims-made coverage without interruption for three years or a period of time equal to the length of any extended reporting period requirement as specified above, whichever is greater (the extended term of protection). If the retroactive date is advanced or if the policy is materially changed, cancelled or not renewed during this period of time, HEALTHeLINK shall purchase, at its own expense, an extended reporting period endorsement covering a term of three years or the minimum as prescribed by the Insurance Department of the State of New York, whichever is greater. It is understood that the length of this extended reporting period endorsement may be reduced to coincide with any time remaining in the extended term of protection.

1.11. Evidence of Insurance

HEALTHeLINK shall deliver separately to Participant, prior to commencement of the work, Certificates of Insurance acceptable to the Participant certifying that policies of insurance for the required coverages have been issued and are in effect and comply with the requirements herein. Upon expiration or cancellation of any policy during the period the coverages under such policy are required to be maintained, HEALTHeLINK shall immediately deliver to each Participant a Certificate of Insurance evidencing proper renewal or replacement of the policy.

- 1.11.1 All certificates shall confirm that 30 days written notice will be provided to each Participant prior to cancellation, non-renewal or material reduction in coverage.
- 1.11.2 The words “endeavor to” and “but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives” shall be deleted from the cancellation provision of all certificates provided by HEALTHeLINK.
- 1.11.3 The NAIC or AM Best Identification Number must be shown on the certificate after the name of each insurance company to allow accurate identification of the insurer(s).
- 1.11.4 Certificates evidencing Liability coverage under which the Participants are required to be named as an Additional Insured must state that “[Participant’s Name] and its respective officers, employees and agents are included as Additional Insureds on a primary basis with respect to any other insurance or self-insurance programs afforded to, or maintained by, [Participant’s Name].” The certificate must specify the policies under which such Additional Insured status has been granted and a copy of the Additional Insured Endorsement(s) or Policy Provision(s) that grant(s) the required Additional Insured status must be attached to the certificate.
- 1.11.5 Failure of a Participant to demand such Certificate of Insurance or failure of a Participant to identify a deficiency in a certificate that is provided shall not be construed as a waiver of HEALTHeLINK’s obligation to maintain such insurance.
- 1.11.6 Each Participant shall have the right, but not the obligation, to prohibit HEALTHeLINK from providing services until such certificate indicating full compliance with the requirements herein has been received and approved by the Participant.
- 1.11.7 Certificates of Insurance shall be sent to the designated representative of each Participant and the address specified elsewhere in this agreement.

1.11.8 Participant shall provide certified copies of any insurance policies required herein within 10 days of any Participant's written request for same.

1.12. Adequacy of Insurance

The Participants do not in any way represent that the insurance specified herein, whether in scope of coverage or limits of coverage, is adequate or sufficient to protect the business or interest of the HEALTHeLINK.

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