ITEM # 19-0814

CITY OF SANTA FE

Software as a Service Agreement

This Software as a Service (SaaS) Agreement (this "**Agreement**"), dated October 15, 2019 (the "**Effective Date**"), is by and between TouchPhrase Development, LLC, a Colorado limited liability company ("**Provider**") and City of Santa Fe, a new Mexico municipal corporation ("**Customer**") (collectively, the "**Parties**").

WHEREAS, Customer wishes to procure from Provider the software services described herein for the purpose of community case management for purposes of health treatment, and Provider wishes to provide such services to Customer, each on the terms and conditions set forth in this Agreement;

WHEREAS, on or around July, 2019, the City determined that the Provider is a sole source ("**Sole Source**") provider for the software services described herein for the next 12-month period;

WHEREAS, Sole Source designation expires at twelve months and most be re-applied for and re-determined for Provider to remain a Sole Source provider; and

WHEREAS, all terms and conditions of the Sole Source designation and the Provider's response to such document(s) are incorporated herein by reference;

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Definitions. Unless defined elsewhere in this Agreement, terms have the meaning as used in the Health Insurance Portability and Accountability Act and regulations promulgated thereunder ("HIPAA") or as set forth below.

"**Acceptance**" or "**Accepted**" shall mean the approval, after Quality Assurance, of all Services by Customer's IT Director.

"**Access Credentials**" means any user name, identification number, password, license or security key, security token, PIN or other security code, method, technology or device used, alone or in combination, to verify an individual's identity and authorization to access and use the Hosted Services.

"Accounting Log" means accounting records compiled and maintained by Provider regarding the usage of the Program by Customer, which records may include, for example, a schedule of the times at which a Program was used by Customer and the amount of time any given Authorized User used the Program or any portion thereof.

"**Authorized User**" means each of the individuals authorized to use the Services pursuant to Section 3.1 and the other terms and conditions of this Agreement as identified in the Subscription Proposal.

"**Customer Data**" means, other than Resultant Data, information, data and other content, in any form or medium that is collected, downloaded or otherwise received, directly or indirectly from Customer or an Authorized User by or through the Services. For the avoidance of doubt, Customer Data does not include any patient information or other related information, such as Accounting Logs.

"**Customer Systems**" means the Customer's information technology infrastructure, including computers, software, hardware, databases, electronic systems (including database management systems) and networks, whether operated directly by Customer or through the use of third-party services.

"**De-identified Information**" means information that has been de-identified in accordance with the provisions of the Privacy Rule, and to "De-Identify" means to make information into De-Identified Information.

"**Documentation**" means any manuals, instructions or other documents or materials that the Provider provides or makes available to Customer in any form or medium and which describe the functionality, components, features or requirements of the Services or Provider Materials, including any aspect of the installation, configuration, integration, operation, use,

support or maintenance thereof.

"**Harmful Code**" means any software, hardware or other technology, device or means, including any virus, worm, malware or other malicious computer code, the purpose or effect of which is to (a) permit unauthorized access to, or to destroy, disrupt, disable, distort, or otherwise harm or impede in any manner any (i) computer, software, firmware, hardware, system or network or (ii) any application or function of any of the foregoing or the security, integrity, confidentiality or use of any data Processed thereby, or (b) prevent Customer or any Authorized User from accessing or using the Services or Provider Systems as intended by this Agreement. Harmful Code does not include any Provider Disabling Device.

"**IT Director**" shall mean the Information Technology Director for the City.

"**Intellectual Property Rights**" means any and all registered and unregistered rights granted, applied for or otherwise now or hereafter in existence under or related to any patent, copyright, trademark, trade secret, database protection or other intellectual property rights laws, and all similar or equivalent rights or forms of protection, in any part of the world.

"**Law**" means any statute, law, ordinance, regulation, rule, code, order, constitution, treaty, common law, judgment, decree or other requirement of any federal, state, local or foreign government or political subdivision thereof, or any arbitrator, court or tribunal of competent jurisdiction.

"**Losses**" means any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs or expenses of whatever kind, including reasonable attorney fees and the costs of enforcing any right to indemnification hereunder and the cost of pursuing any insurance providers.

"**Permitted Use**" means any use of the Services by an Authorized User for the benefit of Customer solely for the purpose of community case management for purposes of health treatment in the course of the Customer's ordinary business.

"**Person**" means an individual, corporation, partnership, joint venture, limited liability entity, governmental authority, unincorporated organization, trust, association or other entity.

"**Protected Health Information**" means any information so defined under HIPAA and any regulations promulgated thereunder.

"**Privacy Rule**" means the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Parts 160, 162, and 164.

"**Process**" means to take any action or perform any operation or set of operations that the Services are capable of taking or performing on any data, information or other content, including to collect, receive, input, upload, download, record, reproduce, store, organize, compile, combine, log, catalog, cross-reference, manage, maintain, copy, adapt, alter, translate or make other derivative works or improvements, process, retrieve, output, consult, use, perform, display, disseminate, transmit, submit, post, transfer, disclose or otherwise provide or make available, or block, erase or destroy. "**Processing**" and "**Processed**" have correlative meanings.

"**Project Manager**" means the Customer's Mobile Integrated Health Officer, in conjunction with the ITT Director.

"**Provider Disabling Device**" means any software, hardware or other technology, device or means (including any back door, time bomb, time out, drop dead device, software routine or other disabling device) used by Provider or its designee to disable Customer's or any Authorized User's access to or use of the Services automatically with the passage of time or under the positive control of Provider or its designee.

"**Provider Materials**" means the Service Software, Specifications, Documentation and Provider Systems and any and all other information, data, documents, materials, works and other content, devices, methods, processes, hardware, software and other technologies and inventions, including any deliverables, technical or functional descriptions, requirements, plans or reports, that are provided or used by Provider or any Subcontractor in connection with the Services or otherwise comprise or relate to the Services or Provider Systems. For the avoidance of doubt, Provider Materials include Resultant Data and any information, data or other content derived from Provider's monitoring of Customer's access to or use of the Services, but do not include Customer Data.

"**Provider Personnel**" means all individuals involved in the performance of Services as employees, agents or independent contractors of Provider or any Subcontractor.

"**Provider Systems**" means the information technology infrastructure used by or on behalf of Provider in performing the Services, including all computers, software, hardware, databases, electronic systems (including database management systems) and networks, whether operated directly by Provider or through the use of third-party services.

"**Quality Assurance**" shall mean a planned and systematic pattern of all actions necessary to provide adequate confidence that the provision of Services conforms to established requirements, Customer needs, and user expectations.

"**Representatives**" means, with respect to a Party, that Party's and its Affiliates' employees, officers, directors, consultants, agents, independent contractors, service providers, sublicensees, subcontractors and legal advisors.

"**Resultant Data**" means information, data and other content that is derived by or through the Services from Processing Customer Data and is sufficiently different from such Customer Data that such Customer Data cannot be reverse engineered or otherwise identified from the inspection, analysis or further Processing of such information, data or content. For the avoidance of doubt, Resultant Data includes all De-Identified Information that comes into Provider's possession as a result of this Agreement or that Provider may at any time create.

"**Security Rule**" means the Security Standards for the Protection of Electronic Protected Health Information at 45 CFR Part 160, 162, and 164.

"**Service Software**" means the Provider software application or applications and any third-party or other software, and all new versions, updates, revisions, improvements and modifications of the foregoing, that Provider provides remote access to and use of as part of the Services.

"**Source Code**" shall mean the human-readable programming instructions organized into sets of files which represent the business logic for the application which might be easily read as text and subsequently edited, requiring compilation or interpretation into binary or machine-readable form before being directly useable by a computer.

"**Specifications**" means the specifications for the Services set forth in Provider's policies as they may be updated from time to time.

"**Territory**" means the United States.

"**Third Party Materials**" means materials and information, in any form or medium, including any software, documents, data, content, specifications, products, equipment or components of or relating to the Services that are not proprietary to Provider.

2. Services.

2.1 Services. Subject to and conditioned on Customer's and its Authorized Users' compliance with the terms and conditions of this Agreement, during the Term, Provider shall use commercially reasonable efforts to provide to Customer and its Authorized Users the services described in the attached **Exhibit A**, **Exhibit D**, and this Agreement (collectively, the "**Services**") in accordance with the Specifications and terms and conditions hereof, including to host, manage, operate and maintain the Service Software for remote electronic access and use by Customer and its Authorized Users ("**Hosted Services**") in substantial conformity with the Specifications at all times except for:

(a) Scheduled Downtime in accordance with Section 5.3;

(b) Service downtime or degradation due to a Force Majeure Event;

(c) any other circumstances beyond Provider's reasonable control, including Customer's or any Authorized User's use of Third Party Materials, misuse of the Hosted Services, or use of the Services other than in compliance with the express terms of this Agreement and the Specifications; and

(d) any suspension or termination of Customer's or any Authorized Users' access to or use of the Hosted Services as permitted by this Agreement.

2.2 Service and System Control. Except as otherwise expressly provided in this Agreement, as between the Parties:

(a) Provider has and will retain sole control over the operation, provision, maintenance and management of the Services and Provider Materials, including the: (i) Provider Systems; (ii) location(s) where any of the Services are performed; (iii) selection, deployment, modification and replacement of the Service Software; and (iv) performance of Support Services and Service maintenance, upgrades, corrections and repairs; and

(b) Customer has and will retain sole control over the operation, maintenance and management of, and all access to and use of, the Customer Systems, and sole responsibility for all access to and use of the Services and Provider Materials by any Person by or through the Customer Systems or any other means controlled by Customer or any Authorized User, including any: (i) information, instructions or materials provided by any of them to the Services or Provider; (ii) results obtained from any use of the Services or Provider Materials; and (iii) conclusions, decisions or actions based on such use.

2.3 Service Management. Each Party shall, throughout the Term, maintain within its organization a service manager to serve as such Party's primary point of contact for day-to-day communications, consultation and decision-making regarding the Services. Each service manager shall be responsible for providing all day-to-day consents and approvals on behalf of such Party under this Agreement. Each Party shall ensure its service manager has the requisite organizational authority, skill, experience and other qualifications to perform in such capacity. Each Party shall use commercially reasonable efforts to maintain the same service manager in place throughout the Term. If either Party's service manager ceases to be employed by such Party or such Party otherwise wishes to replace its service manager, such party shall promptly name a new service manager by written notice to the other Party.

2.4 Changes. Provider reserves the right, in its sole discretion, to make any changes to the Services and Provider Materials that it deems necessary or useful to: (a) maintain or enhance (i) the quality or delivery of the Provider's services to its customers, (ii) the competitive strength of or market for Provider's services or (iii) the Services' cost efficiency or performance; or (b) to comply with applicable Law. Without limiting the foregoing, either Party may, at any time during the Term, request in writing changes to the Services. The Parties shall evaluate and, if agreed, implement all such requested changes in accordance with a mutually-agreed change order. No requested changes will be effective unless and until memorialized in a written change order signed by both Parties, except that Customer may increase or decrease the number of Authorized Users for any Services pursuant to Section 3.4.

2.5 Subcontractors and staff. To the extent otherwise permitted in this Agreement, Provider may from time to time in its discretion engage third parties to perform Services (each, a "**Subcontractor**"). Provider shall conduct criminal background checks and not utilize any staff, including subcontractors, to fulfill the obligations of the Agreement who has been convicted of any crime of dishonesty, including but not limited to criminal fraud, or otherwise convicted of any felony or any misdemeanor offense for which incarceration for a minimum of 1 year is an authorized penalty, Provider shall promote and maintain an awareness of the importance of securing the Customer's information among Provider's employees and agents.

2.6 Suspension or Termination of Services. Provider may, directly or indirectly, and by use of a Provider Disabling Device or any other lawful means, suspend, terminate or otherwise deny Customer's, any Authorized User's or any other Person's access to or use of all or any part of the Services or Provider Materials, without incurring any resulting obligation or liability, if: (a) Provider receives a judicial or other governmental demand or order, subpoena or law enforcement request that expressly or by reasonable implication requires Provider to do so; or (b) Provider reasonably believes, in its sole discretion, that: (i) Customer or any Authorized User has failed to comply with any material term of this Agreement and, after written notification from Provider regarding such breach, Customer fails to cure the breach within a reasonable amount of time not to exceed 30 days; (ii) Provider reasonably believes, in its sole discretion, that Customer, or accessed or used the Services beyond the scope of the rights granted or for a purpose not authorized under this Agreement or in any manner that does not comply with any material instruction or requirement of the Specifications; (iii) Customer or any Authorized User is, has been, or is likely to be involved in any fraudulent, misleading or unlawful activities; or (iv) this Agreement expires or is terminated. This Section 2.6 does not limit any of Provider's other rights or remedies, whether at law, in equity or under this Agreement.

2.7 Source Code; Software Features; Updates and Upgrades.

a) For each maintenance release and software update, the Provider will timely provide that release or update to the Customer via digital means at the Contractor's expense.

b) Provider agrees to not re-bundle features in a manner that results in the Customer having to purchase new software for these features.

c) Provider delivers the application as Service Software. As such, the application may be updated from time to time. Any changes are for the enhancement of the application that all clients receive. Provider shall provide Customer with prior written notice of any application upgrade and update.

2.8 Operational Metrics: Provider shall do the following:

a) Provide to Customer advance notice and Release Notes for major upgrades and system changes;

b) Track system availability and reliability, i.e., Mean Time Between Failures (MTBF) and Mean Time To Repair (MTTR), and disclose this information with the Customer on request; and

c) Perform continuous security vulnerability scanning and track all results therefrom; this is to include Network, Access Control, Data, and Cloud infrastructure.

3. Authorization and Customer Restrictions.

3.1 Authorization. Subject to and conditioned on Customer's payment of the Fees and compliance and performance in accordance with all other terms and conditions of this Agreement, Provider hereby authorizes Customer to access and use, solely in the Territory and during the Term, the Services and such Provider Materials as Provider may supply or make available to Customer solely for the Permitted Use by and through Authorized Users in accordance with the Specifications and the conditions and limitations set forth in this Agreement. This authorization is non-exclusive and non-transferable.

3.2 Reservation of Rights. Nothing in this Agreement grants any right, title or interest in or to (including any license under) any Intellectual Property Rights in or relating to, the Services, Provider Materials or Third Party Materials, whether expressly, by implication, estoppel or otherwise. All right, title and interest in and to the Services, the Provider Materials and the Third Party Materials are and will remain with Provider and the respective rights holders in the Third Party Materials.

3.3 Authorization Limitations and Restrictions. Customer shall not, and shall not permit any other Person to, access or use the Services or Provider Materials except as expressly permitted by this Agreement and, in the case of Third-Party Materials, the applicable third-party license agreement. For purposes of clarity and without limiting the generality of the foregoing, Customer shall not, except as this Agreement expressly permits:

(a) copy, modify or create derivative works or improvements of the Services or Provider Materials;

(b) rent, lease, lend, sell, sublicense, assign, distribute, publish, transfer or otherwise make available any Services or Provider Materials to any Person, including on or in connection with the internet or any time-sharing, service bureau, software as a service, cloud or other technology or service;

(c) reverse engineer, disassemble, decompile, decode, adapt or otherwise attempt to derive or gain access to the source code of the Services or Provider Materials, in whole or in part;

(d) bypass or breach any security device or protection used by the Services or Provider Materials or access or use the Services or Provider Materials other than by an Authorized User through the use of his or her own then valid Access Credentials;

(e) input, upload, transmit or otherwise provide to or through the Services or Provider Systems, any information or materials that are unlawful or injurious, or contain, transmit or activate any Harmful Code;

(f) damage, destroy, disrupt, disable, impair, interfere with or otherwise impede or harm in any manner the Services, Provider Systems or Provider's provision of services to any third party, in whole or in part;

(g) remove, delete, alter or obscure any trademarks, Specifications, Documentation, warranties or disclaimers, or any copyright, trademark, patent or other intellectual property or proprietary rights notices from any Services or Provider Materials, including any copy thereof;

(h) access or use the Services or Provider Materials in any manner or for any purpose that infringes, misappropriates or otherwise violates any Intellectual Property Right or other right of any third party, or that violates any applicable

Law;

(i) access or use the Services or Provider Materials for purposes of competitive analysis of the Services or Provider Materials, the development, provision or use of a competing software service or product or any other purpose that is to the Provider's detriment or commercial disadvantage; or

(j) otherwise access or use the Services or Provider Materials beyond the scope of the authorization granted under Section 3.1.

3.4 Service Use and Data Storage. Exhibit A sets forth a schedule of fees (the "**Fees**") for designated levels of Hosted Service usage and data storage (each a "**Service Allocation**"), beginning with the Fees payable by Customer for the levels of Hosted Service usage and data storage in effect as of the Effective Date. Provider will use commercially reasonable efforts to notify Customer in writing if Customer has reached 80 percent of its then current Service Allocation and Customer may increase its Service Allocation and corresponding Fee obligations in accordance with Exhibit A. If Customer exceeds its Service Allocation for any relevant period, Customer shall also pay to Provider the applicable excess usage and storage Fees set forth in Exhibit A. Customer acknowledges that exceeding its then-current Service Allocation may result in service degradation for Customer and other Provider customers and agrees that Provider has no obligation to permit Customer to exceed its then-current Service Allocation.

4. Customer Obligations.

4.1 Customer Systems and Cooperation. Customer shall at all times during the Term: (a) set up, maintain and operate in good repair and in accordance with the Specifications all Customer Systems on or through which the Services are accessed or used; (b) provide Provider Personnel with such access to Customer's premises and Customer Systems as is necessary for Provider to perform the Services in accordance with the Specifications; and (c) provide all cooperation and assistance as Provider may reasonably request to enable Provider to exercise its rights and perform its obligations under and in connection with this Agreement.

4.2 Effect of Customer Failure or Delay. Provider is not responsible or liable for any delay or failure of performance caused in whole or in part by Customer's delay in performing, or failure to perform, any of its obligations under this Agreement (each, a "**Customer Failure**").

4.3 Corrective Action and Notice. If Customer becomes aware of any actual or threatened activity prohibited by Section 3.3, Customer shall, and shall cause its Authorized Users to, immediately: (a) take all reasonable and lawful measures within their respective control that are necessary to stop the activity or threatened activity and to mitigate its effects (including, where applicable, by discontinuing and preventing any unauthorized access to the Services and Provider Materials and permanently erasing from their systems and destroying any data to which any of them have gained unauthorized access); and (b) notify Provider of any such actual or threatened activity.

4.4 Non-Solicitation. During the Term and for two years after, Customer shall not, and shall not assist any other Person to, directly or indirectly recruit or solicit for employment or engagement as an independent contractor any Person then or within the prior 12 months employed or engaged by Provider or any Subcontractor and involved in any respect with the Services or the performance of this Agreement.

5. Service Levels.

5.1 Service Levels. Subject to the terms and conditions of this Agreement, Provider will use commercially reasonable efforts to make the Hosted Services Available at least 99.99% percent of the time, as further outlined in **Exhibit E.**

5.2 Scheduled Downtime. Provider will use commercially reasonable efforts to; (a) schedule downtime for routine maintenance of the Hosted Services between the hours of 10 p.m. and 4 a.m., Mountain Time; and (b) give Customer at least 24 hours' prior notice of all scheduled outages of the Hosted Services, to the extent possible ("**Scheduled Downtime**").

5.3 Service Support. The Services include Provider's standard customer support services ("**Support Services**") in accordance with the Provider service support schedule, which is available on request (the "**Support Schedule**"). Provider may amend the Support Schedule from time to time in its sole discretion.

6. Intentionally blank.

7. Security.

7.1 Provider Systems and Security Obligations. Provider will employ security measures in accordance with applicable industry practice ("**Privacy and Security Policy**"). The Provider shall maintain a formally documented disaster recovery plan and conduct annual testing of that plan. The Provider shall annually complete Service Organization Control (SOC) 1, 2 and 3 audit reports, or comply with ISO 27001/2 standards. The Provider shall support a maximum recovery time objective of 8 hours and a maximum recovery point of objective of 4 hours.

7.2 Data Breach Procedures. Provider maintains a data breach plan in accordance with the criteria set forth in Provider's Privacy and Security Policy and shall implement the procedures required under such data breach plan on the occurrence of a "**Data Breach**" (as defined in such plan). Provider shall notify the Customer of any data breach and shall detail when the breach occurred and the nature of the breach including: the nature of the unauthorized use or disclosure, the data which was breached, who might have received access to the data under breach. Notification shall occur immediately on the discovery of the unauthorized disclosure.

7.3 Customer Control and Responsibility. Customer has and will retain sole responsibility for: (a) all Customer Data, including its content and use; (b) all information, instructions and materials provided by or on behalf of Customer or any Authorized User in connection with the Services; (c) Customer's information technology infrastructure, including computers, software, databases, electronic systems (including database management systems) and networks, whether operated directly by Customer or through the use of third-party services ("**Customer Systems**"); (d) the security and use of Customer's and its Authorized Users' Access Credentials; and (e) all access to and use of the Services and Provider Materials directly or indirectly by or through the Customer Systems or its or its Authorized Users' Access Credentials, with or without Customer's knowledge or consent, including all results obtained from, and all conclusions, decisions and actions based on, such access or use.

7.4 Access and Security. Customer shall employ all physical, administrative and technical controls, screening and security procedures and other safeguards necessary to: (a) securely administer the distribution and use of all Access Credentials and protect against any unauthorized access to or use of the Hosted Services; and (b) control the content and use of Customer Data, including the uploading or other provision of Customer Data for Processing by the Hosted Services.

7.5 Miscellaneous Security. Provider agrees:

a) To maintain the hosting environment meet Statement on Standards Attestation Engagements (SSAE) 16 Service Organization Control (SOC) 1, SOC 2 and SOC 3 compliance.

b) To immediately report high severity risks to the Customer.

c) To allow the Customer access to view system security logs that affect this engagement, its data and or processes. This includes the ability for the Customer to view a report of the records that a specific user accessed over a specified period of time.

8. Fees; Payment Terms.

8.1 Fees. Customer shall pay Provider the Fees set forth in Exhibit A in accordance with this Section 8.

8.2 Fee Increases. Provider and Customer shall mutually agree on the Fees to be charged after the Initial Term. If Provider and Customer fail to agree on the Fees to be charged after the Initial Term, this Agreement will expire and Customer shall stop using the Services pursuant to Section 2.6.

8.3 Intentionally blank.

8.4 Taxes. As a unit of local government, Customer is tax exempt. The Provider is responsible for ensuring that neither the Provider nor its Subcontractors, vendors, or suppliers, as applicable, incur any taxes that could be avoided as a result of Customer's tax-exempt status. The Provider shall not be reimbursed by the City for applicable New Mexico gross receipts taxes, nor interest or penalties assessed on the Provider by any authority. The payment of taxes for any money received under this Agreement shall be the Provider's sole responsibility and should be reported under the Provider's Federal and State tax identification number(s).

Provider and any and all subcontractors shall pay all Federal, state and local taxes applicable to its operation and any persons employed by the Provider. Provider shall require all subcontractors to hold the City harmless from any responsibility for taxes, damages and interest, if applicable, contributions required under Federal and/or state and local laws and regulations and any other costs, including transaction privilege taxes, unemployment compensation insurance, Social Security and Worker's Compensation

8.5 Payment. Customer shall pay all undisputed Fees for the Service for the Term on or after the IT Director's Acceptance of the Service as set forth in Exhibit A. Customer shall make payments to the address or account specified in Exhibit A or such other address or account as Provider may specify in writing from time to time. However, the total compensation under this Agreement shall not exceed $11,250, including any New Mexico gross receipts tax, if applicable, and as described on **Exhibit A**. This amount is a maximum and not a guarantee that the work assigned to be performed by Provider under this Agreement shall equal the amount stated herein.

(a) Renewal Periods. For any Renewal Period under this Agreement, the Customer shall pay quarterly (four times yearly) in arrears for Services provided under the terms of this Agreement, after the IT Director's Acceptance.

(b) Acceptance. In accord with Section 13-1-158 NMSA 1978, the IT Director shall determine if the Provider's provision of Services meets specifications. No payment shall be made until the Services that are the subject of the Payment Invoice have been Accepted in writing by the IT Director. In order to Accept the provision of Services, the IT Director, in conjunction with the Project Manager, will assess the Quality Assurance level of the Services provided and determine, at a minimum, that the provision of Services:

1. Complies with the Services requirements as defined in Section 2 and Exhibit A;
2. Complies with the terms and conditions of the Sole Source;
3. Meets the performance measures for the Services and this Agreement;
4. Meets or exceeds the generally accepted industry standards and procedures for the Services; and
5. Complies with all the requirements of this Agreement, including the service commitment to 99.99% uptime, as defined in the Parties' Service Level Agreement, incorporated by reference and attached as **Exhibit E**.

If the provision of Services is deemed Acceptable under Quality Assurance by the IT Director or their Designated Representative, the IT Director will notify the Provider of Acceptance, in writing, within 15 Business Days from the date the IT Director receives the provision of Services and accompanying Payment Invoice.

(c) Rejection. Unless the IT Director gives notice of rejection within the fifteen (15) Business Day Acceptance period, the provision of Services will be deemed to have been Accepted. If the provision of Services is deemed unacceptable under Quality Assurance, fifteen (15) Business Days from the date the IT Director receives the provision of Services and accompanying Payment Invoice, the IT Director will send a consolidated set of comments indicating issues, unacceptable items, and/or requested revisions accompanying the rejection. Upon rejection and receipt of comments, the Provider will have ten (10) Business Days to resubmit the Service to the IT Director with all appropriate corrections or modifications made and/or addressed. The IT Director will again determine whether the provision of Services is Acceptable under Quality Assurance and provide a written determination within fifteen (15) Business Days of receipt of the revised or amended receipt of Service. If the provision of Services is once again deemed unacceptable under Quality Assurance and thus rejected, the Provider will be required to provide a remediation plan that shall include a timeline for corrective action acceptable to the IT Director. The Provider shall also be subject to all damages and remedies attributable to the late delivery of the provision of Services under the terms of this Agreement and available at law or equity. In the event that a provision of Services must be resubmitted more than twice for Acceptance, the Provider shall be deemed as in breach of this Agreement. The Customer may seek any and all damages and remedies available under the terms of this Agreement and available at law or equity. Additionally, the Customer may terminate this Agreement.

8.6 Late Payment. If Customer fails to make any undisputed payment when due then, in addition to all other remedies that may be available:

(a) if such failure continues for forty-five (45) days following written notice thereof, Provider may suspend performance of the Services until all undisputed past due amounts, without incurring any obligation or liability to Customer or any other Person by reason of such suspension.

8.7 No Deductions or Setoffs. All amounts payable to Provider under this Agreement shall be paid by Customer to Provider in full without any setoff, recoupment, counterclaim, deduction, debit or withholding for any reason (other than any deduction or withholding of tax as may be required by applicable Law). Notwithstanding the foregoing, Customer

may withhold payments to Provider for Services not performed or that are reasonably disputed by Customer.

9. Intellectual Property Rights.

9.1 Services and Provider Materials. All right, title and interest in and to the Services and Provider Materials, including all Intellectual Property Rights therein, are and will remain with Provider and the respective rights holders in the Third-Party Materials. Customer has no right, license or authorization with respect to any of the Services or Provider Materials (including Third-Party Materials) except as expressly set forth in Section 3.1 or the applicable third-party license, in each case subject to Section 3.3 All other rights in and to the Services and Provider Materials (including Third-Party Materials) are expressly reserved by Provider and the respective third-party licensors. In furtherance of the foregoing, Customer hereby unconditionally and irrevocably grants to Provider an assignment of all right, title and interest in and to the Resultant Data (including any De-Identified Information Provider may create or may have in its possession as a result of this Agreement), including all Intellectual Property Rights relating thereto.

9.2 Customer Data. As between Customer and Provider, Customer is and will remain the sole and exclusive owner of all right, title and interest in and to all Customer Data related to the services provided by this Agreement, subject to HIPAA, including all Intellectual Property Rights relating thereto, subject to the rights and permissions granted in Section 9.3. Provider shall not access Customer accounts, or Customer Data, except (i) in the course of data center operations, (ii) response to service or technical issues, (iii) as required by the express terms of this contract, or (iv) at Customer's written request.

9.3 Consent to Use Customer Data. Customer hereby irrevocably grants all such rights and permissions in or relating to Customer Data: (a) to Provider, its Subcontractors and the Provider Personnel as are necessary or useful to perform the Services; (b) to Provider as are necessary or useful to enforce this Agreement and exercise its rights and perform its hereunder; and (c) to Provider as otherwise might be necessary or useful in its business. All such usage shall be in accordance with applicable law, including HIPAA, and use De-Identified Information as appropriate.

10. Confidentiality.

10.1 Confidential Information. To the extent permitted by applicable Law and in connection with this Agreement, each Party (as the "**Disclosing Party**") may disclose or make available Confidential Information to the other party (as the "**Receiving Party**"). Subject to Section 10.2, "**Confidential Information**" means information in any form or medium (whether oral, written, electronic or other) that consists of: (1) confidential client information as such term is defined in State or Federal statutes and/or regulations; (2) all non-public budget, expense, payment and other financial information; (3) all attorney-client privileged work product; (4) all information designated by the Customer or the Provider as confidential, including all information designated as confidential under federal or state law or regulations; (5) unless publicly disclosed by the Customer, the pricing, payments, and terms and conditions of this Agreement; (6) Customer information that is utilized, received, or maintained by the Customer or the Provider for the purpose of fulfilling a duty or obligation under this Agreement and that has not been publicly disclosed; and (7) information the Disclosing Party considers confidential or proprietary, including information consisting of or relating to the Disclosing Party's technology, trade secrets, know-how, business operations, plans, strategies, customers, and information with respect to which the Disclosing Party has contractual or other confidentiality obligations, in each case and which has been marked, designated and otherwise clearly and physically identified as "confidential."

10.2 Exclusions. Confidential Information does not include information that: (a) was rightfully known to the Receiving Party without restriction on use or disclosure prior to such information's being disclosed or made available to the Receiving Party in connection with this Agreement; (b) was or becomes generally known by the public other than by the Receiving Party's or any of its Representatives' noncompliance with this Agreement; (c) was or is received by the Receiving Party on a non-confidential basis from a third party that was not or is not, at the time of such receipt, under any obligation to maintain its confidentiality; (d) was or is independently developed by the Receiving Party without reference to or use of any Confidential Information; or (e) is subject to disclosure under the New Mexico Inspection of Public Records Act (IPRA), under NMSA 1978, Chapter 14, Article 2.

10.3 Protection of Confidential Information. As a condition to being provided with any disclosure of or access to Confidential Information, the Receiving Party shall for two years:

(a) not access or use Confidential Information other than as necessary to exercise its rights or perform its obligations under and in accordance with this Agreement;

(b) except as may be permitted by and subject to its compliance with Section 10.4, not disclose or permit access to Confidential Information other than to its Representatives who: (i) need to know such Confidential Information for purposes of the Receiving Party's exercise of its rights or performance of its obligations under and in accordance with this Agreement; (ii) have been informed of the confidential nature of the Confidential Information and the Receiving Party's obligations under this Section 10.3; and (iii) are bound by written confidentiality and restricted use obligations at least as protective of the Confidential Information as the terms set forth in this Section 10.3;

(c) safeguard the Confidential Information from unauthorized use, access or disclosure using at least the degree of care it uses to protect its most sensitive information and in no event less than a reasonable degree of care; and

(d) ensure its Representatives' compliance with, and be responsible and liable for any of its Representatives' non-compliance with, the terms of this Section 10.

10.4 Compelled Disclosures. If the Receiving Party or any of its Representatives are required by applicable Law to disclose any Confidential Information then, to the extent permitted by applicable Law, the Receiving Party shall: (a) promptly, and prior to such disclosure, notify the Disclosing Party in writing of such requirement so that the Disclosing Party can seek a protective order or other remedy or waive its rights under Section 10.3; and (b) if consistent with and to the extent permitted by applicable Law, provide reasonable cooperation to the Disclosing Party in opposing such disclosure or seeking a protective order or other limitations on disclosure. If the Disclosing Party waives compliance or, after providing the notice and assistance required under this Section 10.4, the Receiving Party remains required by Law to disclose any Confidential Information, the Receiving Party shall disclose only that portion of the Confidential Information that the Receiving Party is legally required to disclose and shall use commercially reasonable efforts to obtain assurances from the applicable court or other presiding authority that such Confidential Information will be afforded confidential treatment, such as by the entry of a protective order or through other measures to ensure the protection of the Disclosing Party's Confidential Information.

10.5. Notification of Legal Requests. Provider shall notify the Customer upon receipt of any electronic discovery, litigation holds, discovery searches, and expert testimonies related to, or which in any way might reasonably require access to Customer data. Provider shall not respond to subpoenas, service of process, and other legal requests related to the Customer without promptly and prior to such response, notifying the Customer in writing, unless prohibited by law from providing such notice. Such notice shall be provided to the Customer so that the Customer can seek a protective order or other remedy or waive its rights under Section 10.3; and if consistent with and to the extent permitted by applicable Law, the Provider shall provide reasonable cooperation to the Customer in opposing such disclosure or seeking a protective order or other limitations on disclosure.

10.6 Public Records. Provider agrees:

a) That the Customer may disclose confidential information as required by IPRA.

b) To comply with IPRA.

11. Term and Termination.

11.1 Term. The term of this Agreement commences as of the Effective Date and, unless terminated earlier pursuant to any of this Agreement's express provisions, will continue in effect until the date listed on Exhibit A (the "**Term**").

11.3 Termination. In addition to any other express termination right set forth elsewhere in this Agreement:

(a) Provider may terminate this Agreement, effective on written notice to Customer, if Customer: (i) fails to pay any undisputed amount when due hereunder, and such failure continues more than 60 days after Provider's delivery of written notice thereof; or (ii) breaches any of its obligations under Section 3.3 (Use Limitations and Restrictions) or Section 10 (Confidentiality) after Notice and an opportunity to cure. Provider shall not suspend service if Customer has a good-faith dispute regarding payment.

(b) Either Party may terminate this Agreement, effective on written notice to the other Party, if the other Party

materially breaches this Agreement, and such breach: (i) is incapable of cure; or (ii) being capable of cure, remains uncured 30 days after the non-breaching Party provides the breaching Party with written Notice of such breach; and

(c) either Party may terminate this Agreement, effective immediately upon written notice to the other Party, if the other Party: (i) becomes insolvent or is generally unable to pay, or fails to pay, its debts as they become due; (ii) files or has filed against it, a petition for voluntary or involuntary bankruptcy or otherwise becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency Law; (iii) makes or seeks to make a general assignment for the benefit of its creditors; or (iv) applies for or has appointed a receiver, trustee, custodian or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business.

(d) The Customer may terminate this Agreement without cause with 60 days written notice at any time after September 30, 2019

(e) If at any point, the Provider is not designated as a Sole Source provider, this Agreement shall automatically terminate.

11.4 Effect of Expiration, Termination or Suspension. Upon any expiration or termination of this Agreement, except as expressly otherwise provided in this Agreement:

(a) all rights, licenses, consents and authorizations granted by either Party to the other hereunder will immediately terminate;

(b) Customer shall immediately cease all use of any Services or Provider Materials and (i) promptly return to Provider, or at Provider's written request destroy, all documents and tangible materials containing, reflecting, incorporating or based on any Provider Materials or Provider's Confidential Information; (ii) permanently erase all Provider Materials and Provider's Confidential Information from all systems Customer directly or indirectly controls; and (iii) certify to Provider in a signed written instrument that it has complied with the requirements of this Section 11.4(b);

(c) notwithstanding anything to the contrary in this Agreement, with respect to information and materials then in its possession or control: (i) the Receiving Party may retain the Disclosing Party's Confidential Information; and (ii) Provider may retain Customer Data; in its then current state and solely to the extent and for so long as required by applicable Law; and (iii) all information and materials described in this Section 11.4(c) will remain subject to all confidentiality, security and other applicable requirements of this Agreement and of Law;

(d) Provider may disable all Customer and Authorized User access to the Hosted Services and Provider Materials;

(e) if either Party terminates this Agreement, Customer will be relieved of any obligation to pay any Fees attributable to the period after the effective date of such termination and Provider will refund to Customer Fees paid in advance for Services that Provider has not performed as of the effective date of termination (pro-rated according to time); and Customer shall pay such Fees for services rendered, together with all previously-accrued but not yet paid Fees, on receipt of Provider's invoice therefor;

(f) if Customer requests in writing at least 30 days prior to the effective date of expiration or termination, subject to Section 11.4(d), Provider shall, within 30 days following such expiration or termination, deliver to Customer the then most recent version of Customer Data maintained by Provider in .csv file format,, provided that Customer has, after the 30 days, paid all undisputed Fees then outstanding and any amounts payable after or as a result of such expiration or termination, including any fees, on a time and materials basis, for Provider's services in transferring such Customer Data. The Provider shall delete Customer Data only after the Customer has confirmed that all Customer Data has been provided. The Provider shall provide the Customer with written confirmation that the Customer Data has been deleted from the all environments. And,

(g) In the event that the Provider terminates this Agreement, the Provider shall notify the Customer in writing no less than ninety (90) days prior to the date Services cease. The Provider shall not take any action to intentionally erase City data for a period of ninety (90) days after the effective date of the termination and will continue to secure and back up Customer data for such period. After such 90 day period, the Provider shall have no obligation to maintain or provide any City data.

11.5 Surviving Terms. The provisions set forth in the following sections, and any other right or obligation of the Parties

in this Agreement that, by its nature, should survive termination or expiration of this Agreement, will survive any expiration or termination of this Agreement: Section 3.3, Section 9, Section 10, Section 11.4, this Section 11.5, Section 12, Section 13, Section 14, Section 16, and Section 17.

11.6 Notice and Opportunity to Cure.

(a) Except as otherwise provided in Section 11 and Section 16.17, the Non-Breaching Party shall give the other Party written Notice of termination at least thirty (30) days prior to the intended date of termination, which notice shall (i) identify all the material breaches of this Agreement upon which the termination is based and (ii) state what the Party must do to cure such material breaches. The Notice of termination shall only be effective (i) if the Party does not cure all material breaches within the thirty (30) day notice period or (ii) in the case of material breaches that cannot be cured within thirty (30) days, the Breaching Party does not, within the thirty (30) day notice period, notify the Terminating Party of its intent to cure and begin with due diligence to cure the material breach.

By termination pursuant to Section 11, neither Party may nullify obligations already incurred for performance or failure to perform prior to the effective date of the termination. THIS SECTION IS NOT EXCLUSIVE AND DOES NOT CONSTITUTE A WAIVER OF ANY OTHER LEGAL RIGHTS AND REMEDIES AFFORDED THE CUSTOMER CAUSED BY THE PROVIDER'S DEFAULT OR BREACH OF THIS AGREEMENT.

12. Representations and Warranties.

12.1 Mutual Representations and Warranties. Each Party represents and warrants to the other Party that:

(a) it is duly organized, validly existing and in good standing as a corporation or other entity under the laws of the jurisdiction of its incorporation or other organization;

(b) it has the full right, power and authority to enter into and perform its obligations and grant the rights, licenses, consents and authorizations it grants or is required to grant under this Agreement;

(c) the execution of this Agreement by its representative whose signature is set forth at the end of this Agreement has been duly authorized by all necessary corporate or organizational action of such Party; and

(d) when executed and delivered by both Parties, this Agreement will constitute the legal, valid and binding obligation of such Party, enforceable against such Party in accordance with its terms.

12.2 Additional Provider Representations, Warranties and Covenants. Provider represents, warrants and covenants to Customer that Provider will perform the Services using personnel of required skill, experience and qualifications and in a professional and workmanlike manner in accordance with generally recognized industry standards for similar services and will devote adequate resources to meet its obligations under this Agreement.

12.3 Additional Customer Representations, Warranties and Covenants. Customer represents, warrants and covenants to Provider that Customer owns or otherwise has and will have the necessary rights and consents in and relating to the Customer Data so that, as received by Provider and Processed in accordance with this Agreement, they do not and will not infringe, misappropriate or otherwise violate any Intellectual Property Rights, or any privacy or other rights of any third party or violate any applicable Law, including HIPAA.

12.4 Intentionally blank.

12.5 Governmental Immunity. This Agreement is not intended, and shall not be construed, as a waiver of the limitations on damages or any of the privileges, immunities, or defenses provided to, or enjoyed by, Customer and its directors, officers, employees and volunteers under common law or pursuant to statute, including but not limited to the New Mexico Tort Claims Act and the New Mexico Governmental Immunity Act.

13. Indemnification.

13.1 General The Provider shall defend, indemnify and hold harmless the Customer and Customer's officers, employees, directors, agents and volunteers, permitted successors and permitted assigns (each a "Customer Indemnitee") from all actions, proceedings, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Provider, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client

of the Provider resulting in injury or damage to persons or property during the time when the Provider or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Provider or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Provider, the Provider shall, as soon as practicable, but no later than two business (2) days after it receives notice thereof, notify, by certified mail, the legal counsel of the Customer.

The indemnification obligation under this Agreement shall not be limited by the existence of any insurance policy or by any limitation on the amount or type of damages, compensation or benefits payable by or for Provider or any subcontractor, and shall survive the termination of this Agreement. Money due or to become due to the Provider under this Agreement may be retained by the Customer, as necessary, to satisfy any outstanding claim that the Customer may have against the Provider.

(a) Intellectual Property Indemnification. The Provider shall defend, at its own expense, the Customer, and/or any other body against any claim that any product or service provided under this Agreement infringes any patent, copyright or trademark, and shall pay all costs, damages and attorney's fees that may be awarded as a result of such claim. In addition, if any third party obtains a judgment against the Customer based upon Provider's trade secret infringement relating to any product or services provided under this Agreement, the Provider agrees to reimburse the Customer for all costs, attorneys' fees and the amount of the judgment. To qualify for such defense and/or payment, the Customer shall:

(i) Give the Provider written notice, within two (2) business days, of its notification of any claim;
(ii) Work with the Provider to control the defense and settlement of the claim, as allowed under the law; and
(iii) Cooperate with the Provider, in a reasonable manner, to facilitate the defense or settlement of the claim.

(b) Customer Rights. If any product or service becomes, or in the Provider's opinion is likely to become, the subject of a claim of infringement, the Provider shall, at its sole expense:

(i) Provide the Customer the right to continue using the product or service and fully indemnify the Customer against all claims that may arise out of the Customer's use of the product or service;
(ii) Replace or modify the product or service so that it becomes non-infringing; or
(iii) Accept the return of the product or service and refund an amount equal to the prorated value of the unused portion of the paid purchase price , which are due to the Provider. The Provider's obligation will be void as to any product or service modified by the Customer to the extent such modification is the cause of the claim.

13.1.1 The foregoing obligation does not apply to any Action or Losses arising out of or relating to any:

(a) access to or use of the Services or Provider Materials in combination with any hardware, system, software, network or other materials or service not provided or authorized in the Specifications or otherwise in writing by Provider;

(b) modification of the Services or Provider Materials other than: (i) by or on behalf of Provider; or (ii) with Provider's written approval in accordance with Provider's written specification;

(c) failure to timely implement any modifications, upgrades, replacements or enhancements made available to Customer by or on behalf of Provider; or

(d) act, omission or other matter described in Section 13.2(a), Section 13.2(b), Section 13.2(c) or Section 13.2(d), whether or not the same results in any Action against or Losses by any Provider Indemnitee.

(e) allegation of facts that, if true, would constitute Customer's breach of any of its representations, warranties, covenants or obligations under this Agreement; or

(f) negligence or more culpable act or omission (including recklessness or willful misconduct) by Customer, any Authorized User, or any third party on behalf of Customer or any Authorized User, in connection with this Agreement.

13.2 – Intentionally blank.

13.3 – Intentionally blank.

13.4 Mitigation. If any of the Services or Provider Materials are, or in Provider's opinion are likely to be, claimed to infringe, misappropriate or otherwise violate any third-party Intellectual Property Right, or if Customer's or any Authorized User's use of the Services or Provider Materials is enjoined or threatened to be enjoined, Provider may, at its option and sole cost and expense:

(a) obtain the right for Customer to continue to use the Services and Provider Materials materially as contemplated by this Agreement;

(b) modify or replace the Services and Provider Materials, in whole or in part, to seek to make the Services and Provider Materials (as so modified or replaced) non-infringing, while providing materially equivalent features and functionality, in which case such modifications or replacements will constitute Services and Provider Materials, as applicable, under this Agreement; or

(c) by written notice to Customer, terminate this Agreement with respect to all or part of the Services and Provider Materials, and require Customer to immediately cease any use of the Services and Provider Materials or any specified part or feature thereof, provided that if such termination occurs, which terminated part or whole of the contract shall be refunded or not charged for on a pro rata by Provider for the remainder of this Agreement.

SECTIONS 13 AND 14 SET FORTH CUSTOMER'S SOLE REMEDIES AND PROVIDER'S SOLE LIABILITY AND OBLIGATION FOR ANY ACTUAL, THREATENED OR ALLEGED CLAIMS THAT THIS AGREEMENT OR ANY SUBJECT MATTER HEREOF (INCLUDING THE SERVICES AND PROVIDER MATERIALS) INFRINGES, MISAPPROPRIATES OR OTHERWISE VIOLATES ANY THIRD-PARTY INTELLECTUAL PROPERTY RIGHT.

14. Liability and Limitations of Liability.

14.1 Intentionally Blank

14.2 Intentionally Blank

14.3 Provider Liability. Provider shall be liable for damages arising out of injury to persons and/or damage to real or tangible personal property before or after Acceptance, delivery, installation and use of the equipment, either at the Provider's site or the Customer's place of business, provided that the injury or damage was caused by the fault or negligence of the Provider or defect of the TouchPhrase solution or installation. Provider shall not be liable for damages arising out of, or caused by, alterations to the TouchPhrase solution (other than alterations performed or caused by Provider's officers, employees or agents) made by the Customer or for losses occasioned by the Customer's fault or negligence. Nothing in this Agreement shall limit the Provider's liability, if any, to third parties and employees of the Customer, or any remedy that may exist under law or equity in the event a defect in the manufacture of the TouchPhrase solution, or the negligent acts or omissions of the Provider, its officers, employees, or agents, is the cause of injury to such person.

14.4 New Mexico Tort Claims Act. Any liability incurred by the Customer in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, Section 41-4-1, *et seq.* NMSA 1978, as amended. The Customer and its "public employees" as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense and do not waive any limitation of liability pursuant to law. No provision in this Agreement modifies or waives any provision of the New Mexico Tort Claims Act.

15. Force Majeure.

15.1 No Breach or Default. In no event will either Party be liable or responsible to the other Party, or be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement, (except for any payment obligation), when and to the extent such failure or delay is caused by any circumstances beyond such Party's reasonable control (a "**Force Majeure Event**"), including acts of God, flood, fire, earthquake or explosion, war, terrorism, invasion, riot or other civil unrest, embargoes or blockades in effect on or after the date of this Agreement, national or regional emergency, strikes, labor stoppages or slowdowns or other industrial disturbances, passage of Law or any action taken by a governmental or public authority, including imposing an embargo, export or import restriction, quota or other restriction or prohibition or any complete or partial government shutdown, or national or regional shortage of adequate power or telecommunications or transportation. Either Party may terminate this

Agreement if a Force Majeure Event affecting the other Party continues substantially uninterrupted for a period of 30 days or more.

15.2 Affected Party Obligations. In the event of any failure or delay caused by a Force Majeure Event, the affected Party shall give prompt written notice to the other Party stating the period of time the occurrence is expected to continue and use commercially reasonable efforts to end the failure or delay and minimize the effects of such Force Majeure Event.

16. Miscellaneous.

16.1 Further Assurances and Agreement Audit.

(a) Upon a Party's reasonable request, the other Party shall, at the requesting Party's sole cost and expense, execute and deliver all such documents and instruments, and take all such further actions, necessary to give full effect to this Agreement.

(b) Provider shall allow the Customer to audit conformance including contract terms system security and data centers as appropriate. The Customer may perform this audit or contract with a third party at its discretion at the Customer's expense. Such reviews shall be conducted with at least 30 days advance written notice and shall not unreasonably interfere with Provider's business. Audit assistance shall be provided by Provider on a time and materials basis.

16.2 Relationship of the Parties. The relationship between the Parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture or other form of joint enterprise, employment or fiduciary relationship between the Parties, and neither Party shall have authority to contract for or bind the other Party in any manner whatsoever.

16.3 Public Announcements. Neither Party shall issue or release any announcement, statement, press release or other publicity or marketing materials relating to this Agreement or otherwise use the other Party's trademarks, service marks, trade names, logos, domain names or other indicia of source, affiliation or sponsorship, in each case, without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed.

16.4 Notices. All notices, requests, consents, claims, demands, waivers and other communications under this Agreement have binding legal effect only if in writing and addressed to a Party as follows (or to such other address or such other person that such Party may designate from time to time in accordance with this Section 16.4):

If to Provider:
TouchPhrase, LLC
Attention: Rick Pionkowski
1755 Telstar Drive, Suite 300
Colorado Springs, CO 80920
rpionkowski@touchphrase.com

If to Customer:
City of Santa Fe, Mobile Integrated Health Office
Attention: Andres Mercado
200 Murales Rd.
Santa Fe, NM 87501

With a copy to:
City of Santa Fe, ITT Department

2651 Siringo Rd., Building F
Santa Fe, NM 87504

Notices sent in accordance with this Section 16.4 will be deemed effectively given: (a) when received, if delivered by hand; (b) when received, if delivered by a nationally recognized overnight courier; and (c) on the 5th day after the date mailed by certified or registered mail, return receipt requested, postage prepaid.

16.5 Interpretation. For purposes of this Agreement: (a) the words "include," "includes" and "including" are deemed to be followed by the words "without limitation"; (b) the word "or" is not exclusive; (c) the words "herein," "hereof,"

"hereby," "hereto" and "hereunder" refer to this Agreement as a whole; (d) words denoting the singular have a comparable meaning when used in the plural, and vice-versa; and (e) words denoting any gender include all genders. Unless the context otherwise requires, references in this Agreement: (a) to sections, exhibits, schedules, attachments and appendices mean the sections of, and exhibits, schedules, attachments and appendices attached to, this Agreement; (b) to an agreement, instrument or other document means such agreement, instrument or other document as amended, supplemented and modified from time to time to the extent permitted by the provisions thereof; and (c) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder. The Parties intend this Agreement to be construed without regard to any presumption or rule requiring construction or interpretation against the Party drafting an instrument or causing any instrument to be drafted. The exhibits, schedules, attachments and appendices referred to herein are an integral part of this Agreement to the same extent as if they were set forth verbatim herein.

16.6 Headings. The headings in this Agreement are for reference only and do not affect the interpretation of this Agreement.

16.7 Entire Agreement. This Agreement constitutes the sole and entire agreement of the Parties with respect to the subject matter of this Agreement and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such subject matter. In the event of any conflict or inconsistences between the Agreement and the Exhibits, the documents shall control in the following order:

(a) Exhibit B ("Business Associate Agreement");
(b) This Agreement;
(c) Exhibit A ("Service and Fees")
(d) Exhibit C ("Specifications")
(e) Exhibit D ("Support Schedule")
(f) Exhibit E ("Service Level Agreement")

16.8 Assignment and Subcontracting.

(a) Customer shall not assign or otherwise transfer any of Customer's rights, or delegate or otherwise transfer any of Customer's obligations or performance, under this Agreement, without the Provider's prior written consent, which consent Provider may give or withhold in its sole discretion.
(b) Provider shall not be able to assign and transfer its rights or obligations under this Agreement without the prior written consent of Customer, which consent Customer may give or withhold in its sole discretion. Provider shall not be able to subcontract any portion of this Agreement without the prior written approval of the Customer.
(c) No subcontracting shall relieve the Provider from its obligations and liabilities under this Agreement, nor shall any subcontracting obligate payment from the Customer.
(d) Any purported assignment, delegation or transfer in violation of this Section 16.8 is void. This Agreement is binding upon and inures to the benefit of the Parties hereto and their respective permitted successors and assigns.
(e) Subcontractor Disclosure. Provider shall identify all of its strategic business partners related to services provided under this Agreement, including but not limited to, all subcontractors or other entities or individuals who may be a party to a joint venture or similar agreement with Provider, who will be involved in any application development and/or operations.

16.9 No Third-party Beneficiaries. This Agreement is for the sole benefit of the Parties hereto and their respective permitted successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other Person any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

16.10 Amendment and Modification; Waiver. No amendment to or modification of this Agreement is effective unless it is in writing, identified as an amendment to modification of this Agreement and signed by an authorized representative of each Party. No waiver by any Party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the Party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

16.11 Severability. If any term or provision of this Agreement is held to be invalid, illegal or unenforceable by any court of competent jurisdiction, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon such determination that any term or other provision is invalid, illegal or unenforceable, the Parties hereto shall negotiate in

good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

16.12 Governing Law; Submission to Jurisdiction. This Agreement is governed by and construed in accordance with the internal laws of the State of New Mexico without giving effect to any choice or conflict of law provision or rule that would require or permit the application of the laws of any jurisdiction other than those of the State of New Mexico. Any legal suit, action or proceeding arising out of or related to this Agreement or the licenses granted hereunder shall be instituted exclusively in the courts of the State of New Mexico in each case located in the City of Santa Fe and County of Santa Fe, and each Party irrevocably submits to the exclusive jurisdiction of such court in any such suit, action or proceeding.

16.13 Waiver of Jury Trial. Each Party irrevocably and unconditionally waives any right it may have to a trial by jury in respect of any legal action arising out of or relating to this Agreement or the transactions contemplated hereby.

16.14 Equitable Relief. Each Party acknowledges and agrees that a breach or threatened breach by such Party of any of its obligations under Section 2 or Section 10 or, in the case of Customer, Section 3.3, Section 4.3 or Section 7.3, would cause the other Party irreparable harm for which monetary damages would not be an adequate remedy and agrees that, in the event of such breach or threatened breach, the other Party will be entitled to equitable relief, including a restraining order, an injunction, specific performance and any other relief that may be available from any court, without any requirement to post a bond or other security, or to prove actual damages or that monetary damages are not an adequate remedy. Such remedies are not exclusive and are in addition to all other remedies that may be available at law, in equity or otherwise.

16.15 Intentionally blank.

16.16 Counterparts. This Agreement may be executed in counterparts, each of which is deemed an original, but all of which together are deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, e-mail or other means of electronic transmission is deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

16.17 Non-appropriation. All direct and indirect financial obligations of Customer under this Agreement are subject to annual appropriation of the funds necessary to meet such obligations. If Customer's governing body fails to appropriate funds necessary to meet its obligations under this Agreement for the ensuing fiscal year, or if required by changes in State or federal law, or because of court order, or because of insufficient appropriations made available by the United States Congress and/or the New Mexico State Legislature, this Agreement shall terminate at the end of the year in which the non-appropriation occurred, and neither Party shall have liability to the other Party. The Customer's decision as to whether sufficient appropriations are available shall be final.

16.18 Civil and Criminal Penalties. The Provider agrees to abide by Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, which imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

16.19 Equal Opportunity Compliance. The Provider agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws of the, the Provider agrees to assure that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Provider is found not to be in compliance with these requirements during the life of this Agreement, Provider agrees to take appropriate steps to correct these deficiencies.

16.20 Workers Compensation. The Provider agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Provider fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the Customer.

16.21 Independent Contractor. The Provider and its agents and employees are independent contractors performing professional services for the Customer and are not Customer's employees. The Provider and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees

of the Customer as a result of this Agreement. The Provider acknowledges that all sums received hereunder are personally reportable by it for income tax purposes as self-employment or business income and are reportable for self-employment tax.

16.22 Subject of Proceedings. The Provider warrants that neither the Provider nor any officer, stockholder, director or employee of the Provider, is presently subject to any litigation or administrative proceeding before any court or administrative body which would have an adverse effect on the Provider's ability to perform under this Agreement; nor, to the best knowledge of the Provider, is any such litigation or proceeding presently threatened against it or any of its officers, stockholders, directors or employees. If any such proceeding is initiated or threatened during the term of this Agreement, the Provider shall immediately disclose such fact to the Customer.

16.23 Default/Breach. In case of default and/or breach by the Provider, for any reason whatsoever, the Customer may procure the goods or services from another source. Provider shall assist the Customer transition to a new solution in a timely manner and will cover its own costs in assisting with migration. Such assistance shall include, but is not limited to, data and business rule extraction, conversion and validation.

16.24 Exhibits Incorporated by Reference. The foregoing Exhibits attached hereto and referred to herein, are hereby acknowledged to be true and accurate, and are incorporated herein by this reference.

16.25 Release. The Provider's Acceptance of final payment of the amount due under this Agreement after the three-year term shall operate as a release of the Customer, its officers and employees from all liabilities, claims and obligations whatsoever arising from or under this Agreement that were known to Provider at the time of final payment.

16.26 Conflict of Interest. The Provider warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or Services required under the Agreement. The Provider certifies that the requirements of the Governmental Conduct Act, Sections 10-16-1 through 10-16-18, NMSA 1978, regarding contracting with a public officer, state employee or former state employee have been followed.

17. HIPAA; Business Associate Provisions and De-identified Information.

17.1 Protected Health Information. To the extent required by HIPAA and the Privacy Rule promulgated thereunder and notwithstanding anything to the contrary herein, Provider will maintain the confidentiality of Protected Health Information ("**PHI**") as defined by the Privacy Rule, including that Provider will:

(a) not use or further disclose PHI other than as permitted or required by this Agreement or as required by Law;

(b) use commercially reasonable safeguards to prevent the use or disclosure of PHI other than as provided for by this Agreement;

(c) report to Customer any use or disclosure of PHI not provided for by this Agreement of which Provider becomes aware;

(d) ensure that any agent, including any Subcontractors, to whom Provider provides PHI received from, or created or received by Customer on behalf of Customer, agree in writing to the provisions of this Agreement;

(e) mitigate, to the extent practicable, the harmful effect of any use or disclosure of PHI not permitted by this Agreement; and

(f) upon expiration or termination of this Agreement, return to Customer or, upon Customer's request and authorization, destroy all PHI received from, or created or received on behalf of Customer (including all copies thereof) then in Provider's possession or under its control; or if, return or destruction is not feasible, provide Customer with written notice in which Provider describes why return or destruction is not feasible and agree in writing to extend the protections of this Section to the PHI and limit further uses and disclosures to those purposes that make return or destruction unfeasible

17.2. Business Associate Provisions. In maintaining, using and affording access to Customer Data in accordance with this Agreement and HIPAA, the Provider will:

(a) not use or further disclose the information except as permitted or required by this Agreement or as required by Law;

(b) use commercially reasonable safeguards to prevent use or disclosure of the information other than as provided for by this Agreement, including administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of the information;

(c) report to Customer any use or disclosure of the information not provided for by this Agreement of which Provider becomes aware, or any security incident as a result of which Provider determines that unauthorized access has been obtained to Customer Data;

(d) ensure that any of Provider's agents or subcontractors to whom Provider provides Customer Data for purposes of assisting Provider in providing the Programs or the Services, agrees to the same restrictions and conditions that apply to Provider with respect to such information, including the obligation to implement commercially reasonable safeguards to protect it (it being understood that other Authorized Users are not Provider's agents or subcontractors);

(e) make available PHI in accordance with Section 164.524 of the Privacy Rule;

(f) make available PHI for amendment and incorporate any amendments to PHI in accordance with Section 164.526 of the Privacy Rule;

(g) make available the information required to provide an accounting of disclosures in accordance with Section 164.528 of the Privacy Rule;

(h) make Provider's internal practices, books, and records relating to the use and disclosure of PHI received from, or created or received by Provider on Customer's behalf available to the Secretary of the United States Department of Health and Human Services for purposes of determining Customer's compliance with the HIPAA Rules; and

(i) at termination of this Agreement, if feasible, return or, upon Customer's request and authorization, destroy all PHI received from, or created or received by Provider on Customer's behalf that Provider still maintains in any form, and retain no copies of such information; or, if such return or destruction is not feasible, extend the protections of this Agreement to the information and limit further uses and disclosures to those purposes that make the return or destruction of the information infeasible. Customer acknowledges that it will likely be unfeasible to segregate Customer Data for removal from the System. However, Provider will provide Customer with an electronic copy of Customer Data in the format in which it is produced by Provider's standard procedures for copying or archiving such information. Customer acknowledges that Customer may have to purchase proprietary software in order to access such information.

17.3 Resultant Data and De-Identified Information. To the extent permitted by law, Customer hereby transfers and assigns to Provider all right, title and interest in and to all Resultant Data (including De-Identified Information) that Provider may make from Customer Data. Customer agrees that Provider may use, disclose, market, license and sell such De-Identified Information for any purpose without restriction, and that Customer has no interest in such information, or in the proceeds of any sale, license, or other commercialization thereof. Customer acknowledges that the rights conferred by this Section 17.3 are the principal consideration for the provision of the Services, without which Provider would not enter into this Agreement.

17.4 Business Associate Agreement. The Parties agree to abide by the terms of the Business Associate Agreement attached as **Exhibit B**.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first above written.

"CUSTOMER": CITY OF SANTA FE

By: _____

Name: Jarel LePan Hill

Title: Interim City Manager

Date: 10/8/19

"PROVIDER": TOUCHPHRASE DEVELOPMENT, LLC

By: See Attached

Name: _____

Title: _____

Date: _____

CITY BUS. LIC. 19-00142864

ATTEST:

_____
YOLANDA Y. VIGIL, CITY CLERK

APPROVED AS TO FORM:

_____ 7/29/19
ERIN K. McSHERRY, CITY ATTORNEY

APPROVED:

_____
MARY T. McCOY, FINANCE DIRECTOR OR DESIGNEE

1000186.530200 PROJECT FIR2010001

Business Unit Line Item

"CUSTOMER": CITY OF SANTA FE

By: _____

Name: ERIK J. LITZENBERG

Title: CITY MANAGER

Date: _____

ATTEST:

_____
YOLANDA Y. VIGIL, CITY CLERK

APPROVED AS TO FORM:

_____ 7/29/19
ERIN K. McSHERRY, CITY ATTORNEY

APPROVED:

_____
MARY T. McCOY, FINANCE DIRECTOR OR DESIGNEE

1000186.530200 PROJECT FIR2010001
Business Unit Line Item

"PROVIDER": TOUCHPHRASE DEVELOPMENT, LLC

By: _____

Name: RICK RONKOWSKI

Title: Co-founder and CMIO

Date: 9/18/19

CITY BUSINESS LIC. 19-00142864

EXHIBIT A

SERVICES AND FEES

- **Term of Agreement:** One Term ending on June 30, 2020.

- **Summary of Scope of Services**: The Provider shall provide Customer and Customer's Permitted Users with remote access to TouchPhrase's web-based, patient-tracking mobile integrated software called "TouchPhrase® Outreach", for the purpose of long-term patient contact, tracking, monitoring and care. The Customer will, through the administration panel of the software, create and authorize new Authorized Users. The TouchPhrase® Outreach software allows Authorized Users, all of whom have been authorized by the Customer, to efficiently communicate action steps necessary to integrate and coordinate the care of patients. The Provider shall provide continual support, as needed, for the successful implementation, maintenance and administration of the software, as provided for in **Exhibit D**.

The number of Authorized Users that the Customer may authorize is 150.

- **Hosted Services Usage and Data Storage:** The amount of usage and data storage is unlimited.

- **Excess Hosted Services Usage Fee:** Not applicable.

- **Excess Data Storage Fee:** Not applicable.

- **Additional Service Levels:** None.

- **Fees and Expenses:**
  - Term: The Term ends on June 30, 2020. The total fees and expenses for the Term shall be $11,250, payable, on or after Acceptance from the IT Director

Reimbursable Expenses – none.

All payments shall be made by check payable to TouchPhrase Development, LLC at the below address or by such other payment method as Provider may from time to time specify:

TouchPhrase Development, LLC
Attention: Accounting Department
1755 Telstar Drive, Suite 300
Colorado Springs, CO 80920

EXHIBIT B

BUSINESS ASSOCIATE AGREEMENT

1. Preamble and Definitions.

1.1 Pursuant to the Health Insurance Portability and Accountability Act of 1996, as amended (**"HIPAA"**), the City of Santa Fe, a "Hybrid Entity" under HIPAA and a New Mexico municipal corporation (**"Covered Entity"**) and TouchPhrase Development, LLC, or any of its corporate affiliates (**"Business Associate"**), a Colorado limited liability company, enter into this Business Associate Agreement (**"BAA"**) as of the Effective Date of the underlying Software as a Service Agreement entered between Business Associate and Covered Entity (the **"Underlying Agreement"**), that addresses the HIPAA requirements with respect to "business associates," as defined under the privacy, security, breach notification, and enforcement rules at 45 C.F.R. Parts 160 and 164 (**"HIPAA Rules"**). A reference in this BAA to a section in the HIPAA Rules means the section as in effect or as amended.

1.2 This BAA is intended to ensure that Business Associate will establish and implement appropriate safeguards for the Protected Health Information (**"PHI"**) (as defined under the HIPAA Rules) that Business Associate may receive, create, maintain, use, or disclose in connection with the functions, activities, and services that Business Associate performs for Covered Entity. The functions, activities, and services that Business Associate performs for Covered Entity are defined in the Underlying Agreement..

1.3 Pursuant to changes required under the Health Information Technology for Economic and Clinical Health Act of 2009 (the **"HITECH Act"**) and under the American Recovery and Reinvestment Act of 2009 (**"ARRA"**), this BAA also reflects federal breach notification requirements imposed on Business Associate when "Unsecured PHI" (as defined under the HIPAA Rules) is acquired by an unauthorized party and the expanded privacy and security provisions imposed on business associates.

1.4 Unless the context clearly indicates otherwise, the following terms in this BAA shall have the same meaning as those terms in the HIPAA Rules: Breach, Data Aggregation, Designated Record Set, disclosure, Electronic Media, Electronic Protected Health Information (ePHI), Health Care Operations, individual, Minimum Necessary, Notice of Privacy Practices, Required By Law, Secretary, Security Incident, Subcontractor, Unsecured PHI, and use.

1.5 A reference in this BAA to the Privacy Rule means the Privacy Rule, in conformity with the regulations at 45 C.F.R. Parts 160-164 (the **"Privacy Rule"**) as interpreted under applicable regulations and guidance of general application published by the HHS, including all amendments thereto for which compliance is required, as amended by the HITECH Act, ARRA and the HIPAA Rules.

2. General Obligations of the Business Associate.

2.1 Business Associate agrees not to use or disclose PHI, other than as permitted or required by this BAA or as Required By Law, or if such use or disclosure does not otherwise cause a Breach of Unsecured PHI.

2.2 Business Associate agrees to use appropriate safeguards, and comply with Subpart C of 45 C.F.R. Part 164 with respect to ePHI, to prevent use or disclosure of PHI other than as provided for by the BAA.

2.3 Business Associate agrees to mitigate, to the extent practicable, any harmful effect that is known to Business Associate as a result of a use or disclosure of PHI by Business Associate in violation of this BAA's requirements or that would otherwise cause a Breach of Unsecured PHI.

2.4 The Business Associate agrees to the following breach notification requirements:

(a) Business Associate agrees to report to Covered Entity in writing any use, disclosure or Breach of Unsecured PHI not provided for by the BAA and any security incident of which it becomes aware within 15 calendar days of "discovery" within the meaning of the HITECH Act. Such notice shall include without limitation (i) the identification of each individual whose Unsecured PHI has been, or is reasonably believed by Business Associate to have been, accessed, acquired, or disclosed in connection with such Breach; (ii) a description of the types of Unsecured PHI that were involved in the Breach; (iii) any recommended steps the individual(s) whose PHI was inappropriately disclosed should take to protect themselves from potential harm; and, (iv) a brief description of what the Business Associate is doing to investigate the unauthorized access or use of PHI. In addition, Business Associate shall provide any

additional information reasonably requested by Covered Entity for purposes of investigating the Breach and any other available information that Covered Entity is required to include to the individual under 45 C.F.R. § 164.404(c) at the time of notification or promptly thereafter as information becomes delayed. Business Associate's notification of a Breach of Unsecured PHI under this Section shall comply in all respects with each applicable provision of section 13400 of Subtitle D (Privacy) of ARRA, the HIPAA Rules and related guidance issued by the Secretary or the delegate of the Secretary from time to time.

(b) In the event of Business Associate's use or disclosure of Unsecured PHI in violation of HIPAA, the HITECH Act, or ARRA, Business Associate bears the burden of demonstrating that notice as required under this Section 2.4 was made, including evidence demonstrating the necessity of any delay, or that the use or disclosure did not constitute a Breach of Unsecured PHI.

2.5 Business Associate agrees, in accordance with 45 C.F.R. §§ 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, to require that any Subcontractors that create, receive, maintain, or transmit PHI on behalf of the Business Associate agree to the same restrictions, conditions, and requirements that apply to the Business Associate with respect to such information.

2.6 Business Associate agrees to make available PHI in a Designated Record Set to Covered Entity as necessary to satisfy Covered Entity's obligations under 45 C.F.R. § 164.524.

(a) Business Associate agrees to comply with an individual's request to restrict the disclosure of their personal PHI in a manner consistent with 45 C.F.R. § 164.522, except where such use, disclosure, or request is required or permitted under applicable law.

(b) Business Associate agrees that when requesting, using, or disclosing PHI in accordance with 45 C.F.R. § 164.502(b)(1) that such request, use, or disclosure shall be to the minimum extent necessary, including the use of a "limited data set" as defined in 45 C.F.R. § 164.514(e)(2), to accomplish the intended purpose of such request, use, or disclosure, as interpreted under related guidance issued by the Secretary from time to time.

2.7 Business Associate agrees to make any amendments to PHI in a Designated Record Set as directed or agreed to by the Covered Entity pursuant to 45 C.F.R. § 164.526, or take other measures as necessary to satisfy Covered Entity's obligations under 45 C.F.R. § 164.526.

2.8 Business Associate agrees to maintain and make available the information required to provide an accounting of disclosures to Covered Entity as necessary to satisfy Covered Entity's obligations under 45 C.F.R. § 164.528.

2.9 Business Associate agrees to make its internal practices, books, and records, including policies and procedures regarding PHI, relating to the use and disclosure of PHI and Breach of any Unsecured PHI received from Covered Entity, or created or received by the Business Associate on behalf of Covered Entity, available to Covered Entity (and the Secretary) for the purpose of Covered Entity or the Secretary determining compliance with the HIPAA Rules.

2.10 To the extent that Business Associate is to carry out one or more of Covered Entity's obligation(s) under Subpart E of 45 C.F.R. Part 164, Business Associate agrees to comply with the requirements of Subpart E that apply to the Covered Entity in the performance of such obligation(s).

2.11 Business Associate agrees to account for the following disclosures:

(a) Business Associate agrees to maintain and document disclosures of PHI and Breaches of Unsecured PHI and any information relating to the disclosure of PHI and Breach of Unsecured PHI in a manner as would be required for Covered Entity to respond to a request by an individual or the Secretary for an accounting of PHI disclosures and Breaches of Unsecured PHI.

(b) Business Associate agrees to provide to Covered Entity, or to an individual at Covered Entity's request, information collected in accordance with this Section 2.11, to permit Covered Entity to respond to a request by an individual or the Secretary for an accounting of PHI disclosures and Breaches of Unsecured PHI.

(c) Business Associate agrees to account for any disclosure of PHI used or maintained as an Electronic Health Record (as defined in Section 5) (**"EHR"**) in a manner consistent with 45 C.F.R. § 164.528 and related guidance issued by the Secretary from time to time; provided that an individual shall have the right to receive an accounting of disclosures

of EHR by the Business Associate made on behalf of the Covered Entity only during the three years prior to the date on which the accounting is requested from Covered Entity.

(d) In the case of an EHR that the Business Associate acquired on behalf of the Covered Entity as of January 1, 2009, paragraph (c) above shall apply to disclosures with respect to PHI made by the Business Associate from such EHR on or after January 1, 2014. In the case of an EHR that the Business Associate acquires on behalf of the Covered Entity after January 1, 2009, paragraph (c) above shall apply to disclosures with respect to PHI made by the Business Associate from such EHR on or after the later of January 1, 2011 or the date that it acquires the EHR.

2.12 Business Associate agrees to comply with the "Prohibition on Sale of Electronic Health Records or Protected Health Information," as provided in section 13405(d) of Subtitle D (Privacy) of ARRA, and the "Conditions on Certain Contacts as Part of Health Care Operations," as provided in section 13406 of Subtitle D (Privacy) of ARRA and related guidance issued by the Secretary from time to time.

2.13 Business Associate acknowledges that, effective on the Effective Date of this BAA, it shall be liable under the civil and criminal enforcement provisions set forth at 42 U.S.C. 1320d-5 and 1320d-6, as amended, for failure to comply with any of the use and disclosure requirements of this BAA and any guidance issued by the Secretary from time to time with respect to such use and disclosure requirements.

3. Permitted Uses and Disclosures by Business Associate.

3.1 General Uses and Disclosures. Business Associate agrees to receive, create, use, or disclose PHI only in a manner that is consistent with this BAA, HIPAA Rules, the Underlying Agreement, and only as necessary to provide services to Covered Entity; provided that the use or disclosure would not violate the Privacy Rule, including 45 C.F.R. § 164.504(e), if the use or disclosure would be done by Covered Entity. For example, the use and disclosure of PHI will be permitted for "treatment, payment and health care operations," in accordance with the Privacy Rule.

3.2 Business Associate may use or disclose PHI as Required By Law.

3.3 Business Associate agrees to make uses and disclosures and requests for PHI: Consistent with Covered Entity's Minimum Necessary policies and procedures.

3.4 Business Associate may not use or disclose PHI in a manner that would violate Subpart E of 45 C.F.R. Part 164 if done by the Covered Entity.

3.5 Specific Other Uses and Disclosures:

(a) Except as otherwise limited in this BAA, Business Associate may use PHI to provide Data Aggregation Services to Covered Entity as permitted by HIPAA.

(b) Except as otherwise provided in this BAA, Business Associate may use PHI for its proper management and administration or to carry out its legal responsibilities as permitted under applicable law.

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

(d) Pursuant to the Underlying Agreement, Business Associate is authorized to use PHI to de-identify the information in accordance with 45 C.F.R. § 164.514(a)-(c) as Resultant Data (as defined in the Underlying Agreement) for the uses permitted in the Underlying Agreement.

4. **OBLIGATIONS OF COVERED ENTITY**.

4.1 Covered Entity shall:

(a) Provide Business Associate with the Notice of Privacy Practices that Covered Entity produces in accordance with the Privacy Rule, and any changes or limitations to such notice under 45 C.F.R. § 164.520, to the extent that such changes or limitations may affect Business Associate's use or disclosure of PHI.

(b) Notify Business Associate of any restriction to the use or disclosure of PHI that Covered Entity has agreed to or is required to abide by under 45 C.F.R. § 164.522, to the extent that such restriction may affect Business Associate's use or disclosure of PHI under this BAA.

(c) Notify Business Associate of any changes in or revocation of permission by an individual to use or disclose PHI, if such change or revocation may affect Business Associate's permitted or required uses and disclosures of PHI under this BAA.

4.2 Covered Entity shall not request Business Associate to use or disclose PHI in any manner that would not be permissible under the Privacy and Security Rule if done by Covered Entity, except as provided under Section 3 of this BAA.

5. Compliance with Security Rule.

5.1 Business Associate shall comply with the HIPAA Security Rule, which shall mean the Standards for Security of Electronic Protected Health Information at 45 C.F.R. Part 160 and Subparts A and C of Part 164, as amended by ARRA and the HITECH Act. The term **"Electronic Health Record"** or **"EHR"** as used in this BAA shall mean an electronic record of health-related information on an individual that is created, gathered, managed, and consulted by authorized health care clinicians and staff.

5.2 In accordance with the Security Rule, Business Associate agrees to:

(a) Implement the administrative safeguards set forth at 45 C.F.R. § 164.308, the physical safeguards set forth at 45 C.F.R. § 164.310, the technical safeguards set forth at 45 C.F.R. § 164.312, and the policies and procedures set forth at 45 C.F.R. § 164.316 to reasonably and appropriately protect the confidentiality, integrity, and availability of the ePHI that it creates, receives, maintains, or transmits on behalf of Covered Entity as required by the Security Rule. Business Associate acknowledges that, effective on the Effective Date of this BAA, (a) the foregoing safeguards, policies, and procedures requirements shall apply to Business Associate in the same manner that such requirements apply to Covered Entity, and (b) Business Associate shall be liable under the civil and criminal enforcement provisions set forth at 42 U.S.C. 1320d-5 and 1320d-6, as amended from time to time, for failure to comply with the safeguards, policies, and procedures requirements and any guidance issued by the Secretary from time to time with respect to such requirements;

(b) Require that any agent, including a Subcontractor, to whom it provides such PHI agrees to implement reasonable and appropriate safeguards to protect the PHI; and

(c) Report to the Covered Entity any Security Incident of which it becomes aware.

6. Indemnification.

The Parties agree and acknowledge that except as set forth herein, the indemnification obligations, if any, contained under the Underlying Agreement shall govern each Party's performance under this BAA.

7. Term and Termination.

7.1 This BAA shall be in effect as of the date first written above, and shall terminate on the earlier of the date that:

(a) Either Party terminates for cause as authorized under Section 7.2.

(b) All of the PHI received from Covered Entity, or created or received by Business Associate on behalf of Covered Entity, is destroyed or returned to Covered Entity. If it is not feasible to return or destroy PHI, protections are extended in accordance with Section 7.3.

7.2 Upon either Party's knowledge of material breach by the other Party, the non-breaching Party may immediately terminate this BAA upon written notice to the breaching party. Alternatively, the non-breaching party may provide an opportunity for the breaching Party to cure the breach or end the violation. If the breaching Party does not cure the breach or end the violation within a reasonable timeframe not to exceed 30 days from the notification of the breach, or if a material term of the BAA has been breached and a cure is not possible, the non-breaching Party may terminate this BAA and the Underlying Agreement, upon written notice to the other Party.

7.3 Upon termination of this BAA for any reason, the parties agree that Business Associate, with respect to PHI received from Covered Entity, or created, maintained, or received by Business Associate on behalf of Covered Entity, shall:

(a) Retain only that PHI that is necessary for Business Associate to continue its proper management and administration or to carry out its legal responsibilities.

(b) Return to Covered Entity or, if agreed to by Covered Entity, destroy the remaining PHI that the Business Associate still maintains in any form.

(c) Continue to use appropriate safeguards and comply with Subpart C of 45 C.F.R. Part 164 with respect to ePHI to prevent use or disclosure of the PHI, other than as provided for in this Section 7, for as long as Business Associate retains the PHI.

(d) Not use or disclose the PHI retained by Business Associate other than for the purposes for which such PHI was retained and subject to the same conditions set out at Section 3.5 above which applied prior to termination.

(e) Return to Covered Entity or, if agreed to by Covered Entity, destroy the PHI retained by Business Associate when it is no longer needed by Business Associate for its proper management and administration or to carry out its legal responsibilities.

(f) If the destruction of PHI as contemplated by this Section 7.3 is reasonably determined to be unfeasible by Business Associate, Business Associate shall notify Covered Entity in writing. Such notification shall include (i) a statement that the Business Associate has determined that it is not feasible to return or destroy the PHI in its possession, and (ii) the specific reason for such determination. If the determination is made that return or destruction of PHI is not feasible, Business Associate agrees to extend any and all protections, limitation and restrictions contained in this BAA to such PHI and shall take appropriate measures to segregate or protect the remaining PHI from further uses and/or disclosures.

7.4 The obligations of Business Associate under this Section 7 shall survive the termination of this BAA.

8. **MISCELLANEOUS**.

8.1 The parties agree to take such action as is necessary to amend this BAA to comply with the requirements of the Privacy Rule, the Security Rule, HIPAA, ARRA, the HITECH Act, the HIPAA Rules, and any other applicable law.

8.2 The respective rights and obligations of Business Associate under Section 6 and Section 7 of this BAA shall survive the termination of this BAA.

8.3 This BAA shall be interpreted in the following manner:

(a) Any ambiguity shall be resolved in favor of a meaning that permits Covered Entity to comply with the HIPAA Rules.

(b) Any inconsistency between the BAA's provisions and the HIPAA Rules, including all amendments, as interpreted by the HHS, court, or another regulatory agency with authority over the Parties, shall be interpreted according to the interpretation of the HHS, the court, or the regulatory agency.

(c) Any provision of this BAA that differs from those mandated by the HIPAA Rules, but is nonetheless permitted by the HIPAA Rules, shall be adhered to as stated in this BAA.

(d) If any portion of this BAA is inconsistent with the terms of the Underlying Agreement, the terms of the BAA shall be construed so as not to defeat the intent of the Parties with respect to the Underlying Agreement, consistent with HIPAA and the HITECH Act. The execution of this BAA shall in no event constitute a waiver by either Party of any rights or remedies it may have under the Underlying Agreement.

8.4 This BAA constitutes the entire agreement between the parties related to the subject matter of this BAA, except to the extent that the Underlying Agreement relates to the use and protection of PHI upon Business Associate. This BAA

supersedes all prior negotiations, discussions, representations, or proposals, whether oral or written. This BAA may not be modified unless done so in writing and signed by a duly authorized representative of both parties. If any provision of this BAA, or part thereof, is found to be invalid, the remaining provisions shall remain in effect.

8.5 This BAA will be binding on the successors and assigns of the Covered Entity and the Business Associate. However, this BAA may not be assigned, in whole or in part, without the written consent of the other Party. Any attempted assignment in violation of this provision shall be null and void.

8.6 This BAA may be executed in two or more counterparts, each of which shall be deemed an original.

8.7 Except to the extent preempted by federal law, this BAA shall be governed by and construed in accordance with the same internal laws as that of the Underlying Agreement.

8.8 Nothing in this BAA shall confer upon any person other than the parties and their respective successors or assigns, any rights, remedies, obligations, or liabilities whatsoever.

EXHIBIT C

SPECIFICATIONS

1. The Provider shall provide the Support Services to the Customer during the Term, including all of its Authorized Users.
2. As stated in Exhibit A, the software, called "TouchPhrase® Outreach", is a web-based, patient-tracking mobile integrated software for the purpose of long-term patient contact, tracking, monitoring and integration of care.
    a. The general functionality of the software is as was demonstrated to the Customer.
3. The Customer may, through the administration panel of the software, create and authorize new Authorized Users. All Authorized Users are created by the Customer. The TouchPhrase® Outreach software allows users from different organizations, to efficiently communicate action steps necessary to integrate and coordinate the care of the patients.
4. The Provider will be responsible for creating new organizations, as directed by the Customer. Once an organization is created, the Customer, through the administration panel, will be able to create new Authorized Users for that organization

EXHIBIT D

SUPPORT SCHEDULE

1. The Provider shall provide the Support Services to the Customer during the Term, including all of its Authorized Users.

2. The Provider shall make available to the Customer a helpdesk in accordance with the provisions of this main body of this Agreement.

3. The Provider shall provide the Support Services with reasonable skill and care.

4. The Provider shall respond promptly to all requests for Support Services made by the Customer through the helpdesk per the following response schedule, based upon the severity of the event for which support is requested:

Severity Level	Description	Response Time
Critical	Inability to use any major functions of the Hosting site, resulting in a critical impact on user objectives.	Time to respond is 4 – 8 business hours
High	An important existing functionality is not available and there is not an acceptable workaround.	Time to respond is 1-2 business days
Low	Incorrect behavior of the Hosting site, or an important existing functionality is not available but there is an acceptable workaround.	Time to respond is 1 – 3 business days

Resolution of issues based on the above severity levels above is as follows:

- Severity Level Critical – Work to resolve the issue under 4 hours.
- Severity Level High – Work to resolve the issue in under 8 hours.
- Severity Level Low – Work to resolve the issue in less than 3 days.

EXHIBIT E

Service Level Agreement

This TouchPhrase Service Level Agreement ("**SLA**") between TouchPhrase, Inc. ("**Provider**" "**TouchPhrase**", "**us**" or "**we**") and users of TouchPhrase® Outreach ("**you**" "**City of Santa Fe**" or "**Customer**") governs the use of the TouchPhrase® Outreach under the provisions of the TouchPhrase Terms of Service (the "**Terms**").

1. Service Commitment: 99.99% Uptime.

TouchPhrase will use commercially reasonable efforts to make TouchPhrase® Outreach available with a Monthly Uptime Percentage of at least 99.99% during a monthly cycle ("**Service Commitment**"). Subject to the TouchPhrase SLA Exclusions, if we do not meet the Service, you will be eligible to receive a Service Credit.

A Monthly Uptime Percentage of 99.99% means that we guarantee you will experience no more than 4.38 min/month of Unavailability.

2. Definitions.

"**Hours of Operation**" are the hours between 3:00 am MST and 9:59 pm MST, daily.

"**Maintenance**" means scheduled Unavailability of TouchPhrase® Outreach, as announced by us prior to the TouchPhrase® Outreach becoming Unavailable or during the hours outside of the Hours of Operation.

"**Monthly Uptime Percentage**" is calculated by subtracting from 100% the percentage of minutes during the month in which TouchPhrase® Outreach were Unavailable. Monthly Uptime Percentage measurements exclude downtime resulting directly or indirectly from any TouchPhrase SLA Exclusion.

"**Service Credit**" means a credit denominated in US dollars, calculated as set forth below, that we may credit back to an eligible account.

"**Unavailable**" and "**Unavailability**" means the TouchPhrase® Outreach health check endpoint does not return successfully, as confirmed by our monitoring.

3. Service Commitments and Service Credits. Service Credits are calculated as a percentage of the total charges paid by you (excluding one-time payments, customization fees, and development fees) for the billing cycle divided into equal segments, where each segment is equal to one month, in which the Unavailability occurred in accordance with the schedule below:

a) For Monthly Uptime Percentage less than 99.99% but equal to or greater than 95.0%, you will be eligible for a 10% Service Credit.

b) For Monthly Uptime Percentage less than 95.0%, you will be eligible for a 20% Service Credit.

We will apply any Service Credits only against future payments for the Services otherwise due from you. At our discretion, we may issue the Service Credit back in the same method used to pay for the billing cycle in which the Unavailability occurred. Service Credits will not entitle you to any refund or other payment from TouchPhrase. A Service Credit will be applicable and issued only if the credit amount for the applicable billing cycle is greater than one dollar ($1 USD). Service Credits may not be transferred or applied to any other account.

4. Sole Remedy. Unless otherwise provided in the Terms, your sole and exclusive remedy for any unavailability, non-performance, or other failure by us to provide TouchPhrase® Outreach is the receipt of a Service Credit (if eligible) in accordance with the terms of this SLA.

5. Credit Request and Payment Procedures. To receive a Service Credit, you must submit a claim by emailing *tech@touchphrase.com*. To be eligible, the credit request must be received by us within 60 days from the incident occurrence and must include:

a) the words "SLA Credit Request" in the subject line;

b) the dates and times of each Unavailability incident that you are claiming; and

c) logs or other documentation that document the errors and corroborate your claimed outage (any confidential or sensitive information in these logs or documents should be removed or replaced with asterisks).

If the Monthly Uptime Percentage of such request is confirmed by us and is less than the Service Commitment, then we will issue the Service Credit to you within one billing cycle following the date your request is confirmed by us. Your failure to provide the request and other information as required above will disqualify you from receiving a Service Credit.

6. TouchPhrase SLA Exclusions. The Service Commitment does not apply to any unavailability, suspension or termination of TouchPhrase® Outreach, or any other performance issues:

a) That result from a suspension or Remedial Action, as described in the Terms;

b) Caused by factors outside of our reasonable control, including any force majeure event, Internet access, or problems beyond the demarcation point of the TouchPhrase network;

c) That result from any actions or inactions of you or any third party;

d) That result from the equipment, software or other technology of you or any third party (other than third-party equipment within our direct control);

e) That result from failures of TouchPhrase® Outreach not attributable to Unavailability; or

f) That result from any Maintenance.

If availability is impacted by factors other than those used in our Monthly Uptime Percentage calculation, then we may issue a Service Credit considering such factors at our discretion.