

BENCHMARK MEDICAL LLC, BUSINESS ASSOCIATE AGREEMENT

This **BUSINESS ASSOCIATE AGREEMENT** (“Agreement”) dated as of the signature below, (the “Effective Date”), is entered into by and between the signing organization (“Facility”) and Benchmark Medical, LLC d.b.a. BenchMarket Medical and “BMM” (“Business Associate”).

WHEREAS, Facility and Business Associate have entered into, or are entering into, or may subsequently enter into, agreements or other documented arrangements (collectively, the “Business Arrangements”) pursuant to which Business Associate may provide services for Facility that require Business Associate to access, create and use health information that is protected by state and/or federal law; and

WHEREAS, pursuant to the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), the U.S. Department of Health & Human Services (“HHS”) promulgated the Standards for Privacy of Individually Identifiable Health Information (the “Privacy Standards”), at 45 C.F.R. Parts 160 and 164, requiring certain individuals and entities subject to the Privacy Standards (each a “Facility”, or collectively, “Covered Entities”) to protect the privacy of protected health information as defined at 45 C.F.R. Section 160.103 (“Protected Health Information”, or “PHI”); and

WHEREAS, pursuant to HIPAA, HHS has issued the Security Standards for the Protection of Electronic Protected Health Information (the “Security Standards”), at 45 C.F.R. Part 160 and 164, for the protection of electronic protected health information as defined at 45 C.F.R. Section 160.103 (“E PHI”); and

WHEREAS, in order to protect the privacy and security of PHI, including E PHI, created or maintained by or on behalf of the Facility, the Privacy Standards and Security Standards require a Facility to enter into a “business associate agreement” with certain individuals and entities providing services for or on behalf of the Facility if such services require the use or disclosure of PHI or E PHI; and

WHEREAS, HIPAA, the Privacy Standards and Security Standards were recently amended by the American Recovery and Reinvestment Act of 2009 (“ARRA”) and the parties desire to incorporate such changes as they become effective; and

WHEREAS, Business Associate and Facility desire to enter into this Business Associate Agreement;

NOW THEREFORE, in consideration of the mutual promises set forth in this Agreement and the Business Arrangements, and other good and valuable consideration, the sufficiency and receipt of which are hereby severally acknowledged, the parties agree as follows:

1. Business Associate Obligations.

1.1 Business Associate may receive from Facility, or create or receive on behalf of Facility, health information that is protected under applicable state and/or federal law, including without limitation, PHI and E PHI. All capitalized terms not otherwise defined in this Agreement shall have the meanings set forth in the Privacy Standards, Security Standards, the ARRA, as applicable, and all references to PHI herein shall be construed to include E PHI. Business Associate agrees not to use or disclose (or permit the use or disclosure of) PHI in a manner that would violate the requirements of the Privacy Standards or Security Standards (as of the compliance deadline for such standards) if the PHI were used or disclosed by Facility in the same manner. Business Associate shall use appropriate safeguards to prevent the use or disclosure of PHI other than as expressly permitted under this Agreement.

1.2 Business Associate will implement Administrative, Physical and Technical Safeguards that reasonably and appropriately protect the Confidentiality, Integrity and Availability of the EPHI that it creates, receives, maintains or transmits on behalf of Facility. Business Associate will promptly report to Facility any Security Incident of which it becomes aware. Business Associate shall cooperate with, and take any action required by, the Facility to mitigate any harm caused by such improper disclosure of PHI. At such time as required by the ARRA, in the event that Business Associate has Knowledge or a Reasonable Belief that a Breach of Unsecured PHI of the Facility has occurred or may have occurred, Business Associate shall promptly (but in no event more than thirty (30) days of Knowledge of the Breach or Reasonable Belief that a Breach has occurred) notify the Facility of the identification of each individual who has been or is reasonably believed to have been affected by the Breach, along with any other information that the Facility as a Facility will be required to include its notification of the individual under the ARRA, including, without limitation, a description of the breach, the date of the breach and its discovery, types of Unsecured PHI involved and description of the Business Associate's investigation, mitigation and prevention efforts. At such time required by the ARRA and in the manner required by the ARRA, Business Associate shall implement safeguards and policy, procedure, and documentation requirements consistent with the requirements of 45 C.F.R. §§ 164.308, 164.310, 164.312, and 164.316.

1.3 Business Associate shall only request from the Facility, and shall only use and disclose, the minimum amount of PHI necessary to carry out the Business Associate's responsibilities under this Agreement in accordance with any regulations promulgated under the ARRA or any guidance provided by the Secretary of Health and Human Services (the "Secretary").

2. **Use of PHI.** Except as otherwise permitted herein or Required by Law, Business Associate shall use PHI (i) solely for Facility's benefit and only for the purpose of performing services for Facility as such services are defined in Business Arrangements, and (ii) as necessary for the proper management and administration of the Business Associate or to carry out its legal responsibilities, provided that such uses are permitted under federal and state law. Facility shall retain all rights in the PHI not granted herein.

3. **Agreements by Third Parties.** Subject to any limitations in this Agreement, Business Associate may disclose PHI to any third party persons or entities as necessary to perform its obligations under the Business Arrangement and as permitted or required by applicable federal or state law. Business Associate shall obtain satisfactory assurances from any agent or subcontractor who will have access to PHI that is received from Facility, or created or received on behalf of the Facility, and shall ensure that the agent or subcontractor agrees to be bound by the same restrictions, terms and conditions that apply to Business Associate through this Agreement with respect to PHI. Business Associate shall require that any agent or subcontractor notify Business Associate of any instances in which PHI is used or disclosed in an unauthorized manner. Business Associate agrees to notify Facility of any such unauthorized use or disclosure. Business Associate shall take steps to cure the breach of confidentiality and end the violation, or shall terminate the agency agreement or subcontract.

4. **Individual Rights Regarding Designated Record Sets.** If Business Associate maintains Designated Record Set (DRS) documentation on behalf of Facility, Business Associate agrees to provide access to the documentation maintained by the Facility. Business Associate shall make available to Facility such information for so long as it is maintained. If any individual requests access to PHI directly from Business Associate, Business Associate shall forward such request to the Facility. Business Associate shall not deny any individual's request for access to the individual's PHI. A denial of access to PHI requested is the responsibility of the Facility. Within five days of a request from Facility for the amendment of an individual's PHI or a record regarding an individual contained in a DRS (for so long as the PHI is maintained in the DRS), Business Associate shall provide such information to Facility for amendment and incorporate any such amendments in the PHI as required by 45 C.F.R. §164.526

5. **Records and Audit.** Business Associate shall make available to the Secretary or its agents if requested, its internal practices, books, and records relating to the use and disclosure of PHI received from, created, or received by Business Associate on behalf of Facility for the purpose of determining Facility's

compliance with the Privacy Standards. Except to the extent prohibited by law, Business Associate agrees to notify Facility within five day, upon receipt by Business Associate of any and all requests by or on behalf of any and all government authorities served upon Business Associate for PHI.

6. **Confidentiality**. Business Associate shall take any steps reasonably required to (i) protect PHI from unauthorized uses or disclosures, and (ii) maintain the confidentiality and integrity of PHI.

7. **Term and Termination**.

7.1 This Agreement shall commence on the Effective Date and shall remain in effect until terminated in accordance with the terms of this section, provided, however, that any termination shall not affect the respective obligations or rights of the parties arising under this Agreement prior to the effective date of termination, all of which shall continue in accordance with their terms.

7.2 Either party shall have the right to terminate this Agreement for any reason upon thirty (30) days written notice to the other party.

7.3 Facility may immediately terminate this Agreement and shall have no further obligations to Business Associate hereunder if any of the following events shall have occurred and be continuing:

- (i) Business Associate shall fail to observe or perform any material covenant or obligation contained in this Agreement for ten (10) days after written notice thereof has been given to Business Associate by Facility; or
- (ii) A violation by Business Associate of any provision of the Privacy Standards, Security Standards or applicable federal or state privacy law.

7.4 BMM may immediately terminate this Agreement and shall have no further obligations to Facility, other than those specified in section 7.5, if Facility shall fail to observe or perform any material covenant or obligation contained in this Agreement for ten (10) days after written notice thereof has been given to Facility by Business Associate;

7.5 Upon termination of this Agreement for any reason, Business Associate agrees as directed by Facility either to return to Facility or to destroy all PHI received from Facility or otherwise through the performance of services for Facility, that is in the possession or control of Business Associate or its agents. In the case of PHI which is not feasible to "return or destroy" as determined by mutual agreement of the parties, Business Associate shall extend the protections of this Agreement to such PHI and limit further uses and disclosures of such PHI to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such PHI. Business Associate further agrees to comply with other applicable state or federal law, which may require a specific period of retention, redaction, or other treatment of such PHI.

8. **Ineligible Persons**. Business Associate represents and warrants to Facility that Business Associate (i) is not currently excluded, debarred, or otherwise ineligible to participate in any federal health care program as defined in 42 U.S.C. Section 1320a-7b(f) ("the Federal Healthcare Programs"); (ii) has not been convicted of a criminal offense related to the provision of health care items or services and not yet been excluded, debarred, or otherwise declared ineligible to participate in the Federal Healthcare Programs, and (iii) is not under investigation or otherwise aware of any circumstances which may result in Business Associate being excluded from participation in the Federal Healthcare Programs. This shall be an ongoing representation and warranty during the term of this Agreement, and Business Associate shall immediately notify Facility of any change in the status of the representations and warranty set forth in this section. Any breach of this section shall give Facility the right to terminate this Agreement immediately for cause.

9. **Miscellaneous.**

9.1 **Waiver.** No provision of this Agreement or any breach thereof shall be deemed waived unless such waiver is in writing and signed by the party claimed to have waived such provision or breach. No waiver of a breach shall constitute a waiver of or excuse any different or subsequent breach.

9.2 **Assignment.** Neither party may assign (whether by operation or law or otherwise) any of its rights or delegate or subcontract any of its obligations under this Agreement without the prior written consent of the other party. Notwithstanding the foregoing, either party shall have the right to assign its rights and obligations hereunder to any entity that is an affiliate or successor of that party, without the prior approval of the other party.

9.3 **Severability.** Any provision of this Agreement that is determined to be invalid or unenforceable will be ineffective to the extent of such determination without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of such remaining provisions.

9.4 **Entire Agreement.** This Agreement constitutes the complete agreement between Business Associate and Facility relating to the matters specified in this Agreement, and supersedes all prior representations or agreements, whether oral or written, with respect to such matters. In the event of any conflict between the terms of this Agreement and the terms of the Business Arrangements or any such later agreement(s), the terms of this Agreement shall control unless the terms of such Business Arrangements are more strict with respect to PHI and comply with the Privacy Standards and/or Security Standards, or the parties specifically otherwise agree in writing. No oral modification or waiver of any of the provisions of this Agreement shall be binding on either party. No obligation on either party to enter into any transaction is to be implied from the execution or delivery of this Agreement. This Agreement is for the benefit of, and shall be binding upon the parties, their affiliates and respective successors and assigns. No third party shall be considered a third-party beneficiary under this Agreement, nor shall any third party have any rights as a result of this Agreement.

9.5 **Governing Law.** This Agreement shall be governed by and interpreted in accordance with the laws of the State of Washington. Jurisdiction and Venue for any dispute relating to this Agreement shall exclusively rest with the state and federal courts in King County in the State of Washington.

9.6 **Nature of Agreement.** Nothing in this Agreement shall be construed to create (i) a partnership, joint venture or other joint business relationship between the parties or any of their affiliates, or (ii) a relationship of employer and employee between the parties. This Agreement does not express or imply any commitment to purchase or sell goods or services.

9.7 **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document. In making proof of this Agreement, it shall not be necessary to produce or account for more than one such counterpart executed by the party against whom enforcement of this Agreement is sought.

9.8 **Interpretation, Changes in Law.** Any ambiguity in this Agreement shall be resolved to permit the Facility to comply with HIPAA, Privacy Standards, Security Standards, and ARRA. The parties acknowledge that the ARRA requires the Secretary to promulgate regulations and interpretative guidance that is not available at the time of executing this Agreement. In the event Facility determines in good faith that any such regulation or guidance adopted or amended after the execution of this Agreement shall cause any paragraph or provision of this Agreement to be invalid, void or in any manner unlawful or subject either party to penalty, then the parties agree modify and amend this Agreement in a manner that would eliminate any such risk.

9.9 **Indemnification.** Business Associate hereby agrees to defend, indemnify and hold harmless Facility and its directors, officers, employees, agents and owners from and against any and all

fines, penalties, damages, liability and costs, including, without limitation attorneys' fees, created by a breach of this Agreement or a violation by Business Associate of HIPAA, the Privacy Standards, the Security Standards or the ARRA, without regard to any limitation or exclusion of damages provision otherwise set forth in this Agreement or any agreement involving the Business Arrangement. This obligation will survive termination or expiration of this Agreement and/or any agreement involving the Business Arrangement.

9.10 **Notice.** All notices, requests, demands and other communications required or permitted to be given or made under this Agreement shall be in writing, shall be effective upon receipt or attempted delivery, and shall be sent by (i) personal delivery; (ii) certified or registered United States mail, return receipt requested; (iii) overnight delivery service with proof of delivery; or (iv) facsimile with return facsimile acknowledging receipt. Notices shall be sent to the addresses below the signatures. Neither party shall refuse delivery of any notice hereunder.

10. **Approvals.** Neither this Agreement nor any amendment or modification hereto shall be effective or legally binding upon Facility, or any officer, director, employee or agent thereof, unless and until it has been reviewed and approved in writing by a Senior Vice President of Facility's owner and by Facility's Legal Counsel.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date.

FACILITY:

BUSINESS ASSOCIATE:

By: _____

By: _____

Date: _____

Date: _____

NOTICES

FACILITY:

BUSINESS ASSOCIATE:

Benchmark Medical, LLC
2815 Eastlake Ave E, Suite 300
Seattle, WA 98102

Attention: _____

Attention: Justine Norwitz

Tel. No.: _____

Tel. No.: 206-336-5550

Fax No.: _____

Fax No.: _____

Email: _____

Email: justine.norwitz@benchmarkmedical.com