



## Healthix Participation Agreement

This Healthix Participation Agreement (the “Agreement”) is made as of [REDACTED], 2018 (the “Effective Date”) by and between Healthix Inc. (“Healthix”), a New York not-for-profit corporation with its principal office located at 40 Worth St, 5<sup>th</sup> floor, New York NY 10013, and [REDACTED] (“Entity”), with its principal office located at [REDACTED] (Healthix and Entity will each be referred to as a “Party,” and will collectively be referred to as the “Parties.”)

### RECITALS

WHEREAS, Healthix operates an Inter-Organizational Data Exchange and participates in the Statewide Health Information Network for New York (“SHIN-NY”) under the terms of the QEPA and its contract with the New York State Department of Health;

WHEREAS, Entity is an organization that can qualify as a Participant under Healthix Policy and wishes to participate in the Inter-Organizational Data Exchange, and/or access the SHIN-NY; and

WHEREAS, Healthix and Entity seek to set forth the terms of participation in and use of Healthix’s System and SHIN-NY.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, Healthix and Entity agree as follows:

### **I. DEFINITIONS**

The following terms will have the corresponding meanings when used in this Agreement. Other capitalized terms used in this Agreement are defined in the context in which they are used and have the meanings there indicated.

“Data Source” is a Participant and that Participant’s authorized employees, consultants or agents, who are providing Patient Data to or through the System.

“Documentation” means all materials, documentation, technical manuals, operator and user manuals, file descriptions, and other written information made generally available by Healthix to users of the System, including all updates thereto, that describe the functions, operational characteristics and specifications and use of the System.

“Healthix Policy” means all written policies and procedure of Healthix.

“Inter-Organizational Data Exchange” means the exchange of clinical patient information between unrelated organizations that provide or manage care for the purposes of treatment or care management.

“NY Statewide Guidance” means Part 300 of the New York State Public Health Law and the policies, procedures, and guidance approved by the New York State Department of Health for operation of health information exchange and participation in the SHIN-NY, including, without limitation, Privacy and Security Policies and Procedures for QEs and their Participants in New York State.

“Participant” means Entity or other authorized entity that has entered into an agreement with Healthix authorizing access to and use of the System.

“Patient” means an individual who is a patient of a healthcare provider or a member of health plan.

“Patient Data” means all data provided by a Data Source to be accessed or otherwise utilized through the System, which includes (i) PHI; (ii) patient information locator data; (iii) patient demographic data and organization domain information; and (iv) clinical data, medical records, registration information and such other information as shall be consistent with the Healthix Policy.

“Proprietary Rights” means patented or patentable inventions, trade secrets, trademarks, copyrights and other intellectual property rights.

“Protected Health Information (“PHI”) shall have the meaning set forth in 45 C.F.R. 164.501.

“QE” is a not-for-profit regional health information organization or other entity that has entered into a QEPA and is entitled to participation in the SHIN-NY under the QEPA’s terms and under the Part 300 of New York State Public Health Law.

“QEPA” is the qualified entity participation agreement, between Healthix and New York eHealth Collaborative, under which Healthix is considered a QE that is entitled to participate in the SHIN-NY under the terms of the QEPA.

“Software” means any software that Healthix provides to Entity from time to time to facilitate Entity’s interface with or use of the System, including any upgrades of or modifications to such software, or new versions of such software, provided to Entity.

“System” means the software, hardware and related Documentation licensed, owned or prepared by Healthix to allow Participants to engage in health information exchange and participate in the SHIN-NY.

“Terms and Conditions” means the Healthix terms and conditions attached hereto as Exhibit D.

## **II. LICENSE GRANT AND RESTRICTIONS**

Healthix grants Entity a personal, non-exclusive, non-transferable, non-sub-licensable, royalty-free, limited license to access and use the System, during the Term, subject to the terms and conditions of this Agreement. Entity acknowledges and agrees that Healthix and/or any licensor to Healthix are the exclusive owner(s) of all right, title and interest in any aspect of the System, including Proprietary Rights and enhancements or derivative works related to the System, regardless of any participation or collaboration of Entity in the development or implementation of any aspect of the System including the documentation. This Agreement does not convey to Entity any title in or to, or ownership of, the System or of any part thereof, or any modifications, extensions, enhancements or derivative works made thereto.

## **III. RESPONSIBILITIES**

- 1. Terms and Conditions.** Healthix and Entity each acknowledge and agree that it must comply with the Terms and Conditions, which are incorporated herein by reference and an integral part of this Agreement, attached as **Exhibit D**.

2. **Participation in Healthix and Use of the System.** Entity warrants and represents that it shall use the System and participate in Healthix in good faith and in compliance with Healthix Policy, NY Statewide Guidance, the Terms and Conditions, all applicable state or federal law, rule or regulation and this Agreement;
3. **Financial Obligations.** All fees, Entity contributions and distributions, if any, shall be as set forth in **Exhibit B**, annexed hereto and incorporated herein
4. **Patient Consent.** Entity acknowledges it has an affirmative obligation to obtain patient consent when required in accordance with applicable state and federal law, rules and regulations, NY Statewide Guidance, Terms and Conditions and with Healthix Policy.
5. **QEPA Flow Down Requirements.** Entity acknowledges that the QEPA requires Healthix to include certain requirements in this Agreement. The QEPA Flow Down Requirements, are set forth in the limitation on Entity liability and insurance requirements in the Terms and Conditions, and as follows:
  - 5.1 Entity acknowledges that, by participating in the SHIN-NY, data from Entity may be shared with other Participants of Healthix as well as participants of QEs other than Healthix.
  - 5.2 Entity agrees to provide information and/or allow audit to the extent necessary for Healthix to fulfill its reporting, audit and investigation obligations under the QEPA and the NY Statewide Guidance.
6. **Business Associate Agreement.** Notwithstanding anything to the contrary herein or in the terms and conditions, the confidentiality of PHI shall be governed by the terms of the Business Associate Agreement attached as **Exhibit A**.

#### IV. TERM AND TERMINATION

1. **Term.** This Agreement will commence on the Effective Date and be in effect for a term of one year and shall thereafter renew for successive one-year terms (the "Term"), unless terminated sooner in accordance with the provisions of this Article IV below.
2. **Termination.** This Agreement may terminate as follows:
  - 2.1 **Uncured Breach.** Should either Party default in the performance of any material obligation under this Agreement, or breach any material provision contained in this Agreement, and not cure or substantially cure the default or breach within thirty (30) days after receipt of written notice by the other Party of such default or breach, then in addition to other remedies set forth in this Agreement or allowed by law, this Agreement may be terminated by the non-defaulting/non-breaching Party upon written notice to the defaulting/breaching Party.
  - 2.2 **Entity's Right to Terminate this Agreement and Cease Participation.** Entity has the right to terminate this Agreement and cease participation in Healthix, without cause, upon not less than thirty (30) days prior written notice to Healthix.
  - 2.3 **Security/Privacy Breach.** Either Party may terminate this Agreement or, where applicable, suspend the other Party's right to use the System immediately upon written notice to the other Party in the event the other Party materially breaches its obligations under this

Agreement if (i) the security of the System or (ii) the System or any of the computer systems or networks of either Party or its' employees, consultants, medical staff or agents, has been or is likely to be seriously compromised by such breach, or such breach has been or is likely to result in a serious violation of the legal obligations of either Party to patients with respect to the privacy or confidentiality of PHI.

3. **Return of Documentation and Software.** If applicable, Entity will destroy all original, backup and archival copies of the Software, Documentation, and other material relating thereto or to the System. Entity's senior information officer or equivalent thereof will certify such destruction to Healthix in writing.
4. **Survival.** Any provision of this Agreement or the Terms and Conditions that contemplates performance or observance subsequent to termination will survive termination, including Section IV.3 and V of this Agreement.

## V. MISCELLANEOUS PROVISIONS

1. **Venue; Governing Law.** This Agreement will be governed by and construed in accordance with the laws of the State of New York without regard to the conflicts of law provisions thereof. The sole and exclusive jurisdiction and venue for actions related to the subject matter of this Agreement will be the state and federal courts located in New York State.
2. **No Third-Party Beneficiary.** Except as expressly provided in Terms and Conditions, nothing express or implied in this Agreement is intended to confer, nor will anything herein confer, upon any person other than the Parties and the respective successors or assigns of the Parties, any rights, remedies, obligations, or liabilities whatsoever.
3. **Notices.** All notices required or permitted to be given under this Agreement will be in writing, and may be given (i) by personal delivery; (ii) by prepaid certified or registered U.S. mail; or (iii) by reputable commercial overnight courier service with tracking capabilities to the address listed in the signature block; or (iv) by facsimile; or (v) by email, provided that in the case of (iv) facsimile and (v) email, receipt is confirmed by the addressee within 48 hours.

All notices will be deemed given and effective upon receipt, except in the case of registered or certified mail, in which case such notice will be deemed given effective upon the delivery or refusal date specified on the return receipt.

4. **Assignment.** Neither Party may assign, transfer, or sublicense any obligations or benefit under this Agreement without the prior written consent of the other Party, provided that either Party may assign this Agreement to the surviving party in a merger or acquisition of substantially all of its shares or assets. Except as otherwise provided herein, this Agreement will be binding on and inure to the benefit of the respective successors and permitted assigns of the Parties.
5. **Amendment.** This Agreement may not be changed except by written amendment signed by duly authorized representatives of both Parties.
6. **Entire Agreement; Modification.** This Agreement constitutes the entire agreement between the Parties and supersedes all other prior and contemporaneous agreements, understandings, and commitments between Healthix and Entity with respect to the subject matter hereof, except to

the extent they are specifically incorporated into this Agreement.

7. **Severability.** If any term or condition of this Agreement is to any extent held invalid, unenforceable or in violation of any law, the remainder of this Agreement will not be affected thereby and it will remain in full force and effect.
8. **Priority.** In the event of any conflict or inconsistency between a provision in the body of this Agreement and any attachment, schedule or exhibit hereto, the terms contained in the body of this Agreement will prevail.
9. **Force Majeure.** A Party will not be liable for nonperformance or delay in performance (other than of obligations regarding payment of money or confidentiality) caused by any event reasonably beyond the control of such Party including, but not limited to wars, hostilities, riots, national emergency, strikes, lockouts, unavailability of supplies, epidemics, fire, flood, earthquake, force of nature, embargo, or any other Act of God, internet, electric power or communications outage, or any law, proclamation, regulation, ordinance of any court, government or governmental agency.
10. **Headings.** The headings throughout this Agreement are for reference purposes only, and the words contained therein may in no way be held to explain, modify or aid in the interpretation or construction of meaning of the provisions of this Agreement.
11. **Non-Waiver.** No provision of this Agreement may be modified or waived, by course of dealing or otherwise (including any failure or delay by either Party to exercise or partially exercise any right, power or privilege hereunder), unless such modification or waiver is set forth in a written document executed by an authorized representative of the Party to be bound thereby.
12. **Relationship of the Parties.** The Parties will be considered independent contracting entities. Nothing in this Agreement will be construed to create a partnership, agency relationship, or joint venture among the Parties. Neither Party will have any authority to bind or make commitments on behalf of the other Party for any purpose, nor will it hold itself out as having such authority.
13. **Duly Authorized.** Healthix and Entity each represent and warrant to the other that it has full power and authority to enter into and perform this Agreement. Each represents and warrants to the other that its representatives signing this Agreement on its behalf have been properly authorized and empowered to enter into this Agreement.
14. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which will be deemed an original as against the Party whose signature appears thereon, but all of which taken together will constitute but one and the same instrument.

IN WITNESS WHEREOF, an authorized officer of each Party has duly executed and delivered this Agreement effective as of the Effective Date.

**[Entity]**

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

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

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

**Address:** \_\_\_\_\_

**Email:** \_\_\_\_\_

**Healthix Inc.**

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

Name: Todd Rogow

Title: President & CEO

Email: trogow@healthix.org

Address: 40 Worth Street, 5th Floor, New York, NY, 10013

## Exhibit A

### **HIPAA Business Associate Agreement**

This Business Associate Agreement (“BA Agreement”), dated as of [REDACTED], 2018 (“Effective Date”), supplements and is made a part of the Services Agreement (as defined below) by [REDACTED] (“Covered Entity”) and Healthix, Inc. (“Business Associate”), it being noted that Healthix is successor-in interest to Brooklyn Health Information Exchange (BHIX) pursuant to a merger effective December 1, 2013. Covered Entity and Business Associate may be referred to herein collectively as the “Parties” or individually as “Party.”

WHEREAS, Covered Entity and Business Associate are parties to the Services Agreement pursuant to which Business Associate provides certain services to Covered Entity. In connection with Business Associate’s services, Business Associate creates, receives, maintains or transmits Protected Health Information from or on behalf of Covered Entity, which information is subject to protection under the Federal Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104 191 (“HIPAA”), the Health Information Technology for Economic and Clinical Health Act, Title XIII of the American Recovery and Reinvestment Act of 2009 (the “HITECH Act”), and related regulations promulgated by the Secretary (“HIPAA Regulations”); and

WHEREAS, Business Associate qualifies as a “business associate” (as defined by the HIPAA Regulations) of its clients, which means that Business Associate has certain responsibilities with respect to the Protected Health Information of its clients; and

WHEREAS, in light of the foregoing and the requirements of HIPAA, the HITECH Act, and HIPAA Regulations, Business Associate and Covered Entity agree to be bound by the following terms and conditions.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree in this BA Agreement as follows:

#### **I. DEFINITIONS**

- 1. General.** Terms used, but not otherwise defined, in this BA Agreement shall have the same meaning given to those terms by HIPAA, the HITECH Act and HIPAA Regulations as in effect or as amended from time to time.
- 2. Specific.**
  - 2.1 Breach.** “Breach” shall have the same meaning as the term “breach” in 45 C.F.R. § 164.402.
  - 2.2 Data Aggregation Services.** “Data Aggregation Services” shall mean the combining of Protected Health Information by Business Associate with the Protected Health Information received by Business Associate in its capacity as a business associate of a HIPAA covered entity, to permit data analyses that relate to health care operations of the respective covered entities.
  - 2.3 Electronic Health Record.** “Electronic Health Record” shall have the same meaning as the term “electronic health record” in the HITECH Act, Section 13400(5).

- 2.4** Electronic Protected Health Information. “Electronic Protected Health Information” shall have the same meaning as the term “electronic protected health information” in 45 C.F.R. § 160.103, limited to the information that Business Associate creates, receives, maintains, or transmits from or on behalf of Covered Entity.
- 2.5** Individual. “Individual” shall have the same meaning as the term “individual” in 45 C.F.R. § 160.103 and shall include a person who qualifies as a personal representative in accordance with 45 C.F.R. § 164.502(g).
- 2.6** NY Statewide Guidance. “NY Statewide Guidance” shall mean Part 300 of the New York State Public Health Law and the policies, procedures, and guidance, including technical standards, approved by the New York State Department of Health for operation of health information exchange and participation in the Statewide Health Information Network of New York, or SHIN-NY.
- 2.7** Privacy Rule. “Privacy Rule” shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 C.F.R. Part 160 and Part 164.
- 2.8** Protected Health Information. “Protected Health Information” shall have the same meaning as the term “protected health information” in 45 C.F.R. § 160.103, limited to the information created, received, maintained or transmitted by Business Associate from or on behalf of Covered Entity.
- 2.9** Required By Law. “Required by Law” shall have the same meaning as the term “required by law” in 45 C.F.R. § 164.103.
- 2.10** Secretary. “Secretary” shall mean the Secretary of the Department of Health and Human Services or his designee.
- 2.11** Security Rule. “Security Rule” shall mean the Security Standards at 45 Part 160 and Part 164.
- 2.12** Services Agreement. “Services Agreement” shall mean any present or future agreements, either written or oral, between Covered Entity and Business Associate under which Business Associate provides services to Covered Entity which involve the use or disclosure of Protected Health Information. The Services Agreement is amended by and incorporates the terms of this BA Agreement.
- 2.13** Subcontractor. “Subcontractor” shall have the same meaning as the term “subcontractor” in 45 C.F.R. § 160.103.
- 2.14** Unsecured Protected Health Information. “Unsecured Protected Health Information” shall have the same meaning as the term “unsecured protected health information” in 45 C.F.R. § 164.402.

## **II. OBLIGATIONS AND ACTIVITIES OF BUSINESS ASSOCIATE**

- 1. Use and Disclosure.** Business Associate agrees not to use or disclose Protected Health Information other than as permitted or required by the Services Agreement, this BA Agreement, NY Statewide Guidance or as Required By Law. Business Associate shall comply with the

provisions of this BA Agreement relating to privacy and security of Protected Health Information and all present and future provisions of HIPAA, the HITECH Act and HIPAA Regulations that relate to the privacy and security of Protected Health Information and that are applicable to Covered Entity and/or Business Associate. Without limiting the foregoing, to the extent the Business Associate will carry out one or more of the Covered Entity's obligations under the Privacy Rule, Business Associate shall comply with the requirements of the Privacy Rule that apply to the Covered Entity in the performance of such obligations.

- 2. Appropriate Safeguards.** Business Associate agrees to use appropriate safeguards and comply, where applicable, with the Security Rule (with respect to Electronic Protected Health Information) to prevent the use or disclosure of the Protected Health Information other than as provided for by this BA Agreement. Without limiting the generality of the foregoing sentence, Business Associate will:
  - 2.1** Implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of Electronic Protected Health Information as required by the Security Rule; and
  - 2.2** Ensure that any Subcontractor to whom Business Associate provides Electronic Protected Health Information agrees in writing to implement reasonable and appropriate safeguards and comply, where applicable, with the Security Rule to protect Electronic Protected Health Information and comply with the other requirements of Article II, Section 2.1 above.
- 3. Reporting.** Business Associate agrees to promptly, and at most within three (3) business days, report to Covered Entity any of the following:
  - 3.1** Any use or disclosure of Protected Health Information not permitted by this BA Agreement of which Business Associate becomes aware.
  - 3.2** Any Security Incident of which Business Associate becomes aware.
  - 3.3** The discovery of a Breach of Unsecured Protected Health Information. A Breach is considered "discovered" as of the first day on which the Breach is known, or reasonably should have been known, to Business Associate or any employee, officer or agent of Business Associate, other than the individual committing the Breach. Any notice of a Security Incident or Breach of Unsecured Protected Health Information shall include the identification of each Individual whose Protected Health Information has been, or is reasonably believed by Business Associate to have been, accessed, acquired or disclosed during such Security Incident or Breach as well as any other relevant information regarding the Security Incident or Breach. Any such notice shall be directed to Covered Entity as set forth in the Services Agreement.
- 4. Mitigation.** Business Associate agrees to mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of Protected Health Information by Business Associate or its employees, officers, Subcontractors or agents in violation of the requirements of this BA Agreement (including, without limitation, any Security Incident or Breach of Unsecured Protected Health Information).

5. **Subcontractors.** Business Associate shall ensure that any Subcontractor to whom Business Associate provides Protected Health Information received from, or created, maintained, received or transmitted by, Business Associate on behalf of Covered Entity agrees in writing to the same restrictions and conditions that apply through this BA Agreement to Business Associate with respect to such information.
6. **Access to Designated Record Sets.** To the extent that Business Associate possesses or maintains Protected Health Information in a Designated Record Set, Business Associate agrees to provide access, at the request of Covered Entity to Protected Health Information in a Designated Record Set, to Covered Entity in order to meet the requirements under HIPAA Regulations. If an Individual makes a request for access to Protected Health Information directly to Business Associate, Business Associate shall notify Covered Entity of the request within three (3) business days of such request and will cooperate with Covered Entity and allow Covered Entity to send the response to the Individual.
7. **Amendments to Designated Record Sets.** To the extent that Business Associate possesses or maintains Protected Health Information in a Designated Record Set, Business Associate agrees to make any amendment(s) to Protected Health Information in a Designated Record Set that the Covered Entity directs or agrees to pursuant to HIPAA Regulations at the request of Covered Entity or an Individual. If an Individual makes a request for an amendment to Protected Health Information directly to Business Associate, Business Associate shall notify Covered Entity of the request within three (3) business days of such request and will cooperate with Covered Entity and allow Covered Entity to send the response to the Individual.
8. **Access to Books and Records.** Business Associate agrees to make its internal practices, books, and records, including policies and procedures and Protected Health Information, relating to the use and disclosure of Protected Health Information received from, or created or received by Business Associate on behalf of, Covered Entity available to the Secretary, in a time and manner designated by the Secretary, for purposes of the Secretary determining Covered Entity's compliance with the Privacy Rule.
9. **Accountings.** Business Associate agrees to document such disclosures of Protected Health Information and information related to such disclosures as would be required for Covered Entity to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with HIPAA, HIPAA Regulations and the HITECH Act.
10. **Requests for Accountings.** Business Associate agrees to provide to Covered Entity, within twenty (20) days of a request by Covered Entity, information collected in accordance with Article II, Section 9 of this BA Agreement, to permit Covered Entity to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with HIPAA, HIPAA Regulations and the HITECH Act. If an Individual makes a request for an accounting directly to Business Associate, Business Associate shall notify Covered Entity of the request within three (3) business days of such request and will cooperate with Covered Entity and allow Covered Entity to send the response to the Individual.

### III. PERMITTED USES AND DISCLOSURES BY BUSINESS ASSOCIATE

1. **Services Agreement.** Except as otherwise limited in this BA Agreement, Business Associate may use or disclose Protected Health Information to perform functions, activities, or services for, or

on behalf of, Covered Entity as specified in the Services Agreement, provided that such use or disclosure would not violate HIPAA, HIPAA Regulations or the HITECH Act if done by Covered Entity or the minimum necessary policies and procedures of the Covered Entity.

- 1.1** Data Aggregation Services. Except as otherwise limited in this BA Agreement, Business Associate may provide Data Aggregation Services as permitted by 45 C.F.R. § 164.504(e)(2)(i)(B) and may use and disclose data sets resulting from Data Aggregation Services as permitted by the Services Agreement.
  - 1.2** De-Identified Data. Except as otherwise limited in this BA Agreement, Business Associate may de-identify Protected Health Information received from Covered Entity in accordance with 45 C.F.R. § 164.514 and may use and disclose such de-identified Protected Health Information as permitted by the Services Agreement.
  - 1.3** Limited Data Sets. Except as otherwise limited in this BA Agreement, Business Associate may create Limited Data Sets using Protected Health Information received from Covered Entity in accordance with 45 C.F.R. § 164.514 and may use and disclose such Limited Data Sets as permitted by the Services Agreement.
- 2. Use for Administration of Business Associate.** Except as otherwise limited in this BA Agreement, Business Associate may use Protected Health Information for the proper management and administration of the Business Associate or to carry out the legal responsibilities of the Business Associate.
  - 3. Disclosure for Administration of Business Associate.** Except as otherwise limited in this BA Agreement, Business Associate may disclose Protected Health Information for the proper management and administration of the Business Associate, provided that (i) disclosures are Required by Law, or (ii) Business Associate obtains reasonable assurances from the person to whom the information is disclosed that it will remain confidential and used or further disclosed only as Required by Law or for the purpose for which it was disclosed to the person, and the person notifies the Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached.

#### **IV. PERMISSIBLE REQUESTS BY COVERED ENTITY**

Except as set forth in Article III of this BA Agreement, Covered Entity shall not request Business Associate to use or disclose Protected Health Information in any manner that would not be permissible under the Privacy Rule if done by Covered Entity.

#### **V. TERM AND TERMINATION**

- 1. Term.** This BA Agreement shall be Effective Date and shall terminate when all of the Protected Health Information provided by Covered Entity to Business Associate, or created, received or maintained by Business Associate on behalf of Covered Entity, is destroyed or returned to Covered Entity, or, if it is infeasible to return or destroy Protected Health Information, protections are extended to such information, in accordance with the termination provisions in this Section.
- 2. Termination for Cause.** Upon either Party's knowledge of a material breach by the other Party of the terms of this BA Agreement, the non-breaching Party shall either:

- 2.1 Provide an opportunity for the other Party to cure the breach or end the violation. If such Party does not cure the breach or end the violation within thirty (30) days, the non-breaching Party shall terminate: (A) this BA Agreement; (B) all of the provisions of the Services Agreement that involve the use or disclosure of Protected Health Information; and (C) such other provisions, if any, of the Services Agreement as the non-breaching Party designates in its sole discretion; or
- 2.2 Notwithstanding anything contained in the Services Agreement to the contrary, if the other Party has breached a material term of this BA Agreement and cure is not possible, immediately terminate: (A) this BA Agreement; (B) all of the provisions of the Services Agreement that involve the use or disclosure of Protected Health Information; and (C) such other provisions, if any, of the Services Agreement as the non-breaching Party designates in its sole discretion.

### 3. **Effect of Termination.**

- 3.1 Except as provided in Article V, Section 3.2, upon termination of this BA Agreement, for any reason, Business Associate shall return or destroy all Protected Health Information received from Covered Entity, or created or received by Business Associate on behalf of Covered Entity. This provision shall apply to Protected Health Information that is in the possession of Subcontractors or agents of Business Associate. Business Associate shall retain no copies of the Protected Health Information.
- 3.2 In the event that Business Associate determines that returning or destroying the Protected Health Information is infeasible, Business Associate shall provide to Covered Entity notification of the conditions that make return or destruction infeasible. Business Associate shall extend the protections of this BA Agreement to such Protected Health Information and limit further uses and disclosures of such Protected Health Information to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such Protected Health Information.

## VI. **OBLIGATIONS OF COVERED ENTITY**

1. **Privacy Notice.** Covered Entity shall notify Business Associate of any limitation(s) in its notice of privacy practices of Covered Entity in accordance with 45 C.F.R. § 164.520, to the extent that such limitation may affect Business Associate's use or disclosure of Protected Health Information.
2. **Changes of Permission of Individual.** Covered Entity shall notify Business Associate of any changes in, or revocation of, permission by an Individual to use or disclose Protected Health Information, to the extent that such changes may affect Business Associate's use or disclosure of Protected Health Information.
3. **Restrictions on Use or Disclosure.** Covered Entity shall notify Business Associate of any restriction to the use or disclosure of Protected Health Information that Covered Entity has agreed to in accordance with 45 C.F.R. § 164.522, to the extent that such restriction may affect Business Associate's use or disclosure of Protected Health Information.

## VII. COORDINATION OF BUSINESS ASSOCIATE AND COVERED ENTITY

1. **Investigation.** The Parties shall reasonably cooperate and coordinate with each other in the investigation of any violation of the requirements of this BA Agreement and/or any Security Incident or Breach.
2. **Reports and Notices.** The Parties shall reasonably cooperate and coordinate with each other in the preparation of any reports or notices to the Individual, a regulatory body or any third party required to be made under HIPAA, HIPAA Regulations, the HITECH Act, or any other Federal or State laws, rules or regulations.

## VIII. MISCELLANEOUS

1. **No HIPAA Agency Relationship.** It is not intended that an agency relationship (as defined under the Federal common law of agency) be established hereby expressly or by implication between Covered Entity and Business Associate for purposes of liability under HIPAA, HIPAA Regulations, or the HITECH Act. No terms or conditions contained in this BA Agreement shall be construed to make or render Business Associate an agent of Covered Entity.
2. **Regulatory References.** A reference in this BA Agreement to a section in HIPAA, HIPAA Regulations, or the HITECH Act means the section as in effect or as amended or modified from time to time, including any corresponding provisions of subsequent superseding laws or regulations.
3. **Amendment.** The Parties agree to take such action as is necessary to amend the Services Agreement and/or this BA Agreement from time to time as is necessary for Covered Entity to comply with the requirements of HIPAA, the HIPAA Regulations and the HITECH Act.
4. **Survival.** The rights and obligations of Business Associate under Article V, Section 3, and Article VIII shall survive the termination of the Services Agreement and this BA Agreement.
5. **Interpretation.** Any ambiguity in this BA Agreement shall be resolved to permit both Parties to comply with HIPAA, HIPAA Regulations and the HITECH Act.
6. **Miscellaneous.** The terms of this BA Agreement are hereby incorporated into the Services Agreement. Except as otherwise set forth in Article VIII, Section 5 of this BA Agreement, in the event of a conflict between the terms of this BA Agreement and the terms of the Services Agreement, the terms of this BA Agreement shall prevail. The terms of the Services Agreement which are not modified by this BA Agreement shall remain in full force and effect in accordance with the terms thereof. This BA Agreement shall be governed by, and construed in accordance with, the state where the Business Associate is located, exclusive of conflict of law rules. Each Party hereby agrees and consents that any legal action or proceeding with respect to this BA Agreement shall only be brought in the courts of the state where the Business Associate is located in the county where the Business Associate is located. The Services Agreement together with this BA Agreement constitutes the entire agreement between the Parties with respect to the subject matter contained herein, and this BA Agreement supersedes and replaces any former business associate agreement or addendum entered into by the Parties. This BA Agreement may be executed in counterparts, each of which when taken together shall constitute one original. Any PDF or facsimile signatures to this BA Agreement shall be deemed original signatures to this

BA Agreement. No amendments or modifications to the BA Agreement shall be effective unless agreed upon by both Parties in writing.

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

**[Covered Entity]**

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

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

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

Address: \_\_\_\_\_

Email: \_\_\_\_\_

**Healthix Inc.**

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

Name: Todd Rogow

Title: President & CEO

Email: trogow@healthix.org

Address: 40 Worth Street, 5th Floor, New York, NY, 10013

**Exhibit B**

**Projects**

[ALL PROJECT WORK AND PRICING TO BE IN THIS EXHIBIT]

Agreed and Acknowledged as to the terms of this Scope of Work:

**[Entity]**

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

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

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

**Address:** \_\_\_\_\_

**Email:** \_\_\_\_\_

**Healthix Inc.**

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

Name: Todd Rogow

Title: President & CEO

Email: trogow@healthix.org

Address: 40 Worth Street, 5th Floor, New York, NY, 10013

**Exhibit C**  
**Healthix Support and Maintenance Guide**

**I. HEALTHIX SYSTEM/APPLICATOIN SUPPORT**

1. **System/Application Authentication:** Access to the Healthix System/application is maintained by Healthix. The end users have a few ways to gain access to the System/application. Depending on the path of access, some Participants may have a supportive role in assuring their system/application is providing proper access to the Healthix System/application.
2. **System/Application Roles and Data:** Healthix is responsible for maintaining the proper role for each Participant. Healthix also is responsible for ensuring that Participants can only gain access to data to that the Participants are authorized to see according to consent rules, including if “Break the Glass” is allowed.

**II. PROVIDER BASE SUPPORT HEALTHIX ACCESS**

Entity is required to establish and maintain access to the Healthix System/application. Depending on the organization this can be provided via the local internet access (primary); via a hyperlink on the local portal (optional); or Access via a clinical viewer (optional).

**III. HEALTHIX SUPPORT TO BASE SYSTEM**

1. **Application Support:** The Health Share and Ensemble applications are managed and supported by Healthix.
2. **Edge Server Hardware Support (only applies if Participant is hosting the edge server):** The Healthix edge server is purchased with 7x24x365, 4-hour vendor response support contract. The relevant contact information and documentation will be provided to the Participant. All hardware issues should be dispatched directly to the hardware vendor.
3. **Restores:** Restores will be requested by Healthix on a “need only” basis. The Participant will provide the restore request process or point of contact.
4. **Secure VPN Tunnel:** The Secure VPN tunnel is monitored by Healthix. If any issues arise, Healthix will notify the respective groups for resolution. Firewall rules are managed by each side.

**IV. HELP DESK PROCESS**

1. **Website:** The Local helpdesk will verify if the end users has access to the login website of <https://portal.healthix.org>.
2. **Password:** If it is a password issue the Helpdesk would advise them to click on the “Reset Password” link that is at the bottom of <https://portal.healthix.org>.
3. **For non-password calls** the local help desk will direct the end user to call the Healthix HelpDesk at 1-877-695-4749 Ext. 1 or email [support@healthix.org](mailto:support@healthix.org). From this point please see section VI for Service Levels Support Provided.

## V. UPTIME OBJECTIVES

The uptime objective is 99.75%. Excused scheduled downtimes (i.e., system maintenance) are not included in calculations.

## VI. SERVICE LEVELS SUPPORT PROVIDED

1. Support Hours: Healthix will provide helpdesk support during regular business hours (EST) with the intent to as soon as possible provide twenty-four (24) hours a day, seven (7) days per week, 365 days per year. Healthix or its designee may utilize a third-party vendor to help with coverage.
2. Mode of Communication: Healthix Support is provided via a single toll free, telephone number and email for all support calls.
3. Response Times: Response times are based upon the severity of the problem, as determined by Healthix and described herein. Healthix will provide direct support for all basic end-user support calls, such as registration questions, password resets, and the like and will address all calls immediately based on availability or within 5 business hours. For more severe issues the following applies:
  - 3.1 Problem Classification: Healthix will assign a Severity score to each problem reported, based on the *Problem Classification Table* below. Severity 2 will be the default Severity Level, unless otherwise specified by help desk personnel.
  - 3.2 Error Reporting and Response: For all (i) e-mail and fax support requests which cannot be resolved in an initial telephone support conversation we will take the following steps, in accordance with the response expectations outlined in the *Problem Classification Table* below:
    - Step 1: Acknowledge problem and begin collecting additional information from Participant, if required.
    - Step 2: Healthix will actively address the problem and provide a temporary patch, correction, or workaround, based on severity.
    - Step 3: Healthix will provide a permanent solution in the form of a tested permanent patch or a completely new release of the applicable software.
  - 3.3 Determining Response Times: Response times shall be measured commencing upon direct contact with level 2 support staff, technical support staff or from the first documented good-faith attempt to make contact. Once Healthix diagnoses the problem, we will indicate an estimated repair time to the Participant. Repair consists of diagnosing and correcting the problem and returning the Services to the operational condition before the failure.

3.4 Response Times: Healthix will respond to Participants support problems during the response times indicated below.

**Problem Classification Table**

Category of Measure	Notes	Measure
<b>Message Response Time</b>		On average, over any 2-hour period, all messages will be delivered with less than a 5 seconds response time from the trigger time. On average, over any 2-hour period, all received messages will be acknowledged within 3 seconds
<b>Severity 1a</b>	Critical systems unusable System users are unable to perform a mission-critical business function through the Services and there is no electronic systemic workaround in place. Mission Critical is defined as, but not limited to, any problem under Healthix control that results in Participant being unable to complete an important business transaction via the Software; Healthix unable to receive or send messages from any one or more the proposed interfaces	<b>&lt;2 hours Restore Time from 8 am – 6 pm Monday-Friday and &lt;4 hours nights, weekends and holidays</b>
<b>Severity 1b</b>	“Degrading critical sys” more than 90% of messages received and delivered successfully, but some messages are not delivered/received with required accuracy  Ex: System users are unable to perform a mission-critical business function through the Services and there is no electronic systemic workaround in place. Mission Critical is defined as, but not limited to, any problem under Healthix control that results in Participant being unable to complete an important business transaction via the Software; either web services response or HL7 feed to EHR is down.	<b>&lt;3 hours Restore Time from 8 am-6 pm Monday-Friday and &lt;6 hours nights, weekends and holidays</b>
<b>Severity 2</b>	“Degrading critical sys—Alternative Work Around Available” Ex: Messages being received by Healthix, but Healthix unable to send the messages to the end systems. Web based access to consume data through Healthix portal is available. All non-Severity 1a or 1b issues are considered Severity 2 issues.	<b>&lt;4 hours Restore Time from 8 am -6 pm Monday –Friday and &lt;12 hours nights, weekends and holidays.</b>

## Exhibit D

### HEALTHIX TERMS AND CONDITIONS

#### I. DEFINITIONS

The following terms will have the corresponding meanings when used in these Terms and Conditions. Other capitalized terms used in these Terms and Conditions are defined in the Agreement or in the context in which they are used and have the meanings there indicated.

“Agreement” means Healthix Participation Agreement and all exhibits, schedules and attachments thereto.

“Data User” is a Participant and that Participant’s authorized employees, consultants or agents, who may access Patient Data from or through the System.

“Healthix Participant Listing” means the listing of Participants at <http://healthix.org/wp-content/uploads/Healthix-Participant-List.pdf>.

“HIPAA” means Title II, Subtitle F, “Administrative Simplification,” of the Health Insurance Portability and Accountability Act of 1996, as amended and its implementing regulations, as amended.

“Vendor” means a health information technology vendor who provides software and/or services that are “mission critical” to the SHIN-NY and/or EHR adoption.

#### II. LICENSE RESTRICTIONS

Nothing in the Participation Agreement or these Terms and Conditions will be construed as an implied grant to any Participant of any right to, and a Participant will not, and will not permit its’ employees, consultants, medical staff and agents or any third party to, (a) use or reproduce, distribute, disclose or allow use of, decompile, disassemble, or otherwise reverse engineer or attempt to deconstruct or discover, modify or alter the Software or Documentation in any manner (b) allow use of the Software, or access to or use of the System, by anyone who is not authorized, provided that it will not violate this section if Participant allows access by a third party vendor providing services to Participant in connection with the Software or System (e.g., implementation, maintenance), provided that such third party vendor agrees in writing to abide by the same restrictions with respect to the Software and the System as are set forth in these Terms and Conditions.

#### III. PARTICIPANT RESPONSIBILITIES

##### 1. Participation in Healthix and Use of the System.

###### 1.1 Participants shall:

- a. Use the System and participate in Healthix in good faith and in compliance with Healthix Policy, NY Statewide Guidance, these Terms and Conditions and all applicable state or federal law, rule or regulation.
- b. Either be responsible for facilitating Participant’s authorized users to access the System through trusted secure web services connections (thus allowing Healthix to rely on the Participant for authentication and authorization of its users as per Healthix Policy)

or for allowing Healthix to authenticate all of the Participant's authorized users that enroll in and access the System (in which case Participant shall be responsible for identifying and/or helping Healthix to identify authorized System users and Participant will notify Healthix as soon as possible via email of any Healthix users who should no longer have access to the System. Revocation of access, if necessary, shall occur promptly thereafter);

c. Be responsible for maintaining in full working condition, at its own expense, its technical interfaces, software, telecommunications connectivity, and equipment necessary to operate the System that is in Participant's (or its agents) possession, if applicable. Such interfaces, software and equipment will conform to the current specifications of Healthix. Healthix may change such specifications from time to time in its sole discretion, and to the extent reasonably practicable, Healthix will provide Participant not less than thirty (30) days prior notice of any such change.

d. Provide Healthix all information reasonably requested by Healthix regarding proposed clinical information exchange methodology, results of System testing activities, results of pilot testing, and similar developmental and operational issues; and

e. Provide Healthix with such information as Healthix may deem necessary or appropriate to evaluate the utility and usefulness of the System (including evaluation of the System's technical performance and the impact of the use of the System on matters such as quality, safety, finances, and operations).

## **2. Patient Data.**

**2.1 Integration of Patient Data by Participant.** Each Participant will, in accordance with Healthix Policy, use its best efforts to ensure that all Patient Data provided by it is accurate, free from serious error, reasonably complete, and provided in a timely manner. Participant will use reasonable and appropriate efforts to make clinical information about its patients available to be exchanged through the System by (i) providing clinical information in the categories and of the types requested through Healthix; (ii) providing or having its EHR Vendor provide such information in the format(s) specified by Healthix Policy and (iii) facilitating the integration of its EHR as more fully described in Exhibit B annexed hereto and incorporated herein. It is understood that each Data Source, including Participant, may not be able to make all categories/types of clinical information available in the formats specified by Healthix, nor is there a requirement on Data Sources to provide historical data. Participant grants Healthix the right to permit all Participants and Data Users, their officers, employees, medical staff, consultants and agents who enter into an agreement with Healthix, access through the System to all Patient Data, as appropriate for the purposes set forth in these Terms and Conditions subject to Healthix Policy.

**2.2 Excluded Patient Data.** If a Participant is a Data Source, the Participant will not include within the Patient Data any clinical information maintained or created by Participant which has not been approved by the New York State Department of Health for exchange through the System in accordance with the NY Statewide Guidance, and all applicable state and federal laws, rules and regulations. If the Participant has chosen and informed Healthix of an affirmative decision to participate in Healthix, then other than (i) such

Patient Data which has been excluded as stated in this Section; (ii) information that Participant is not able or willing to make available in accordance with Article III, Section 2.1 above; or (iii) information that Participant has agreed with the patient (or the patient's legally authorized representative) to protect as confidential or to make unavailable to or through the System, Participant will not otherwise unreasonably withhold any Patient Data from the System. Participant will notify Healthix of any data or type of data that is withheld.

- 2.3 Uses of Patient Data.** Participants may not use information in the System for purposes other than those explicitly allowed based upon Healthix Policy and NY Statewide Guidance. When the System is queried by a Participant, and once PHI received as a result of such query is incorporated into such Participant's records, the Participant will handle and maintain such PHI in the same form, place and manner as the Participant would handle and maintain its own PHI and any PHI that Participant received from other health care providers and in full compliance with all applicable state and federal laws, rules and regulations.
- 2.4 Responsibility for Acts and Omissions.** Each Participant accepts sole responsibility for (i) the accuracy and completeness of its Patient Data, but only to the extent of Participant's obligations under this Article III, Section 2; (ii) the performance of its information technology systems; (iii) all of its use of the System and the Patient Data obtained through the System, including any treatment, care management and quality improvement decisions made by Participant, including any of its employees, consultants, medical staff and agents in reliance on Patient Data obtained through the System; and (iv) use of any password, identifier, or log-on received or obtained, directly or indirectly, lawfully or unlawfully from the Participant or any of its employees, consultants, medical staff, or agents with respect to the System. The acts and omissions of Participant, its' employees, consultants, medical staff and agents will be deemed to be the acts and omissions of the Participant.
- 2.5 Rights, Title and Interest.** Each Participant represents and warrants to Healthix that Participant has all necessary rights, title and interest in and to all Patient Data that Participant provides or makes available during the Term of this Agreement. The Participant grants to Healthix permission to access Patient Data to: (a) exercise its rights and obligations under this Agreement to provide services on behalf of Participant, including but not limited to System administration (including performance measurement), testing, upgrades, problem identification and resolution, (b) provide the proper management and administration of Healthix to the extent permitted by HIPAA and applicable State law, and (c) perform data aggregation activities and other uses permitted by applicable state and federal laws, rules and regulations, including, but not limited to, HIPAA.
- 2.6 No Limitations on Participant's Use of Its Own Data.** Nothing in this Article III or elsewhere in these Terms and Conditions is intended or will be deemed to in any way limit a Participant's use of its own Patient Data outside of the System.

3. **Audits.** Participants will be subject to audit by Healthix (or a third party engaged by Healthix for such purposes) to confirm compliance and proper use of the System in accordance with these Terms and Conditions, NY Statewide Guidance and Healthix Policy. Such audits will take place during normal business hours and at mutually agreeable times and shall be limited to such records, personnel and other resources of Participant as are necessary to determine compliance with these Terms and Conditions proper use of the System under NY Statewide Guidance and Healthix Policy, and/or compliance with applicable state or federal requirements. Such audits will be performed at the expense of Healthix, and in a manner designed to reasonably minimize interference with Participant's day-to-day operations.
4. **End-User Training.** Each Participant, at its own expense, shall provide appropriate training to its employees, consultants, medical staff and agents who will be accessing clinical information through Healthix and will not allow access until such training is complete, regarding, without limitation: (i) proper use of the System; (ii) proper use of the clinical information obtained using the System; and (iii) privacy and security procedures for accessing clinical information using the System. Healthix will assist this training via a "Train the Trainer" model. Healthix will ensure all users have attested (in writing, electronically, or otherwise in accordance with Healthix Policy) to protect the confidentiality of the clinical information accessed through the System.
5. **Organizational Liaison.** Each Participant will designate an individual to serve as its organizational liaison to Healthix for both technical and clinical issues.
6. **Security.** Participant and its officers, employees, medical staff, consultants and agents will at all times comply with all reasonable security standards, practices and procedures established by Healthix in connection with Participant's use of the System. Without limitation of the foregoing, Participant will use reasonable efforts to ensure that its connection to and use of the System, including the medium containing any data or other information provided to the System, does not include, and that any method of transmitting such data will not introduce, any program, routine, subroutine, or data (including malicious software or "mal-ware," viruses, worms, and Trojan Horses) that will disrupt the proper operation of the System or any part thereof or any hardware or software used by Healthix in connection therewith, or which, upon the occurrence of a certain event, the passage of time, or the taking of or failure to take any action will cause the System or any part thereof or any hardware, software or data used by Healthix or any other Participant in connection therewith, to be destroyed, damaged, or rendered inoperable.

#### IV. HEALTHIX RESPONSIBILITIES

1. **Participation Agreements.** Healthix will require that all non-patient Participants enter into substantially similar Participation Agreements in such form as Healthix may determine is appropriate prior to being granted access to and use of the System and be bound by Healthix Policy.
2. **Enforcement.** Healthix agrees to enforce Healthix Policy as it pertains to Participant and all Participants in such manner as defined in Healthix Policy or, notwithstanding, as Healthix may deem appropriate.
3. **Maintenance and Support of the System.** Specific responsibilities and service level agreements for maintenance and support of the System will be defined in the Healthix Support and Maintenance Guide, attached hereto as Exhibit C.

4. **Notification of Changes to Healthix Policy.** Healthix may modify these Terms and Conditions or Healthix Policy at any time. Healthix shall notify Participant of any material modifications to Healthix Policy or these Terms and Conditions not less than thirty (30) days prior to any such change. Such modifications shall be made in Healthix's sole discretion and shall not be considered an "amendment" for purposes of Article V, Section 5.
5. **Healthix' Vendor Responsibilities.** Healthix will ensure that all of its Vendors follow applicable Healthix policies and maintain, at their own expense, appropriate levels of insurance.

## V. CONFIDENTIAL INFORMATION

### 1. Confidentiality Obligations.

**1.1 General.** In the performance of their respective responsibilities pursuant to the Participation Agreement and these Terms and Conditions, Healthix and Participant may come into possession of certain Confidential Information about the other Party. Each Party will use the other Party's Confidential Information only as permitted by this Agreement and to take reasonable and appropriate measures to prevent unauthorized use, reproduction, dissemination, and disclosure of the other's Party Confidential Information during the Term and thereafter. Each Party will confine knowledge of the other Party's Confidential Information only to its employees, consultants, medical staff and agents who require such knowledge and use such knowledge in the ordinary course and scope of their employment, association or retention by such Party in a manner consistent with the terms and conditions of this Article V, and to such other persons who have a need to know such materials and information, in all cases in connection with the purposes of these Terms and Conditions. Confidential Information also may be disclosed as required by applicable law, provided that in the event of disclosure required by applicable law pursuant to a court order, subpoena, or other valid legal process, the disclosing Party will give the other Party reasonable notice to allow the non-disclosing Party an opportunity to object to such disclosure and then may disclose such Confidential Information only to the minimum extent necessary to comply with such court order, subpoena, or legal process (as reasonably determined by the disclosing Party). Healthix may share information with third parties: (a) as it may deem necessary or appropriate to apply for or make reports under (or as otherwise required by) grants or other similar activities for funding Healthix's operations or projects; and (b) to current and prospective vendors of services to Healthix, as it may deem necessary or appropriate, provided that Healthix will use reasonable efforts to require such vendors to protect the confidentiality of such information through a non-disclosure agreement or other agreement, as applicable.

**1.2 Defined.** As used herein, "Confidential Information" includes the following information:

**a.** Any designs, drawings, procedures, and trade secrets regarding the System, including any Documentation and the technical and design specifications for the System or other intellectual property;

**b.** Non-public financial and administrative information concerning each Party and all other Participants;

c. Each Party's and all other Participants secret and confidential information, records, and other material regarding its business and operations (including, as applicable, its customers, patients, physicians, providers, provider groups, referral sources, members, employees, vendors, products, methods, processes, systems, business or marketing plans, methods and strategies, pricing and costs);

d. Any other non-public information designated by either Party in writing as confidential or proprietary;

e. (i) Any password or other identifier issued by Healthix or Participant and (ii) other information or data stored on magnetic media or otherwise or communicated orally, and obtained, received, transmitted, processed, stored, archived, or maintained by Healthix under these Terms and Conditions;

f. With respect to Participant, any documentation or technical specifications relating to the hardware or the software that relate to the System; and

**1.3 Excluded.** "Confidential Information" will not include any information which:

a. Is or becomes known publicly through no fault of the receiving Party;

b. Is learned by the receiving Party from a third party entitled to disclose it;

c. Is already known to the receiving Party before receipt from the disclosing Party as shown by the receiving Party's written records; or

d. Is independently developed by the receiving Party, as shown by the receiving Party's written records.

## **VI. WARRANTIES; LIMITATION OF LIABILITY**

**1. Availability of the System and Patient Data.** Each Participant acknowledges and agrees that because the System (i) is accessed over the Internet; (ii) relies, in part, on the existence and proper operation of equipment and software that is outside of the control of Healthix (including telecommunication lines); and (iii) relies on access to information from, and the provision of information controlled by, third parties, Healthix makes no representations, warranties, or guarantees as to the availability or accessibility of the System or any Patient Data, or the completeness or accuracy of any Patient Data.

**2. No Warranties.** HEALTHIX MAKES NO REPRESENTATIONS OR WARRANTIES TO ANY PERSON OR PARTICIPANT WITH RESPECT TO THE SYSTEM, THE SOFTWARE, TRAINING, THE DOCUMENTATION, OR ANY SERVICES PROVIDED BY HEALTHIX OR ITS AGENTS WITH RESPECT THERETO, AND HEREBY DISCLAIMS ALL IMPLIED WARRANTIES WITH RESPECT TO THE SYSTEM, THE SOFTWARE, THE DOCUMENTATION, AND SUCH SERVICES, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. FURTHER, HEALTHIX MAKES NO WARRANTY, GUARANTEE, OR REPRESENTATION REGARDING THE USE, OR ANY INTENDED, EXPECTED OR ACTUAL RESULTS OF THE USE OF THE SYSTEM, THE SOFTWARE, THE DOCUMENTATION OR ANY INFORMATION CONTAINED THEREIN OR OTHERWISE PROVIDED PURSUANT TO A PARTICIPATION AGREEMENT INCLUDING ANY PATIENT DATA, IN TERMS OF CORRECTNESS, ACCURACY, RELIABILITY, OR OTHERWISE. HEALTHIX DOES NOT MAKE ANY

WARRANTIES THAT THE SYSTEM, THE SOFTWARE, OR THE DOCUMENTATION WILL BE ERROR-FREE OR THAT THE OPERATION OF THE SYSTEM OR THE SOFTWARE WILL BE UNINTERRUPTED. WITHOUT LIMITING THE FOREGOING, HEALTHIX SPECIFICALLY DISCLAIMS ALL EXPRESS WARRANTIES NOT STATED HEREIN AND ALL IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NO HEALTHIX AGENT OR EMPLOYEE IS AUTHORIZED TO MAKE ANY EXPANSION, MODIFICATION OR ADDITION TO THIS LIMITATION AND EXCLUSION OF WARRANTIES IN THESE TERMS AND CONDITIONS

3. **No Consequential or Special Damages.** NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES ARISING UNDER OR IN CONNECTION WITH A PARTICIPATION AGREEMENT, INCLUDING ANY LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF EQUIPMENT USE, OR LOSS OF DATA OR INFORMATION OF ANY KIND, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
4. **Limitation on Healthix Liability.** HEALTHIX WILL NOT BE LIABLE FOR THE SYSTEM, THE SOFTWARE, THE DOCUMENTATION OR THE LICENSE GRANTED OR THE INFORMATION ACCESSED THROUGH THE SYSTEM HEREUNDER, OR UNDER ANY BREACH OF WARRANTY, CONTRACT, NEGLIGENCE, STRICT LIABILITY, OR ANY OTHER LEGAL OR EQUITABLE THEORY. WITHOUT LIMITATION OF THE FOREGOING PROVISIONS OF THESE TERMS AND CONDITIONS, HEALTHIX WILL NOT HAVE ANY LIABILITY TO PARTICIPANT FOR (A) THE CONTENT OF ANY PATIENT DATA, OR (B) FOR ANY ACTION OR INACTION OF ANY PARTICIPANT.
5. **Limitation on Participant Liability.** EACH PARTICIPANT'S OBLIGATION TO INDEMNIFY HEALTHIX FOR PARTICIPANT'S NEGLIGENT ACTS OR OMISSIONS SHALL BE SUBJECT TO A CAP OF \$1,000,000, PROVIDED THAT SUCH CAP IS APPLICABLE ON A PER OCCURRENCE BASIS AND PROVIDED FURTHER THAT PARTICIPANT ACKNOWLEDGES THAT ITS OBLIGATION TO INDEMNIFY HEALTHIX FOR ITS INTENTIONAL ACTS OR OMISSIONS, AND FOR ALL OTHER PURPOSES, AS STATED IN ARTICLE VII, SECTION 3.1 SHALL NOT BE SUBJECT TO THE FORGOING CAP.
6. **No Obligation to Operate.** Healthix may dissolve, discontinue its business, or cease to operate the System at any time and Participant will have no recourse against Healthix as a result of such action or inaction.
7. **Accuracy of Data.** All data to which access is made through the System originates from Data Sources and other parties making data available through the System, and not from Healthix. All such data is subject to change arising from numerous factors, including changes to PHI made at the request of the patient, changes in the patient's health condition, the passage of time and other factors. Healthix neither initiates the transmission of any data nor monitors the specific content of data being transmitted. Without limiting any other provision of these Terms and Conditions, Healthix will have no responsibility for or liability related to the accuracy, content, currency, completeness, content, or delivery of any data either provided or used by a Participant.
8. **Equitable Remedies.** In the event of a breach, or threatened breach, (i) by a Party of any of its obligations under Article V above, (ii) by Participant of its obligations under Article III, above, or (iii) by Healthix of its obligations under Article IV, the damages resulting therein would be difficult to ascertain but would result in irreparable loss to the non-breaching/non-threatening Party. Accordingly, the non-breaching/non-threatening Party will be entitled to seek and obtain equitable relief to prevent such a breach without the necessity of proving actual damages or

posting bond or other security. Such equitable relief is in addition to any other rights or remedies available to such non-breaching/non-threatening Party.

## **VII. MISCELLANEOUS PROVISIONS**

- 1. Use of Name.** Except as otherwise provided in this Agreement, neither Party may use the other's name or logo (or any variant thereof) in any news or publicity release, policy recommendation, advertising, or any commercial communication in any form of media (whether written, electronic, video or otherwise), without the prior written consent of the other Party.

Notwithstanding the foregoing provision of this Article VII, Section 1, (i) Healthix may issue to the general press, trade press and industry, or publish on website concerning a Participation Agreement and may identify any employees of Participant who are serving as directors, officers, or subcommittee members of Healthix, in publications, presentations and other non-commercial public statements regarding Healthix; and (ii) Participant consents to use of its name and those of its affiliates by Healthix in the Healthix Participant Listings.

- 2. Insurance.**

- 2.1** Each of Healthix and Participant shall maintain, at its own expense, liability insurance covering activities of the Party in the following coverage types and including the following features:

- a.** Commercial General Liability, including Products Liability insurance, in the minimum amount of \$1,000,000 per occurrence, \$2,000,000 Products Aggregate, and \$2,000,000 Annual Aggregate, and a \$1,000,000 Umbrella policy, which provides a total limit of \$2,000,000 per occurrence, \$3,000,000 Products Aggregate and \$3,000,000 annual aggregate;

- b.** Network Security and Privacy Liability insurance in the minimum amount of \$3,000,000 per occurrence and \$3,000,000 in the annual aggregate; the aggregate limit for all coverage under this subsection (b) is \$3,000,000 except for Privacy Notification and Monitoring Costs for affected persons, which are in addition to the aggregate limit;

- c.** Workers' Compensation insurance, with limits in compliance with applicable Laws;

- d.** Directors and Officers Liability insurance, in the minimum amount of \$2,000,000 per occurrence and \$2,000,000 in the aggregate; and

- e.** Such other policies of insurance as may from time to time be required under the NY Statewide Guidance or applicable laws.

- 2.2** Each Party shall provide the other with evidence of such coverage upon request and shall provide thirty (30) days prior written notice to the other Party of any material change in the terms of its' coverage. All insurance coverage required under this Agreement shall be provided under valid and enforceable policies issued by insurance companies legally authorized to do business in the State of New York.

### **3. Indemnification.**

- 3.1** Subject to the terms of Article VI above and, as applicable, to the availability of lawful appropriations and restrictions applicable to public health benefit corporations, public health authorities, or other entities operated by the State of New York or a county thereof or by the federal government or a governmental agency, Participant will indemnify and hold harmless Healthix, and its directors, officers, trustees, employees, medical staff, consultants agents, subcontractors, and licensors (hereinafter “Indemnitees”) from and against any and all liability (including reasonable attorneys’ fees), injury or damage arising from any negligent, reckless, deliberate, illegal or fraudulent act or omission by the indemnifying Party, except to the extent such liability, loss, damage, cost or expense is caused by the breach of the Participant Agreement or these Terms and Conditions by the Indemnitees or the negligent, reckless, deliberate, illegal or fraudulent act or omission by any of the Indemnitees or any other individuals who access Patient Data through the indemnified Party or by use of any password, identifier, or log-on received or obtained, directly or indirectly, lawfully or unlawfully from the indemnified Party.
- 3.2** Any indemnification made pursuant to the provisions will include payment of all costs associated with defending any claim or cause of action involved, whether or not such claim or cause of action is meritorious, including the costs of any reasonable attorneys’ fees and of any settlement by or judgment against the Party to be indemnified. If the Party being indemnified demands indemnification by written notice given to the indemnifying Party within a period of time wherein the indemnifying Party is not prejudiced by lack of notice, upon receipt of such notice, the indemnifying Party will have control of such litigation but may not settle such litigation without the express consent of the Party to be indemnified, which consent may not be unreasonably withheld, conditioned or delayed. The indemnification obligations of a Party under these Terms and Conditions or the Participation Agreement will not, as to third parties, be a waiver of any defense or immunity otherwise available, and the indemnifying Party, in indemnifying the indemnified Party, will be entitled to assert in any action every defense or immunity that the indemnified Party could assert on its own behalf. Nothing in this Article VII, Section 3 is intended to limit the right of any indemnified Party to retain its own counsel, at its own cost and expense, in connection with any indemnified claim or cause of action.