HIPAA Business Associate Agreement

This HIPAA Business Associate Agreement (the "Agreement") is made and entered into between:

"Customer":	[_____]
Street Address:	[_____]
City, State and Postal Code:	[_____]
Country:	[_____]
"Effective Date":	[_____]
"Services Agreement":	[_____]
"Applicable OnDemand Area(s)":	[_____]

and Questionmark Corporation, a Connecticut corporation, with an address at 260 Madison Avenue, 8th Floor, New York, NY 10016, USA ("Questionmark"). Customer and Questionmark may in this Agreement be referred to singularly as a "Party" and collectively as the "Parties." This Agreement is effective as of the Effective Date above.

WHEREAS

A. Questionmark and Customer are involved in a business relationship whereby Questionmark provides the Services to Customer pursuant to the Services Agreement;

B. Customer has informed Questionmark that it is a Covered Entity or Business Associate as defined in the Health Insurance Portability and Accountability Act 1996 and the implementing regulations thereunder ("HIPAA") and therefore must enter into a business associate agreement with organizations that may have access to Protected Health Information;

C. In the context of providing the Services to Customer, Questionmark may receive, store and transmit Protected Health Information on behalf of Customer, and therefore qualifies as a Business Associate under HIPAA;

D. The Parties have therefore decided to enter into this Agreement to document their respective rights and obligations under HIPAA and any modifications thereto, including the privacy and security provisions of Subtitle D of the Health Information Technology for Economic and Clinical Health Act ("HITECH"), enacted as part of the American Recovery and Reinvestment Act 2009, and regulations promulgated thereunder in respect of Protected Health Information created or received by Questionmark as a Business Associate in providing the Services, from or on behalf of Customer in its capacity, as applicable, as a Covered Entity or Business Associate only, and limited to Protected Health Information within the Applicable OnDemand Area(s) identified above;

E. The Parties intend that this Agreement provides the necessary satisfactory assurances pursuant to HIPAA and HITECH to the extent applicable to Questionmark as a Business Associate in its provision of the Services.

NOW THEREFORE, for and in consideration of these promises and the terms set forth below, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Definitions

In this Agreement, the following words have the following meanings. Unless otherwise defined in this Agreement, capitalized terms have the meanings given to them in the Services Agreement.

Catch-all definition:

The following terms shall have the same meaning as those terms in the HIPAA Rules: Breach, Data Aggregation, Designated Record Set, Disclosure, Individual, Minimum Necessary, Notice of Privacy Practices, Protected Health Information, Required By Law, Secretary, Security Incident, Subcontractor, Unsecured Protected Health Information, and Use.

Specific definitions:

(a) **Business Associate.** "Business Associate" shall generally have the same meaning as the term "business associate" at 45 CFR 160.103.

(b) **Covered Entity.** "Covered Entity" shall generally have the same meaning as the term "covered entity" at 45 CFR 160.103.

(c) **HIPAA Rules.** "HIPAA Rules" shall mean the Privacy, Security, Breach Notification, and Enforcement Rules at 45 CFR Part 160 and Part 164.

(d) **Services.** "Services" means the services provided by Questionmark to Customer pursuant to the Services Agreement, including access to the OnDemand Service and support.

2. Obligations and Activities of Questionmark as Business Associate

Questionmark agrees to:

(a) Not Use or disclose Protected Health Information other than as permitted or required by the Services Agreement, this Agreement or as Required By Law;

(b) Use reasonable and appropriate safeguards designed to prevent Use or Disclosure of Protected Health Information other than as provided for in this Agreement, and comply with the applicable requirements of Subpart C of 45 CFR Part 164 with respect to electronic Protected Health Information;

(c) Report to Customer, to the extent permitted by applicable law, any Use or Disclosure of Protected Health Information not provided for by this Agreement of which it becomes aware, including Breaches of Unsecured Protected Health Information as required at 45 CFR § 164.410, and any Security Incident of which it becomes aware, provided that notice is hereby deemed given for Unsuccessful Security Incidents and no further notice of such Unsuccessful Security Incidents shall be given. Any notification of a Breach of Unsecured Protected Health Information must be made to Customer's address on page 1 without unreasonable delay and in no case later than sixty (60) days of the first day of Questionmark's discovery of the Breach. Questionmark shall be deemed to have knowledge of a Breach if the Breach is known, or by exercising reasonable diligence would have been known, to any person, other than the person committing the Breach, who is an employee, officer, or other agent of Questionmark (determined in accordance with the Federal common law of agency). Any notification of a Breach of

Unsecured Protected Health Information shall include, if known, at the time of the notification or promptly thereafter as information becomes available: (i) the identity of the Individuals whose Unsecured Protected Health Information has been, or is reasonably believed by Questionmark to have been accessed, acquired, used, or disclosed as a result of the Breach; (ii) a brief description of the Breach (i.e. what happened, the date of the Breach and the date of Questionmark's discovery of the Breach); (iii) a description of the type of Unsecured Protected Health Information involved in the Breach (such as, if known, whether full name, social security number, date of birth, home address, account number, diagnosis, disability code, or other types of information were involved); (iv) any steps Individuals should take to protect themselves from potential harm resulting from the Breach; (v) a brief description of what Questionmark is doing to investigate the Breach, to mitigate harm to Individuals, and to protect against any further Breaches; and (vi) contact procedures for Individuals to ask questions or learn additional information. For the purposes of this section, "Unsuccessful Security Incident" means, without limitation, pings and other broadcast attacks on Questionmark's firewall, port scans, unsuccessful log-in attempts, denial of service attacks, and any combination of the foregoing as long as no incidents result in unauthorized access, acquisition, Use, or Disclosure of Protected Health Information;

(d) In accordance with 45 CFR 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, ensure that any Subcontractors that create, receive, maintain, or transmit Protected Health Information on behalf of Questionmark agree to the same restrictions, conditions, and requirements that apply to Questionmark with respect to such information, and provide satisfactory assurances that the Protected Health Information will be appropriately safeguarded;

(e) To the extent Customer does not already have access to such Protected Health Information, make access available to any Protected Health Information maintained by Questionmark in a Designated Record Set to the Customer no later than 30 days after receipt of such request from Customer as necessary to satisfy the obligations under 45 CFR 164.524;

(f) To the extent Customer does not already have access to such Protected Health Information, make any Protected Health Information maintained by Questionmark

in a Designated Record Set available for amendment no later than 30 days after receipt of such request as directed or agreed to by the Customer pursuant to 45 CFR 164.526, or take other measures as necessary to satisfy the obligations under 45 CFR 164.526, and shall if applicable and as directed by Customer incorporate any reasonably requested amendment into the Designated Record Set;

(g) Maintain and make available no later than 30 days after receipt of such a request the information required to provide an accounting of Disclosures to the Customer as necessary to satisfy the obligations under 45 CFR 164.528. If any Individual to whom the Protected Health Information relates directly requests that Questionmark provide access to or amend Protected Health Information as provided for in (e) and (f), or provide an accounting of Disclosures, Questionmark shall notify Customer within thirty (30) days of such request. Customer agrees that it, and not Questionmark, is responsible for responding to any such requests;

(h) To the extent Questionmark is to carry out one or more Covered Entity obligation(s) under Subpart E of 45 CFR Part 164, comply with the requirements of Subpart E that apply to the Customer in the performance of such obligation(s); and

(i) Make its internal practices, books, and records relating to the Use and/or Disclosure of Protected Health Information received from Customer available to the Secretary for purposes of determining compliance with the HIPAA Rules, subject to attorney-client and other applicable legal privileges..

3. Permitted Uses and Disclosures by Questionmark as Business Associate

Questionmark agrees that:

(a) Questionmark may only Use or disclose Protected Health Information as necessary to perform the Services set forth in the Services Agreement;

(b) Questionmark may Use or disclose Protected Health Information as Required By Law;

(c) Questionmark will make Uses and Disclosures and requests for Protected Health Information consistent with Covered Entity's minimum necessary policies and procedures that are provided to Questionmark;

(d) Questionmark may not Use or disclose Protected Health Information in a manner that would violate Subpart E of 45 CFR Part 164 if done by Customer;

(e) Questionmark will make reasonable efforts not to request, Use or disclose more than the minimum amount of Protected Health Information necessary to accomplish the purposes of such request, Use or Disclosure. Questionmark may Use or disclose the Minimum Necessary Protected Health Information to parties such as agents or Subcontractors with whom it contracts to assist in providing services pursuant to the Services Agreement, for the proper management and administration of Questionmark or to carry out the legal responsibilities of Questionmark, provided the Disclosures are Required By Law, or Questionmark obtains reasonable written assurances from the person to whom the information is disclosed that the information will remain confidential and used or further disclosed only as Required By Law or for the purposes for which it was disclosed to the person, and the person notifies Questionmark of any instances of which it is aware in which the confidentiality of the information has been breached;

(f) Questionmark shall not directly or indirectly sell or otherwise receive remuneration in exchange for any Protected Health Information unless Questionmark has obtained in accordance with 45 C.F.R. § 164.508 a valid authorization that includes a statement that Protected Health Information can be further exchanged for remuneration. Such prohibition shall not affect any payments for services provided to Questionmark by Customer;

(g) Unless specifically agreed to otherwise in writing between the Parties, Questionmark shall not Use Protected Health Information for Data Aggregation services. Unless specifically agreed to otherwise in writing between the Parties, Questionmark shall not de-identify Protected Health Information or Use de-identified Protected Health Information for any purpose other than troubleshooting and product improvement.

4. Provision for Customer to Inform Questionmark of Privacy Practices and Restrictions

Customer shall notify Questionmark of any limitation(s) in the Notice of Privacy Practices of Covered Entity under 45 CFR 164.520 and of any other restrictions to the Use or Disclosure of Protected Health Information agreed to by Customer in accordance with the HIPAA Rules, to the

extent that such limitation may affect Questionmark's Use or Disclosure of Protected Health Information.

5. Obligations of Customer

(a) Customer shall not request Questionmark to Use or disclose Protected Health Information in any manner that would not be permissible under Subpart E of 45 CFR Part 164 if done by a Covered Entity. Customer shall not disclose Protected Health Information to Questionmark unless such is necessary for Questionmark to perform under the Services Agreement.

(b) Customer is responsible for using appropriate safeguards to protect Protected Health Information in compliance with HIPAA during its use of the Services. Without limitation thereto, Customer shall not provide Protected Health Information to Questionmark through a technical support request or by email. Questionmark does not act as a Business Associate under HIPAA and/or this Agreement in respect of any information or data sent outside of the OnDemand Service by the public internet.

(c) It is Customer's responsibility not to add or process Protected Health Information in the Services until such time as this Agreement is effective.

6. Term and Termination

(a) **Term.** The Term of this Agreement shall be effective as of the Effective Date, and shall terminate: (i) on termination or expiry of the Services Agreement or (ii) on the date Customer terminates for cause as authorized in paragraph (b) of this Section, whichever is sooner.

(b) **Termination for Cause.** Questionmark authorizes immediate termination of this Agreement by Customer, if Customer determines Questionmark has violated a material term of the Agreement. Customer may at its discretion provide Questionmark with a period to cure a material violation of the Agreement.

(c) **Obligations of Questionmark Upon Termination**. Upon termination of this Agreement for any reason, Questionmark shall return or destroy all Protected Health Information received from Customer, or created, maintained, or received

by Questionmark on behalf of Customer, that Questionmark still maintains in any form. Questionmark shall retain no copies of the Protected Health Information. If it is infeasible to return or destroy the Protected Health Information, then Questionmark shall continue to extend the protections of this Agreement to such Protected Health Information and limit further use of such Protected Health Information to those purposes that make the return or destruction of infeasible. If Protected Health Information is destroyed, Questionmark agrees to provide Customer with a certification evidencing such destruction, upon written request. Questionmark has no obligation to retain copies or backups of Protected Health Information following termination of this Agreement.

(d) **Survival.** The obligations of Questionmark under this Section shall survive the termination of this Agreement.

7. Indemnity

To the fullest extent of the law, Customer agrees to indemnify, defend and hold harmless the Questionmark, its officers, employees, agents, representatives, consultants, and contractors from and against any and all losses, liabilities, damages, claims, penalties and expenses, including attorneys' fees, arising directly out of a third party claim that the Customer has violated this Agreement or failed to comply with applicable laws, rules, and regulations ("Claims"). Customer shall have no indemnification obligations under this clause 7 in respect of any Claims caused by the gross negligence or willful misconduct of Questionmark.

8. Limitation of liability.

IN NO EVENT SHALL EITHER PARTY AND/OR ITS LICENSORS BE LIABLE FOR ANY INDIRECT, PUNITIVE, SPECIAL, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL OR OTHER DAMAGES OF ANY TYPE OR KIND (INCLUDING LOSS OF DATA, REVENUE, PROFITS, USE OR OTHER ECONOMIC ADVANTAGE) ARISING OUT OF, OR IN ANY WAY CONNECTED WITH THIS AGREEMENT (INCLUDING SUCH DAMAGES INCURRED BY THIRD PARTIES) EVEN IF THE PARTY FROM WHICH DAMAGES ARE BEING SOUGHT OR SUCH PARTY'S LICENSORS HAVE BEEN PREVIOUSLY ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT SHALL EITHER PARTY'S TOTAL AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILTY, EXCEED THE GREATER OF: (A) THE TOTAL AMOUNTS ACTUALLY PAID TO QUESTIONMARK BY CUSTOMER UNDER THE SERVICES

AGREEMENT IN THE SIX (6) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO SUCH CLAIM; OR (B) TWENTY-FIVE THOUSAND (25,000) UNITED STATES DOLLARS.

THE ABOVE LIMITATIONS OF LIABILITY SHALL NOT APPLY TO ANY CLAIMS BY A PARTY BASED ON THE INDEMNIFICATION OBLIGATIONS OF THE OTHER PARTY OR ON THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE OTHER PARTY. FOR CLARITY, THIS SECTION 8 SHALL NOT AFFECT THE LIABILITY OF THE PARTIES UNDER THE SERVICES AGREEMENT, NOR SHALL THE LIABILITY PROVISIONS OF THE SERVICE AGREEMENT APPLY IN RESPECT OF THIS AGREEMENT.

9. Miscellaneous

(a) **Scope.** This Agreement is applicable in respect of the Applicable OnDemand Area(s) referred to on page 1 of this Agreement and not in respect of any other OnDemand Areas provided as part of the Services, in respect of which the Parties agree that Customer is prohibited from uploading and storing Protected Health Information.

(b) **Amendments.** Except as stated within this section, this Agreement may be amended only by written Agreement signed by both Parties to this Agreement. The Parties agree to modify this Agreement as may be necessary due to changes to state and federal laws relating to the security and privacy of Protected Health Information.

(c) **No Third-Party Beneficiaries; Ownership.** This Agreement does not create any rights for any person or entity other than the Parties hereto and their respective successors or permitted assigns, any rights, remedies, obligations or liabilities whatsoever. Questionmark acquires no ownership rights or title to Protected Health Information.

(d) **Interpretation.** This Agreement shall be interpreted as broadly as necessary to implement and comply with the HIPAA Rules and any ambiguity shall be resolved in favor of the meaning that complies with the HIPAA Rules. If there is any conflict between a provision of this Agreement and a provision of the Services Agreement, this Agreement shall control. The Services Agreement otherwise remains in full force and effect.

(e) **No Agency Relationship**. No agency relationship is expressly or impliedly created by this Agreement. The Parties are independent contractors.

(f) **Governing Law.** This Agreement shall be governed by HIPAA and the law of the State of Connecticut without regard to its conflict of laws principles, and any disputes, actions, claims or causes of action arising out of or in connection with this Agreement shall be subject to the exclusive jurisdiction of the state and federal courts of Bridgeport, Connecticut.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as follows:

Signed by: **Signed by:**