

**MODERNIZING MEDICINE  
STANDARD TERMS AND CONDITIONS (OTOLARYNGOLOGY)**

The Standard Terms and Conditions (Otolaryngology) hereinafter set forth, as amended from time to time (these “**Terms and Conditions**”), form a part of the Modernizing Medicine License Agreement (Otolaryngology) between Medical Practice and Modernizing Medicine (the “**License Agreement**” and together with these Terms and Conditions, this “**Agreement**”) and are hereby incorporated by reference into the License Agreement, without the need for further action. All capitalized terms set forth herein shall have the meaning set forth in the License Agreement unless expressly provided to the contrary herein. These Terms and Conditions were last updated on August 21, 2013.

1. **Definitions.** As used in this Agreement:
  - 1.1 “**Basic Support**” has the meaning set forth in **Exhibit B** to this Agreement.
  - 1.2 “**Fellow**” means an individual participating in a fellowship program at the Medical Practice that has been accredited by the Accreditation Council for Graduate Medical Education and for whom Modernizing Medicine has received written documentation, satisfactory to Modernizing Medicine in Modernizing Medicine’s sole discretion, evidencing same.
  - 1.3 “**FTE**” means full-time equivalent.
  - 1.4 “**HIPAA**” means the Health Insurance Portability and Accountability Act of 1996, the Health Information Technology for Economic and Clinical Health Act and their implementing regulations, as each may be amended from time to time.
  - 1.5 “**Implementation Fee**” means the total Training Fees and Practice Management Interface and Set-up Fees listed, on the Effective Date, on Schedule “A” to the License Agreement.
  - 1.6 “**Medical Practice Data**” means any electronic data, information or material that Modernizing Medicine receives from or on behalf of Medical Practice, Medical Practice’s Patients and/or Medical Practice’s Users (or at any of their direction) through the Software or otherwise in connection with this Agreement, including, without limitation, (i) any electronic data, information or material entered into the Software by Medical Practice and its Users (or at any of their direction), (ii) any electronic data, information or material imported into the Software relating to Medical Practice or any of its Patients, (iii) Patient Data and (iv) any electronic data, information or material provided or submitted by a third party through the Software relating to the Medical Practice or any of its Patients.
  - 1.7 “**Patient(s)**” shall mean any person who was a previous or is a prospective or current patient of Medical Practice.
  - 1.8 “**Patient Data**” means any electronic data, information or material about a Patient entered into the Software.
  - 1.9 “**Physician**” means an individual duly licensed by the appropriate state authorities to practice medicine or surgery.
  - 1.10 “**Physician Extender**” means any medically trained and appropriately licensed professional, other than a Physician, who may enter patient information into the Software under the supervision of a Physician including, without limitation, advanced registered nurse practitioners and physician assistants.
  - 1.11 “**Premium Support**” has the meaning set forth in **Exhibit B** to this Agreement
  - 1.12 “**Provider**” means a Physician User (including, without limitation, a Resident User or a Fellow User) and/or a Physician Extender User.

**1.13 “Representative”** means, as to a Party, its employees, directors, officers, advisors, agents, vendors, consultants and contractors.

**1.14 “Resident”** means an individual conducting their residency at the Medical Practice through a residency program accredited by the Accreditation Council for Graduate Medical Education and for whom Modernizing Medicine has received written documentation, satisfactory to Modernizing Medicine in Modernizing Medicine’s sole discretion, evidencing same.

**1.15 “Software”** means Modernizing Medicine’s proprietary web-based software (including any locally installed software supplied by Modernizing Medicine to Medical Practice), including its screen displays and documentation, printed or otherwise, marketed under the name EMA Otolaryngology, residing at www.modmed.com and any related sites operated by Modernizing Medicine, and any other software licensed to Modernizing Medicine and provided to Medical Practice by Modernizing Medicine in conjunction with Modernizing Medicine’s EMA Otolaryngology software.

**1.16 “Software Delivery Date”** means such date as Medical Practice’s first employee, representative, consultant, contractor or agent, including Physicians, Physician Extenders or Administrative Support Personnel, shall have initially been provided a login by Modernizing Medicine to access an on-line training environment for the Software (the “**Sandbox**”). Notwithstanding the foregoing, to the extent that such login shall not have been provided by Modernizing Medicine to access the Sandbox within forty-five (45) days after the Effective Date (the “**Cut-Off Date**”), and such failure to provide such login is not primarily due to a failure by Modernizing Medicine to perform its obligations under this Agreement (as determined by Modernizing Medicine in its sole discretion), then the Software Delivery Date shall be deemed the Cut-Off Date.

**1.18 “Support Services”** means Basic Support and Premium Support.

**1.19 “Territory”** means the United States of America.

**1.20 “Transaction Documents”** means this Agreement (including the Business Associate Addendum (as defined below)), the exhibits hereto, any addendums to this Agreement executed by each of Modernizing Medicine and Medical Practice, the TOS (as defined below), any web pages or documents incorporated herein by reference, any Statement of Work (as defined below) and the Electronic Payment Authorization Form (as defined below).

**1.21 “URL”** means Uniform Resource Locator, internet address.

**1.25 “User”** means Medical Practice’s employees, representatives, consultants, contractors or agents, including Physicians and Physician Extenders, who are authorized to use the Software and have been supplied user logins and passwords by Modernizing Medicine. For the avoidance of doubt, a User is a specifically identified individual with a corresponding user login and password.

## **2. License; EMA Services; User Logins & Contact Information.**

**2.1 License; EMA Services.** Commencing on the Software Delivery Date, Modernizing Medicine hereby grants to Medical Practice a non-exclusive, nontransferable and limited (as provided in this Agreement) license, without the right to sublicense, to access and use the Software and Services in the Territory for Medical Practice’s internal business purposes only (the “**License**”). Subject to Section 6 of these Terms and Conditions, Modernizing Medicine may also provide Medical Practice with medical records forms, templates for prescriptions and billing forms, and other services (collectively, the “**EMA Service(s)**”) as made available by Modernizing Medicine to Medical Practice through the Software (which EMA Services, for the avoidance of doubt, do not include training or other SOW Services (as defined below)). Medical Practice acknowledges and agrees that (i) Modernizing Medicine is not a health care provider, (ii) that the Software and the EMA Services provide only sample forms and templates, (iii) that the treatments, procedures, information, medications, products and other matters referenced by the

Software and/or the EMA Services are not intended as a recommendation or endorsement of any course of treatment, procedure, information, product or medication and (iv) that the ultimate responsibility for diagnosing and treating any Patient, as well as drafting or completing all written materials related to such Patient, rests exclusively with the Physicians and the Physician Extenders treating such Patient.

**2.2 User Logins.** Medical Practice and its Users shall each become a User of the Software by logging into the Software and using the login information provided by Modernizing Medicine or, with the consent of Modernizing Medicine, the practice's administrator. Without limiting any terms of this Agreement, after the issuance of logins to the number of Physician Users and Physician Extender Users specified as being authorized to use the Software on Schedule "A" to this Agreement, Modernizing Medicine may make the issuance of any additional logins to Physician Users, Physician Extender Users, Resident Users and Fellow Users (e.g., upon the substitution of one Physician User for another Physician User) subject to such conditions as Modernizing Medicine may determine, including, without limitation, the payment of activation, trainings and other fees by Medical Practice with respect to such new Users. Additionally, Medical Practice may have access to certain additional services, software and technology (a "**Subscription**"), provided that Modernizing Medicine may require Medical Practice to agree to modified or additional terms in order to access such Subscription.

**2.3 Medical Practice Contact Information.** On or prior to the Effective Date, Medical Practice shall provide to Modernizing Medicine Medical Practice's contact information and designate a contact person. If Medical Practice's contact person or contact information changes at any time during the Term, Medical Practice shall, no later than five (5) business days prior to such change, submit Medical Practice's new contact person or contact information to Modernizing Medicine in writing in accordance with this Agreement.

### **3. Fees.**

**3.1 Physician Services Fee.** Medical Practice shall pay Modernizing Medicine the monthly fees specified on Schedule "A" of the License Agreement with respect to the Physician Users (the "**Physician Services Fee**") authorized to use the Software in accordance with this Agreement. Initially, the Software shall provide access for the number of FTE Physician Users specified on Schedule "A" of the License Agreement. Part-time Physician Users will be grouped together to create a full-time or half-time Physician User. The determination of the number of full and half-time Physician Users shall be made by Modernizing Medicine in its discretion.

**3.2 Physician Extender Services Fee.** Medical Practice shall pay Modernizing Medicine the monthly fees specified on Schedule "A" of the License Agreement with respect to the Physician Extender Users (the "**Physician Extender Services Fee**") authorized to use the Software in accordance with this Agreement. Initially, the Software shall provide access for the number of FTE Physician Extender Users specified on Schedule "A" of the License Agreement. Part-time Physician Extender Users will be grouped together to create a full-time or half-time Physician Extender User. The determination of the number of full and half-time Physician Extender Users shall be made by Modernizing Medicine in its discretion.

**3.3 Fax Fees.** Medical Practice shall pay Modernizing Medicine the fees specified on Schedule "A" to the License Agreement for each fax sent by a User through the Software (the "**Fax Fees**").

**3.4 Excess Data Storage Use Fees.** Modernizing Medicine shall provide data storage space for Medical Practice Data to the maximum cumulative amount specified on Schedule "A" of the License Agreement for each full-time equivalent Physician User or Physician Extender User at no additional charge. Medical Practice may purchase additional data storage space at the monthly rate specified on Schedule "A" of the License Agreement for each additional 1GB of storage (the "**Excess Data Storage Use Fee**").

**3.5 Support Fees.** Medical Practice shall be eligible to receive either Basic Support or Premium Support (the "**Support Options**") based on the Support Option listed on Schedule "A" to the License Agreement. Medical Practice shall pay Modernizing Medicine the monthly fee specified on Schedule "A"

of the License Agreement for either Basic Support (the “**Basic Support Fee**”) or Premium Support (the “**Premium Support Fee**”) and together with the Basic Support Fee, the “**Support Fees**”) based on the Support Option that Medical Practice has selected. Medical Practice may elect to change the Support Option it has selected by providing at least ten (10) days prior written notice to Modernizing Medicine of such change, which change shall become effective at the commencement of the next applicable Renewal Term, unless otherwise agreed to in writing by Modernizing Medicine.

**3.6 Overdue Payments.** Any payment owed by Medical Practice to Modernizing Medicine hereunder and not paid to Modernizing Medicine from Medical Practice’s account (e.g. due to low balance, a stop payment order, or any other reason) (an “**Overdue Payment**”) may accrue, at Modernizing Medicine’s discretion, late charges at the rate of one and one-half percent (1.5%) of the outstanding balance per month, or at the maximum rate permitted by law, whichever is lower, from the date such payment was due until the date paid.

**3.7 Advance Payment.** If Medical Practice elects to make an advance payment (the “**Advance Payment**”) to Modernizing Medicine of all Physician Services Fees, Physician Extender Services Fees and Support Fees due for the Initial Term (based on the number of Physician Users and Physician Extender Users set forth on Schedule “A”) then Medical Practice shall receive the discount on such Physician Services Fees, Physician Extender Services Fees and Support Fees set forth on Schedule “A”. If Medical Practice seeks to increase its number of Physician Users and Physician Extender Users from the number specified on Schedule “A”, the fee for such Users, if Medical Practice has elected to make the Advance Payment, will be the same as for Medical Practice’s initial Physician Users and Physician Extender Users specified on Schedule “A”, provided such additional Users are added within six (6) months of the Effective Date and the applicable Advance Payment for such additional Users is made by Medical Practice on the date such additional Users are added.

### **3.8 Payment.**

**3.8.1** Upon Medical Practice’s execution of this Agreement, if Medical Practice has elected to make the Advance Payment, Medical Practice shall deliver a payment to Modernizing Medicine equal to the amount of the Advance Payment (the “**Initial Payment**”). Except to the extent that the Medical Practice has made an Advance Payment of such Fees, the applicable monthly Physician Services Fees, Physician Extender Services Fees and Support Fees, if any, shall be due in advance beginning on the Software Delivery Date and on each monthly anniversary of the Software Delivery Date thereafter (provided, that, to the extent that the applicable month does not have a day that is the same day of the month as the Software Delivery Date, then the last day of such month) (the “**Monthly Anniversary Date**”). The Fax Fees and Excess Data Storage Use Fees, if any, will be invoiced and charged monthly, based on Medical Practice’s prior month’s usage.

**3.8.2** The Implementation Fee is payable on the execution of this Agreement by Medical Practice. The Implementation Fee shall be paid by check, credit card or through the Automated Clearing House (“**ACH**”) and Modernizing Medicine shall have no obligation to issue a separate Invoice to Medical Practice with respect to the Implementation Fee.

**3.9 Payment Method.** Other than the Initial Payment and the Implementation Fee (which shall each be paid by check, credit card or through ACH), Medical Practice shall pay Modernizing Medicine for any other amounts due under this Agreement via electronic payment. Upon the Effective Date, Medical Practice shall have executed, completed and delivered to Modernizing Medicine the electronic payment authorization form (the “**Electronic Payment Authorization Form**”) provided to Medical Practice by Modernizing Medicine. If the account or other information specified in such form changes during the Term, Medical Practice shall provide Modernizing Medicine with a revised Electronic Payment Authorization Form in a timely manner so as to avoid incurring an Overdue Payment.

**3.10 Changing Number of Authorized Users.** Medical Practice acknowledges and agrees that the number of FTE Physician Users and FTE Physician Extender Users of Medical Practice that use the Software and the EMA Services shall not exceed the number specified in this Agreement. The number of

FTE Physician Users and FTE Physician Extender Users authorized to use the Software can be increased through such methods as are approved by Modernizing Medicine in its discretion, including through the execution of an Addendum to this Agreement by Medical Practice and Modernizing Medicine (the “**Add-On Addendum**”). Medical Practice acknowledges and agrees that Modernizing Medicine may make any increase in the number of FTE Physician Users and/or FTE Physician Extender Users contingent upon the payment of such fees by Medical Practice to Modernizing Medicine as deemed appropriate by Modernizing Medicine and specified in the Add-On Addendum, including, without limitation, Physician Services Fees, Physician Extender Services Fees, activation fees and training fees. Medical Practice may not decrease the number of FTE Physician Users or FTE Physician Extender Users during the Term.

**3.11 Changes to Fees.** The fees and discounts set forth in this Agreement are subject to change at the end of the Initial Term or any Renewal Term, with a 30-day notice from Modernizing Medicine.

**3.12 Currency.** All amounts set forth in this Agreement are denominated in U.S. dollars.

**3.13 Suspension of Service.** If there are Overdue Payments outstanding for more than thirty (30) days, Modernizing Medicine reserves the right to suspend Users’ access to the Software until such amounts are paid in full. Medical Practice shall continue to be obligated to pay the Fees during such suspension period, including, without limitation, the Physician Services Fees, Physician Extender Services Fees and Support Fees.

**3.14 Taxes.** All amounts payable by Medical Practice to Modernizing Medicine pursuant to this Agreement (including, without limitation, pursuant to any Statement of Work) are exclusive of all local, state, federal and foreign taxes, levies, or duties of any nature (“**Taxes**”), and all payments to Modernizing Medicine are payable in full without reduction for Taxes. Medical Practice is responsible for payment of all Taxes, excluding taxes owed by Modernizing Medicine based on Modernizing Medicine’s income. If Modernizing Medicine has the legal obligation to pay or collect Taxes for which Medical Practice is responsible pursuant to this Section the appropriate amount shall be invoiced to and paid by Medical Practice, unless Medical Practice provides Modernizing Medicine with a valid tax exemption certificate authorized by the appropriate taxing authority.

**3.15 Residents.** Subject to the terms of this Agreement, during the period of time that a User is a Resident, (i) Medical Practice shall not be required to pay Physician Services Fees or Support Fees with respect to such User, (ii) Medical Practice shall pay Modernizing Medicine all other Fees applicable to such User and (iii) such User shall not count against the number of FTE Physician Users of Medical Practice authorized to use the Software. Immediately upon the expiration or termination of a User’s status as a Resident such User shall cease to be authorized to use the Software unless (x) the counting of such former Resident as a Physician User would not cause the number of FTE Physician Users of Medical Practice that use the Software to exceed the number of FTE Physician Users authorized to use the Software specified on Schedule “A” of this Agreement or (y) the total number of FTE Physician Users authorized to use the Software is increased in accordance with Section 3.10 of this Agreement. Medical Practice shall provide Modernizing Medicine with any evidence of a person’s status as a Resident as Modernizing Medicine may reasonably request, including, without limitation, evidence of the accreditation of the applicable residency program and a letter with respect to such Resident from such individual’s residency program director certifying that such individual is a resident and the residency year of such individual. Notwithstanding the foregoing, Medical Practice acknowledges and agrees that Modernizing Medicine may determine whether or not any individual is a Resident in its sole discretion. Medical Practice shall promptly notify Modernizing Medicine in writing when a User ceases to be a Resident.

**3.16 Fellows.** Subject to the terms of this Agreement, during the period of time that a User is a Fellow, (i) Medical Practice shall not, unless such User “moonlights” as a primary biller, be required to pay Physician Services Fees or Support Fees with respect to such User, (ii) Medical Practice shall pay Modernizing Medicine all other Fees applicable to such User and (iii) such User shall not count against the number of FTE Physician Users of Medical Practice authorized to use the Software. Immediately upon the expiration or termination of a User’s status as a Fellow, or if such User “moonlights” as a primary



biller, such User shall cease to be authorized to use the Software unless (x) the counting of such former Fellow as a Physician User would not cause the number of FTE Physician Users of Medical Practice that use the Software to exceed the number of FTE Physician Users authorized to use the Software specified on Schedule "A" of this Agreement or (y) the total number of FTE Physician Users authorized to use the Software is increased in accordance with Section 3.10 of this Agreement. Medical Practice shall provide Modernizing Medicine with any evidence of a person's status as a Fellow as Modernizing Medicine may reasonably request, including, without limitation, evidence of the accreditation of the applicable fellowship program and a letter from Medical Practice representing to such individual's status as a fellow and the remaining period of time in such fellowship. Notwithstanding the foregoing, Medical Practice acknowledges and agrees that Modernizing Medicine may determine whether or not any individual is a Fellow in its sole discretion. Medical Practice shall promptly notify Modernizing Medicine in writing when a User ceases to be a Fellow.

#### **4. Medical Practice's Responsibilities; Medical Practice's Sole Responsibility for Medical Services & Medical Practice Data.**

**4.1 Hardware.** Medical Practice is solely responsible for acquiring, installing and maintaining any computer hardware necessary for Medical Practice to use the Software. Modernizing Medicine will not provide maintenance for any of Medical Practice's hardware. Medical Practice is solely responsible for acquiring and maintaining such internet connections as are necessary for Medical Practice to use the Software. Without limiting the foregoing, if Modernizing Medicine provides any iPads to Medical Practice pursuant to Schedule "A" of this Agreement then Medical Practice acknowledges and agrees that: (i) such iPads have been provided to Medical Practice so that Medical Practice may better utilize the Software and to evaluate and provide feedback to Modernizing Medicine on utility and connectivity of the iPads with the Software, (ii) the Software may not be pre-loaded on the iPads and Medical Practice shall promptly download the applicable "app" from the Apple App Store pursuant to Modernizing Medicine's instructions; (iii) no Medical Practice Data will be stored on the iPads; (iv) Medical Practice shall provide feedback to Modernizing Medicine with respect to the operation of the iPads with the Software upon the reasonable request of Modernizing Medicine; (v) Modernizing Medicine has no obligation to repair or replace any iPad provided by Modernizing Medicine to Medical Practice for any reason and (vi) Medical Practice shall return each iPad provided to it hereunder to Modernizing Medicine upon the earlier expiration or termination of this Agreement.

**4.2 Terms of Service.** The Terms of Service of the Software ("TOS") are located at [http://www.modernizingmedicine.com/website/media/pdf/Modernizing\\_Medicine\\_Terms\\_of\\_Service\\_Feb\\_2012.pdf](http://www.modernizingmedicine.com/website/media/pdf/Modernizing_Medicine_Terms_of_Service_Feb_2012.pdf) and apply to each User's use of the Software. As a condition to Medical Practice's and its Users' use of the Software, Medical Practice shall require its Users to review and accept the TOS. Medical Practice shall cause each of its Users to observe the terms of the Transaction Documents and the TOS. In the event of a conflict between the TOS and the Transaction Documents, the terms of the Transaction Documents shall prevail.

**4.3 Patient-Physician Communications.** As part of the EMA Services and the Software, Modernizing Medicine may provide Medical Practice with sample communication forms and templates applicable to different circumstances (e.g., medical prescription, visit report, etc.). Medical Practice acknowledges and agrees that (i) Modernizing Medicine is not a health care provider, (ii) Modernizing Medicine only provides sample forms and templates, and (iii) that each Physician and Physician Extender is solely responsible for drafting or completing, customizing and authorizing final versions of any communication form used by Medical Practice and for ensuring compliance with any applicable federal, state, American Medical Association, state medical association, or local laws, rules and regulations, and professional ethical guidelines which may apply to such communications.

**4.4 Medical Practice Data.** Medical Practice is responsible for all activities that occur under logins assigned to Medical Practice's Users. Medical Practice shall have sole responsibility for the accuracy, quality, integrity, legality, reliability and appropriateness of Medical Practice Data.

**4.5 Service Guidelines.** Medical Practice and its Users shall use the Software and any services provided by Modernizing Medicine solely for Medical Practice's internal business purposes as contemplated by this Agreement and shall not use the Software and any services provided by Modernizing Medicine to: (i) send spam or any other form of duplicative or unsolicited communications; (ii) harvest, collect, gather or assemble information or data regarding other Users and/or other Users' patients for uses other than Treatment (as defined under HIPAA), Payment (as defined under HIPAA), and Health Care Operations (as defined under HIPAA) without their consent; (iii) transmit through or post on the Software or Modernizing Medicine's website(s) unlawful, immoral, libelous, tortious, infringing, defamatory, threatening, vulgar, or obscene material or material harmful to minors; (iv) transmit material containing software viruses or other harmful or deleterious computer code, files, scripts, agents, or programs; (v) interfere with or disrupt the integrity or performance of the Software or the data contained therein; (vi) attempt to gain unauthorized access to the EMA Services, Software, computer systems or networks related to the Software; or (vii) harass or interfere with another user's use and enjoyment of the Software or the services provided by Modernizing Medicine. Modernizing Medicine may, without liability or notice to Medical Practice, remove or delete any material from the Software that Modernizing Medicine determines, in its sole discretion, violates any of the guidelines set forth in this Agreement. In addition to any other remedies Modernizing Medicine may have, Modernizing Medicine reserves the right to terminate each of the Transaction Documents or terminate any or all of the logins provided to Medical Practice or any User immediately and without notice, if Modernizing Medicine becomes aware or determines, in its sole discretion, that Medical Practice or any User is violating any of the foregoing guidelines. Medical Practice shall be responsible for verifying the accuracy of results produced using the Software and for proper use of any forms provided by Modernizing Medicine. Medical Practice shall be responsible for following proper backup procedures for any other programming and all data to protect against loss or error resulting from use of any or all of the Software.

**5. Service Levels.** Modernizing Medicine shall provide 99% Software availability during each calendar month during the Term (the "**Minimum Service Level**") except for: (a) planned down time, which shall be any period outside of normal business hours (business days during 8:00 a.m. to 8:00 p.m., Eastern time) for which Modernizing Medicine gives reasonable notice on its website(s) or otherwise that the Software will be unavailable; or (b) down time caused by circumstances beyond Modernizing Medicine's reasonable control, including without limitation, a Force Majeure Event (as defined below), computer or telecommunications failures or delays involving hardware or software not within Modernizing Medicine's possession or reasonable control, and network intrusions or denial of service attacks. If Modernizing Medicine fails to meet the Minimum Service Level for any calendar month during the Term as reasonably determined by Modernizing Medicine by reference to its server logs and other technical data, Medical Practice's sole and exclusive remedy shall be for Medical Practice to receive a pro-rata decrease in its Physician Services Fees for the calendar month following the calendar month in which such deficiency occurs, up to the full amount of Medical Practice's Physician Services Fees for such calendar month. The pro-rata decrease will be calculated so that a 1% deficiency from the Minimum Service Level equals a decrease that is equal to 1% of the Physician Services Fees payable with respect to the applicable calendar month. All such decreases shall be applied against Medical Practice's account as a credit. To receive the credits described in this paragraph, Medical Practice must notify Modernizing Medicine of its credit request within ten (10) days from the end of the calendar month in which such deficiency occurred. Failure to comply with this requirement will forfeit Medical Practice's right to receive a credit. Credits will be applied against amounts otherwise payable by Medical Practice after the date of such request and in no event shall Modernizing Medicine, as a result of a credit request, be required to refund any amounts previously paid by Medical Practice to Modernizing Medicine. This Section 5 shall not apply to any "beta" or similar in-development versions of the Software that Modernizing Medicine may make available for evaluation purposes.

**6. Software Updates; Modifications to Services.** During the Term, Modernizing Medicine may, in its sole discretion, provide updates of the Software to Medical Practice. Such updates may include modifications to the Software that increase the speed, efficiency or ease of use of the Software, and may add additional capabilities or functionality to the Software. Modernizing Medicine is under no obligation to provide any such updates. Modernizing Medicine may offer customizations to the Software requested by Medical Practice or additional modules to the Software that may provide specific functionality or services

at an additional cost to Medical Practice. Any such customizations or modules shall be separately negotiated and priced. Without limiting the foregoing, Modernizing Medicine may determine, in its sole discretion, whether any specific functionality or services constitute customizations or modules that may be separately negotiated and priced. For the avoidance of doubt, nothing in the Transaction Documents obligates Modernizing Medicine to make any such customizations or modules available to Medical Practice or to require Modernizing Medicine to provide such modules for free or at any set price. Notwithstanding anything in the Transaction Documents to the contrary, Modernizing Medicine may, in its sole discretion, modify, update, revise, enhance or change any aspect of the EMA Services and/or the Software. Notwithstanding anything in the Transaction Documents to the contrary, Medical Practice acknowledges and agrees that Modernizing Medicine is under no obligation to provide Medical Practice with access to any third party software, website or service as part of the EMA Services, through the Software or otherwise and to the extent that the Software and/or the EMA Services provide access to any third party software, website or service Modernizing Medicine reserves the right, without prior notice, to suspend, limit or cancel such access for any reason.

## **7. SOW Services.**

**7.1 Statements of Work.** From time to time, the Parties may execute statements of work that describe the specific services to be performed by Modernizing Medicine, including any work product to be delivered by Modernizing Medicine (as executed by the Parties, a **“Statement of Work”**). Each Statement of Work will expressly refer to this Agreement, will form a part of this Agreement, and will be subject to the terms and conditions contained herein.

**7.2 Performance of Services.** Modernizing Medicine will perform the services specified in each Statement of Work (the **“SOW Services”**) in accordance with the terms and conditions of this Agreement and of each applicable Statement of Work. For purposes of this Agreement, any training services specified in Schedule “A” to this Agreement, any services provided by Modernizing Medicine with respect to the PM Bridge (as defined below) described on Schedule “A” to this Agreement and any set-up services referenced in Schedule “A” to this Agreement shall be deemed SOW Services under this Agreement. Medical Practice acknowledges, agrees and authorizes that telephone conversations with Modernizing Medicine personnel may be electronically recorded for quality purposes and the mutual protection of the Parties without further notice to Medical Practice of such recording.

**7.3 Changes to Statement of Work.** Medical Practice may submit to Modernizing Medicine written requests to change the scope of SOW Services (each such request, a **“Change Order Request”**). Modernizing Medicine may approve or reject such Change Order Requests in its sole discretion. If Modernizing Medicine approves a Change Order Request, then Modernizing Medicine will promptly notify Medical Practice if it believes that such Change Order Request requires an adjustment to the SOW Fees (as defined below) or to the schedule for the performance of the SOW Services. In such event, the Parties will negotiate in good faith a reasonable and equitable adjustment to the SOW Fees and/or schedule, as applicable. Modernizing Medicine will continue to perform SOW Services pursuant to the existing Statement of Work and will have no obligation to perform any Change Order Request unless and until the Parties have agreed in writing to such an equitable adjustment to the SOW Fees and/or schedule, as applicable.

**7.4 Medical Practice Responsibilities.** In connection with the SOW Services, Medical Practice will: (i) provide qualified personnel who are capable of performing Medical Practice’s duties and tasks with respect to applicable SOW Services; (ii) provide Modernizing Medicine with access to Medical Practice’s sites and facilities during Medical Practice’s normal business hours and as otherwise reasonably required by Modernizing Medicine to perform the SOW Services; (iii) provide Modernizing Medicine with such working space and office support (including access to telephones, photocopying equipment, and the like) as Modernizing Medicine may reasonably request; and (iv) perform Medical Practice’s duties and tasks under this Agreement, including under any Statement of Work, and such other duties and tasks as may be reasonably required to permit Modernizing Medicine to perform the SOW Services. Medical Practice will also make available to Modernizing Medicine any data, information and any other materials required by Modernizing Medicine to perform the SOW Services, including, but not limited to, any data, information



or materials specifically identified in this Agreement (collectively, "**Medical Practice Materials**"). Medical Practice will be responsible for ensuring that all such Medical Practice Materials are accurate and complete.

**7.5 SOW Fees and Expenses.** For Modernizing Medicine's performance of the SOW Services, Medical Practice will pay Modernizing Medicine the fees calculated in accordance with the terms set forth in this Agreement, including, any applicable Statement of Work (the "**SOW Fees**"). In addition, Medical Practice will reimburse Modernizing Medicine for the following expenses incurred by Modernizing Medicine or its personnel in connection with the performance of the SOW Services (the "**SOW Expenses**"): all reasonable out-of-pocket costs and all reasonable travel, lodging and other related expenses.

**7.6 SOW Payment Terms.** Unless otherwise specified in this Agreement, Modernizing Medicine shall send an invoice (each, a "**SOW Invoice**") to Medical Practice on (i) a monthly basis for all applicable SOW Fees and SOW Expenses based on the SOW Services performed by Modernizing Medicine during the preceding month and (ii) an annual basis with respect to any annual maintenance fees applicable to Medical Practice's PM Bridge. For the avoidance of doubt, Modernizing Medicine shall have no obligation to issue a separate Invoice to Medical Practice with respect to the Implementation Fee. Unless otherwise specified in the applicable Statement of Work, all amounts specified in a SOW Invoice are due upon the issuance of such SOW Invoice by Modernizing Medicine. Unless otherwise specified in the applicable Statement of Work, Medical Practice will pay each such SOW Invoice via electronic payment. Medical Practice hereby authorizes Modernizing Medicine to automatically charge Medical Practice's bank, credit card or other account (the "**Account**") designated under the Electronic Payment Authorization Form an amount equal to the sum of any outstanding SOW Fees and SOW Expenses owing to Modernizing Medicine pursuant to any SOW Invoice. Medical Practice shall not, under any circumstances: (i) revoke any authorization to charge the Account for any SOW Fees or SOW Expenses owing under this Agreement or any Statement of Work or (ii) contest any charges to the Account, which are made by Modernizing Medicine in accordance with this Agreement or any applicable Statement of Work.

**7.7 Ownership.** Modernizing Medicine will exclusively own all rights, title and interest in and to any software programs or tools, utilities, technology, processes, inventions, devices, methodologies, specifications, documentation, training manuals, techniques and materials of any kind used or developed by Modernizing Medicine or its personnel in connection with performing the SOW Services (collectively "**Modernizing Medicine Materials**"), including all worldwide patent rights (including patent applications and disclosures), copyright rights, moral rights, trade secret rights, know-how and any other intellectual property rights therein. Medical Practice will have no rights in the Modernizing Medicine Materials except as expressly agreed to in writing by the Parties in the Statement of Work.

**7.8 Other Services.** Nothing in this Agreement or any Statement of Work will be deemed to restrict or limit Modernizing Medicine's right to perform similar services for any other party or to assign any employees or subcontractors to perform similar services for any other party. Medical Practice acknowledges that Modernizing Medicine may engage subcontractors to perform certain of the SOW Services.

**7.9 Non-Solicitation.** During the Term and for a period of twelve (12) months thereafter, Medical Practice will not recruit or otherwise solicit for employment any Modernizing Medicine employees without Modernizing Medicine's express prior written approval.

**7.10 Practice Management Interface.** Medical Practice acknowledges and agrees that if Schedule "A" to this Agreement or a Statement of Work contemplates that Modernizing Medicine shall establish an interface between Medical Practice's practice management system (the "**Medical Practice PM**") and the Software (a "**PM Bridge**") that, unless otherwise set forth in Schedule "A" or such Statement of Work, such PM Bridge shall enable certain inbound demographic information to be received into the Software from the Medical Practice PM. Medical Practice further acknowledges that the cooperation and services of third parties, including, the provider of Medical Practice's practice management system, may be necessary in order to establish such PM Bridge and, as such, Modernizing Medicine does not guarantee

when, or if, Medical Practice's PM Bridge will be established. Medical Practice acknowledges and agrees that the timing of the completion of any PM Bridge will not impact the Medical Practice's obligations under the Transaction Documents, including, without limitation, the obligation to pay all Fees. Modernizing Medicine and Medical Practice agree that in the event that Modernizing Medicine determines, in its sole discretion, that it is unable, using commercially reasonable efforts, to establish a PM Bridge for Medical Practice that was previously specified on Schedule "A" to this Agreement or a Statement of Work, that (i) if Modernizing Medicine provides written notice of such determination to Medical Practice (the "**Bridge Notice**") then Modernizing Medicine shall have no further obligation to establish the applicable PM Bridge and (ii) Medical Practice's sole and exclusive remedy shall be for Medical Practice to receive a refund of the unused portion of the fee paid by Medical Practice to Modernizing Medicine with respect to the establishment of such PM Bridge as determined by Modernizing Medicine. To receive the refund described in this Section 7.10, Medical Practice must notify Modernizing Medicine of its refund request within fifteen (15) days from the date of the Bridge Notice. For the avoidance of doubt, Modernizing Medicine has no obligation to modify any PM Bridge after its initial establishment or provide any new interfaces, including, without limitation, if Medical Practice changes the version of the practice management system used by the Medical Practice or adopts a new practice management system. In addition, if the Medical Practice elects to change its practice management system after the commencement of work to establish a PM Bridge then additional charges may apply. Medical Practice agrees that any fees charged by the practice management software provider, or any other vendor, that relate to, or arise out of, a PM Bridge are the responsibility of Medical Practice.

## **8. Intellectual Property.**

**8.1 Medical Practice Intellectual Property.** Medical Practice represents and warrants that none of the content, materials, designs, text, names, data or other information provided by Medical Practice, its Users and/or its Patients to Modernizing Medicine with respect to the Software, the Transaction Documents or otherwise, including Medical Practice Data (collectively, "**Medical Practice Content**"), infringes or violates the intellectual property or other proprietary rights of Modernizing Medicine or any third-party, and Modernizing Medicine shall have no liability for any claims arising out of Medical Practice Content, including those claims based on infringement. Further, Medical Practice and its Users grant to Modernizing Medicine a nonexclusive license to use Medical Practice Content, as well as any other copyrights, trade names and/or trademarks of Medical Practice, solely to the extent necessary for Modernizing Medicine to provide the Software, the EMA Services or the SOW Services (which includes, without limitation, the right to make copies, create illustrations, display personal and/or corporate name(s), and display other pictures and materials). Nothing in this Section 8.1 shall be deemed to limit Modernizing Medicine's rights under Section 12.4 of these Terms and Conditions or under the Business Associate Addendum.

**8.2 Restrictions.** Medical Practice acknowledges that in providing the Software, the EMA Services and the SOW Services, Modernizing Medicine utilizes: (i) the Modernizing Medicine name, the Modernizing Medicine logo, the modmed.com and other domain names, the product names associated with the Software and other trademarks; (ii) certain information, documents, software and other works of authorship; and (iii) other technology, software, hardware, products, processes, algorithms, user interfaces, website content, visual interfaces, interactive features, graphics, compilations, computer code, all elements of website, know-how and other trade secrets, techniques, designs, inventions and other tangible or intangible technical material or information (which together with the Software shall be collectively referred to as "**Modernizing Medicine IP**") and that the Modernizing Medicine IP is covered by intellectual property rights owned or licensed by Modernizing Medicine ("**Modernizing Medicine IP Rights**"). Except as otherwise expressly permitted herein, Medical Practice and its Users shall not, nor will they assist or encourage anyone else to: (i) sell, license, distribute, publicly perform or display, transmit, edit, adapt, modify, copy, translate or make derivative works based on the Modernizing Medicine IP; (ii) disassemble, reverse engineer, or decompile any of the Modernizing Medicine IP; or (iii) create Internet "links" to or from the Software, or "frame" or "mirror" any of Modernizing Medicine's content which forms part of the Software (other than on Medical Practices' own internal intranets). Additionally, Medical Practice and its Users are not entitled to: (i) sell, grant a security interest in or transfer reproductions of the Software to other parties in any way, nor to rent, lease or license the Software to others without the

prior written consent of Modernizing Medicine; (ii) emulate or redirect the communication protocols used by the Software; (iii) access the Software or EMA Services in order to build a competitive product or service, (iv) copy any features, functions or graphics of the Software or EMA Services or (v) exploit the Software or any of its parts for any commercial purpose without Modernizing Medicine's express written consent. Nothing in the Transaction Documents shall be construed to give Medical Practice or its Users any right to inspect, possess, use, or copy the source code or object code used to create or constituting the Software. Neither Medical Practice nor its Users shall apply any process, technique, or procedure designed to ascertain or derive the source code of the Software, or attempt to do any of the foregoing.

**8.3 Ownership and Reservation of Rights.** The Modernizing Medicine IP is the proprietary work of Modernizing Medicine and/or its licensors. Other than as expressly set forth in the Transaction Documents, no license or other rights in the Modernizing Medicine IP Rights are granted to Medical Practice or its Users, and all such rights are hereby expressly reserved by Modernizing Medicine. Additionally, and for avoidance of doubt, Modernizing Medicine shall at all times retain sole and exclusive ownership of, or, as applicable, sole and exclusive rights as a licensee or sublicensee of, all of its copyrights, trademarks, trade names, trade dress, patents, software, source code, object code and other intellectual property rights with respect to the Modernizing Medicine IP, including, without limitation, all of the proprietary material provided and/or displayed by Modernizing Medicine at the Software, affiliated web sites, extranet, marketing materials or otherwise. Medical Practice acknowledges and agrees that the Modernizing Medicine IP may contain certain licensed materials and Modernizing Medicine's licensors may independently protect their rights in the event of any violation of the Transaction Documents.

## **9. User Content.**

**9.1 General.** The Software may now or in the future permit Users to post or link media, text, audio and video recordings, photos, graphics, commentary or any other content (collectively, "**User Content**"), and to host and/or share such User Content. User Content is not controlled by Modernizing Medicine. Modernizing Medicine makes no representations that any User Content will remain available via the Software in any way and may remove User Content in its sole discretion. Medical Practice shall cause each of its Users to observe the terms of this Agreement.

**9.2 Representations and Warranties Regarding User Content.** Medical Practice shall be responsible for any User Content and the consequences of its Users posting such User Content. In connection with User Content, Medical Practice, on behalf of itself and its Users, affirms, represents, and warrants that: (i) each User owns, or has the necessary licenses, rights, consents, and permissions to use, and to grant Modernizing Medicine the right to use, all patent, trademark, copyright, or other proprietary rights in and to any and all of such User's User Content and to enable inclusion and use of such User Content in the manner contemplated by the TOS and this Agreement, and (ii) Modernizing Medicine's use of such User Content pursuant to the TOS and this Agreement, does not and will not: (a) infringe upon, violate, or misappropriate any third-party right, including any copyright, trademark, patent, trade secret, moral right, privacy right, right of publicity, or any other intellectual property or proprietary right; (b) slander, defame, libel, or invade the right of privacy, publicity or other property rights of any other person; or (c) violate any applicable law or regulation.

**9.3 Prohibited Uses of User Content.** The Medical Practice agrees that it shall cause its Users to not publish, post, submit, transmit through or otherwise make available through the Software: (i) any falsehoods or misrepresentations that could damage Modernizing Medicine or any third-party; (ii) any material which is unlawful, defamatory, libelous, slanderous, pornographic, obscene, abusive, profane, vulgar, sexually explicit, threatening, harassing, harmful, hateful, racially or ethnically offensive or otherwise objectionable, or which encourages conduct that would be considered a criminal offense, give rise to civil liability, violate any law or any right of privacy or publicity, or is otherwise inappropriate; (iii) advertisements or solicitations of business, products, or services; or (iv) any material that would be harmful to minors in any manner.

**9.4 Non-Modernizing Medicine Content Disclaimer.** The Medical Practice on behalf of itself and its authorized Users acknowledges and agrees that Modernizing Medicine does not endorse any User

Content or other third-party content (together, the “**Non-Modernizing Medicine Content**”) or any opinion, recommendation, or advice expressed therein. Under no circumstances will Modernizing Medicine be liable in any way for or in connection with the Non-Modernizing Medicine Content, including, but not limited to, for any inaccuracies, errors or omissions in any Non-Modernizing Medicine Content, any intellectual property infringement with regard to any Non-Modernizing Medicine Content, or for any loss or damage of any kind incurred as a result of the use of any Non-Modernizing Medicine Content posted, emailed or otherwise displayed or transmitted through the Software.

**9.5 Non-Monitoring of Non-Modernizing Medicine Content.** Modernizing Medicine does not control the Non-Modernizing Medicine Content posted by Users or otherwise made available by other persons and does not have any obligation to monitor such Non-Modernizing Medicine Content for any purpose. Modernizing Medicine, nonetheless, reserves the right, in its sole discretion, to monitor the Non-Modernizing Medicine Content but assumes no responsibility for the Non-Modernizing Medicine Content, no obligation to modify or remove any inappropriate Non-Modernizing Medicine Content, and no responsibility for the conduct of the User submitting any such Non-Modernizing Medicine Content.

**9.6 Removal of Non-Modernizing Medicine Content.** Modernizing Medicine shall have the right (but not the obligation), in its sole discretion, to remove or to refuse to post any Non-Modernizing Medicine Content that is available on the Software in whole or in part at any time, if, Modernizing Medicine determines that such Non-Modernizing Medicine Content is prohibited by this Agreement.

**10. Remedies for Breach of Medical Practice’s Obligations.** If Medical Practice or any of its Users materially breaches any of its or their obligations under this Agreement or any other Transaction Document, Modernizing Medicine shall be permitted, at its sole discretion, to do any or all of the following (it being understood that such remedies are not exclusive of one another or any other remedies Modernizing Medicine may have at equity or law): (i) terminate each of the Transaction Documents and any license or other right granted to Medical Practice with respect to the Software without notice, in which case all Fees, SOW Fees and SOW Expenses incurred prior to the date of termination shall remain due and owing to Modernizing Medicine; (ii) temporarily suspend Medical Practice’s and its Users’ access to the Software without notice during which time the Fees and SOW Fees shall continue to accrue and be due and owing; (iii) for unpaid Fees, SOW Fees and SOW Expenses, assess interest at the lesser of one and one-half percent (1.5%) of the amounts owed per month or the maximum amount allowed by law; and/or (iv) collect from Medical Practice reimbursement for all costs, including attorneys’ fees and expenses and costs, incurred by Modernizing Medicine in collecting any Fees, SOW Fees, SOW Expenses or other monies owed to it by Medical Practice, or otherwise enforcing its rights under the Transaction Documents. Upon termination or expiration of this Agreement for any reason, Medical Practice shall not use, directly or indirectly, the Software. Termination of this Agreement for any reason shall not affect Modernizing Medicine’s right to recover damages for events occurring before termination.

**11. Business Associate Addendum.** The parties acknowledge and agree that Medical Practice is a Covered Entity and Modernizing Medicine is a Business Associate under HIPAA and each party shall comply with the party’s respective obligations under HIPAA. Without limiting the foregoing, each party shall comply with the Business Associate Addendum attached to this Agreement as **Exhibit A** (the “**Business Associate Addendum**”). The Business Associate Addendum is hereby incorporated into this Agreement.

**12. Confidentiality.**

**12.1 Definition of Confidential Information.** “**Confidential Information**” shall mean the Software source and object code, information which concerns the management and business of either Party, files maintained by either Party, the contents and terms of the Transaction Documents, the business relationships and affairs of either Party and its clients, patients, and referral sources, the internal policies and procedures applicable to either Party’s personnel and the formulation of strategies and policies by either Party. It also includes displays, designs, descriptions, procedures, formulas, discoveries, inventions, specifications, drawings, sketches, models, samples, codes, improvements, concepts, ideas and past, present and future research, development, business activities, products or services and any

other information provided by either Party to the other Party regardless of whether it is identified as confidential at the time of disclosure. “**Confidential Information**” excludes the information explicitly excluded under Section 12.3 as well as PHI as that term is defined in the Business Associate Addendum attached hereto.

**12.2 Confidential Information Terms.** Except as expressly provided in the Transaction Documents, each Party agrees to hold the other Party’s Confidential Information in strict confidence and not to (i) use such information for any purposes whatsoever other than the provision or receipt of services as contemplated by the Transaction Documents or (ii) copy, reproduce, sell, assign, license, market, transfer or otherwise dispose of, give or disclose such information to third-parties; provided that Modernizing Medicine may disclose Confidential Information of Medical Practice to Modernizing Medicine’s Representatives in the ordinary course of its business. Notwithstanding the above, either Party may disclose the other Party’s Confidential Information upon the order of any competent court or government agency; provided that prior to disclosure, to the extent possible, the receiving Party shall inform the other Party of such order and shall reasonably cooperate with the efforts of the disclosing Party, at the disclosing Party’s expense, to obtain a protective order or other action to protect the confidentiality of the Confidential Information. It is understood and agreed that in the event of a breach of this provision damages may not be an adequate remedy and each Party shall be entitled to injunctive relief to restrain any such breach, threatened or actual without the necessity of posting a bond or other security.

**12.3 Non-Confidential Information.** The term “**Confidential Information**” shall not include any information which: (i) is in the public domain at the time of disclosure or enters the public domain following disclosure through no fault of the receiving Party or its Representatives, (ii) the receiving Party, through demonstrable evidence, can demonstrate knowledge prior to disclosure, (iii) is disclosed to the receiving Party by a third party legally entitled to make such disclosure without violation of any obligation of confidentiality or (iv) is independently developed by the receiving Party without reference to the disclosing Party’s Confidential Information as evidenced by the written records of the receiving Party.

**12.4 De-Identified Information.** Notwithstanding anything to the contrary in the Transaction Documents, Medical Practice acknowledges and agrees that Modernizing Medicine (i) may use Medical Practice Data to create de-identified data in accordance with the HIPAA de-identification requirements; (ii) may use, create, sell, provide to third parties, and otherwise exploit Medical Practice Data provided same has first been de-identified in accordance with HIPAA and (iii) owns all right, title and interest in such de-identified Medical Practice Data and any data, information and material created by Modernizing Medicine with such de-identified Medical Practice Data.

**12.5 Feedback.** If Medical Practice or any Users inform Modernizing Medicine of any errors, difficulties or other problems with the Software, or provide any feedback or make any suggestions as to changes or modifications to the Software, including beta or other in-development versions of the Software (collectively, “**Feedback**”), then Modernizing Medicine shall own all right, title and interest in that Feedback. Medical Practice hereby irrevocably assigns and agrees to assign all of its right, title and interest in and to the Feedback to Modernizing Medicine. To the extent Medical Practice is unable to assign any of its rights in the Feedback to Modernizing Medicine, Medical Practice hereby grants to Modernizing Medicine a perpetual, irrevocable, worldwide license to sell, offer to sell, make, have made, import, use, disclose, copy, distribute, publicly perform, publicly display, modify, create derivative works of and otherwise fully exploit the Feedback.

### **13. Warranties & Disclaimers.**

#### **13.1 Warranties.**

**13.1.1** Medical Practice represents and warrants that it has the legal power and requisite authority to enter into the Transaction Documents to which it is a party.

**13.1.2** MEDICAL PRACTICE HEREBY AGREES AND ACKNOWLEDGES THAT MODERNIZING MEDICINE IS IN NO WAY ACTING AS A MEDICAL PROVIDER WITH RESPECT TO ANY PATIENT OR



ANY OF MEDICAL PRACTICE'S RELATED PARTIES AND PROVIDERS. MEDICAL PRACTICE FURTHER ACKNOWLEDGES AND AGREES THAT THE TREATMENTS, PROCEDURES, INFORMATION, MEDICATIONS, PRODUCTS AND OTHER MATTERS REFERENCED BY THE SOFTWARE, THE EMA SERVICES AND/OR THE SOW SERVICES ARE NOT INTENDED AS A RECOMMENDATION OR ENDORSEMENT OF ANY COURSE OF TREATMENT, PROCEDURE, INFORMATION, PRODUCT OR MEDICATION AND THAT THE ULTIMATE RESPONSIBILITY FOR DIAGNOSING AND TREATING ANY PATIENT RESTS WITH THE PHYSICIANS AND THE PHYSICIAN EXTENDERS TREATING SUCH PATIENT.

**13.1.3** MEDICAL PRACTICE UNDERSTANDS AND AGREES THAT ITS USE, ACCESS, DOWNLOAD, OR OTHERWISE OBTAINING INFORMATION, MATERIALS, OR DATA THROUGH THE SOFTWARE (INCLUDING RSS FEEDS) FROM A SOURCE OTHER THAN MODERNIZING MEDICINE IS AT ITS OWN DISCRETION AND RISK AND THAT IT WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE TO ITS OR ITS USERS PROPERTY OR LOSS OF DATA THAT RESULTS FROM THE DOWNLOAD OR USE OF SUCH MATERIAL OR DATA.

**13.1.4** Medical Practice represents and warrants that all Physicians and Physician Extenders are duly licensed by the appropriate professional board or agency in the state where Medical Practice is located and/or such individual practices and that Medical Practice shall provide evidence of such licensing upon reasonable request. At any time that Medical Practice, the Physicians or Physician Extenders, or its Users cease to be duly licensed or authorized, Medical Practice shall immediately so inform Modernizing Medicine and such unlicensed party shall immediately cease using the Software.

**13.2 Disclaimer of Warranties.** EXCEPT AS EXPRESSLY PROVIDED HEREIN OR IN THE TRANSACTION DOCUMENTS, MODERNIZING MEDICINE MAKES NO WARRANTY OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE. MODERNIZING MEDICINE HEREBY SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW.

THE ENTIRE RISK ARISING OUT OF USE OR PERFORMANCE OF THE SOFTWARE, ANY PRODUCTS OR FEATURES IN CONNECTION WITH THE SOFTWARE, THE EMA SERVICES AND SOW SERVICES, INCLUDING, WITHOUT LIMITATION, ANY TREATMENTS, PROCEDURES, INFORMATION, DATA, PRODUCTS, MEDICATIONS AND OTHER MATTERS REFERENCED BY THE SOFTWARE, REMAINS WITH THE MEDICAL PRACTICE. EXCEPT AS EXPRESSLY PROVIDED HEREIN, MODERNIZING MEDICINE EXPRESSLY DISCLAIMS ANY WARRANTY FOR THE SOFTWARE AND ANY PRODUCT(S), GOOD(S), INFORMATION, DATA OR MATERIALS PROVIDED BY MODERNIZING MEDICINE AS PART OF THE SOFTWARE, EMA SERVICES OR SOW SERVICES. EXCEPT AS EXPRESSLY PROVIDED HEREIN, THE SOFTWARE, THE MODERNIZING MEDICINE IP, AND ANY EMA SERVICE OR SOW SERVICE IS PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS, WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NONINFRINGEMENT. IN ADDITION, EXCEPT AS EXPRESSLY PROVIDED HEREIN, ANY THIRD-PARTY MEDIA, CONTENT, SOFTWARE, SERVICES OR APPLICATIONS MADE AVAILABLE IN CONJUNCTION WITH OR THROUGH THE SOFTWARE ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE", "WITH ALL FAULTS" BASIS AND WITHOUT WARRANTIES OR REPRESENTATIONS OF ANY KIND, EITHER EXPRESS OR IMPLIED.

MODERNIZING MEDICINE DOES NOT WARRANT OR MAKE ANY REPRESENTATION REGARDING (A) THE USE OR THE RESULTS OF THE USE OF ITS SOFTWARE, WEBSITES OR ANY THIRD PARTY WEBSITES IN TERMS OF CORRECTNESS, ACCURACY, RELIABILITY OR OTHERWISE, OR (B) THE ACCURACY OF CODES, IMAGES, INFORMATION OR OTHER DATA PROVIDED BY THE SOFTWARE, EMA SERVICES OR SOW SERVICES. THE CLINICAL INFORMATION PROVIDED BY THE SOFTWARE, EMA SERVICES AND SOW SERVICES IS INTENDED AS A SUPPLEMENT TO, AND NOT A SUBSTITUTE FOR, THE KNOWLEDGE, SKILL AND JUDGMENT OF PHYSICIANS, PHYSICIAN EXTENDERS OR OTHER HEALTHCARE PROFESSIONALS IN PATIENT CARE. THE

ABSENCE OF A WARNING FOR A GIVEN DRUG OR DRUG COMBINATION OR OTHER TREATMENT SHOULD NOT BE CONSTRUED TO INDICATE THAT THE DRUG OR DRUG COMBINATION OR OTHER TREATMENT IS SAFE, APPROPRIATE OR EFFECTIVE IN ANY GIVEN PATIENT. MODERNIZING MEDICINE IS NOT A HEALTH PLAN, HEALTH CARE PROVIDER OR PRESCRIBER.

EXCEPT AS EXPRESSLY PROVIDED HEREIN, MODERNIZING MEDICINE DOES NOT GUARANTEE CONTINUOUS, ERROR-FREE, VIRUS-FREE OR SECURE OPERATION AND ACCESS TO THE SOFTWARE, ITS WEBSITES AND THE CONTENTS THEREOF, SERVICE ELEMENTS OR RELATED SOFTWARE. MEDICAL PRACTICE ASSUMES THE ENTIRE RISK WITH RESPECT TO THE PERFORMANCE AND RESULTS IN CONNECTION WITH THE EMA SERVICE, SOW SERVICE AND MEDICAL PRACTICE'S USE OF THE SOFTWARE IN CONNECTION WITH MEDICAL PRACTICE'S HARDWARE. MODERNIZING MEDICINE SHALL NOT BE LIABLE FOR ANY DAMAGE CAUSED BY THE INTERACTION OF THE SOFTWARE WITH ANY DEVICE OR ANY INFORMATION TECHNOLOGY INFRASTRUCTURE OF MEDICAL PRACTICE.

EXCEPT AS OTHERWISE EXPRESSLY SET FORTH HEREIN, NEITHER MODERNIZING MEDICINE NOR ITS AFFILIATES SHALL BE LIABLE IN ANY WAY FOR LOSS OR DAMAGE OF ANY KIND RESULTING FROM THE USE OR INABILITY TO USE THE SOFTWARE OR ANY FEATURES OR PRODUCTS IN CONNECTION WITH THE SOFTWARE INCLUDING, BUT NOT LIMITED TO, LOSS OF GOODWILL, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION, OR ANY AND ALL OTHER COMMERCIAL DAMAGES OR LOSSES.

MEDICAL PRACTICE ACKNOWLEDGES THAT MODERNIZING MEDICINE MAY USE THIRD PARTY WEBSITES, THIRD PARTY HELP DESK SYSTEMS AND OTHER THIRD PARTY SERVICES TO PROVIDE CERTAIN SUPPORT SERVICES AND ONLINE FORUMS TO MEDICAL PRACTICE. MEDICAL PRACTICE UNDERSTANDS THAT SUCH THIRD PARTY WEBSITES, THIRD PARTY HELP DESK SYSTEMS, ONLINE FORUMS AND OTHER THIRD PARTY SERVICES MAY NOT MEET THE REQUIREMENTS FOR THE PROTECTION OF PROTECTED HEALTH INFORMATION (AS DEFINED IN THE BUSINESS ASSOCIATE ADDENDUM) SET FORTH IN APPLICABLE LAWS AND REGULATIONS, INCLUDING, WITHOUT LIMITATION, HIPAA AND THE HEALTH INFORMATION TECHNOLOGY FOR ECONOMIC AND CLINICAL HEALTH ACT. MEDICAL PRACTICE AGREES THAT IT SHALL NOT, AND IT SHALL CAUSE ITS USERS TO NOT, SUBMIT ANY PROTECTED HEALTH INFORMATION (A) TO MODERNIZING MEDICINE OUTSIDE OF MODERNIZING MEDICINE'S PROPRIETARY WEB-BASED SOFTWARE MARKETED UNDER THE NAME ELECTRONIC MEDICAL ASSISTANT OR EMA ("**EMA**"), INCLUDING BUT NOT LIMITED TO EMAIL TRANSMISSIONS, SUBMISSIONS TO ANY ONLINE FORUM MADE AVAILABLE BY MODERNIZING MEDICINE TO ITS CUSTOMERS, AND SUBMISSIONS THROUGH ANY SUPPORT WEBSITE, PORTAL, OR ONLINE HELP DESK OR SIMILAR SERVICE MADE AVAILABLE BY MODERNIZING MEDICINE OUTSIDE OF EMA; OR (B) DIRECTLY TO ANY THIRD PARTY INVOLVED IN THE PROVISION OF AN ONLINE FORUM, EMAIL, SUPPORT WEBSITE, ONLINE HELP DESK OR OTHER SERVICE DESCRIBED IN (A), ABOVE. REPEATED VIOLATIONS OF THIS REPRESENTATION BY MEDICAL PRACTICE WILL ENTITLE MODERNIZING MEDICINE, IN MODERNIZING MEDICINE'S SOLE DISCRETION, TO RESTRICT MEDICAL PRACTICE'S ACCESS TO SUCH THIRD PARTY SERVICES AND/OR TAKE ANY OTHER ACTIONS REQUIRED OR PERMITTED BY THE BUSINESS ASSOCIATE ADDENDUM IN CONNECTION WITH SUCH VIOLATIONS.

IF MODERNIZING MEDICINE PROVIDES ANY IPADS TO MEDICAL PRACTICE THEN (I) EACH IPAD IS PROVIDED ON AN "AS IS" BASIS, WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, FREEDOM FROM DEFECTS OR NONINFRINGEMENT, (II) THE ENTIRE RISK ARISING OUT OF USE OR PERFORMANCE OF EACH IPAD REMAINS WITH THE MEDICAL PRACTICE, (III) MODERNIZING MEDICINE EXPRESSLY DISCLAIMS ANY WARRANTY FOR EACH IPAD, (IV) MODERNIZING MEDICINE HEREBY SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES WITH RESPECT TO EACH IPAD, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, FREEDOM FROM DEFECTS OR NONINFRINGEMENT, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW AND (V)

MODERNIZING MEDICINE FURTHER DISCLAIMS ANY LIABILITY FOR MEDICAL PRACTICE DATA STORED ON ANY IPAD.

**13.3 Limitations by Applicable Law.** CERTAIN JURISDICTIONS DO NOT ALLOW LIMITATIONS ON IMPLIED WARRANTIES OR THE EXCLUSION OR LIMITATION OF CERTAIN DAMAGES. IF MEDICAL PRACTICE IS LOCATED IN SUCH A JURISDICTION, SOME OR ALL OF THE ABOVE DISCLAIMERS, EXCLUSIONS, OR LIMITATIONS MAY NOT APPLY TO IT, AND MEDICAL PRACTICE MAY HAVE ADDITIONAL RIGHTS. THE LIMITATIONS OR EXCLUSIONS OF WARRANTIES, REMEDIES, OR LIABILITY CONTAINED IN THE TRANSACTION DOCUMENTS APPLY TO MEDICAL PRACTICE TO THE FULLEST EXTENT SUCH LIMITATIONS OR EXCLUSIONS ARE PERMITTED UNDER THE LAWS OF THE JURISDICTION IN WHICH MEDICAL PRACTICE AND ITS USERS ARE LOCATED.

**13.4 Basis of the Bargain.** MEDICAL PRACTICE ACKNOWLEDGES AND AGREES THAT MODERNIZING MEDICINE HAS OFFERED ITS PRODUCTS AND SERVICES AND ENTERED INTO THE TRANSACTION DOCUMENTS TO WHICH IT IS A PARTY IN RELIANCE UPON THE WARRANTY DISCLAIMERS AND THE LIMITATIONS OF LIABILITY SET FORTH HEREIN, THAT THE WARRANTY DISCLAIMERS AND THE LIMITATIONS OF LIABILITY SET FORTH HEREIN REFLECT A REASONABLE AND FAIR ALLOCATION OF RISK BETWEEN MEDICAL PRACTICE AND MODERNIZING MEDICINE, AND THAT THE WARRANTY DISCLAIMERS AND THE LIMITATIONS OF LIABILITY SET FORTH HEREIN FORM AN ESSENTIAL BASIS OF THE BARGAIN BETWEEN MEDICAL PRACTICE AND MODERNIZING MEDICINE. MEDICAL PRACTICE ACKNOWLEDGES AND AGREES THAT MODERNIZING MEDICINE WOULD NOT BE ABLE TO PROVIDE THE SOFTWARE, EMA SERVICES OR SOW SERVICES TO MEDICAL PRACTICE ON AN ECONOMICALLY REASONABLE BASIS WITHOUT THESE LIMITATIONS.

**14. Limitation of Liability; Indemnification.**

**14.1 Limitation of Liability.** IN NO EVENT SHALL MODERNIZING MEDICINE'S AND ITS PRESENT AND FORMER SUBSIDIARIES', AFFILIATES', DIRECTORS', OFFICERS', EMPLOYEES', AND AGENTS' AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THE SOFTWARE, EMA SERVICES, SOW SERVICES AND/OR THE TRANSACTION DOCUMENTS, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEED THE AMOUNTS ACTUALLY PAID BY AND DUE FROM MEDICAL PRACTICE UNDER THE TRANSACTION DOCUMENTS DURING THE ONE (1) YEAR PERIOD IMMEDIATELY PRECEDING THE DATE THE CAUSE OF ACTION AROSE.

**14.2 Exclusion of Consequential and Related Damages.** IN NO EVENT SHALL MODERNIZING MEDICINE OR ITS PRESENT AND FORMER SUBSIDIARIES, AFFILIATES, DIRECTORS, OFFICERS, EMPLOYEES OR AGENTS HAVE ANY LIABILITY TO MEDICAL PRACTICE, ITS USERS OR ANY THIRD PARTY FOR ANY LOST PROFITS, LOSS OF DATA, LOSS OF USE, COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES HOWEVER CAUSED AND, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY WHETHER OR NOT MODERNIZING MEDICINE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. BECAUSE SOME STATES OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR THE LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, IN SUCH STATES OR JURISDICTIONS, MODERNIZING MEDICINE'S AND ITS PRESENT AND FORMER SUBSIDIARIES', AFFILIATES', DIRECTORS', OFFICERS', EMPLOYEES' AND AGENTS' LIABILITY SHALL BE LIMITED TO THE MAXIMUM EXTENT PERMITTED BY LAW.

**14.3 Limitation of Action.** No action (regardless of form) arising out of the Transaction Documents may be commenced by Medical Practice against Modernizing Medicine more than two (2) years after the cause of action has accrued.

**14.4 Indemnification.** Medical Practice shall indemnify and hold harmless Modernizing Medicine and its officers, directors, employees and agents, from and against any and all damages, liabilities, penalties, interest, fines, losses, costs and expenses (including reasonable attorneys' fees and expenses and costs), which arise from any claim or allegation arising, directly or indirectly, out of or relating to (i) the use or operation of the Software by Patients, Medical Practice and/or the Users, including, without limitation, any non-authorized use of Medical Practice's user logins, (ii) a breach of any of the Transaction Documents by Medical Practice or any of its authorized Users, (iii) the accuracy, quality, integrity, legality, reliability or appropriateness of Medical Practice Data or any other content or data introduced to the Software by any User, (iv) violation of any applicable law, rule or regulation by Medical Practice or any of the Users, (v) the diagnosis and/or treatment of any of Medical Practice's Patients and/or (vi) the negligent acts or willful misconduct of Medical Practice or its personnel.

**14.5 Sole Responsibility.** Medical Practice agrees that the sole and exclusive responsibility for any medical decisions or actions with respect to a Patient's medical care and for determining the accuracy, completeness or appropriateness of any billing, clinical, coding, diagnostic, medical or other information provided by the Software, the EMA Services or the SOW Services resides solely with the Physicians and the Physician Extenders treating such Patient. Modernizing Medicine does not assume any responsibility for how such information is used. Medical Practice acknowledges and agrees that the Software, the EMA Services and the SOW Services do not "recommend," "suggest," or "advise" proper prescribing or other treatment decisions and that the responsibility for the medical treatment, and any associated decisions regarding billing for medical services, rests with the Physicians and the Physician Extenders treating such Patient and revolves around such health care provider's judgment and such health care provider's analysis of the Patient's condition.

**14.6 Support.** If Modernizing Medicine fails to fulfill its Support Services obligations, Medical Practice's sole and exclusive remedy shall be for Medical Practice to receive a credit equal to the amount of Support Fees paid by Medical Practice with respect to the month in which such deficiency occurs, up to the full amount of Medical Practice's Support Fees for such month. To receive the credits described in this Section 14.6, Medical Practice must notify Modernizing Medicine of its credit request within ten (10) days from the end of the month in which such deficiency occurred. Credits will be applied against amounts otherwise payable by Medical Practice after the date of such request and in no event shall Modernizing Medicine, as a result of a credit request, be required to refund any amounts previously paid by Medical Practice to Modernizing Medicine.

## **15. Termination.**

**15.1 Termination.** Medical Practice may terminate this Agreement: (i) in the event of a material breach of this Agreement by Modernizing Medicine, provided, that, Medical Practice provides written notice of such material breach to Modernizing Medicine and such breach remains uncured thirty (30) days after Modernizing Medicine's receipt of such notice; (ii) in accordance with the terms of the Business Associate Addendum; or (iii) immediately if Modernizing Medicine becomes the subject of a petition in bankruptcy or any proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors. Upon any valid termination for cause by Medical Practice, Modernizing Medicine shall refund Medical Practice any prepaid Fees for the period after the date of termination. Modernizing Medicine may terminate each of the Transaction Documents: (i) as set forth in Section 10 of these Terms and Conditions; (ii) in accordance with the terms of the Business Associate Addendum or (iii) immediately if Medical Practice becomes the subject of a petition in bankruptcy or any proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors.

**15.2 Outstanding Fees.** Termination shall not relieve Medical Practice of the obligation to pay any fees or expenses accrued or payable to Modernizing Medicine prior to the effective date of termination. Additionally, in the event of the termination of this Agreement in the situation where Medical Practice has exercised its right to receive a discount based on an Advance Payment, Modernizing Medicine will return the unused portion of the Advance Payment, less any discounts previously given.

**15.3 Return of Medical Records.** Modernizing Medicine stores various forms of information for the Medical Practice that meet the definition of a medical record in many states (the “**Medical Records**”). To ensure the proper transfer of the Medical Records, the following policies shall apply: (i) Prior to the termination of this Agreement, the Medical Practice may obtain a copy of the Medical Records by providing Modernizing Medicine with a written request for such records; (ii) In the event of the termination of this Agreement then the Medical Practice may obtain a copy of the Medical Records by providing Modernizing Medicine with a written request for such records within fifteen (15) days of the date of such termination; (iii) If the Medical Practice is a multi-Physician group and one of the Physicians in such group has terminated its relationship with such group, and the Medical Practice requests in writing that Medical Records be transferred to such Physician and provides a written list of Patients of such Physician to Modernizing Medicine (the “**Applicable Patients**”), then Modernizing Medicine will provide a copy of the records of the Applicable Patients (the “**Applicable Patient Records**”) to the Medical Practice or the departing Physician as directed in writing by the Medical Practice. The Medical Practice shall have the burden of determining whether the departing Physician is entitled to a copy of the Applicable Patient Records. Subject to the terms and conditions of this Section, Modernizing Medicine shall not be required to transfer any Applicable Patient Records to a departing Physician until the Medical Practice directs Modernizing Medicine to transfer such Applicable Patient Records and Modernizing Medicine determines that the transfer complies with applicable law. Modernizing Medicine shall not be responsible for transfers of Applicable Patient Records to persons or entities that Modernizing Medicine determines in good faith to be entitled to receive the Applicable Patient Records regardless of the accuracy of such determination; (iv) If the Medical Practice (including an authorized representative of the Medical Practice) is unavailable for any reason to give Modernizing Medicine written direction as to how to process a Medical Records transfer request, after a reasonable attempt to contact the Medical Practice, Modernizing Medicine shall be permitted to transfer the Medical Records to any third party requesting the Medical Records in writing if such third party provides Modernizing Medicine reasonable written evidence that it has the legal right to request and obtain such Medical Records under applicable law; and (v) In the event of a merger or sale of the Medical Practice, Modernizing Medicine will transfer a copy of the Medical Practice’s Medical Records to the Medical Practice’s successor or acquirer if requested in writing by the Medical Practice. In no event shall Modernizing Medicine be responsible for transfers of Medical Records to persons or entities that Modernizing Medicine determines in good faith to be entitled to receive the Medical Records regardless of the accuracy of such determinations. The provision of any Medical Records (including any Applicable Patient Records) by Modernizing Medicine under this Section 15.3 shall be contingent upon the payment to Modernizing Medicine of a non-refundable fee of (i) \$500 with respect to the first request for any records pursuant to this Section 15.3 and (ii) \$5,000 for each subsequent request for any records pursuant to this Section 15.3. Subject to the requirements of this Section 15.3, Modernizing Medicine shall transfer the applicable records in readable pdf format or such other format as is agreed to by the Medical Practice and Modernizing Medicine. The transferee of any records under this Section 15.3 shall be responsible for the cost of any disk drives or other media used by Modernizing Medicine for the transfer of such records as well as shipping and handling for the transfer of such disk drives or other media to such transferee. Any recipient of any records as a result of a transfer of records under this Section 15.3 shall indemnify and hold Modernizing Medicine harmless from, any liability, damage, loss, cost or expense (including reasonable attorneys’ fees) arising out of or related to the transfer of such records and Modernizing Medicine shall have the right to require any such recipient to agree in writing to such requirement as a condition to any transfer of records. This indemnity shall survive the expiration or earlier termination of this Agreement. Notwithstanding the foregoing, after the thirty (30) day period commencing on the date of termination or expiration of this Agreement, Modernizing Medicine shall have no obligation to maintain any copies of or provide any copies of the Medical Records (including any Applicable Patient Records), except as otherwise required by law.

**15.4 Effect of Termination.** Upon termination or expiration of this Agreement for any reason, the License shall terminate and Medical Practice shall not use, directly or indirectly, the Software or any other Modernizing Medicine IP. If Medical Practice has made any copies of any Modernizing Medicine IP, Medical Practice shall either destroy or return to Modernizing Medicine all such copies along with a certificate signed by Medical Practice that all such copies have been either destroyed or returned, respectively, and that no copy or any part of any Modernizing Medicine IP has been retained by Medical Practice in any form. Termination of this Agreement for any reason shall not affect Modernizing



Medicine's right to recover damages for events occurring before termination. In the event either Party provides written notice of termination of any of the Transaction Documents to the other Party in accordance with the applicable Transaction Document, Modernizing Medicine shall have the right to automatically charge Medical Practice's bank, credit card or other account designated under the Electronic Payment Authorization Form, an amount equal to the sum of any outstanding Fees, SOW Fees, SOW Expenses or other amounts owed to Modernizing Medicine plus, to be held as a deposit, an amount reasonably estimated by Modernizing Medicine to cover any Fees, SOW Fees or SOW Expenses, which are anticipated to be due and owing for the period commencing on the date of such notice through the termination date (which deposit shall be credited back to Medical Practice subsequent to termination to the extent the actual Fees, SOW Fees and SOW Expenses due and owing for such period are less than the amount of such deposit). Medical Practice shall not, under any circumstances: (i) revoke any authorization to charge Medical Practice's bank, credit card or other account for any Fees incurred or to reasonably anticipated to be incurred during the above-referenced termination period or (ii) contest any charges to Medical Practice's bank, credit card or other account, which are made by Modernizing Medicine in accordance with any of the Transaction Documents.

**15.5 Survival.** Sections 1, 3.6, 3.8, 4.2, 4.3, 4.4, 7.7, 7.8, 7.9, 8, 9, 10, 11,12, 13, 14, 15 and 16 shall survive the expiration or termination of this Agreement for any reason.

## **16. General Provisions.**

**16.1 Relationship of the Parties.** None of the Transaction Documents create a partnership, franchise, joint venture, agency, fiduciary, or employment relationship between the Parties and the status of the Parties shall be independent parties to a contractual arrangement. Neither Party shall have the authority to bind the other Party by contract or otherwise.

**16.2 Benefit to Others.** The representations, warranties, covenants and agreements contained in the Transaction Documents are for the sole benefit of the Parties and their respective successors and permitted assigns, and they are not to be construed as conferring any rights on any other persons, including, but not limited to, third party rights for Medical Practice's Patients.

**16.3 Notices.** Any notice required by this Agreement or given in connection with therewith, shall be in writing and shall be given (i) if to Modernizing Medicine, to Modernizing Medicine, Inc., 3600 FAU Boulevard, Suite #202, Boca Raton, Florida 33431, Attention: Chief Financial Officer with a copy sent to Modernizing Medicine, Inc., 3600 FAU Boulevard, Suite #202, Boca Raton, Florida 33431, Attention: General Counsel and (ii) if to Medical Practice, to the Medical Practice's address set forth in this Agreement or such other address as may be provided in writing from time to time by personal delivery or by certified mail, postage prepaid, or recognized overnight delivery services with proof of delivery.

**16.4 Waiver and Cumulative Remedies.** No failure or delay by either Party in exercising any right under this Agreement shall constitute a waiver of that right. Other than as expressly stated therein, the remedies provided herein are in addition to, and not exclusive of, any other remedies of a Party at law or in equity.

**16.5 Force Majeure.** Modernizing Medicine shall not be liable for failure or delay in performing its obligations hereunder if such failure or delay is due to a force majeure event or other circumstances beyond its reasonable control, including, without limitation, acts of any governmental body, war, cyber war or attack, terrorism, insurrection, sabotage, embargo, fire, flood, tropical storm, earthquake, tornado, hurricane, labor disturbance, interruption of or delay in transportation, unavailability of third-party services, failure of third-party software or services or inability to obtain raw materials, supplies or power used in or equipment needed for provision of the Software, the EMA Services or the SOW Services (each, a "**Force Majeure Event**").

**16.6 Severability.** If any provision of this Agreement is held by a court or arbitrator of competent jurisdiction to be unenforceable, such provision shall be changed by the court or by the arbitrator and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted

by law, and the remaining provisions of this Agreement shall remain in effect, unless the modification or severance of any provision has a material adverse effect on a Party, in which case such Party may terminate this Agreement by notice to the other Party.

**16.7 Assignment.** Neither Party may assign any of its rights or obligations hereunder or under any other Transaction Document, whether by operation of law or otherwise, without the prior express written consent of the other Party. Notwithstanding the foregoing, Modernizing Medicine shall be permitted to assign each of the Transaction Documents: (i) to an affiliate, parent company or subsidiary or (ii) in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets. Any attempt by a Party to assign its rights or obligations under any of the Transaction Documents in breach of this Section 16.7 shall be void and of no effect. Subject to the foregoing, each of the Transaction Documents shall bind and inure to the benefit of the Parties, their respective successors and permitted assigns.

**16.8 Governing Law .** Except as otherwise provided herein, each of the Transaction Documents shall be governed by, and construed in accordance with, the laws of the State of Florida, without regard to its conflict of laws provisions.

**16.9 Venue.** The federal courts of the United States in and for the Southern District of Florida and the state courts of the State of Florida located in Palm Beach County, Florida shall have exclusive jurisdiction to adjudicate any dispute arising out of or relating to any of the Transaction Documents. Each Party hereby consents to the jurisdiction of such courts and waives any right it may otherwise have to challenge the appropriateness of such forums, whether on the basis of the doctrine of forum non conveniens or otherwise.

**16.10 Enforcement Costs.** If any legal action or other proceeding is brought for the enforcement or interpretation of any of the Transaction Documents, or because of an alleged dispute, breach, default or misrepresentation in connection with any provision of the Transaction Documents, the prevailing Party shall be entitled to recover reasonable attorneys' fees, court costs and all expenses incurred in that action or proceeding and at all levels of trial and appeal, in addition to any other relief to which such Party may be entitled.

**16.11 Third Party Arrangements.** Medical Practice acknowledges and agrees that it shall be solely responsible for performance of all of its duties, obligations, and covenants arising under the Transaction Documents. In the event that Medical Practice enters into an arrangement with any other individual or entity to fulfill all or any part of its payment obligations pursuant to the Transaction Documents ("**third party arrangement**"), Medical Practice represents and warrants that any such third party arrangement shall not affect the obligations of Medical Practice to Modernizing Medicine pursuant to the Transaction Documents. Medical Practice further represents and warrants that any such third party arrangement shall be in compliance at all times with all applicable federal, state, and local laws, regulations and ordinances including, without limitation, the Medicare and Medicaid Anti-Fraud and Abuse Amendments to the Social Security Act [42 U.S.C. Section 1320a-7a and 7b, and the regulations promulgated pursuant thereto, including 42 C.F.R. Section 1001.952(y)] and the Stark Law [42 U.S.C. Section 1320nn, and the regulations promulgated pursuant thereto]. Medical Practice acknowledges and agrees that Modernizing Medicine is under no obligation to accept any payment from any third party, which is unsatisfactory to Modernizing Medicine in its good faith business judgment. The Medical Practice agrees that it shall be responsible for promptly reimbursing Modernizing Medicine for all fees required by the American Medical Association or other similar organization to be paid by Modernizing Medicine to such organization relating to the Medical Practice and its Patients, employees, representatives, consultants, contractors or agents use of the Software.

**16.12 Entire Agreement and Construction.** The Transaction Documents constitute the entire agreement between the Parties as to their subject matter, and supersede all previous and contemporaneous agreements, proposals or representations, written or oral, concerning such subject matter. Except as otherwise set forth therein, no modification, amendment, or waiver of any provision of the Transaction Documents shall be effective unless in writing and signed by the Party against whom the

modification, amendment, or waiver is to be asserted. Under no circumstances shall the terms of any purchase order submitted by Medical Practice to Modernizing Medicine, whether before or after the execution of this Agreement, be deemed binding upon Modernizing Medicine.

**16.13 Counterparts.** Each of the Transaction Documents executable by a Party hereto may be executed in one or more counterparts, which may be delivered by fax or other electronic transmission, including email, each of which shall be deemed an original and which taken together shall form one legal instrument.

**16.14 Headings.** Headings used in each of the Transaction Documents are provided for convenience only and shall not be used to provide meaning or intent.

**16.15 Due Execution.** Medical Practice acknowledges that Modernizing Medicine shall not be deemed bound by any Transaction Documents until such Transaction Documents have been duly executed by an authorized representative of Modernizing Medicine.

[Remainder of page left intentionally blank]

**Exhibit A**  
**Business Associate Addendum**

**I. GENERAL PROVISIONS**

**Section 1.1. Applicability.** This Business Associate Addendum (this “**Addendum**”) relates to Protected Health Information received by Modernizing Medicine from or on behalf of the Medical Practice (“**PHI**”).

**Section 1.2. HIPAA Amendments.** The parties acknowledge and agree that the Health Information Technology for Economic and Clinical Health Act and its implementing regulations impose requirements with respect to privacy, security and breach notification applicable to Business Associates (collectively, the “**HITECH BA Provisions**”). The HITECH BA Provisions and any other future amendments to HIPAA affecting Business Associate Agreements are hereby incorporated by reference into this Addendum as if set forth in this Addendum in their entirety, effective on the later of the effective date of this Addendum or such subsequent date as may be specified by HIPAA.

**Section 1.3. Regulatory References.** A reference in this Addendum to a section in HIPAA means the section as it may be amended from time-to-time. Capitalized terms used in this Addendum without definition shall have the meanings given to them by HIPAA or by this Agreement, as applicable.

**II. OBLIGATIONS OF MODERNIZING MEDICINE**

**Section 2.1. Use and Disclosure of PHI.** Modernizing Medicine may use and disclose PHI as permitted or required under this Agreement (including this Addendum) or as Required by Law, but shall not otherwise use or disclose PHI. Modernizing Medicine shall not use or disclose PHI received from the Medical Practice in any manner that would constitute a violation of HIPAA if so used or disclosed by the Medical Practice (except as set forth in Sections 2.1(a), (b) and (c) of this Addendum). To the extent Modernizing Medicine carries out any of the Medical Practice’s obligations under the HIPAA Privacy Rule, Modernizing Medicine shall comply with the requirements of the HIPAA Privacy Rule that apply to the Medical Practice in the performance of such obligations. Without limiting the generality of the foregoing, Modernizing Medicine is permitted to use or disclose PHI as set forth below:

(a) Modernizing Medicine may use PHI internally for Modernizing Medicine’s proper management and administrative services or to carry out its legal responsibilities;

(b) Modernizing Medicine may disclose PHI to a third party for Modernizing Medicine’s proper management and administration, provided that the disclosure is Required by Law or Modernizing Medicine obtains reasonable assurances from the third party to whom the PHI is to be disclosed that the third party will (1) protect the confidentiality of the PHI, (2) only use or further disclose the PHI as Required by Law or for the purpose for which the PHI was disclosed to the third party and (3) notify Modernizing Medicine of any instances of which the person is aware in which the confidentiality of the PHI has been breached;

(c) Modernizing Medicine may use PHI to provide Data Aggregation services as defined by HIPAA; and

(d) Modernizing Medicine may use PHI to create de-identified health information in accordance with the HIPAA de-identification requirements. Without limiting any other rights of Modernizing Medicine under this Agreement, Modernizing Medicine may use, create, sell, disclose to third parties and otherwise exploit de-identified health information for any purposes

not prohibited by law. Modernizing Medicine owns all right, title and interest in such de-identified health information and any data, information and material created by Modernizing Medicine with such de-identified health information. For the avoidance of doubt, the second sentence of this Section 2.1(d) shall survive the expiration or earlier termination of this Agreement.

**Section 2.2. Safeguards.** Modernizing Medicine shall use reasonable and appropriate safeguards to prevent the use or disclosure of PHI except as otherwise permitted or required by this Addendum. In addition, Modernizing Medicine shall implement Administrative Safeguards, Physical Safeguards and Technical Safeguards that reasonably and appropriately protect the Confidentiality, Integrity and Availability of PHI transmitted or maintained in Electronic Media (“**EPHI**”) that it creates, receives, maintains or transmits on behalf of the Medical Practice. Modernizing Medicine shall comply with the HIPAA Security Rule with respect to EPHI.

**Section 2.3. Minimum Necessary Standard.** To the extent required by the “minimum necessary” requirements of HIPAA, Modernizing Medicine shall only request, use and disclose the minimum amount of PHI necessary to accomplish the purpose of the request, use or disclosure.

**Section 2.4. Mitigation.** Modernizing Medicine shall take reasonable steps to mitigate, to the extent practicable, any harmful effect (that is known to Modernizing Medicine) of a use or disclosure of PHI by Modernizing Medicine in violation of this Addendum.

**Section 2.5. Subcontractors.** Modernizing Medicine shall enter into a written agreement meeting the requirements of 45 C.F.R. §§ 164.504(e) and 164.314(a)(2) with each Subcontractor (including, without limitation, a Subcontractor that is an agent under applicable law) that creates, receives, maintains or transmits PHI on behalf of Modernizing Medicine. Modernizing Medicine shall ensure that the written agreement with each Subcontractor obligates the Subcontractor to comply with restrictions and conditions that are at least as restrictive as the restrictions and conditions that apply to Modernizing Medicine under this Addendum.

#### **Section 2.6. Reporting Requirements.**

(a) If Modernizing Medicine becomes aware of a use or disclosure of PHI in violation of this Agreement by Modernizing Medicine or by a third party to which Modernizing Medicine disclosed PHI, Modernizing Medicine shall report any such use or disclosure to the Medical Practice without unreasonable delay.

(b) Modernizing Medicine shall report any Security Incident involving EPHI of which it becomes aware in the following manner: (a) any actual, successful Security Incident will be reported to the Medical Practice in writing without unreasonable delay, and (b) any attempted, unsuccessful Security Incident of which Modernizing Medicine becomes aware will be reported to the Medical Practice orally or in writing on a reasonable basis, as requested by the Medical Practice. If the HIPAA security regulations are amended to remove the requirement to report unsuccessful attempts at unauthorized access, the requirement hereunder to report such unsuccessful attempts will no longer apply as of the effective date of the amendment.

(c) Modernizing Medicine shall, following the discovery of a Breach of Unsecured PHI, notify the Medical Practice of the Breach in accordance with 45 C.F.R. § 164.410 without unreasonable delay and in no case later than sixty (60) days after discovery of the Breach.

**Section 2.7. Access to Information.** Modernizing Medicine shall make available PHI in EMA to Medical Practice in accordance with this Agreement for so long as Modernizing Medicine maintains the PHI in a Designated Record Set. If Modernizing Medicine receives a request for access to PHI directly from an Individual, Modernizing Medicine shall forward such request to Medical Practice within ten (10) business days. Medical Practice shall have the sole responsibility for



determining whether to approve a request for access to PHI and to provide such access to the Individual.

**Section 2.8. Availability of PHI for Amendment.** Modernizing Medicine shall provide PHI in EMA to Medical Practice for amendment, and incorporate any such amendments in the PHI (for so long as Modernizing Medicine maintains such information in the Designated Record Set), in accordance with this Addendum and as required by 45 C.F.R. § 164.526. If Modernizing Medicine receives a request for amendment to PHI directly from an Individual, Modernizing Medicine shall forward such request to Medical Practice within ten (10) business days. Medical Practice shall have the sole responsibility for determining whether to approve an amendment to PHI and to make such amendment.

**Section 2.9. Accounting of Disclosures.** Within thirty (30) business days of written notice by Medical Practice to Modernizing Medicine that it has received a request for an accounting of disclosures of PHI (other than disclosures to which an exception to the accounting requirement applies), Modernizing Medicine shall make available to Medical Practice such information as is in Modernizing Medicine's possession and is required for Medical Practice to make the accounting required by 45 C.F.R. § 164.528. If MMI receives a request for an accounting directly from an Individual, MMI shall forward such request to Medical Practice within seven (7) business days. Medical Practice shall have the sole responsibility for providing an accounting to the Individual.

**Section 2.10. Availability of Books and Records.** Following reasonable advance written notice, Modernizing Medicine shall make its internal practices, books and records relating to the use and disclosure of PHI received from, or created or received by Modernizing Medicine on behalf of, Medical Practice available to the Secretary for purposes of determining Medical Practice's compliance with HIPAA.

### III. OBLIGATIONS OF THE MEDICAL PRACTICE

**Section 3.1. Permissible Requests.** The Medical Practice shall not request Modernizing Medicine to use or disclose PHI in any manner that would not be permissible under HIPAA if done by Medical Practice.

**Section 3.2. Minimum Necessary Information.** When Medical Practice discloses PHI to Modernizing Medicine, Medical Practice shall provide the minimum amount of PHI necessary for the accomplishment of Medical Practice's purpose.

**Section 3.3. Appropriate Use of PHI.** Medical Practice and its employees, representatives, consultants, contractors and agents shall not submit any Protected Health Information to Modernizing Medicine (A) outside of EMA, including but not limited to submissions to any online forum made available by Modernizing Medicine to its customers, email transmissions, and submissions through any support website, portal, or online help desk or similar service made available by Modernizing Medicine outside of EMA; or (B) directly to any third party involved in the provision of an online forum, email, support website, online help desk or other service described in (A), above.

**Section 3.4. Permissions; Restrictions.** Medical Practice warrants that it has obtained and will obtain any consent, authorization and/or other legal permission required under HIPAA and other applicable law for the disclosure of PHI to Modernizing Medicine. Medical Practice shall notify Modernizing Medicine of any changes in, or revocation of, the permission by an Individual to use or disclose his or her PHI, to the extent that such changes may affect Modernizing Medicine's use or disclosure of PHI. Medical Practice shall not agree to any restriction on the use or disclosure of PHI under 45 CFR § 164.522 that restricts Modernizing Medicine's use or disclosure of PHI under this Agreement (including under this Addendum) unless such restriction is Required By Law or Modernizing Medicine grants its written consent.

**Section 3.5. Notice of Privacy Practices.** Except as Required By Law, with Modernizing Medicine's consent or as set forth in this Agreement, Medical Practice shall not include any limitation in Medical Practice's notice of privacy practices that limits Modernizing Medicine's use or disclosure of PHI under this Agreement (including this Addendum).

#### IV. TERMINATION OF THIS AGREEMENT

**Section 4.1. Addendum Term.** Without limiting any other term of this Agreement (including this Addendum), this Addendum shall continue in full force and effect for so long as Modernizing Medicine maintains any PHI.

**Section 4.2. Termination Upon Breach of this Addendum.** Any other provision of this Agreement notwithstanding, this Agreement may be terminated by either party (the "**Non-Breaching Party**") upon ninety (90) days written notice to the other party (the "**Breaching Party**") in the event that the Breaching Party materially breaches this BA Agreement in any material respect and such breach is not cured within such ninety (90) day period. Any determination of whether a material breach has been cured shall be made by Modernizing Medicine in its sole discretion.

**Section 4.3. Return or Destruction of PHI upon Termination.** Upon termination of this Agreement, Modernizing Medicine shall return or destroy all PHI received from Medical Practice or created or received by Modernizing Medicine on behalf of Medical Practice and which Modernizing Medicine still maintains as PHI. Notwithstanding the foregoing, to the extent that Modernizing Medicine determines, in its sole discretion, that it is not feasible to return or destroy such PHI, this Addendum (including, without limitation, Section 2.1(d) of this Addendum) shall survive termination of this Agreement and such PHI shall be used or disclosed solely for such purpose or purposes which prevented the return or destruction of such PHI.

**Exhibit B**  
**Support Options**

**I. Description of Basic Support (“Basic Support”)**

- A. Telephone help desk and online support services between the hours of 8:00 a.m. and 8:00 p.m., Eastern time, Monday through Friday.<sup>1</sup>
- B. A client support representative shall provide an initial response to a support ticket submitted through the telephone help desk or online support portal within eight (8) business hours of Modernizing Medicine’s receipt of such support ticket.<sup>1</sup>

**II. Description of Premium Support (“Premium Support”)**

- A. Telephone help desk and online support services between (i) the hours of 8:00 a.m. and 10:00 p.m., Eastern time, Monday through Friday, and (ii) 8:00 a.m. and 8:00 p.m., Eastern time, Saturday and Sunday.<sup>1</sup>
- B. A client support representative shall provide an initial response to a support ticket submitted through the telephone help desk or online support portal within two (2) business hours of Modernizing Medicine’s receipt of such support ticket during weekdays and within four (4) business hours of Modernizing Medicine’s receipt of such support ticket during weekends.<sup>1</sup>
- C. A named client support representative shall be assigned as Medical Practice’s primary contact for application support and basic training.
- D. Support assistance may be provided through Modernizing Medicine’s EMA Connect™ system.

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<sup>1</sup> Support services may not be available during holidays observed by Modernizing Medicine.