Terms of Service

1. PROVISION OF THE SERVICE.

1.1 Restrictions on Use. Client and Authorized Users shall not (i) lease, loan, resell or otherwise distribute the Service or Software to any party that is not an Authorized User; (ii) use the Service or Software to develop a product or service which is competitive with any aspect of the Service or Software; (iii) sublicense to, permit access to, or use of, the Software or Service by unauthorized third parties; or (iv) use the Software or Service for the processing of information other than Client and its patients' information. Use of the Service by a party other than an Authorized User shall be grounds for immediate termination of the Agreement under Section 2.3 hereof. Client covenants that it will monitor use of the Service to ensure that only Authorized Users shall use the Service and shall immediately report to digiChart any use of the Service or the Software not authorized by the Agreement.

1.2 Additional Functionality. digiChart may make available additional functionality or change functionality of the Software or the Service from time to time without the prior consent of Client. If Client elects to subscribe to additional functionality, Client may incur charges in addition to those set forth herein.

1.3 Interfaces. digiChart has developed interfaces to integrate the Service with certain third party software. digiChart will make such interfaces available to Client at Client's request; provided, however, that Client acknowledges and agrees that digiChart does not guaranty that the Service will successfully and fully integrate with any third party software, whether or not such interfaces are used, that digiChart does not control the application interfaces made available in any third party software and that changes made by third party software providers to their software (including, for example, changes to application interfaces and data structures) may cause an interface with the Service to fail.

1.4 Support. Provided Client is current in the payment of any fees due and has complied with all of the terms and conditions required under the Agreement, digiChart shall provide Client with software maintenance services pursuant to the Client's Service Level Agreement (SLA).

1.5 Patient Access. digiChart may offer Client the ability to give Client's patients limited access to online patient history forms. digiChart makes no representations or warranties with regard to the accuracy or completeness of information that may be provided by Client, Client's Authorized Users or Client's patients in through such online access.

1.6 NOT A SUBSTITUTE FOR INDEPENDENT MEDICAL JUDGMENT. THE SERVICE AND SOFTWARE IS PROVIDED TO ASSIST CLIENT AND ITS AUTHORIZED USERS IN PATIENT CARE. NEITHER CLIENT NOR ANY OF ITS AUTHORIZED USERS SHALL RELY ON INFORMATION PROVIDED THROUGH THE SERVICE OR THE SOFTWARE (OR OTHERWISE USE THE SERVICE OR THE SOFTWARE) IN LIEU OF FOLLOWING THE REQUIRED STANDARD OF CARE IN THE CLIENT'S OR ITS AUTHORIZED USERS' MEDICAL COMMUNITY OR THEIR INDEPENDENT PROFESSIONAL MEDICAL JUDGMENT, INCLUDING, WITHOUT LIMITATION, WITH RESPECT TO DECISIONS ABOUT MEDICATIONS, DIAGNOSIS OF DISEASES, DETERMINATION OF TREATMENTS OR PERFORMANCE OF ANY OTHER TASKS THAT CONSTITUTE THE PRACTICE OF MEDICINE. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, CLIENT AND ITS AUTHORIZED USERS SHOULD USE THEIR INDEPENDENT PROFESSIONAL MEDICAL JUDGMENT IN DETERMINING WHETHER TO USE TEMPLATES AND CLINICAL TREATMENT PLANS MADE AVAILABLE AS PART OF THE SERVICE. DIGICHART MAKES NO REPRESENTATIONS OR WARRANTIES WITH RESPECT TO WHETHER SUCH TEMPLATES AND CLINICAL TREATMENT PLANS ARE APPROPRIATE FOR USE IN PROVIDING MEDICAL CARE.

1.7 Verification. Client must keep records relating to the use by it and its Authorized Users of the Service. digiChart has the right to verify compliance with the terms of use of the Service, at digiChart's expense. digiChart will provide Client reasonable notice of its intent to verify compliance. Verification will take place during normal business hours and in a manner that does not unreasonably interfere with Client's operations. If verification reveals any unauthorized use, Client must immediately order sufficient additional subscriptions to cover its use. If unauthorized use is 5% or more, Client must reimburse digiChart for the costs digiChart has incurred in verification. By exercising the rights and procedures described in this Section 1.5, digiChart does

not waive its rights to enforce this Agreement or to protect its intellectual property by any other means permitted by law.

2. INTELLECTUAL PROPERTY.

2.1 Ownership. All right, title and interest in any copyrights, trade secrets and other intellectual property rights in and to the Software and Service are owned by digiChart, and/or its licensors, and the Software and Service's structure, organization, workflow processes, operational processes, templates and code are the valuable trade secrets of digiChart and/or its licensors. Client acknowledges, on its behalf and on behalf of all Authorized Users, that no right, title or interest in or to the intellectual property in the Software or Service is transferred to Client (except for the limited licenses expressly provided in this Agreement), and that Client does not obtain any rights, express or implied, in the Software or Service other than the rights expressly granted in the Agreement. Client acknowledges that Client and its Authorized Users may suggest concepts, processes, workflows, inventions, or improvements (collectively, "Concepts") and that digiChart, at its sole option, may incorporate such Concepts in the Software and Service or in other products or services that may or may not be made available to Client. Any such Concept shall be and remain solely the property of digiChart and may be used and sold, licensed, or otherwise provided by digiChart to third parties, or published or otherwise publicly disclosed, in digiChart's sole discretion without notice, attribution, payment of royalties, or liability to Client. Client hereby assigns to digiChart any and all of its right, title, and interest, including copyright and patent rights, in and to any such Concepts.

2.2 User Materials. Any and all user materials provided to the Client are solely to support the Client's internal use of the Service and Software. The user materials contain proprietary information of digiChart, and distribution of the user materials to unauthorized third parties is expressly prohibited and shall be considered a material breach of the Agreement. Client is responsible for ensuring that the user materials are used by Authorized Users only as permitted under the Agreement. Client, at no additional cost, may reproduce user materials provided that (i) the number of such copies are limited to those reasonably required for authorized use of the Service and Software, including training and archival purposes; and (ii) all proprietary notices contained in the original copies of the user materials are reproduced and included in all copies, whether such copies are made in whole or in part.

2.3 Template Library. Client and its Authorized Users may contribute templates and clinical treatment plans to digiChart for use in the Service. By contributing templates and clinical treatment plans, Client, on its own behalf and on behalf of its Authorized Users, certifies that it owns all right, title and interest in and to the contributed templates and plans and assigns to digiChart exclusive ownership of such contributed templates and plans without any restrictions on use.

3. CPT AND ICD-9 CODES.
The American Medical Association ("AMA") and Medicode have developed CPT codes and ICD-9 codes that are valuable assets, trade secrets, trademark and/or copyrighted materials licensed to digiChart (the provision of updated versions of which is dependent upon a continuing contractual relationship with the AMA). digiChart has entered into a CPT License Agreement ("Primary Agreement") with the AMA. As a sub-licensee of the Primary Agreement, Client and any Authorized User of the CPT codes agree to comply with the terms of the Primary Agreement. CPT codes are commercial technical data that were developed exclusively at private expense by the AMA, 515 North State Street, Chicago, Illinois 60610. digiChart, its subcontractors, the AMA, Medicode, and any other party involved in the creation, production and delivery of the Service do not warrant the CPT codes and ICD-9 codes will meet Client's requirements. Client acknowledges that the CPT codes and ICD-9 codes utilized therein have not been developed according to Client's specifications or otherwise custom-made. digiChart, its subcontractors, the AMA, Medicode, and any other party involved in the creation, production and delivery of the Service disclaim responsibility for any consequences attributable to or related to any uses, non-use or interpretation of information contained in or not contained in the CPT codes and ICD-9 codes. In no event shall digiChart, its subcontractors, the AMA, Medicode, and any other party involved in the creation, production and delivery of the Service be liable to Client for any damages, including incidental and consequential damages, including any lost profits, lost savings, fines or penalties imposed by the Health Care Financing Administration, other state or federal agency charged with administering the Medicare program, or any third party, or other incidental or consequential damages arising out of the use or inability to use the CPT codes and ICD-9 codes, even if digiChart, its subcontractors, the AMA, Medicode, and any other party involved in the creation, production and delivery of the Service has been advised of the possibility of such damages, or for any claim by any other party. CPT is a registered trademark of the AMA, and ICD-9 is a registered trademark of Medicode.

4. CONFIDENTIALITY.

4.1   Confidential Information. "Confidential Information" means: (i) the object and source codes and documentation for the Software, (ii) user training materials, (iii) workflow processes and operational processes, and (iv) information of digiChart which derives value from not being generally known. "Confidential Information" shall not include:

(a)   information made available to the general public without restriction by digiChart or by an authorized third party;
(b)   information known to Client, without restriction, independently of disclosures by digiChart under the Agreement; or
(c)   information independently developed by Client without reference to Confidential Information.

4.2   Requirements. Client shall not disclose the Confidential Information except to those persons having a need to know. Client shall take appropriate action, by instruction to or agreement with its employees, agents and subcontractors, to maintain the confidentiality of the Confidential Information. Client shall promptly notify digiChart in the event that Client learns of an unauthorized release of Confidential Information.

4.3   Exception. Client may disclose Confidential Information without violating the terms of this Section 5 to the extent required to comply with the order of a court of competent jurisdiction or other government demand that has the force of law, provided that, before doing so, Client shall provide prompt written notice to digiChart of such requirement so that digiChart may seek a protective order or other remedy and reasonable assistance to digiChart in opposing such disclosure or seeking a protective order or other limitations on disclosure. If, after providing such notice and assistance, Client remains required by law to disclose Confidential Information, Client will disclose no more than that portion of the Confidential Information which, on the advice of legal counsel, Client is legally required to disclose and, upon digiChart's request, will use commercially reasonable efforts to obtain assurances from the applicable court or agency that such Confidential Information will be afforded confidential treatment.

4.4   Termination. In the event of termination of this Agreement, Client shall (i) immediately cease to use the Confidential Information, (ii) return to digiChart or certify the destruction of the Confidential Information and all copies thereof within ten (10) days of the termination, unless otherwise provided in the Agreement, and (iii) upon request, certify in writing to digiChart that it has complied with its obligations set forth in this Section.

4.5   Injunctive Relief. The parties acknowledge that monetary remedies may be inadequate to protect digiChart's rights in the Confidential Information and that, in addition to legal remedies otherwise available, injunctive relief is an appropriate judicial remedy to protect such rights.

5.   INDEMNITY.

5.1   By Client. Client shall indemnify, defend and hold digiChart and its affiliates, directors, officers, employees and agents (collectively, the "Indemnitees") harmless against all liabilities, damages and losses, including reasonable attorney's fees, arising out of or relating to any third party claim, suit, action or proceeding arising out of or relating to: (i) a breach of this Agreement by Client; (ii) any dispute between an Authorized User and Client regarding access or ownership of patient information; (iii) the acts or omissions of Client, any Authorized User or any of Client's employees, contractors or agents in connection with the Service; (iv) the negligence or wilful misconduct of Client or any Authorized User; (v) the use of any third party software, hardware, services or data in connection with the Service; (vi) the loss, disclosure, or alteration of data hosted by the Services resulting in whole or in part from the acts or omissions of Client, any Authorized User, or any of Client's employees, contractors or agents; and (vii) the use of any templates or clinical treatment plans contributed pursuant to Section 3.3 above. Additionally, and not in limitation of the foregoing, Client shall indemnify, defend and hold the Indemnitees harmless against any claim by or on behalf of any patient of Client, which is brought against any of the Indemnitees regardless of the cause if such claim arises for any reason whatsoever out of the operation of the Service. Client shall not settle any indemnified action in a manner that adversely affects the rights of the Indemnitees or otherwise admits liability on the part of any of the Indemnitees without the Indemnitees' prior written consent.

5.2 By digiChart. digiChart shall indemnify and hold Client harmless from all settlements agreed to by digiChart and all costs and direct damages finally awarded by a court of competent jurisdiction to a third party to the extent they arise out of a claim that the Software or Services, as provided hereunder to Client, infringes a U.S. copyright, U.S. patent or trade secret under U.S. law. Such obligation is subject to the following conditions (i) Client shall notify digiChart in writing within fifteen (15) days of the date Client first becomes aware of a claim; (ii) digiChart has sole control of the settlement, compromise, negotiation and defense of any such action; and (iii) Client and its Authorized Users give Client all reasonably available information, assistance and authority, to defend against such action. If an infringement action described above were to occur, digiChart may remedy the situation, at its option, by either: (i) obtaining the right to continued use of the Software or Service, (ii) substituting other reasonably equivalent software or service, (iii) modifying the Software or Service, so it is no longer infringing, or (iv) terminating Client's right to the allegedly infringing Software and Service, in which event digiChart shall refund to Client the Monthly Subscription Fees already paid by Client for the affected portion of the Software or Service for the then-current term prorated for the portion of the term through the date of such termination. The foregoing indemnity shall not apply to any infringement claim arising from use of the Software or Service in conjunction with other software, hardware, services or data where use with such other software, hardware, services or data gives rise to an infringement claim. THE FOREGOING STATES CLIENT'S SOLE AND EXCLUSIVE REMEDY WITH RESPECT TO CLAIMS OF INFRINGEMENT OF THIRD PARTY PROPRIETARY RIGHTS OF ANY KIND. DIGICHART EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTY OF NONINFRINGEMENT.

6. DISCLAIMER. THE SERVICE AND SOFTWARE ARE LICENSED AND PROVIDED "AS IS." NO WARRANTY IS MADE REGARDING THE RESULTS OF THE SERVICE OR SOFTWARE USAGE, THAT THE SOFTWARE OR SERVICE WILL OPERATE ERROR FREE OR WITH RESPECT TO THE COMPATIBILITY OF CO-OPERATING SOFTWARE, OF ANY INTERCONNECTED INTERNET SERVICE OR CLIENT COMPUTER CONNECTED TO THE SERVICE. NO ORAL ADVICE OR WRITTEN INFORMATION GIVEN BY CLIENT, DIGICHART, OR THEIR RESPECTIVE EMPLOYEES AND AGENTS SHALL CREATE A WARRANTY; NOR SHALL CLIENT RELY ON ANY SUCH INFORMATION OR ADVICE. THE WARRANTIES STATED WITHIN THE AGREEMENT ARE EXCLUSIVE, AND IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE OR IMPLIED WARRANTIES ARISING FROM COURSE OF DEALING OR COURSE OF PERFORMANCE.

7. LIMITATION OF LIABILITY. UNDER NO CIRCUMSTANCES SHALL DIGICHART, ITS AFFILIATES, OFFICERS, EMPLOYEES, OR DIRECTORS BE LIABLE FOR ANY INDIRECT, PUNITIVE, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR EXEMPLARY DAMAGES INCLUDING BUT NOT LIMITED TO LOSS OF REVENUE OR LOST PROFITS, OR LOSS OR INACCURACY OF ANY DATA OR PATIENT INFORMATION, FAILURE TO REALIZE EXPECTED SAVINGS THAT RESULT FROM THE USE OR INABILITY TO USE THE SERVICE OR SOFTWARE, THAT RESULT FROM MISTAKES, OMISSIONS, INTERRUPTIONS, DELETION OF FILES OR EMAIL, ERRORS, DEFECTS, VIRUSES, DELAYS IN OPERATION OR TRANSMISSION, OR ANY FAILURE OF PERFORMANCE, WHETHER OR NOT LIMITED TO EVENTS OF FORCE MAJEURE, COMMUNICATIONS FAILURE, THEFT, DESTRUCTION, OR UNAUTHORIZED ACCESS TO RECORDS, PROGRAMS, OR SERVICES. THIS SECTION WILL APPLY EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. BECAUSE SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CERTAIN DAMAGES, IN SUCH STATES, ANY LIABILITY SHALL BE LIMITED TO THE FULLEST EXTENT PERMITTED BY LAW. UNDER NO CIRCUMSTANCES SHALL THE AGGREGATE LIABILITY OF DIGICHART, ITS AFFILIATES, OFFICERS, EMPLOYEES, OR DIRECTORS TO CLIENT (INCLUDING LIABILITY TO ANY PERSON OR PERSONS WHOSE CLAIM OR CLAIMS ARE BASED ON OR DERIVED FROM A RIGHT OR RIGHTS CLAIMED BY OR THROUGH CLIENT) WITH RESPECT TO ANY AND ALL CLAIMS ARISING FROM OR RELATED TO THE SUBJECT MATTER OF THIS AGREEMENT, IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, EXCEED THE MONTHLY SUBSCRIPTION FEES PAID BY CLIENT FOR THE APPLICABLE PRODUCT INCLUDED IN THE SERVICE DURING THE 12-MONTH PERIOD IMMEDIATELY PRECEDING THE ACT GIVING RISE TO THE CLAIM.

8. MISCELLANEOUS.

8.1 Notice. Any notice required under this Agreement must be in writing and (i) delivered personally, (ii) delivered prepaid with next-business-day instruction by FedEx, UPS or similar nationally-recognized express delivery service (in which case such notices shall be deemed delivered on the next business day after deposit), (iii) sent by postage-prepaid certified or registered U.S. mail (in which case such notices shall be deemed delivered on the third business day after deposit with the U.S. Postal Service), or (iv) sent by email with a

copy sent by certified or registered U.S. mail (in which case such notices shall be deemed delivered on the third business day after deposit with the U.S. Postal Service).

8.2   Assignment. Client may not assign this Agreement, in whole or in part, without the prior written consent of digiChart; provided, however, that in the event Client merges with or is acquired by another entity, the terms and conditions of this Agreement shall be assigned to the new ownership entity.

8.3   Entire Agreement. The Agreement, including the Order Form, the Terms of Service, the SLA and the BAA, constitutes the entire agreement between the parties and supersedes all prior representations, agreements, statements and understandings, whether verbal or in writing.

8.4   Amendment and Waiver. No amendment of this Agreement will be effective unless it is in writing and signed by the parties. No term of this Agreement shall be deemed to be waived except by notice in writing signed by each party. Any failure by a party to enforce any provision of this Agreement, or any forbearance, delay or indulgence granted by a party to the other party, will not be construed as a waiver of any continuing or succeeding breach of such provision or a waiver of any rights under this Agreement.

8.5   Severability. If any provision of this Agreement is ruled wholly or partly invalid or unenforceable by a court or other body of competent jurisdiction, then (i) the validity and enforceability of all provisions of this Agreement not ruled to be invalid or unenforceable will be unaffected; (ii) the effect of the ruling will be limited to the jurisdiction of the court or other body making the ruling; (iii) the provision held wholly or partly invalid or unenforceable shall be deemed amended, and the court or other body is authorized to reform the provision, to the minimum extent necessary to render them valid and enforceable in conformity with the parties' intent as manifested herein; and (iv) if the ruling or the controlling principle of law or equity leading to the ruling subsequently is overruled, modified, or amended by legislative, judicial, or administrative action, then the provision in question as originally set forth in this Agreement shall be deemed valid and enforceable to the maximum extent permitted by the new controlling principle of law or equity.

8.6   Relationship of the Parties. The relationship between the parties is that of independent contractors. Nothing contained in this Agreement is intended to create any agency, partnership, joint venture or other form of joint enterprise, employment or fiduciary relationship between the parties, and neither party has the authority to contract for or bind the other party in any manner whatsoever.

8.7   No Third Party Beneficiary. Nothing express or implied in the Agreement is intended to confer, nor shall anything herein confer, upon any patient or person other than Client and digiChart and their respective successors or permitted assigns, any rights, remedies, obligations or liabilities whatsoever.

8.8   Force Majeure. Neither party shall be liable for any failure to perform its obligations under this Agreement if such failure arises, directly or indirectly, out of causes beyond such party's reasonable control, including without limitation acts of God, acts of terrorists or criminals, acts of domestic or foreign governments, change in any law or regulation, fires, floods, explosions, epidemics, disruptions in communications, power, or other utilities, strikes or other labor problems, riots, or unavailability of supplies.

8.9   Governing Law, Jurisdiction and Venue. THE AGREEMENT SHALL BE BINDING WHEN ACCEPTED IN WRITING BY DIGICHART AND SHALL BE GOVERNED BY THE LAWS OF THE STATE OF TENNESSEE WITHOUT GIVING EFFECT TO ITS PRINCIPLES OF CONFLICTS OF LAW. CLIENT AGREES THAT ANY APPROPRIATE FEDERAL OR STATE COURT LOCATED IN WILLIAMSON COUNTY, TENNESSEE, SHALL HAVE EXCLUSIVE JURISDICTION OF ANY CASE OR CONTROVERSY ARISING UNDER THE AGREEMENT. CLIENT WAIVES TRIAL BY JURY IN ANY ACTION BETWEEN THE PARTIES. ANY CAUSE OF ACTION AGAINST DIGICHART ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY OTHER AGREEMENT EXECUTED IN CONNECTION HEREWITH SHALL BE INSTITUTED AND SERVED UPON DIGICHART NOT LATER THAN EIGHTEEN (18) MONTHS FOLLOWING THE OCCURRENCE OF THE FIRST EVENT GIVING RISE THERETO. The prevailing party, in any action to enforce the terms and conditions of this Agreement shall be entitled to recover, in addition to any damages, their costs and expenses including reasonable attorneys' fees.

8.10 Counterparts. If the parties sign this Agreement in counterparts, each will be deemed an original but all counterparts together will constitute one executed document. A signed copy of this Agreement delivered by facsimile or e-mail is deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

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