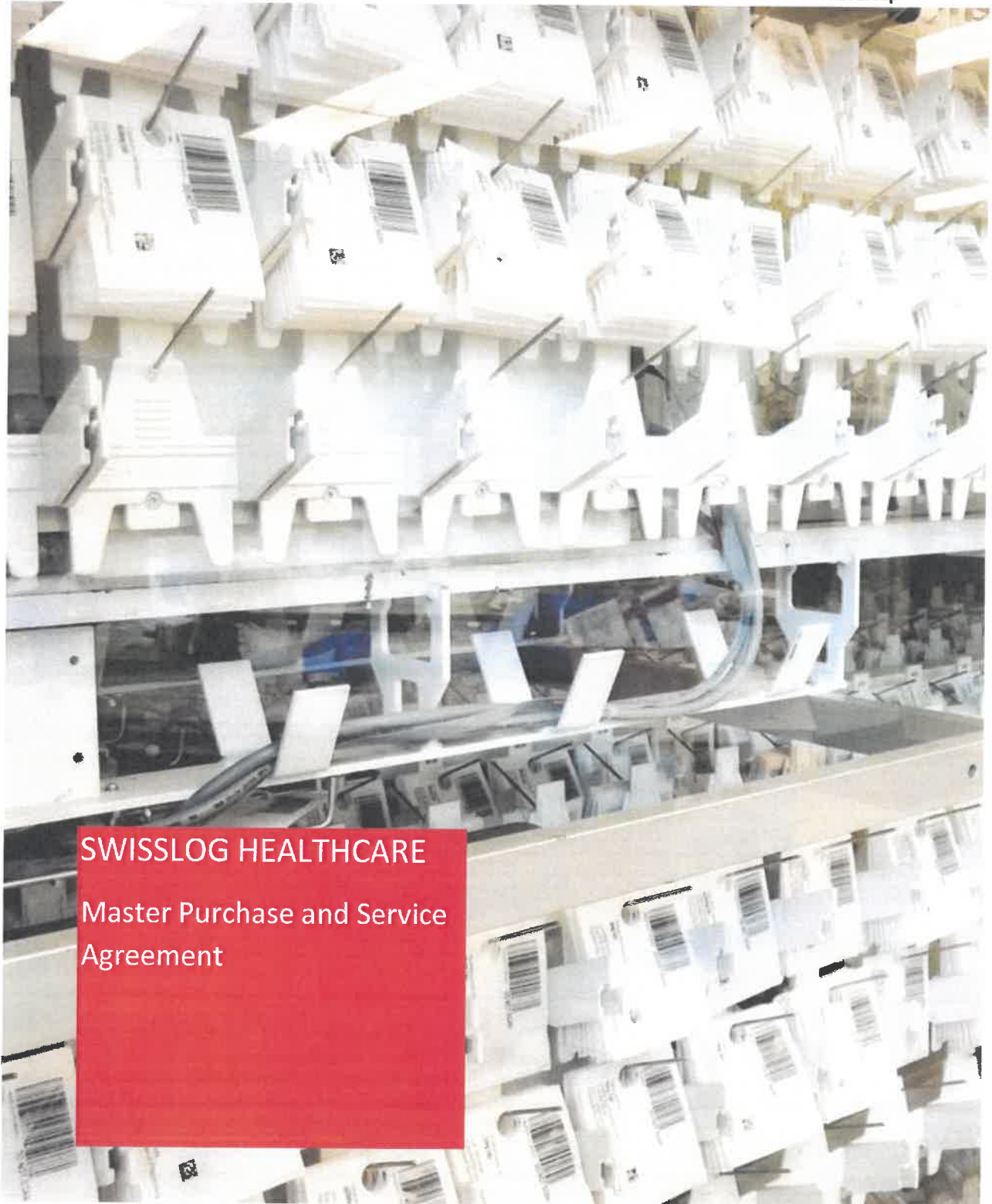swisslog
Member of the KUKA Group

SWISSLOG HEALTHCARE

Master Purchase and Service Agreement

MASTER PURCHASE AND SERVICE AGREEMENT TERMS AND CONDITIONS

1. **Agreement**. County of San Bernardino on behalf of Arrowhead Regional Medical Center ("Customer") agrees to purchase and Translogic Corporation d/b/a Swisslog Healthcare ("Swisslog") agrees to furnish Hardware, Software and/or Services according to the provisions of the Proposal (hereinafter referred to as "Proposal") presented to Customer and incorporated hereto, subject to all the following terms and conditions herein. The Proposal and these Terms and Conditions are collectively referred to as the "Agreement."

2. **Definitions.** Capitalized terms used in this Agreement have the meanings set forth below or as provided within the body of this Agreement.

   "**Affiliate**" means any entity that directly or indirectly controls, is controlled by, or is under common control with the subject entity. "Control," for purposes of this definition, means direct or indirect ownership or control of more than 50% of the voting interests of the subject entity.

   "**Agreement**" means this Master Purchase and Service Agreement and executed Proposal.

   "**Beneficial Use**" of the system is defined when the Swisslog system has been used by the Customer for a period of 5 days.

   "**Corrective Maintenance**" means Services that are ordered by Customer under a Proposal, or ordered directly by Customer, and made available by Swisslog, pursuant to the conditions of this Agreement.

   "**Customer Data**" means electronic data and information collected and stored by Customer.

   "**Current**" means in payment compliance with Sections 5 and 6 of this Agreement.

   "**Documentation**" means any manuals, notes, instructions and/or guidelines presented to the Customer as updated from time to time.

   "**Event**" means the Customer is experiencing a downtime event with their Swisslog System(s), as further defined by the Proposal.

   "**Final Acceptance**" shall occur once Customer has operated the Hardware and/or Software, in accordance with Swisslog instructions, for a period of five days and the Hardware and /or Software has performed to specifications for 98% of such period.

   "**Hardware**" means a physical component that is manufactured or refined for sale as defined by Swisslog Customer Proposal.

   "**Network**" means an aggregation of devices, any of which may perform the functions of computation, data storage, and/or data communications, and are interconnected by cable or wireless communications means so as to permit the passage of machine-readable information among two or more such devices. Network includes, without limitation, any publicly accessible communications, systems capable of data and/or voice communications; which systems may be generally known as the internet, the worldwide web, or other designation.

   "**Proposal**" means an ordering document specifying the System, Subscription or Services to be provided hereunder that is entered into between Customer and Swisslog or any Affiliates, including any addenda and supplements thereto. By entering into a Proposal, a Customer agrees to be bound by the terms of this Agreement as if it were an original party hereto.

   "**Preventive Maintenance or Maintenance**" means Services that are ordered by Customer under a Proposal, or ordered directly by Customer, and made available by Swisslog, pursuant to the conditions of this Agreement.

   "**Services**" means a task(s) or duty that is ordered by Customer under a Proposal and made available by Swisslog.

   "**Software**" means the part of the system that consists of encoded information or computer instructions ordered by Customer under a Proposal, or included for the operation of any Hardware and/or System ordered by Customer under a Proposal.

   "**Software Error**" means an instance of failure of the Software to be operative as further defined by Swisslog.

   "**Software Error Correction**" means either a modification or addition to the Software that, when made or added to the Software, corrects a Software Error.

   "**Software Maintenance**" means Services that are ordered by Customer under a Proposal and made available by Swisslog pursuant to the conditions of this Agreement.

   "**Software Update**" means a revision to Software on the same platform or providing Software Error Correction(s) to maintain an operative status.

   "**Software Upgrade**" means a new version or release of the Software, provided by Swisslog, that improves the functionality or adds functional capabilities to the Software that is not included in a Software update.

   "**Subscription**" means the continued use and support of specific Swisslog System(s), Hardware or Services ordered by the customer, under a Proposal pursuant to the conditions of this Agreement.

   "**System**" means Swisslog Hardware and Software interacting together to create a functioning product as described in the Proposal.

   "**Typical usage**" means the average use and or production of the installed Swisslog System, as defined by System type and referenced in the Proposal.

"User" means an individual who is authorized by Customer to use the System or Service, for whom Customer has ordered the System or Service, and to whom Customer (or Swisslog at Customer request) may have supplied a user identification and password. Users may include, for example, Customer employees, consultants, contractors and agents, and third parties with which Customer transact business.

3. **Term**. This Agreement for System(s), Subscription(s), and/or Service(s) is effective as of December 15, 2018 and expires December 14, 2023, unless sooner terminated pursuant to this Agreement ("Term").

4. Termination. A party may terminate this Agreement for cause (i) upon 30 days' written notice to the other party of a material breach if such breach remains uncured at the expiration of such period, or (ii) if the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors, which proceedings are not dismissed or otherwise resolved in that Party's favor within sixty (60) days thereafter, a party may terminate this Agreement for convenience upon 30 days written notice to the other Party.

5. **Payment**. Customer will pay all fees specified in Proposals or herein. Except as otherwise specified herein or in a Proposal, (i) fees are based on Services, Subscription, Software or System(s) purchased through the Proposal or ordered outside of the Proposal, and (ii) payment obligations are noncancelable and fees paid are non-refundable. Payment terms are net sixty (60) days upon date of receipt of invoice. Customer acknowledges payment by credit card is not accepted. Unless otherwise specified in this Agreement, all fees will be invoiced in advance and all invoices issued under this Agreement are payable in the currency sold. Customer's obligation to pay all charges which shall have accrued hereunder prior to termination of this Agreement shall survive termination, irrespective of the reason.

   a. Subscriptions fees. Unless otherwise provided in the applicable Proposal, Subscription(s) purchased; (a) are Services, Hardware and/or System(s) purchased as a Subscription, and (b) may be increased at the beginning of each Subscription renewal term, as set forth in Section 3. Additional Subscriptions may be added during a Subscription term at the pricing described in Customer's new Proposal. Any additional Subscription(s) may be proposed up to the expiration of the Term or prorated, for the portion of the new Subscription term, to align terms with an already existing Subscription. Proposal pricing is based on the number of sites at the time of the proposal, if such number of sites changes pricing is subject to change.

   b. System fees. Charges as specified in the Proposal, or pursuant to this Agreement, shall be invoiced and due within sixty (60) days from the date of receipt of the Invoice.

   c. Service fees. Charges as specified in the Proposal, or pursuant to this Agreement, shall be invoiced and due within sixty (60) days from the date of receipt of the Invoice. Charges due for a fractional part of a calendar month shall be computed at the rate of one-thirtieth (1/30th) of the monthly rate for each day. Except as otherwise specified in this Agreement, any Service hours or parts allowances in the Swisslog Proposal are set forth on the basis of a 12-month year regardless of whether Proposal/Agreement has a multi-year term. Except as provided within this Agreement, Customer acknowledges that any unused hours and/or parts allowances expire without refund or recourse at the end of each 12-month calendar year and shall not accumulate or carry forward in any manner. It is the Customer's responsibility to track service hours and parts allowance usage. Upon request of the Customer, Swisslog shall provide copies of all invoices dated within the term of the Agreement.

   d. Other charges. Pursuant to this Agreement and/or as ordered or directed by Customer, Customer may be charged other fees for Services or System use. Such fees shall be invoiced during the month in which they have been incurred and due within 60 days from the date of the invoice.

6. **Suspension of Service and Acceleration**. If any amount owed by Customer under this Agreement or any other agreement for Services is **90** or more days overdue, Swisslog may, without limiting its other rights and remedies suspend Services to Customer until such amounts are paid in full. Once Customer is considered overdue (90 days) the Customer is not Current with its account and not eligible for continued Subscription Services.

7. **Taxes.** Customer is exempt from Federal excise taxes and no payment shall be made for any personal property taxes levied on Swisslog or on any taxes levied on employee wages. Customer shall only pay for any State or local sales or use taxes on the services rendered or equipment and/or parts supplied to Customer pursuant to this Agreement.

8. **Hardware Installation and Software Deployment Cooperation.** For any Hardware installed by Swisslog, installation will be done in a workmanlike manner. The parties acknowledge and agree that collaboration and teamwork to improve and install the Hardware is critical to the future success of both parties and they will work together to accomplish the same. Swisslog employees and agents shall, while on Customer premises, comply with all rules and regulations of the premises, including security requirements. Swisslog shall repair, or cause to be repaired, at its own cost, all damages to Customer vehicles, facilities, buildings or grounds caused by the willful or negligent acts of Swisslog or its employees or agents. Such repairs shall be made immediately after Swisslog becomes aware of such damage, but in no event later than sixty (60) days after the occurrence. If Swisslog fails to make timely repairs, Customer may make any necessary repairs. Swisslog, as determined by

Customer, shall repay all costs incurred by Customer for such repairs, by cash payment upon demand, or Customer may deduct such costs from any amounts due to Swisslog from Customer.

9. **Shipment, Title and Risk of Loss.** Swisslog shall deliver the Hardware FOB Origin/FCA destination. Swisslog agrees to pay all freight, insurance, packing and other administrative and transportation charges related to said delivery. Swisslog shall make all arrangements for shipping, including making partial shipments, if required. Upon delivery, Customer shall provide a clean, safe and temperature-controlled area for receiving said shipment. Swisslog shall select, at its discretion, the types and amount of crating and the carrier of any insurance. All shipments hereunder will be made to Customer at Customer's address, as made known to Swisslog. Title and risk of loss of the Hardware passes to Customer once the shipment is received at Customer's address.

10. **Preventive and Corrective Hardware Maintenance.** Swisslog shall provide on-site Preventive and Corrective Maintenance Services according to the Proposal. Preventive Maintenance and Services are for the purpose of inspection and adjustment of the System and Hardware, as defined in the Proposal. Corrective Maintenance for failed wear-and-tear parts and Preventive Maintenance on all qualifying parts will be performed at no additional charge to Customer. Maintenance of non-qualifying parts, or work performed out of the scope of work, as defined in the Proposal, will be billed at Swisslog standard rates, on a time and-materials basis. The list for all wear-and-tear and qualifying Preventive Maintenance parts is found at www.swisslog.com/pharmacyautomationmasterscheduleB. Swisslog does not include consumables for its Systems, these are the responsibility of the Customer to purchase. A list of these parts is available at www.swisslog.com/pharmacyautomationmasterscheduleA. Onsite system Maintenance and monitoring is coordinated between the field service engineer and the Customer. Swisslog will obtain Customer's approval of any additional charges before performing the work.

11. **Emergency Services.** Emergency service hours are used to address and resolve a system Event. Emergency service allotments and unused emergency service hours are forfeited at the time of Agreement expiration. At Swisslog's sole discretion, if it is determined the Error was not an Event, or was caused by the Customer's wrongdoing or was a result of noncompliance or incident occurring in Section 14 of this Agreement, or the System requires repair or replacement outside the scope of the Proposal, such compliance and fees are subject to this Agreement.

12. **Storage of Maintenance Tools.** Customer shall provide, free of charge and with ready access, working space, heat, light, ventilation, electric current, and outlets for the use of Swisslog maintenance personnel. Such facilities shall be within a reasonable distance from the System being maintained. Title to all maintenance tools and spare parts not contained in spare parts kit purchased by Customer shall remain with Swisslog, except that upon installation of parts into Customer-owned equipment, title to such parts shall pass to Customer.

13. **Software Maintenance.** Pursuant to a Customer's Proposal and based upon this Agreement, Swisslog shall provide Customer accessibility, maintenance and added functionality described in this Agreement with respect to Software. Software Maintenance services include the following:

a. Support and Response Time. Swisslog shall provide 24x7x365 live technical telephone support with trained representatives.

b. Error Reporting. If Customer requires support, Customer shall contact Swisslog technical support. Swisslog will provide consultation, assistance, and advice relating to support of the Software within the timeframes described herein.

c. Software Updates. Swisslog shall make available to Customer (who is Current with its account) Software Updates on existing software versions, as part of this Agreement.

d. Software Upgrades. Swisslog shall make available to Customers that are Current with their account, annual Software Upgrade(s), to the latest Software version, as made available by Swisslog throughout the term of this Agreement. In order to obtain such Upgrades, it shall be the responsibility of the Customer to initiate a request once notified of the release.

e. Continuing Support and Downtime. Customer may decline to install a Software Update or Software Upgrade made available by Swisslog. Customer's decision not to update or upgrade relieves Swisslog of its responsibilities for any System issues the update or upgrade was intended to address. In such event, Swisslog shall continue the maintenance for whatever version of the Software that is installed at Customer's site, subject to Swisslog, or any third party's, right to end-of-life any Software, Hardware or System Swisslog deems appropriate and at its discretion. During Software Updates or Software Upgrades, the System may experience temporary downtime. Swisslog will notify Customer of pending Updates and Upgrades, and schedule installation at Customer's convenience.

f. Optimization Dashboards. Swisslog shall provide subsequent dashboard releases, as available, as well as annual dashboard support and maintenance.

g. Modifications. Modifications to the Software may be provided at the discretion of Swisslog. Swisslog is not obligated to make any custom modification to the Software at the request of the Customer, though depending on the nature of the request, may include in future plans for Software development.

h. Notice of Maintenance Discontinuance. Swisslog agrees to provide Customer with at least twelve (12) months' prior written notice before discontinuing maintenance for any Software or portion thereof.

i. Quarterly Small Change Orders. Customer will be allowed one change order or enhancement request per quarter specifically designated as a quarterly small change order to be provided at no additional fee. To qualify, quarterly small change orders must require 8 hours of development labor or less to complete, as determined by Swisslog. Any change order or enhancement request that requires Service hours in excess of the 8 provided quarterly hours will be quoted on a time and materials basis according to then current standard Swisslog rates. Customer acknowledges that all unused hours amounting to all or part of the 8 hours, allowed per quarterly small change order request will expire without refund or recourse at the end of each quarter, and shall not include training requests, accumulate or carry forward in any manner.

14. **Maintenance Exceptions**. Swisslog shall have no obligation to perform any Maintenance Services related to the following, unless Swisslog and Customer have otherwise agreed in writing:

    a. On-site visits for routine Software issues or Software Updates or Upgrades that can be conducted remotely.

    b. The failure of Customer to continually maintain the Network and/or its equipment or the System in conformance with Swisslog specifications or requirements.

    c. Damage or necessity of repair resulting from Customer's failure to maintain proper network security and protection.

    d. Damage or increases in service time caused by Customer's failure to provide a suitable environment for the system including, but not limited to, failure to provide adequate power, air conditioning, or humidity controls.

    e. Damage or impairments in the performance of the system, Customer software or vendor software, resulting from any unauthorized changes/alterations to or relocation of the system by Customer or any third party.

    f. Software Updates, Upgrades or alterations required by third-party vendor except as otherwise permitted in this Agreement or authorized in writing by Swisslog. Support of Software to accommodate third party vendors may be billed at standard Swisslog rates.

    g. Damage caused by use of the system or System for purposes outside the ordinary use for which it was designed or outside the uses allowed in this Agreement.

    h. Damage caused by accidents or natural disasters, fire, water, flood, electrical power surge or drop, use of third party consumables, storm, explosion, burglary, vandalism, accident, abuse, strike, acts of God or of public enemy, war, riot, civil commotion or the negligence of, or improper use or misuse of, the Hardware, Software, or the System.

    i. Damage to any of Customer's software or vendor software (not to include Swisslog Software) due to a Swisslog Update, Upgrade or Error Correction.

    j. Interruption of Customer's business operations due to discontinuation of third party hardware or software.

15. **Customer Responsibilities during Software Maintenance Term**. Customer shall maintain the installation site throughout the term of maintenance service identified herein with accordance to the specifications established by Swisslog.

    a. If Customer discovers any suspected Error, Customer shall analyze the suspected Error to determine if it is the result of Customer's misuse or misunderstanding of the Software before seeking Swisslog assistance.

    b. With all software releases, Customer is responsible for complying with Swisslog minimum IT specifications and compatibility requirements.

16. **Software License**. Swisslog retains ownership of all Software and will grant a license to Customer, subject to the terms and conditions of this Agreement (including the payment obligations hereunder.) Swisslog grants to Customer a perpetual, non-exclusive, nontransferable, revocable, limited license, terminable as provided herein, without the right to sublicense, to use the Software integrated with the Hardware. If applicable, and provided the additional consideration set forth herein is paid, Swisslog grants to Customer, during the term of this Agreement, a nonexclusive, nontransferable, revocable, limited license, terminable as provided herein, without the right to sublicense, to use Software associated with Service or Maintenance solutions, provided under the Proposal, and not directly integrated with the Hardware.

17. **Software Use**. Subject to the terms and conditions of this Agreement:

    a. Customer agrees to use the Software only for business purposes that are permitted by (i) the terms and conditions of this Agreement; and (ii) any applicable law or regulation in the relevant jurisdictions (including any laws administered by the US Office of Foreign Asset Control).

    b. Customer agrees not to reproduce, duplicate, copy, modify, sell, trade, resell, license, sublicense, distribute, transmit, display, or disseminate any portion of the Software.

    c. Customer agrees not to access, disassemble, or reverse engineer the Software for any reason including but not limited to building a product or software similar or competitive in features, ideas, functions, or graphics to the Software.

d. Customer is solely responsible for the actions, conduct, user data, and data content ("Customer Data") of all parties Customer allows to use the Software. Customer shall not use the Software to post or transmit:(a) information or material that is unlawful, obscene, or otherwise objectionable; (b) any advertisements, solicitations, or other unsolicited commercial or noncommercial communication except as otherwise expressly permitted by Swisslog; or (c) any software or information that can be harmful to any computer system.

18. **Connections.** Connecting the System or any individual component, without Swisslog prior approval is prohibited. If Equipment, Hardware or Software with connections interface with the normal functioning of the Equipment in a manner that increases Swisslog cost of maintaining the Equipment or creates a safety hazard, Customer agrees to remove such connections promptly upon notice from Swisslog.

19. **Hardware Replacement.** Unless otherwise agreed upon, replacement and Upgrade of system computers, printers, barcode readers, touch screen monitors and standard monitors after the initial warranty term are the Customer's responsibility. Swisslog will assist with the configuration of replaced hardware as a part of this Agreement as long as valid backups, where needed, have been maintained.

20. **System and Software Final Acceptance.** Final Acceptance shall occur once Customer has operated the Hardware and/or Software, in accordance with Swisslog instructions, for a period of five days and the Hardware/Software has performed to specifications for 98% of such period. For the avoidance of doubt, the Hardware/Software will be deemed to be performing its essential functions even if the Hardware/Software is not operable due to scheduled maintenance or user induced errors. Final Acceptance shall also occur if the Swisslog product provides Beneficial Use to the Customer for a period of 5 days.

21. **Return of Hardware.** Due to their custom nature, no System(s) may be returned to Swisslog. Consumable and normal wear parts (as defined herein) may be returned for full credit if a return goods authorization form is obtained and returned to Swisslog within thirty (30) days of Customer's initial receipt of such items. Customer is responsible for all return shipping expense.

22. **Delays and Adequate Assurance.** Swisslog shall not be liable for costs or delays occasioned by non-receipt of timely, complete or accurate information from the Customer, delays in drawing approval, changes and/or interruptions resulting from acts or omissions of the Customer, improper site preparation, or any other causes beyond Swisslog reasonable control.

23. **Standard Business Hours and Rates.** For Services not covered under this Agreement, or for Services that exceed the scope of work within the Proposal, the Customer agrees to pay Swisslog, pursuant to Section 5 and upon receipt of an itemized invoice, in accordance with the following schedule:

Labor – Normal Swisslog business hours	$161.00
Overtime – After-hours weekdays and Saturdays	$239.00
Overtime – Sundays & Holidays (defined by Swisslog)	$317.00
Mileage	$0.99/mile
Other Travel Related Expenses	Actual Cost

A Customer's invoice will reflect any discount stated under the Proposal and is subject to the Customer's account being Current. Swisslog normal business hours are 8:00 AM to 5:00 PM (local time of Customer), Monday through Friday, excluding Swisslog observed holidays. On-site system Maintenance and monitoring shall be limited to 8 hours per normal business hours/days, unless otherwise agreed to in writing by Swisslog service management. All Service visits will be invoiced for a minimum of four (4) hours (portal-to-portal) plus expenses, per visit. Time is calculated from door to door. Off hours are prorated at time and-a-half, holidays at double time. Travel-related costs for driving are included in the agreement. Pricing subject to additional mileage fees if over 100 miles. Rates are subject to change.

24. **Biohazard Cleanup:** Swisslog employees are not certified in biohazardous waste handling and cannot perform biohazard waste cleanup. Swisslog will default to each individual facility's expert when it comes to biohazard transport, handling and cleanup.

25. **Hazardous Materials.** Except as otherwise agreed by Swisslog in writing, Customer is responsible for all hazardous materials, however defined from time to time by applicable law, located in any area where the System is to be installed. Swisslog will not assume responsibility or any costs associated with any hazardous materials, including but not limited to any investigation, abatement, containment, testing, inspection or remediation of any asbestos, polychlorinated biphenyl (PCB), radioactive material, toxic mold or any other hazardous materials. Customer certifies that the work areas are safe and free of actionable levels of any and all hazardous materials, as defined above. All arrangements and expenses required for any and all hazardous material inspections, testing, monitoring, abatement, containment, etc., will be by the Customer.

26. **Warranties.** The following warranties shall apply to this Agreement:

a. **General Warranty.** THE WARRANTIES SET FORTH HEREIN ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, WHICH ARE HEREBY DISCLAIMED AND EXCLUDED BY SWISSLOG, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR USE. SWISSLOG SHALL NOT BE LIABLE FOR ANY LOSS OR DAMAGE CAUSED BY DELAY IN FURNISHING HARDWARE, A SYSTEM(S) AND SERVICES OR ANY OTHER PERFORMANCE UNDER OR PURSUANT TO THIS AGREEMENT. CUSTOMER'S SOLE AND EXCLUSIVE

REMEDIES FOR BREACH OF ANY AND ALL WARRANTIESUNDER THIS AGREEMENT WILL NOT EXCEED THE AMOUNT PAID BY CUSTOMER HEREUNDER.

b. **Hardware Warranty.** Swisslog manufactured Hardware will function, perform and conform in accordance with the included terms of then current Swisslog documentation and specifications to this Agreement, under normal service. Swisslog sole obligation to Customer shall be limited to the repair or replacement, at Swisslog option, of defective Hardware provided that written notice of failure is received by Swisslog within one (1) year from date of the occurrence of either Beneficial Use or Final Acceptance, whichever occurred earlier. Any items not manufactured by Swisslog items will be subject to the vendor's warranty.

c. **Exceptions to Hardware Warranty.** Swisslog warranty of any Hardware is of no effect if (i) the Hardware is not stored, operated or handled in accordance with the Documentation or written instructions provided to Customer, (ii) the defect of the Hardware resulted from damages occurring after delivery and prior to Final Acceptance of the Hardware, (iii) the defect of the Hardware has not been reported to Swisslog within thirty days after its occurrence, (iv) or stay Current with its account (v) the Customer uses consumables that are not provided directly by Swisslog or (vi) the defect should have been discovered by Customer prior to Final Acceptance and the Customer did not notify Swisslog of any such defect, (vii) Swisslog determines such defects are not due to, or limited by, abuse, carelessness, fire or decomposition by chemical or galvanic action and (viii) Customer failed to notify Swisslog, in writing, and within one (1) year from date of either Final Acceptance or Beneficial Use. Upon receipt of a claim report, Swisslog may either ask Customer for a sample of the defect or schedule an inspection of the defective the System.

d. **Software Warranty.** Notwithstanding anything else in this Agreement to the contrary, Swisslog hereby warrants to Customer that Swisslog is the owner of the Software and has the right to grant to Customer the license to use the Software and Documentation in the manner and for the purposes set forth in this Agreement without violating any rights of a third party.

28. **Indemnification.**

a. **General Mutual Indemnification.** Each party to the Agreement shall be responsible for and indemnify, defend, and hold harmless the other from liability of third parties arising out of injuries or damages to third parties or property of third parties as a result of this Agreement, caused by the negligent acts or omissions of the other party, its employees, agents and subcontractors. If this indemnification provision is in contradiction to any local or jurisdictional law, it shall be replaced by a reasonable indemnification provision in accordance with the jurisdiction of Customer's county.

b. **Software Indemnity.** Notwithstanding anything else in this Agreement to the contrary, Swisslog indemnifies, defends, and holds Customer harmless from and against any claims, actions, or demands alleging that the Software infringes any patent, copyright, or other intellectual property right of a third party. If use of the Software is permanently enjoined for any reason, Customer's sole remedy hereunder and at Swisslog's option, and in its sole discretion, Swisslog may (a) modify the Software so as to avoid infringement; (b) procure the right for Customer to continue to use the Software and Documentation; or (c) terminate this Agreement and refund to Customer any Subscription Fees paid, within the last 12 months, to Swisslog under this Agreement. Should any claim subject to software indemnity be made against Swisslog or Customer, the party against whom the claim is made agrees to provide the other party with prompt written notice of the claim. Swisslog will control the defense and settlement of any claim under this Section; provided that Swisslog may not settle the claim or suit absent the written consent of Customer, which will not be unreasonably withheld, unless such settlement (a) includes a release of all claims pending against Customer, (b) contains no admission of liability or wrongdoing by Customer, and (c) imposes no obligations upon Customer other than an obligation to stop using the Hardware, Software, System or Services that are the subject of the claim. If requested, Customer agrees to cooperate and provide reasonable assistance in the defense and settlement of such claim at Swisslog's sole expense.

29. **LIMITATION OF LIABILITY.** NEITHER PARTY'S LIABILITY WITH RESPECT TO ANY SINGLE INCIDENT ARISING OUT OF OR RELATED TO THIS AGREEMENT WILL EXCEED THE AMOUNT PAID BY CUSTOMER HEREUNDER IN THE 12 MONTHS PRECEDING THE INCIDENT, PROVIDED THAT IN NO EVENT WILL EITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT EXCEED ONE TIMES THE CONTRACT VALUE OF THE TOTAL AGREEMENT AMOUNT PAID BY CUSTOMER. THE ABOVE LIMITATIONS WILL APPLY WHETHER AN ACTION IS IN CONTRACT OR TORT AND REGARDLESS OF THE THEORY OF LIABILITY. HOWEVER, THE ABOVE LIMITATIONS WILL NOT LIMIT CUSTOMER'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT. IN NO EVENT WILL EITHER PARTY HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY LOST PROFITS, REVENUES OR INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, COVER OR PUNITIVE DAMAGES, WHETHER AN ACTION IS IN CONTRACT OR TORT AND REGARDLESS OF THE THEORY OF LIABILITY, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING DISCLAIMER WILL NOT APPLY TO THE EXTENT PROHIBITED BY LAW.

30. **Force Majeure.** Force Majeure shall mean any event or condition, not existing as of the date of signature of this Agreement, not reasonably foreseeable as of such date and

not within the control of either party, which prevents in whole or in material part of the performance by one of the parties of its obligations hereunder or which renders the performance of such obligations so difficult or costly as to make such performance commercially unreasonable. Without limiting the foregoing, the following shall constitute events or conditions of Force Majeure: requisition or compulsory acquisition by any governmental authority, riots, war, invasion, national labor strikes, lockouts, or slowdowns, fire, flood, earthquake, or other natural disaster.

Upon giving notice to the other party, a party affected by an event of Force Majeure shall be released without any liability on its part from the performance of its obligations under this Agreement, except for the obligation to pay any amounts incurred, due and owing hereunder, but only to the extent and only for the period that is performance of such obligations is prevented the event of Force Majeure. The party claiming Force Majeure shall promptly notify the other party of the termination of such event. During the period that the performance by one of the parties of its obligations under this Agreement has been suspended by reason of any event of Force Majeure, the other party may likewise suspend the performance of all of its obligations hereunder to the extent that such suspension is commercially reasonable.

Should the period of Force Majeure continue for more than two (2) consecutive months, either party may terminate this Agreement without liability to the other party, except for payments due to such date, upon giving written notice to the other party.

31. **Independent Contractor.** The parties intend that Swisslog, in performing services specified in this agreement, shall act as an independent contractor and shall have complete control of the work and the manner in which it is performed. Swisslog is not to be considered an agent or employee of Customer and is not entitled to participate in any pension plans, or in bonus, stock, or similar benefits that Customer provides for its employees.

32. **Confidentiality and Non-Disclosure.** It is expressly understood the parties may be exposed to or receive certain confidential information. "Confidential Information" means all non-public information, whether or not explicitly marked or identified as such, and whether written, oral, recorded on tapes, disks or in any other media or format about the other party, including without limitation, information that the party designates confidential or which, under the circumstances surrounding disclosure or receipt, ought to be treated as confidential. Confidential Information includes, without limitation, merchandising strategies, order handling, processes and procedures, and information relating to the Services, System, Hardware or Subscription's intellectual property, trade secrets, plans, drawings, specifications, know-how, manuals and/or technology including usernames, passwords, and any other security information used to access the Systems. Except as stated herein, the parties agree both during and after the termination of this

Agreement, to hold the Confidential Information in the strictest confidence, not to disclose such Confidential Information to any third Party and to use the same solely for the purposes for which it was provided by the party. Further, the parties shall not modify, reverse-engineer, or decompile the Hardware or Software or the System or Confidential Information nor create derivative works based on the Hardware or Software or the System or Confidential Information. The parties shall not use Confidential Information for any purpose other than in furtherance of this Agreement and the activities described herein. Each party agrees that in the event of a breach or threatened breach of this section (Confidentiality and Non-Disclosure), the other party may suffer irreparable harm for which it may have no adequate monetary remedy, and may be entitled to seek injunctive and other equitable relief for such breach, in addition to and not in limitation of any other legal or equitable remedies to which it would otherwise be entitled. Customer agrees that Customer shall be liable for any failure on the part of any such Representative, employee or third party to comply with these Terms and Conditions to the same extent as if such Representative, employee or third party had been parties hereto to use the Confidential Information solely in accordance with the terms of these Terms and Conditions; and to protect the Confidential Information from unauthorized disclosure or use. Confidential Information will not include information which the receiving Party is able to demonstrate: (i) is or becomes available to the general public in a manner other than as a result of an unauthorized disclosure by the receiving Party; (ii) is already in the possession of the receiving Party prior to disclosure by the disclosing Party and was not subject to an obligation of confidentiality owed to the disclosing Party at the time such information came into the possession of the receiving Party; (iii) becomes available to the receiving Party on a nonconfidential basis from a third party who has a right to make such disclosure and is not in violation of confidentiality obligations with the disclosing Party; and/or (iv) is independently developed by the receiving Party without use of, access to, and/or reference to the disclosing Party's Confidential Information. Either Party may disclose Confidential Information of the other Party to the extent required by law, court, or governmental order, rule, and/or regulation.

33. **Confidential Health Information.** The Parties agree that the Business Associate Agreement attached hereto as Exhibit B is hereby incorporated herein.

34. **Protection of Customer Data.** Except as otherwise provided, Swisslog does not own any Customer Data. Customer shall have sole responsibility for the accuracy, quality, integrity, legality, reliability, appropriateness, and intellectual property ownership of all User Data, and Swisslog shall not be responsible or liable for the deletion, correction, destruction, damage, loss, failure or misuse of any Customer Data. If for some reason Customer Data is accessed or stored, we will maintain administrative, physical, and technical safeguards

for protection of the security, confidentiality and integrity of Customer Data. Those safeguards will include, but will not be limited to, measures for preventing access, use, modification or disclosure of Customer Data by Swisslog personnel except (a) to provide the Services and prevent or address service or technical problems, (b) as compelled by law, or (c) as Customer expressly permit in writing. SWISSLOG DOES NOT GUARANTEE THAT THE SYSTEM WILL NOT BE THE SUBJECT OF A SECURITY BREACH AND MAKES NO WARRANTY THAT INFORMATION STORED IN ANY SYSTEM WILL BE COMPLETELY SECURE. Customer acknowledges and agrees that information used and stored within the Software and Systems is not the responsibility or liability of Swisslog.

35. **Health and Human Services Audit.** Should the provisions of section 952 of the Omnibus Reconciliation Act of 1980 [42 USC 1395X (V) (1)] (the "Act") apply to this Agreement, then Swisslog agrees to abide by the terms of the Act and its interpretative regulations including, but not limited to, maintenance of records concerning services and costs incurred under said agreement. Pursuant to the foregoing, Swisslog agrees that until the expiration of four (4) years after the furnishing of any goods and services pursuant to this Agreement, it will make available, upon written request of the Secretary of Health and Human Services or the Comptroller General of the United States or any of their duly authorized representatives, copies of this Agreement and any books, documents, records, and other data of Swisslog that are necessary to certify the nature and extent of the costs incurred by Customer in purchasing such System and Services. If Swisslog carries out any of its duties under this Agreement through a subcontract with a related organization involving a value or cost of ten thousand dollars ($10,000) or more over a twelve-month period, Swisslog will cause such subcontract to contain a clause to the effect that, until the expiration of four (4) years after the furnishing of any good or service pursuant to said contract, the related organization will make available upon written request of the Secretary of Health and Human Services or the Comptroller General of the United States or any of their duly authorized representatives, copies of this Agreement and any books, documents, records, and other data of said related organization that are necessary to certify the nature and extent of costs incurred by Customer for such System or Services. Swisslog shall give Customer notice immediately upon receipt of any request from the Secretary of Health and Human Services or the Comptroller General of the United States or any of their duly authorized representatives for disclosure of such information.

36. **Exclusion List.** Swisslog represents and warrants to Customer that it (i) is not currently sanctioned by the Health and Human Services Office of the Inspector General as set forth on the Cumulative Sanctions Report, or excluded by the General Services Administration as set forth on the List of Excluded Providers [see http://olg.hhs.gov/fraud/exclusions.html and http://epls.arnet.gov/]; and (ii) has not been convicted of a criminal offense related to the provision of healthcare items or services but has not yet been excluded, debarred, or otherwise declared ineligible to participate in the Federal Healthcare Programs or any state healthcare programs. Swisslog will immediately notify Customer of any change in the status of the representations and warranty set forth in this section.

37. **Assignment.** Neither party shall have the right to assign or otherwise transfer its right and obligations under this Agreement except with the written consent of the other party, which will not be unreasonably withheld. Any prohibited assignment shall be null and void.

38. **Export Control.** The Software, the Documentation, and all underlying information or technology may not be exported or re-exported into any country to which the US has embargoed goods, or to anyone on the US Treasury Department's list of Specially Designated Nationals or the US Commerce Department's Table of Deny Orders. Client shall not export the Software or Documentation or any underlying information or technology to any facility in violation of these or other applicable laws and regulations. Client represents and warrants that it is not a national or resident of, or located in or under the control of, any country subject to such export controls. The Software and Documentation are provided with Restricted Rights, as defined herein and by reference to the applicable regulations set forth in this section. Use, duplication, or disclosure by the US Government is subject to restrictions as set forth in the Commercial Computer Software - Restricted Rights clause at FAR 52.227-19, of The Rights in Technical Data and Computer Software clause at DFARS 252.227-7013, or subparagraph (d) of the Commercial Computer Software – Licensing at NASA FAR supplement 16-52.227-86, or their equivalent, as applicable.

39. **Amendments.** This Agreement shall not be deemed or construed to be modified, amended, rescinded, canceled or waived, in whole or in part, except by written amendment signed by an authorized representative of each of the parties hereto.

40. **Notices.** Notices permitted or required to be given hereunder shall be deemed sufficient if given by registered or certified air mail, postage prepaid, return receipt requested, addressed to the respective addresses or the parties as written in the Proposal or as updated by either Party though formal notification. Notices so given shall be effective as of the date stamped on the receipt.

41. **Severability.** In the event that any of the terms of this Agreement are in conflict with any rule of laws, regulations, provisions or otherwise unenforceable under the laws or regulations of any government or subdivision thereof, such terms shall be deemed stricken from this Agreement, but such invalidity or unenforceability shall not invalidate any of the other terms of this Agreement and this Agreement such continue in force, unless the invalidity or unenforceability of any such provisions hereof does substantial violence to, or where the invalid or unenforceable provisions comprise an

integral part of, or are otherwise inseparable from, the remainder of this Agreement.

44. **Choice of Law and Venue.** This Agreement and Proposal shall be governed by, and construed in accordance with, the laws of the state in which Customer is located. Each party irrevocably agrees that any claim brought by it in any way arising out of this Agreement or Proposal must be brought solely and exclusively in the Superior Court of California, County of San Bernardino, San Bernardino District, and each party irrevocably accepts and submits to the sole and exclusive jurisdiction of each of the aforesaid courts in person, generally and unconditionally with respect to any action, suit, or proceeding brought by it or against it by the other party. If any action or claim concerning this Contract is brought by any third party and filed in another venue, the parties hereto agree to use their best efforts to obtain a change of venue to the Superior Court of California, County of San Bernardino, San Bernardino District.

45. **Insurance.** Swisslog agrees to provide insurance set forth below in accordance with the requirements set forth in Exhibit B herein incorporated by this reference.

46. **Conflicting Terms.** This Agreement is the entire agreement between Customer and Swisslog regarding Customer's Services, Subscriptions or System(s) and supersedes all prior and contemporaneous agreements, proposals or representations, written or oral, concerning its subject matter. No addendum, amendment, or waiver of any provision of this Agreement will be effective unless in writing and signed by the party against whom the modification, amendment or waiver is to be asserted. The parties agree that any term or condition stated in Customer purchase order or in any other Customer order documentation (excluding the Proposal) is void. In the event of any conflict or inconsistency among the following documents, the order of precedence shall be: (1) this Agreement, (2) the applicable Proposal, and (3) the Documentation.

47. **Authority.** By executing this Agreement, Customer is providing Swisslog with a guarantee they have signing authority for all facilities referenced on the Proposal. To ensure a timely transition to implementation Customer agrees to submit a PO no later than ten (10) days from date of execution of the Proposal. Swisslog will not process Customer's order until such PO is received and failure to do so may delay installation.

IN WITNESS WHEREOF, the County of San Bernardino and the Swisslog have each caused this Agreement to be subscribed by its respective duly authorized officers, on its behalf.

BOARD OF SUPERVISORS

► *[signature]*

Robert A. Lovingood, Chairman, Board of Supervisors

Dated: **DEC 04 2018**

SIGNED AND CERTIFIED THAT A COPY OF THIS
DOCUMENT HAS BEEN DELIVERED TO THE
CHAIRMAN OF THE BOARD

Laura H. Welch
Clerk of the Board of Supervisors
of the County of San Bernardino

By *[signature]*

Deputy
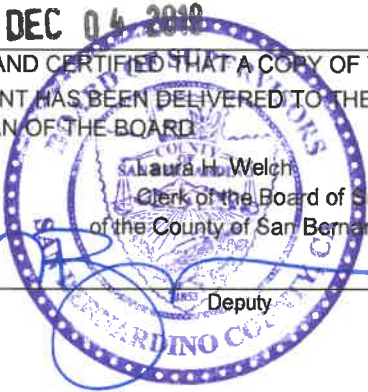
Translogic Corporation d/b/a Swisslog Healthcare

(Print or type name of corporation, company, contractor, etc.)

By ► *[signature]*

(Authorized signature - sign in blue ink)

Name   Michele Holcomb

(Print or type name of person signing contract)

Title   Assistant Secretary

(Print or Type)

Dated: 11/14/2018

Address   11325 Main Street

Broomfield, CO 80020

Approved as to Legal Form

► *[signature]*

BONNIE UPHOLD County Counsel

Dated: 11/19/18

EXHIBIT B
Insurance

Swisslog agrees to provide insurance set forth below in accordance with the requirements herein. If Swisslog uses existing coverage to comply with these requirements and that coverage does not meet the specified requirements, Swisslog agrees to amend, supplement or endorse the existing coverage to do so. The type(s) of insurance required is determined by the scope of the contract services. Without in anyway affecting the indemnity herein provided and in addition thereto, Swisslog shall secure and maintain throughout the contract term the following types of insurance with limits as shown:

Workers' Compensation/Employers Liability: A program of Workers' Compensation insurance or a state-approved, self-insurance program in an amount and form to meet all applicable requirements of the Labor Code of the State of California, including Employer's Liability with $250,000 limits covering all persons including volunteers providing services on behalf of Swisslog and all risks to such persons under this contract.

Commercial/General Liability Insurance: Swisslog shall carry General Liability Insurance covering all operations performed by or on behalf of Swisslog providing coverage for bodily injury and property damage with a combined single limit of not less than one million dollars ($1,000,000), per occurrence. The policy coverage shall include:

      (a) Premises operations and mobile equipment.
      (b) Products and completed operations.
      (c) Broad form property damage (including completed operations).
      (d) Explosion, collapse and underground hazards.
      (e) Personal injury
      (f) Contractual liability.
      (g) $2,000,000 general aggregate limit.

Automobile Liability Insurance: Primary insurance coverage shall be written on ISO Business Auto coverage form for all owned, hired and non-owned automobiles or symbol 1 (any auto). The policy shall have a combined single limit of not less than one million dollars ($1,000,000) for bodily injury and property damage, per occurrence. If Swisslog is transporting one or more non-employee passengers in performance of contract services, the automobile liability policy shall have a combined single limit of two million dollars ($2,000,000) for bodily injury and property damage per occurrence. If Swisslog owns no autos, a non-owned auto endorsement to the General Liability policy described above is acceptable.

Cyberliability Insurance: With limits of no less than $1,000,000 for each occurrence or event with an annual aggregate of $2,000,000 covering claims involving violation, information theft, damage to or destruction of electronic information, intentional and/or unintentional release of private information, alteration of electronic information, extortion and network security. The policy shall protect the involved Customer entities and cover breach response cost as well as regulatory fines and penalties.

Umbrella Liability Insurance: An umbrella (over primary) or excess policy may be used to comply with limits or other primary coverage requirements. When used, the umbrella policy shall apply to bodily injury/property damage, personal injury/advertising injury and shall include a "dropdown" provision providing primary coverage for any liability not covered by the primary policy. The coverage shall also apply to automobile liability.

Additional Insured – All policies, except for the Workers' Compensation, shall contain endorsements naming the Customer and its officers, employees, agents and volunteers as additional insureds with respect to liabilities arising out of the performance of services hereunder. The additional insured endorsements shall not limit the scope of coverage for the Customer to vicarious liability but shall allow coverage for the Customer to the full extent provided by the policy.

Waiver of Subrogation Rights – Swisslog shall require its carriers to waive all rights of subrogation against the Customer, its officers, employees, agents, volunteers, contractors and subcontractors. All general or auto liability insurance coverage provided shall not prohibit Swisslog and Swisslog's employees or agents from waiving the right of subrogation prior to a loss or claim. Swisslog hereby waives all rights of subrogation against the Customer.

Policies Primary and Non-Contributory – All policies required herein are to be primary and non-contributory with any insurance or self-insurance programs carried or administered by the Customer.

Severability of Interests – Swisslog agrees to ensure that coverage provided to meet these requirements is applicable separately to each insured and there will be no cross liability exclusions that preclude coverage for suits between Swisslog and the Customer or between the Customer and any other insured or additional insured under the policy.

Proof of Coverage – Swisslog shall furnish Certificates of Insurance to the Customer Department administering the contract evidencing the insurance coverage, including endorsements, as required, prior to the commencement of performance of services hereunder, which certificates shall provide that such insurance shall not be terminated or expire without thirty (30) days written notice to the Department,

and Swisslog shall maintain such insurance from the time Swisslog commences performance of services hereunder until the completion of such services. Within fifteen (15) days of the commencement of this contract, Swisslog shall furnish a copy of the Declaration page for all applicable policies and will provide complete certified copies of the policies and endorsements immediately upon request.

Acceptability of Insurance Carrier – Unless otherwise approved by Risk Management, insurance shall be written by insurers authorized to do business in the State of California and with a minimum "Best" Insurance Guide rating of "A- VII".

Deductibles and Self-Insured Retention - Any and all deductibles or self-insured retentions in excess of $10,000 shall be declared to and approved by Risk Management.

Failure to Procure Coverage – In the event that any policy of insurance required under this contract does not comply with the requirements, is not procured, or is canceled and not replaced, the Customer has the right but not the obligation or duty to cancel the contract, without incurring any cancellation or termination charges, or obtain insurance if it deems necessary and any premiums paid by the Customer will be promptly reimbursed by Swisslog or Customer payments to Swisslog will be reduced to pay for Customer purchased insurance.

Insurance Review – Insurance requirements are subject to periodic review by the Customer. The Director of Risk Management or designee is authorized, but not required, to reduce, waive or suspend any insurance requirements whenever Risk Management determines that any of the required insurance is not available, is unreasonably priced, or is not needed to protect the interests of the Customer. In addition, if the Department of Risk Management determines that heretofore unreasonably priced or unavailable types of insurance coverage or coverage limits become reasonably priced or available, the Director of Risk Management or designee is authorized, but not required, to change the above insurance requirements to require additional types of insurance coverage or higher coverage limits, provided that any such change is reasonable in light of past claims against the Customer, inflation, or any other item reasonably related to the Customer's risk. Any change requiring additional types of insurance coverage or higher coverage limits must be made by amendment to this contract. Swisslog agrees to execute any such amendment within thirty (30) days of receipt. Any failure, actual or alleged, on the part of the Customer to monitor or enforce compliance with any of the insurance and indemnification requirements will not be deemed as a waiver of any rights on the part of the Customer.

BUSINESS ASSOCIATE AGREEMENT

This Business Associate Agreement (Agreement) supplements and is made a part of the contract (Contract) by and between the County of San Bernardino on behalf of Arrowhead Regional Medical Center (hereinafter Covered Entity) and Translogic Corporation d/b/a Swisslog Healthcare (hereinafter Business Associate). This Agreement is effective as of the effective date of the Contract.

RECITALS

WHEREAS, Covered Entity (CE) wishes to disclose certain information to Business Associate (BA) pursuant to the terms of the Contract, which may include Protected Health Information (PHI); and

WHEREAS, CE and BA intend to protect the privacy and provide for the security of the PHI disclosed to BA pursuant to the Contract in compliance with the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (HIPAA), the Health Information Technology for Economic and Clinical Health Act, Public Law 111-005 (HITECH Act), their implementing regulations, and other applicable laws; and

WHEREAS, The Privacy Rule and the Security Rule require CE to enter into a contract containing specific requirements with BA prior to the disclosure of PHI, as set forth in, but not limited to, Title 45, sections 164.314, subdivision (a), 164.502, subdivision (e), and 164.504, subdivision (e) of the Code of Federal Regulations (C.F.R.) and contained in this Agreement; and

WHEREAS, Pursuant to HIPAA and the HITECH Act, BA shall fulfill the responsibilities of this Agreement by being in compliance with the applicable provisions of the HIPAA Standards for Privacy of PHI set forth at 45 C.F.R. sections 164.308 (Administrative Safeguards), 164.310 (Physical Safeguards), 164.312 (Technical Safeguards), 164.316 (Policies and Procedures and Documentation Requirements), and, 164.400, et seq. and 42 United States Code (U.S.C.) section 17932 (Breach Notification Rule), in the same manner as they apply to a CE under HIPAA;

NOW THEREFORE, in consideration of the mutual promises below and the exchange of information pursuant to this Agreement, the parties agree as follows:

A.   Definitions

Unless otherwise specified herein, capitalized terms used in this Agreement shall have the same meanings as given in the Privacy Rule, the Security Rule, the Breach Notification Rule, and HITECH Act, as and when amended from time to time.

1. Breach shall have the same meaning given to such term under the HIPAA Regulations [45 C.F.R. §164.402] and the HITECH Act [42 U.S.C. §§17921 et seq.], and as further described in California Civil Code section 1798.82.

2. Business Associate (BA) shall have the same meaning given to such term under the Privacy Rule, the Security Rule, and the HITECH Act, including but not limited to 42 U.S.C. section 17921 and 45 C.F.R. section 160.103.

3. Covered Entity (CE) shall have the same meaning given to such term as under the Privacy Rule and Security Rule, including, but not limited to 45 C.F.R. section 160.103.

4. Designated Record Set shall have the same meaning given to such term under 45 C.F.R. section 164.501.

5. Electronic Protected Health Information (ePHI) means PHI that is maintained in or transmitted by electronic media as defined in the Security Rule, 45 C.F.R. section 164.103.

6. Individual shall have the same meaning given to such term under 45 C.F.R. section 160.103.

7. Privacy Rule means the regulations promulgated under HIPAA by the United States Department of Health and Human Services (HHS) to protect the privacy of Protected Health Information, including, but not limited to, 45 C.F.R. Parts 160 and 164, subparts A and E.

8. Protected Health Information (PHI) shall have the same meaning given to such term under 45 C.F.R. section 160.103, limited to the information received from, or created or received by Business Associate from or on behalf of, CE.

9. Security Rule means the regulations promulgated under HIPAA by HHS to protect the security of ePHI, including, but not limited to, 45 C.F.R. Part 160 and 45 C.F.R. Part 164, subparts A and C.

10. Unsecured PHI shall have the same meaning given to such term under the HITECH Act and any guidance issued pursuant to such Act, including, but not limited to 42 U.S.C. section 17932, subdivision (h).

B.   Obligations and Activities of BA

1. Permitted Uses and Disclosures

BA may disclose PHI: (i) for the proper management and administration of BA; (ii) to carry out the legal responsibilities of BA; (iii) for purposes of Treatment, Payment and Operations (TPO); (iv) as required by law; or (v) for Data Aggregation purposes for the Health Care Operations of CE. Prior to making any other disclosures, BA must obtain a written authorization from the Individual.

If BA discloses PHI to a third party, BA must obtain, prior to making any such disclosure, (i) reasonable written assurances from such third party that such PHI will be held confidential as provided pursuant to this Agreement and only disclosed as required by law or for the purposes for which it was disclosed to such third party, and (ii) a written agreement from such third party to immediately notify BA of any breaches of confidentiality of the PHI, to the extent it has obtained knowledge of such breach. [42 U.S.C. section 17932; 45 C.F.R. sections 164.504(e)(2)(i), 164.504(e)(2)(i)(B), 164.504(e)(2)(ii)(A) and 164.504(e)(4)(ii)]

2. Prohibited Uses and Disclosures

    i. BA shall not use, access or further disclose PHI other than as permitted or required by this Agreement and as specified in the attached Contract or as required by law. Further, BA shall not use PHI in any manner that would constitute a violation of the Privacy Rule or the HITECH Act. BA shall disclose to its employees, subcontractors, agents, or other third parties, and request from CE, only the minimum PHI necessary to perform or fulfill a specific function required or permitted hereunder.

    ii. BA shall not use or disclose PHI for fundraising or marketing purposes.

    iii. BA shall not disclose PHI to a health plan for payment or health care operations purposes if the patient has requested this special restriction, and has paid out of pocket in full for the health care item or service to which the PHI solely relates. (42 U.S.C. section 17935(a) and 45 C.F.R. section 164.522(a)(1)(i)(A).)

    iv. BA shall not directly or indirectly receive remuneration in exchange for PHI, except with the prior written consent of CE and as permitted by the HITECH Act (42 U.S.C. section 17935(d)(2); and 45 C.F.R. section 164.508); however, this prohibition shall not affect payment by CE to BA for services provided pursuant to this Agreement.

3. Appropriate Safeguards

    i. BA shall implement appropriate safeguards to prevent the unauthorized use or disclosure of PHI, including, but not limited to, administrative, physical and technical safeguards that reasonably protect the confidentiality, integrity and availability of the PHI BA creates, receives, maintains, or transmits on behalf of the CE, in accordance with 45 C.F.R. sections 164.308, 164.310, 164.312 and 164.316. [45 C.F.R. sections 164.504(e)(2)(ii)(b) and 164.308(b).]

    ii. In accordance with 45 C.F.R. section 164.316, BA shall maintain reasonable and appropriate written policies and procedures for its privacy and security program in order to comply with the standards, implementation specifications, or any other requirements of the Privacy Rule and applicable provisions of the Security Rule.

    iii. BA shall provide appropriate training for its workforce on the requirements of the Privacy Rule and Security Rule as those regulations affect the proper handling, use confidentiality and disclosure of the CE's PHI.

        Such training will include specific guidance relating to sanctions against workforce members who fail to comply with privacy and security policies and procedures and the obligations of the BA under this Agreement.

4. Subcontractors

BA shall enter into written agreements with agents and subcontractors to whom BA provides CE's PHI that impose the same restrictions and conditions on such agents and subcontractors that apply to BA with respect to such PHI, and that require compliance with all appropriate safeguards as found in this Agreement.

5. Reporting of Improper Access, Use or Disclosure or Breach

Every suspected and actual Breach shall be reported no later than ten (10) business day upon discovery, to CE's Office of Compliance, consistent with the regulations under HITECH Act. Upon discovery of a Breach or suspected Breach, BA shall complete the following actions:

    i. Provide CE's Office of Compliance with the following information to include but not limited to:

        a) Date the Breach or suspected Breach occurred;

        b) Date the Breach or suspected Breach was discovered;

        c) Number of staff, employees, subcontractors, agents or other third parties and the names and titles of each person allegedly involved;

        d) Number of potentially affected Individual(s) with contact information; and

     e)   Description of how the Breach or suspected Breach allegedly occurred.

  ii.   Conduct and document a risk assessment by investigating without unreasonable delay and in no case later than five (5) calendar days of discovery of the Breach or suspected Breach to determine the following:

     a)   The nature and extent of the PHI involved, including the types of identifiers and likelihood of re-identification;

     b)   The unauthorized person who had access to the PHI;

     c)   Whether the PHI was actually acquired or viewed; and

     d)   The extent to which the risk to PHI has been mitigated.

  iii.   Provide a completed risk assessment and investigation documentation to CE's Office of Compliance within ten (10) calendar days of discovery of the Breach or suspected Breach with a determination as to whether a Breach has occurred. At the discretion of CE, additional information may be requested.

     a)   If BA and CE agree that a Breach has not occurred, notification to Individual(s) is not required.

     b)   If a Breach has occurred, notification to the Individual(s) is required and BA must provide CE with affected Individual(s) name and contact information so that CE can provide notification.

  iv.   Make available to CE and governing State and Federal agencies in a time and manner designated by CE or governing State and Federal agencies, any policies, procedures, internal practices and records relating to a Breach or suspected Breach for the purposes of audit or should the CE reserve the right to conduct its own investigation and analysis.

6.   Access to PHI

To the extent BA maintains a Designated Record Set on behalf of CE, BA shall make PHI maintained by BA or its agents or subcontractors in Designated Record Sets available to CE for inspection and copying within ten (10) days of a request by CE to enable CE to fulfill its obligations under the Privacy Rule. If BA maintains ePHI, BA shall provide such information in electronic format to enable CE to fulfill its obligations under the HITECH Act. If BA receives a request from an Individual for access to PHI, BA shall immediately forward such request to CE.

7.   Amendment of PHI

If BA maintains a Designated Record Set on behalf of the CE, BA shall make any amendment(s) to PHI in a Designated Record Set that the CE directs or agrees to, pursuant to 45 C.F.R. section 164.526, or take other measures as necessary to satisfy CE's obligations under 45 C.F.R. section 164.526, in the time and manner designated by the CE.

8.   Access to Records

BA shall make internal practices, books, and records, including policies and procedures, relating to the use, access and disclosure of PHI received from, or created or received by BA on behalf of, CE available to the Secretary of HHS, in a time and manner designated by the Secretary, for purposes of the Secretary determining CE's compliance with the Privacy Rule and Security Rule and patient confidentiality regulations. Any documentation provided to the Secretary shall also be provided to the CE upon request.

9.   Accounting for Disclosures

BA, its agents and subcontractors shall document disclosures of PHI and information related to such disclosures as required by HIPAA. This requirement does not apply to disclosures made for purposes of TPO. BA shall provide an accounting of disclosures to CE or an Individual, in the time and manner designated by the CE. BA agrees to implement a process that allows for an accounting to be collected and maintained by BA and its agents or subcontractors for at least six (6) years prior to the request. At a minimum, the information collected and maintained shall include: (i) the date of disclosure; (ii) the name of the entity or person who received PHI and, if known, the address of the entity or person; (iii) a brief description of PHI disclosed; and (iv) a brief statement of purpose of the disclosure that reasonably informs the individual of the basis for the disclosure, or a copy of the Individual's authorization, or a copy of the written request for disclosure.

10. Termination

CE may immediately terminate this agreement, and any related agreements, if CE determines that BA has breached a material term of this agreement. CE may, at its sole discretion, provide BA an opportunity to cure the breach or end the violation within the time specified by the CE.

11. Return of PHI

Upon termination of this Agreement, BA shall return all PHI required to be retained by the BA or its subcontractors, employees or agents on behalf of the CE. In the event the BA determines that returning the PHI is not feasible, the BA shall provide the CE with written notification of the conditions that make return not feasible. Additionally, the BA must follow established policies and procedures to ensure PHI is safeguarded and disposed of adequately in accordance with 45 C.F.R. section 164.310, and must submit to the CE a certification of destruction of PHI. For destruction of ePHI, the National Institute of Standards and

Technology (NIST) guidelines must be followed. BA further agrees to extend any and all protections, limitations, and restrictions contained in this Agreement, to any PHI retained by BA or its subcontractors, employees or agents after the termination of this Agreement, and to limit any further use, access or disclosures.

12. Breach by the CE

Pursuant to 42 U.S.C. section 17934, subdivision (b), if the BA is aware of any activity or practice by the CE that constitutes a material Breach or violation of the CE's obligations under this Agreement, the BA must take reasonable steps to address the Breach and/or end eliminate the continued violation, if the BA has the capability of mitigating said violation. If the BA is unsuccessful in eliminating the violation and the CE continues with non-compliant activity, the BA must terminate the Agreement (if feasible) and report the violation to the Secretary of HHS.

13. Mitigation

BA shall have procedures in place to mitigate, to the extent practicable, any harmful effect that is known to BA of a use, access or disclosure of PHI by BA, its agents or subcontractors in violation of the requirements of this Agreement.

14. Costs Associated to Breach

BA shall be responsible for reasonable costs associated with a Breach. Costs shall be based upon the required notification type as deemed appropriate and necessary by the CE and shall not be reimbursable under the Agreement at any time. CE shall determine the method to invoice the BA for said costs. Costs shall incur at the current rates and may include, but are not limited to the following:

- Postage;
- Alternative means of notice;
- Media notification; and
- Credit monitoring services.

15. Direct Liability

BA may be held directly liable under HIPAA for impermissible uses and disclosures of PHI; failure to provide breach notification to CE; failure to provide access to a copy of ePHI to CE or individual; failure to disclose PHI to the Secretary of HHS when investigating BA's compliance with HIPAA; failure to provide an accounting of disclosures; and, failure to enter into a business associate agreement with subcontractors.

16. Indemnification

BA agrees to indemnify, defend and hold harmless CE and its authorized officers, employees, agents and volunteers from any and all claims, actions, losses, damages, penalties, injuries, costs and expenses (including costs for reasonable attorney fees) that are caused by or result from the acts or omissions of BA, its officers, employees, agents and subcontractors, with respect to the use, access, maintenance or disclosure of CE's PHI, including without limitation, any Breach of PHI or any expenses incurred by CE in providing required Breach notifications.

17. Judicial or Administrative Proceedings

CE may terminate the Contract, effective immediately, if (i) BA is named as a defendant in a criminal proceeding for a violation of HIPAA, the HITECH Act, the Privacy Rule, Security Rule or other security or privacy laws or (ii) a finding or stipulation is made in any administrative or civil proceeding in which the BA has been joined that the BA has violated any standard or requirement of HIPAA, the HITECH Act, the Privacy Rule, Security Rule or other security or privacy laws.

18. Insurance

In addition to any general and/or professional liability insurance coverage required of BA under the Contract for services, BA shall provide appropriate liability insurance coverage during the term of this Agreement to cover any and all claims, causes of action, and demands whatsoever made for loss, damage, or injury to any person arising from the breach of the security, privacy, or confidentiality obligations of BA, its agents or employees, under this Agreement and under HIPAA 45 C.F.R. Parts 160 and 164, Subparts A and E.

19. Assistance in Litigation or Administrative Proceedings

BA shall make itself, and any subcontractors, employees, or agents assisting BA in the performance of its obligations under the Agreement, available to CE, at no cost to CE, to testify as witnesses, or otherwise, in the event of litigation or administrative proceedings being commenced against CE, its directors, officers, or employees based upon a claimed violation of HIPAA, the HITECH Act, the Privacy Rule, the Security Rule, or other laws relating to security and privacy, except where BA or its subcontractor, employee or agent is a named adverse party.

C.   Obligations of CE

1. CE shall notify BA of any of the following, to the extent that such may affect BA's use, access, maintenance or disclosure of PHI:

    i. Any limitation(s) in CE's notice of privacy practices in accordance with 45 C.F.R. section 164.520.

    ii. Any changes in, or revocation of, permission by an individual to use, access or disclose PHI.

    iii. Any restriction to the use, access or disclosure of PHI that CE has agreed to in accordance with 45 C.F.R. section 164.522.

D. General Provisions

1. Remedies

    BA agrees that CE shall be entitled to seek immediate injunctive relief as well as to exercise all other rights and remedies which CE may have at law or in equity in the event of an unauthorized use, access or disclosure of PHI by BA or any agent or subcontractor of BA that received PHI from BA.

2. Ownership

    The PHI shall be and remain the property of the CE. BA agrees that it acquires no title or rights to the PHI.

3. Regulatory References

    A reference in this Agreement to a section in the Privacy Rule and Security Rule and patient confidentiality regulations means the section as in effect or as amended.

4. No Third-Party Beneficiaries

    Nothing express or implied in the Contract or this Agreement is intended to confer, nor shall anything herein confer, upon any person other than CE, BA and their respective successors or assigns, any rights, remedies, obligations or liabilities whatsoever.

5. Amendment

    The parties acknowledge that state and federal laws related to privacy and security of PHI are rapidly evolving and that amendment of the Contract or this Agreement may be required to ensure compliance with such developments. The parties shall negotiate in good faith to amend this Agreement when and as necessary to comply with applicable laws. If either party does not agree to so amend this Agreement within 30 days after receiving a request for amendment from the other, either party may terminate the Agreement upon written notice. To the extent an amendment to this Agreement is required by law and this Agreement has not been so amended to comply with the applicable law in a timely manner, the amendment required by law shall be deemed to be incorporated into this Agreement automatically and without further action required by either of the parties. Subject to the foregoing, this Agreement may not be modified, nor shall any provision hereof be waived or amended, except in a writing duly signed and agreed to by BA and CE.

6. Interpretation

    Any ambiguity in this Agreement shall be resolved to permit CE to comply with the Privacy and Security Rules, the HITECH Act, and all applicable patient confidentiality regulations.

7. Compliance with State Law

    In addition to HIPAA and all applicable HIPAA Regulations, BA acknowledges that BA and CE may have confidentiality and privacy obligations under State law, including, but not limited to, the California Confidentiality of Medical Information Act (Cal. Civil Code §56, et seq. ("CMIA")). If any provisions of this Agreement or HIPAA Regulations or the HITECH Act conflict with CMIA or any other California State law regarding the degree of protection provided for PHI and patient medical records, then BA shall comply with the more restrictive requirements.

8. Survival

The respective rights and obligations and rights of CE and BA relating to protecting the confidentiality or a patient's PHI shall survive the termination of the Contract or this Agreement.