

PARTICIPATION AGREEMENT

This Participation Agreement (the “Agreement”), dated _____, 2018 (the “Effective Date”), is between _____ (the “Plan Sponsor”), and Exclusive Surgeries Solutions LLC, an Arizona limited liability company (“ESS”).

RECITALS

- A. Plan Sponsor has established and currently sponsors a Benefit Plan for Plan Participants.
- B. ESS provides administrative services to employers by connecting medical providers, facilities (e.g., ambulatory surgery centers, surgical hospitals, and hospitals), physical therapists, allied health professionals, or other medical care providers who provide medical services with Plan Participants pursuant to a single case rate negotiated by ESS on behalf of such employers.
- C. Plan Sponsor desires to contract with ESS for ESS to provide such administrative services to Plan Sponsor.
- D. Pursuant to the terms and conditions herein, ESS agrees to provide such administrative services to Plan Sponsor.

AGREEMENT

NOW THEREFORE, based on the premises and terms and conditions herein, the parties hereby agree as follows:

- 1. Defined Terms. As used herein, the following terms will have the meanings assigned below.
 - 1.1 “Benefit Plan” means an employee welfare benefit plan offered by Plan Sponsor to Plan Participants.
 - 1.2 “Payor” means a Plan Sponsor or a third party administrator working on behalf of Plan Sponsor and pays for Services rendered to a Plan Participant.
 - 1.3 “Plan Participant” means a person who is entitled to receive certain benefits with respect to health care services under a Benefit Plan.
 - 1.4 “Provider” means a physician, surgeon, anesthesiologist, physical therapist, physician assistant, and other medical professional, as well as facilities under contract with ESS to provide services to Plan Participants.
 - 1.5 “Protected Health Information” or “PHI” shall have the same meaning as the term “protected health information” in 45 Code of Federal Regulations Section 160.103.
 - 1.6 “Required by law” shall have the same meaning as the term “required by law” in 45 Code of Federal Regulations Section 164.103.

1.7 “Services” means the medical services that are delivered by a Provider to Plan Participant.

1.8 “Single Case Agreement” is an agreement for a particular set of medical services entered into by the authorized representatives of Plan Sponsor and ESS, the form of which is provided in Exhibit A.

2. ESS Services.

2.1 ESS Services. ESS will arrange for a single case rate for particular medical procedures with Providers for Plan Participants. ESS pre-negotiates all expenses for particular medical procedures. When a Plan Participant has elected to have a certain procedure performed by a Provider, ESS may enter into with a Single Case Agreement among the Plan Sponsor, the Provider and ESS to provide for the negotiated rate for the Services to be provided to the Plan Participant. Payment will either be made by Plan Sponsor to the Provider or Providers or payment will be made to ESS for ESS to deliver payment in accordance with the Single Case Agreement. If applicable, all Providers shall be responsible for the collection of the co-payment, coinsurance or deductible required to be paid by a Plan Participant under the applicable Benefit Plan. Providers have sole discretion for medical services delivered to Plan Participants.

2.2 Acknowledgement Regarding Marketing. Plan Sponsor understands that, while the intent of this Agreement is to permit ESS to create a provider solution panel that appropriately responds to identified health care needs of the Plan Participants, Plan Sponsor hereby grants ESS a license to use and authorizes ESS to identify and publish Plan Sponsor’s name, address, logo and available services in ESS’s information materials and website for distribution to Plan Participants and in marketing materials for distribution to Payors and potential Payors of ESS.

2.3 Records. Plan Sponsor shall maintain accurate financial books and records, including electronic records, concerning Services provided to each Plan Participant, including any charges to and payments received from the Plan Participant by Plan Sponsor (“Records”). Upon ten (10) business days’ advance notice, or such shorter notice as may be required by law, Plan Sponsor shall permit ESS or its designee and/or the applicable Payor to inspect, audit and copy those Records maintained by the Plan Sponsor during regular business hours. Plan Sponsor shall maintain such Records and provide copies of such information to ESS and/or the applicable Payor upon reasonable request, at no charge.

3. ESS Credentialing. For the purposes of credentialing, ESS utilizes an internal proprietary credentialing process for all Providers. Plan Sponsor shall cooperate with and abide by the standards and the requirements of ESS’s credentialing programs.

4. Tracking System. ESS has a proprietary system that collects all claim and outcome data from day of surgery for ninety (90) days or per American Medical Association guidelines. This system, as well as the assignment of a care coordinator for each individual patient, is used for the patients scheduling, surgical, and if necessary rehabilitative needs. Plan Sponsor shall provide ESS with such information as requested by ESS for purposes of utilization of the ESS tracking system.

5. Payment. Plan Sponsor shall pay ESS, the ESS administrative fees for services provided to Plan Sponsor for medical services provided to Plan Participants, as provided on Exhibit C. All pricing is calculated as a bundled price which includes Provider fees, anesthesia, facility, and ESS administrative fee, as well as other fees, including, but not limited to, implants and other medical devices/procedures that may be necessary during the surgical process. All ESS pricing will be handled with a Single Case Agreement that will be signed prior to the delivery of medical services. Plan Sponsor shall remit separate

payments for Providers, facilities, and ESS to ESS for distribution to the various entities, within (7) business days of the provision of medical services. For services rendered to a Plan Participant per Single Case Agreement, ESS will prepare completed medical billing forms for services rendered by Providers to Plan Participant. For purposes of the Employee Retirement Income Security Act of 1974 (“ERISA”) and any other applicable state or federal laws, ESS shall not be deemed the “Administrator” or “Named Fiduciary” of any Benefit Plan. Plan Sponsor waives and Plan Sponsor shall have no cause of action, at law or in equity, against ESS, its employees, agents, officers and directors, and hereby releases each of the foregoing parties of and from any claims, demands, obligations, liabilities, and causes of action of every nature whatsoever, relating to, arising out of, or resulting from the enforcement of and compliance with ERISA and this Agreement.

6. Term and Termination.

6.1 Term. The initial term of this Agreement shall be for three (3) years commencing on the Effective Date and shall automatically renew for consecutive one year terms, unless either party provides written notice of intent not to renew at least ninety (90) days prior to the expiration of the then-current term.

6.2 Termination. This Agreement may be terminated in the event of a breach by either party, provided that the non-breaching party provides the breaching party with sixty (60) days’ prior written notice of the breach and of its intention to terminate this Agreement and an opportunity to cure the breach within such notice period. If the breaching party fails to cure such breach during the sixty (60) day period, then this Agreement shall terminate and be of no further force or effect.

6.3 Use of De-Identified. Notwithstanding anything herein, regardless of termination of this Agreement, ESS shall be entitled to indefinitely use any de-identified PHI for ESS’s own purposes.

6.4 Insurance. ESS shall maintain insurance with respect to ESS’s obligations under this Agreement reasonably satisfactory to Plan Sponsor and provide from time to time as requested by Plan Sponsor proof of such insurance.

7. Limitation of Liability. In no event whatsoever shall either party be liable for indirect, inconsequential, incidental, exemplary, punitive, or special damages including but not limited to lost profits or interruption of business. The liability of ESS for any claim arising out of this Agreement (whether based in contract, on negligence, on strict liability or otherwise) regardless of the form of bringing such action, shall not exceed in the aggregate, the total amount of fees received by ESS for the services which gave rise to the claim. ESS shall only be responsible for any undisputed fees actually received by ESS.

8. Indemnification. Plan Sponsor shall indemnify, defend, protect and hold ESS and its employees, agents, partners, shareholders, directors, officers or affiliates and assigns harmless for, from and against any and all liabilities, harm, claims, proceedings, lawsuits, damages, attorneys’ fees and costs arising out or related to: (a) this Agreement, (b) any breach of this Agreement, (c) any negligence, gross negligence or intentional misconduct by Plan Sponsor or any officer, director, employee, agent, successor, affiliate or assign, and/or (d) the delivery of Services by a Provider to a Plan Participant.

9. Miscellaneous

9.1 Survival. The respective rights and obligations of the parties under Sections 5, 6.3, 7, 8, and 9 of the Agreement shall survive indefinitely.

9.2 Amendments and Waiver. This Agreement constitutes the entire agreement between the parties with respect to its subject matter. It may not be modified, nor will any provision be waived or amended, except in a writing duly signed by authorized representatives of the parties or when required by regulatory agencies. A waiver with respect to one event will not be construed as continuing, or as a bar to or waiver of any right or remedy as to subsequent events.

9.3 Assignment. Except as otherwise expressly provided herein, neither this Agreement nor any rights or obligations hereunder may be transferred or assigned by either party without the other party's prior written consent. Any attempted assignment in contravention hereof shall be null and void. Notwithstanding the foregoing or any provision herein to the contrary, a party may assign this agreement, in its entirety, without the other parties written consent, to any legal entity that acquires all or a major portion of the assets or business of such party, whether by merger, sale of stock, reorganization, recapitalization or other form of business consolidation provided that any such assignee delivers to the other party a signed notice evidencing its agreement to be bound by the terms and conditions of this agreement and is not a competitor of the non-assigning party. This Agreement shall be binding on any permitted successors, and assignees of the parties

9.4 Non-Solicitation. During the term of this Agreement and for three years thereafter, Plan Sponsor will not directly or indirectly, without the express written consent of ESS, solicit or assist in solicitation of any Providers to discontinue participation in ESS's panel or to join another competing network of healthcare providers within ESS's panel and thereby avoiding, evading or bypassing ESS.

9.5 No Third-party Beneficiaries. Except as provided, nothing express or implied in this Agreement is intended to confer, nor shall anything herein confer, upon any person other than the parties and the respective successors and permitted assigns of the parties, any rights, remedies, obligations, or liabilities whatsoever.

9.6 Notices. Any notice to be given under this Agreement to a party shall be made via U.S. Mail, commercial courier or hand delivery to such party at its address given below, and/or via facsimile to the facsimile telephone number listed below, or to such other address or facsimile number as shall hereafter be specified by notice from the party. Any such notice shall be deemed given when so delivered to or received at:

If to ESS: Exclusive Surgeries Solutions, LLC
8671 West Union Hills #503
Peoria, Arizona 85382
Facsimile: (623) 321- 1095

If to Plan Sponsor: _____

9.7 Confidentiality. Each of the parties and its respective employees, contractors and agents shall maintain in confidence during the term of this Agreement and thereafter, except as otherwise required by law: (1) all Plan Participant information including medical information, learned through the operation of this Agreement; (2) all confidential Plan Sponsor information, including information disclosed as part of any peer review processes; (3) quality assurance and utilization review information; (4) all financial and business information related to this Agreement or either party's respective operations, including, but not limited to, either party's earnings, volume of business, methods, systems, practices, plans, discounts and contract terms, and other commercially valuable proprietary information; and (5) any other information required to be maintained in confidence by applicable law and regulation (collectively "Confidential

Information”), unless disclosure of a specific part of the Confidential Information is otherwise required to accomplish the purposes of this Agreement or is required by applicable law and regulation. Each of the parties and its respective employees, contractors and agents shall use best efforts to safeguard and protect Confidential Information against any unauthorized disclosure by any person and shall refrain from using or allowing any other person to use Confidential Information in any way that is considered detrimental to the other party. Each party shall provide immediate notice to the other of any *subpoena duces tecum* served on it for the production of records. The parties hereby agree to the terms and conditions of the Business Associate Agreement, attached as Exhibit B.

9.8 Jurisdiction and Venue. This Agreement is governed by the laws of the State of Arizona. The parties consent to the jurisdiction of the courts of the State of Arizona and the United States District Court having competent jurisdiction over Maricopa County, Arizona for any dispute arising out of a breach in this Agreement.

9.9 Relation of Parties. In relation to the agreements herein contained ESS is defined as an independent contractor. The employees of ESS shall not be deemed at any time as employees, joint employees, or agents of Plan Sponsor. Plan Sponsor also affirms that it has no influence or directive authority over the management and operations of ESS employees.

9.10 Governing Law. This Agreement, and the rights and obligations of the parties hereto, shall be governed by and construed in accordance with the laws of the State of Arizona.

9.11 Entire Agreement. This Agreement supersedes any and all other agreements between the parties hereto with respect to the subject matter hereof and contains all of the covenants and agreements between the parties with respect hereto.

9.12 Counterparts. This Agreement may be executed in one or more counterparts, each of which will constitute an original and together will constitute one and the same instrument.

9.13 Attorneys’ Fees. In the event of any dispute arising out of this Agreement, the substantially prevailing party shall be entitled to recovery of its attorneys’ fees.

IN WITNESS HEREOF, the parties hereby agree to the terms and conditions herein as of the date first listed above.

EXCLUSIVE SURGERIES SOLUTIONS, LLC

PLAN SPONSOR

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

EXHIBIT A

Single Case Agreement: _____

Bill To: _____ **Date:** _____

Name _____ **Claim #:** _____

Company Name _____ **Patient Name:** _____

Street Address _____ **Patient Account #:** _____

City ST, Zip Code _____ **Authorization #:** _____

Phone # _____

Global Fee: _____ **DX Code:** _____
CPT Code: _____
CPT Code: _____

Breakdown of Fees:

Surgeon: _____ **EIN #:** _____
Anesthesiologist: _____ **EIN #:** _____
Facility: _____ **EIN #:** _____

Plan Sponsor shall pay the Global Fee listed above to the Providers listed above for the medical services to be provided to Patient listed above. Each Provider shall accept the fees listed above as complete payment for the medical services to be rendered to the Patient. Upon Plan Sponsor's execution and return of this Agreement, ESS will arrange for the scheduling of the medical services to be provided to the Patient. This form must be attached to Plan Sponsor invoice, along with such other forms as required by ESS, with detailed description of services rendered. Any changes in this procedure must be submitted to Plan Sponsor within 48 hours. Each Provider represents and warrants that the services rendered associated with this claim have not been previously assigned to any other organization for payment. Provider agrees not to balance bill the patient.

The undersigned hereby accepts the provisions outlined in this Single Case Agreement. Please return within 24 hours.

EXCLUSIVE SURGERIES SOLUTIONS, LLC
By: _____
Print Name: _____
Title: _____
Date: _____

PROVIDER
By: _____
Print Name: _____
Title: _____
Date: _____

PLAN SPONSOR
By: _____
Print Name: _____
Title: _____
Date: _____

EXHIBIT B

Business Associate Agreement

This Business Associate Agreement (the “**Agreement**”) is entered into between Exclusive Surgeries Solutions, LLC (“**Business Associate**”), and _____ (“**Plan Sponsor**”).

RECITALS

- A. Plan Sponsor and Business Associate are parties to a Participation Agreement (the “**Services Agreement**”), under which Business Associate provides services for or on behalf of Plan Sponsor.
- B. Plan Sponsor is a “covered entity,” as that term is defined in the HIPAA Standards for Privacy of Individually Identifiable Health Information and the Standards for Security of Electronic Protected Health Information, 45 C.F.R. Part 160 and Part 164, Subparts A, C and E (the “**HIPAA Regulations**”), and the Health Information Technology for Economic and Clinical Health Act, as incorporated in the American Recovery and Reinvestment Act of 2009 (the “**HITECH Act**”) (collectively, the HIPAA Regulations and the HITECH Act are referred to as the “**Requirements**”), and, therefore, must comply with the Requirements.
- C. The Requirements require Plan Sponsor to enter into with its “business associates,” as that term is defined in 45 C.F.R. § 160.103, an agreement containing certain minimum safeguards. As a result of the Services Agreement, Business Associate will be a business associate of Plan Sponsor.
- D. The parties desire to enter into an agreement that complies with the Requirements.

AGREEMENT

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. **Definitions.** Except as otherwise set forth in this Agreement, all capitalized terms have the same meaning as set forth in the Requirements, as such may be amended from time to time.
- a. “**Disclose**” has the same meaning as the term “disclosure” in 45 C.F.R. § 160.103.
- b. “**EPHI**” has the same meaning as the term “electronic protected health information” in 45 C.F.R. § 160.103, but limited to information created or received by Business Associate as a Business Associate of Plan Sponsor.
- c. “**PHI**” has the same meaning as the term “protected health information” in 45 C.F.R. § 160.103, but limited to information created or received by Business Associate as a Business Associate of Plan Sponsor.
- d. “**Secretary**” means the Secretary of the Department of Health and Human Services or his or her designee.

2. **Business Associate's Obligations.** Business Associate will:

(a) Not Use or Disclose PHI except as permitted or required by this Agreement or as required by law;

(b) Use appropriate safeguards and comply, where applicable, with 45 C.F.R. Part 164, Subpart C with respect to EPHI, to prevent the Use or Disclosure of PHI, except as set forth in this Agreement;

(c) Implement Administrative, Physical and Technical Safeguards that reasonably and appropriately protect the Confidentiality, Integrity and Availability of EPHI;

(d) Promptly report to Plan Sponsor: (i) any Use or Disclosure of PHI by Business Associate or a third party to which Business Associate Disclosed PHI that is not contemplated by this Agreement, including any Breach of Unsecured PHI; and (ii) any Security Incident, of which Business Associate becomes aware;

(e) Ensure that any subcontractors who create, receive, maintain or transmit PHI on behalf of Business Associate agree to the same restrictions and conditions in the Services Agreement and this Agreement;

(f) In accordance with Plan Sponsor's reasonable request, provide Plan Sponsor, in accordance with 45 C.F.R. § 164.524, access to PHI in a Designated Record Set;

(g) Make any amendment to PHI in a Designated Record Set that Plan Sponsor has agreed to pursuant to 45 C.F.R. § 164.526;

(h) Document any Disclosures of PHI necessary to provide an accounting of Disclosures in accordance with 45 C.F.R. § 164.528;

(i) To the extent Business Associate carries out any obligations of Plan Sponsor under the Requirements, Business Associate will comply with the Requirements that apply to Plan Sponsor in the performance of such obligation;

(i) Make its internal practices, books and records, relating to the Use and Disclosure of PHI available to the Secretary for purposes of determining Plan Sponsor's compliance with the Requirements; and

(j) Mitigate, to the extent practicable, any harmful effects (known to Business Associate) from any Use or Disclosure of PHI by Business Associate not permitted by this Agreement.

3. **Permitted Uses and Disclosures.** Except as otherwise set forth in this Agreement, Business Associate may:

(a) Use or Disclose PHI to perform its duties and obligations under the Services Agreement and to report violations of the law to law enforcement; provided that, such Use or Disclosure complies with the Requirements;

(b) Use PHI for its management and administration or to carry out Business Associate's legal responsibilities; and

(c) Disclose PHI for the purposes in Section 3(b) of this Agreement, if (i) the Disclosure is required by law, or (ii) Business Associate obtains reasonable assurances from the persons to whom the PHI is disclosed that (x) the PHI will remain confidential and will not be Used or further Disclosed except as required by law or for the purpose for which it was Disclosed to the person, and (y) the person will notify Business Associate of any instances of which it becomes aware that the confidentiality of the PHI has been breached.

4. **Plan Sponsor's Obligations.** Plan Sponsor will notify Business Associate of any:

(a) Limitation in Plan Sponsor's Notice Of Privacy Plan Sponsors, as required by the Requirements, that may affect Business Associate's Use or Disclosure of PHI;

(b) Changes in or revocation of an individual's permission to Use or Disclose PHI, to the extent such change may affect Business Associate's Use or Disclosure of PHI; and

(c) Restriction regarding the Use or Disclosure of an individual's PHI that Plan Sponsor has agreed to in accordance with 45 C.F.R. § 164.522, to the extent that such restriction may affect Business Associate's Use or Disclosure of the PHI.

5. **Effective Date.** The terms and conditions in this Agreement will be effective as of the effective date of the Services Agreement and will continue until all PHI is destroyed or returned to Plan Sponsor.

6. **Termination.** Notwithstanding any provision to the contrary in this Agreement or the Services Agreement, if Business Associate breaches any of its obligations under this Agreement or the Requirements, Plan Sponsor may terminate this Agreement and the Services Agreement immediately upon providing notice to Business Associate or it may provide Business Associate with a reasonable opportunity to cure the breach or end the violation. If Plan Sponsor determines, in its sole discretion, that neither termination nor cure is feasible, Plan Sponsor will report the violation to the Secretary.

7. **Effect of Termination.** Upon termination of this Agreement, Business Associate will return to Plan Sponsor or destroy all PHI. If it is not feasible for Business Associate to return or destroy the PHI, (i) Business Associate will notify Plan Sponsor of such unfeasibility; (ii) Business Associate will limit Business Associate's Use and Disclosure of such PHI to the purpose which makes it unfeasible for Business Associate to return or destroy the PHI; and (iii) the terms and conditions set forth in this Agreement will continue with respect to the PHI for so long as Business Associate maintains the PHI.

8. **Indemnification.** Business Associate will indemnify, defend and hold harmless Plan Sponsor for, from and against any and all liabilities, costs, fees, fines, penalties and other expenses (including reasonable attorneys' and expert fees) arising from or related to Business Associate's breach of any of its obligations under this Agreement or the Requirements. The obligations under this Section will survive the termination of this Agreement.

9. **Amendment.** If the Requirements are amended and the amendments require an amendment to this Agreement to comply with the amendments to the Requirements, notwithstanding anything in the Services Agreement to the contrary, this Agreement will be amended automatically, without any signed, written amendment by Business Associate and Plan Sponsor, to comply with the amendments. All applicable Requirements, including all future applicable Requirements, are hereby incorporated in this Agreement by this reference, as if they were set forth herein in full. Otherwise, no modification, amendment, or cancellation or waiver of rights under this Agreement will be effective unless it is in a writing that is signed by both parties. No waiver of any breach of this Agreement will be construed as a waiver of any other rights under this Agreement.

10. **Entire Agreement.** This Agreement constitutes the parties' entire agreement with respect to the subject matter hereof. There are no restrictions, promises, representations, warranties, covenants, or understandings other than those expressly set forth herein. This Agreement supersedes all prior agreements or understandings between the parties with respect to the subject matter hereof, and may not be modified or amended in any manner other than as set forth herein.

11. **Governing Law.** This Agreement will be construed in accord with and any dispute or controversy arising from any breach or asserted breach of this Agreement will be governed by the laws of the State of Arizona.

12. **Third-party Beneficiaries.** There are no third-party beneficiaries of this Agreement.

EXCLUSIVE SURGERIES SOLUTIONS, LLC

PLAN SPONSOR

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

Exhibit C

FEE STRUCTURE

Plan Sponsor shall pay ESS an amount equal to 20% of the total amount payable for Services provided pursuant to a Single Case Agreement. Payment due to ESS shall be due and payable no later than the time of delivery of the Services. All Single Case Agreements must be executed prior to any procedures being scheduled for Plan Participants.

EXCLUSIVE SURGERIES SOLUTIONS, LLC

PLAN SPONSOR

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

Date: _____

Date: _____