

## Uplevel Systems Business Associate Agreement

This Business Associate Agreement ("Agreement") is entered into this \_\_\_ day of \_\_\_\_\_, between \_\_\_\_\_, a \_\_\_\_\_ [name of state] \_\_\_\_\_ ("MSP") with offices at \_\_\_\_\_, and Uplevel Systems, Inc, an Delaware corporation, with offices at 6950 SW Hampton St., Suite 308, Tigard, OR 97223 ("Vendor").

### RECITALS

MSP provides services to Covered Entity \_\_\_\_\_, a \_\_\_\_\_ ("Covered Entity") with principal place of business at \_\_\_\_\_.

Vendor sells Networking and Information Technology Equipment and Services ("Services").

MSP desires to engage Vendor to perform certain functions for, or on behalf of, MSP that may involve the handling, transfer, storage, or disclosure of Protected Health Information ("PHI") (as defined herein) to Vendor by MSP, or by MSP on behalf of Covered Entity; or the creation, maintenance, or use of PHI by Vendor on behalf of MSP; and Vendor desires to perform such functions.

MSP, as a Business Associate under the Health Information Portability and Accountability Act of 1996 ("HIPAA") is required to enter into this Agreement to obtain satisfactory assurances that Vendor, also regarded as a Business Associate under HIPAA, will appropriately safeguard all PHI that is or may be disclosed, created, maintained or received by Vendor on behalf of MSP.

In consideration of the mutual promises below, and the exchange of information pursuant to this agreement, and in order to comply with all legal requirements for the protection of this information, the parties therefore agree as follows:

### DEFINITIONS OF TERMS

1.1. Unless otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Privacy, Security, Breach Notification and Enforcement Rules at 45 C.F.R. Parts 160 and 164 (the "HIPAA Rules").

"Business Associate" shall generally have the meaning as such term in 45 C.F.R. § 160.103.

"Covered Entity" shall have the meaning given to such term in 45 C.F.R. § 160.103.

"Protected Health Information" ("PHI") shall have the meaning given to such term in 45 C.F.R. § 160.103.

"Privacy Rule" shall mean the Privacy Standards at 45 C.F.R. Part 164, Subpart E.

"Secretary" shall mean the Secretary of Health and Human Services ("HHS") or his or her designee as provided in 45 C.F.R. § 160.103.

“Security Incident” shall have the same meaning given to such term under the Security Rule, including, but not limited to, 45 C.F.R. § 164.304.

“Security Rule” shall mean the Security Standards at 45 C.F.R. Part 164, Subparts A and C.

## **OBLIGATIONS OF VENDOR**

2.1. Protected Health Information. Vendor agrees and acknowledges that any PHI that comes within Vendor’s custody, exposure, or knowledge, or is created, maintained, transmitted, prepared or used by Vendor, in the course of, or in connection with, the performance of services under this Agreement, is confidential; and such PHI shall be used, disclosed, transmitted and/or maintained solely in accordance with this Agreement and as required by law. Vendor agrees to comply with its obligations as a Business Associate and acknowledges that it is subject to and agrees to comply with HIPAA, and any applicable regulations issued by the Secretary to implement HIPAA.

2.2. Access, Use and/or Disclosure of PHI. Vendor shall cooperate with MSP, consistent with 45 C.F.R. § 164.524(b)(2), to enable MSP to fulfill any lawful request for access to PHI. Vendor shall not use or further disclose PHI other than as permitted or required by this Agreement, or as required by law. Vendor shall forward to MSP any requests for restriction on the use and/or disclosure of PHI within five (5) business days of receipt of such requests.

2.3. Requests for Lawful Disclosure. Vendor shall forward to MSP all requests for the disclosure of PHI from a law enforcement or government official, or pursuant to a subpoena, other legal request or court or administrative order, as soon as possible before making the requested disclosure, but no later than five (5) business days following its receipt of such request or order. Vendor shall also provide to MSP, as soon as possible following its receipt of such written request from MSP, but no later than ten (10) business days from such receipt, all PHI in Vendor’s custody that is necessary to respond to a lawful request made to MSP for the disclosure of PHI.

2.4. Appropriate Safeguards. Vendor shall implement administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of PHI that it creates, receives, maintains, or transmits on behalf of MSP, as required by the Security Rule. Vendor agrees to retain written documentation of the policies and procedures pertaining to these safeguards for 6 years from the date when it last was in effect.

2.5. Duty to Mitigate. Vendor shall take steps to mitigate, to the extent practicable or as reasonably directed by MSP, any harmful effect that may become known to Vendor of a use or disclosure of PHI by Vendor in violation of the requirements of this Agreement, the Privacy Rule or the Security Rule. Such steps may include obtaining the recipient’s satisfactory assurances that the information will not be further used or disclosed (through a confidentiality agreement or similar means), or will be destroyed.

2.6. Reporting of Unauthorized Uses or Disclosures. Vendor shall report to MSP any use or disclosure of the PHI not provided for by this Agreement, the Privacy Rule or the Security Rule, including breaches of unsecured PHI, as required at 45 C.F.R. § 164.410, and any security incident of which it becomes aware, as soon as possible, but no later than five (5) business days after discovery, stating (to the extent known by Vendor) the nature of such use or disclosure, the PHI that is the subject of such use or disclosure, and the names of the individuals who made or engaged

in such use or disclosure, and other available information that the MSP may reasonably require as part of a notification to the Covered Entity.

2.7. SubVendors, Consultants, Agents and Other Third Parties. Vendor shall, in accordance with 45 C.F.R. §§ 164.502(e)(1)(ii) and 164.308(b)(2), ensure that any subVendor, consultant, agent, or other third party that creates, receives, maintains, or transmits PHI on behalf of Vendor, agrees to the same restrictions, conditions, and requirements that apply to Vendor under this Agreement, and agrees to implement reasonable and appropriate safeguards to protect such information. Vendor shall, upon request from MSP, provide MSP with a list of all such third parties. Vendor must terminate its agreement with any subVendor, consultant, agent or other third party, and obtain all PHI provided to such subVendor, consultant, agent or other third party, if Vendor becomes aware that the subVendor, consultant, agent or other third party has breached its contractual duties relating to HIPAA or this agreement.

2.8. Availability of Records. Vendor shall make internal practices, books, and records relating to PHI received from MSP, or created or received by Vendor on behalf of MSP, available to MSP, or at the request of MSP to the Secretary, for purposes of the Secretary determining MSP's compliance with the Privacy Rule. Vendor shall, upon written request, provide such disclosures of PHI and information related to such disclosures as would be required for MSP to respond to a request for an accounting of disclosures of PHI in accordance with 45 C.F.R. § 164.528.

2.9. Minimum Necessary. Vendor acknowledges that it shall request from the MSP and so disclose to its affiliates, subsidiaries, agents, subVendors or other third parties, only the minimum PHI necessary to perform or fulfill those functions for which MSP has engaged Vendor. Vendor acknowledges that the Secretary is required by the Health Information Technology for Economic and Clinical Health "HITECH Act" to issue guidance on what constitutes "minimum necessary" for purposes of the Privacy Standards. Vendor agrees to comply with the guidance, once issued by the Secretary, and to only request, use or disclose the minimum amount of PHI as described in such guidance.

2.10. Breach Notification. If any PHI in the possession, custody or control of Vendor becomes or remains unsecured, Vendor shall, following discovery of a breach (as such term is defined in 45 C.F.R. § 164.402) of such unsecured PHI, provide notification to MSP as set forth in 45 C.F.R. §§ 164.404 through 164.408. Except where a law enforcement official states to MSP or Vendor that a notification would impede a criminal investigation or cause damage to national security, all notifications shall be made without unreasonable delay and in no case later than 60 calendar days from discovery of the breach.

2.11. Marketing and Sale of PHI. Vendor shall not engage in the sale of PHI, or the disclosure of PHI for marketing purposes, except pursuant to and in compliance with 45 C.F.R. § 164.508(a)(4) and 45 C.F.R. §§ 164.508(a)(3)(i)(A) and (B).

2.12. Training. Vendor shall provide training as to the Privacy Rule and the MSP's privacy policy to all of its employees who will access or handle PHI on the MSP's behalf.

2.13. Compliance and Enforcement. Vendor is subject to the compliance, enforcement and civil monetary penalties provisions at 45 C.F.R., Part 160, Subparts C and D.

2.14. Indemnification. Vendor shall indemnify and hold harmless MSP from and against any or all costs, loss, damage, liability, claim, or legal action arising out of a breach of unsecured PHI by Vendor under this Agreement, or failure by Vendor to provide the breach notifications required by 45 C.F.R. §§ 164.404 through 164.408; except to the extent that such loss, interest, damage, liability, claim, legal action or demand was incurred as a result of the negligence, actions, or willful misconduct of MSP, or MSP's failure to adhere to Vendor's Service Agreements; and provided that MSP shall notify Vendor within a reasonable time subsequent to learning of any claim or liability, in order to give Vendor an opportunity to present any appropriate defense on behalf of MSP and Vendor.

### **PERMITTED USES AND DISCLOSURES BY VENDOR**

3.1. General Use. Except as otherwise limited in this Agreement, Vendor may use PHI for its proper management and administration, or to perform its obligations and services to MSP or as required by law, provided that such use or disclosure would not violate the Privacy or Security Rule.

3.2. Other Disclosures. Except as otherwise limited in this Agreement, Vendor may disclose PHI for the proper management and administration of Vendor, provided that such disclosures are required by law, or Vendor obtains reasonable assurances from the person to whom the information is disclosed that it will be held confidential and used or further disclosed only as required by law or for the purpose for which it was disclosed to the person, and the person notifies the Vendor of any instances of which it is aware in which the confidentiality of the information has been breached.

3.3. Data Aggregation Services. Vendor may use PHI to provide data aggregation services as permitted by 42 C.F.R. § 164.504(e)(2)(i)(B).

### **OBLIGATIONS OF MSP**

4.1. Notification. Upon Vendor's request, MSP shall provide Vendor with the notice of privacy practices to which MSP adheres, in accordance with 45 C.F.R. § 164.520, as well as any changes to that notice. MSP shall further notify Vendor, in writing, of any restrictions on uses or disclosures of PHI that may impact in any manner the user and/or disclosure of that PHI under this Agreement. MSP shall further provide Vendor with any changes in, or revocation of, authorization to use or disclose PHI, if such changes affect Vendor's permitted or required uses and disclosures.

4.2. Minimum Necessary. MSP acknowledges that it shall provide to, or request from, the Vendor only the minimum PHI necessary for Vendor to perform or fulfill specific functions required or permitted under this Agreement.

4.3. Duty to Mitigate. MSP shall immediately mitigate an impermissible use or disclosure of PHI from Vendor to MSP, including staff, employees and agents of MSP who may transmit PHI to and from Vendor in the course and scope of their employment.

4.4. Permissible Requests by MSP. MSP represents and warrants that it has the right and authority to disclose PHI to Vendor for Vendor to perform its obligations and provide services to MSP. MSP shall not request Vendor to use or disclose PHI in any manner that would not be permissible under the Privacy Rule if done by MSP.

4.5. Permissible Use Of Vendor Services. MSP shall utilize only those functions and services provided by Vendor that are, in Vendor's sole judgement, compliant to the Privacy Rule and Security Rule, and deemed by Vendor to be capable of supporting the administrative, physical and technical safeguards that are necessary to protect the confidentiality, integrity and availability of PHI that Vendor may create, receive, maintain, or transmit on behalf of MSP. These functions and services shall be specified by one or more Service Agreements provided by Vendor to MSP, and shall be configured by MSP in accordance with limitations placed upon them within the Service Agreement. MSP agrees to strictly adhere to the Service Agreements and limitations specified therein.

## **TERM AND TERMINATION**

5.1. Term. This Agreement shall take effect as of the date set forth hereunder. Except as otherwise provided herein, the Agreement shall terminate when all PHI provided by MSP to Vendor, or created or received by Vendor on behalf of MSP, is destroyed or returned to MSP; excepting that the obligations of Vendor under Section 5.04 of this Agreement shall survive termination of this Agreement. Following the termination of this Agreement, Vendor shall not disclose PHI except to MSP or as required by law.

5.2. Termination for Cause. Upon any party's knowledge of a material breach of this Agreement by the other party, the non-breaching party shall notify the breaching party, and shall provide an opportunity for the breaching party to cure the breach or end the violation. The non-breaching party may terminate this Agreement if the breaching party does not cure the breach or end the violation within a reasonable time; or may immediately terminate this Agreement if cure of such breach is not possible.

5.3. Termination Without Cause. Either party to this Agreement may terminate the Agreement upon provision of sixty (60) days prior written notice.

5.4. Disposal of PHI Upon Termination. Upon termination of this Agreement, Vendor shall as far as reasonably practicable return or destroy all PHI received from MSP, or created or received on behalf of MSP. Vendor shall request, in writing, that PHI in the possession of subVendors or agents of Vendor shall likewise be returned or destroyed. If Vendor determines that returning or destroying all or part of the PHI is infeasible, Vendor shall notify MSP, and shall limit further uses and disclosures of PHI to those purposes that make the return or destruction of that PHI infeasible.

## **MISCELLANEOUS**

6.1. Independent Vendor. The relationship of the Vendor with MSP shall be one of independent Vendor, and not an employee or agent of MSP.

6.2. Amendment. This Agreement may be amended upon the mutual written agreement of the parties.

6.3. No Third Party Beneficiaries. Except as specifically set forth herein, nothing in this Agreement is intended to confer upon any person other than the parties hereto, and the respective successors or assigns of the parties, any rights, remedies, obligations, or liabilities whatsoever.

Neither party to this Agreement may assign any of its rights or obligations under this Agreement without the prior written consent of the other party.

6.4. Interpretation. Any ambiguity in this Agreement shall be resolved in favor of a meaning that permits MSP or Vendor to comply with the HIPAA Rules. In the event of any inconsistency or conflict between this Agreement and any other agreement between the parties, the terms, provisions and conditions of this Agreement shall govern and control.

6.5. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon. Any disputes relating to this Agreement shall be resolved by the state or federal courts located in Portland, Oregon, and MSP consents to venue in those courts as proper.

**IN WITNESS WHEREOF**, the parties hereto have duly caused this Agreement to be executed in its name and on its behalf by their duly authorized representatives; and the parties hereto acknowledge that they agree to comply with the terms and conditions of this Agreement. This Agreement is to be effective as of \_\_\_\_\_.

MSP

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Vendor

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_