

SAMPLE PRO-VENDOR MAINTENANCE AGREEMENT*

_____ (“Vendor”) and the undersigned customer (the “Customer”) are parties to the License Agreement dated _____ (the “Agreement”). This Maintenance Agreement supplements the License Agreement and for all purposes shall be considered a part thereof. Except as otherwise provided in this Maintenance Agreement, the License Agreement continues in full force and effect and terms not otherwise defined herein have the meanings set forth in the Agreement. Set forth below is a schedule of the Hardware and/or Software Products to which this Maintenance Agreement applies (the “Covered Products”), and the charges applicable to each Covered Product for the services described below.

CUSTOMER ACKNOWLEDGES AND AGREES THAT (1) CUSTOMER HAS CAREFULLY READ THIS MAINTENANCE AGREEMENT IN ITS ENTIRETY, (2) CUSTOMER HAS HAD THE OPPORTUNITY TO CONSULT WITH ATTORNEYS AND OTHER ADVISORS CONCERNING THIS MAINTENANCE AGREEMENT, (3) THIS MAINTENANCE AGREEMENT SUPPLEMENTS AND IS PART OF THE LICENSE AGREEMENT, AND (4) CUSTOMER INTENDS TO BE BOUND THE **TERMS AND CONDITIONS** SET FORTH BELOW.

_____ [Vendor Company’s Name]

By: _____

_____ Print Name

_____ Title

By: _____

* **CAVEAT:** This form of Agreement is provided merely as a guide in identifying some of the issues that arise in software licensing. However, because every transaction will have its own unique structure, features and issues, this form and its provisions will not be applicable to all situations and may not contain all of the provisions necessary or advisable with respect to a particular transaction. Therefore, this form Agreement is not a substitute for obtaining competent legal advice, and should not be used without review by competent counsel.

Print Name

Title

TERMS AND CONDITIONS

1. Vendor Obligations

Vendor shall provide Maintenance for each Covered Product during the Term applicable to such Covered Product. Vendor shall have no obligation to provide any Maintenance in respect of any other Product. Vendor does not warrant or guarantee the availability, quality, or effectiveness of Maintenance provided to Customer except as otherwise expressly provided herein. Vendor shall have no obligation to provide Maintenance in respect of any version of a Software Product which is not the most current version then generally available or which contains modifications or changes not previously approved by Vendor. Vendor shall have no responsibility for the functioning of any of the Customer's Hardware or Software other than the Covered Products.

Comment: While Vendor will resist maintaining software and hardware not specified in the Maintenance Agreement (i.e. products which are not "Covered Products"), clinics should be careful to make sure that Releases (as defined in the Addendum) will be considered a Covered Product for which the Vendor is obligated to provide services.

2. Availability

Vendor has no obligation to provide Maintenance other than during Business Hours. If, at Customer's request, Vendor provides any maintenance during Non-Business Hours there shall be added to the normal periodic Maintenance charges a surcharge equal to \$105.00 per man hour (rounding up to the next half-hour and including portal to portal travel time of the serviceman) of the labor performed during Non-Business Hours. Vendor reserves the right to prioritize all maintenance requests by its Customers in Vendor's sole judgment and discretion. Vendor does not guarantee maintenance availability at certain times or within certain response times.

Comment: Like virtually all of the terms in the maintenance agreement and license agreement, the hours of service coverage ("Business Hours"), and the amount of hourly fees that will be charged outside of Business Hours, will be the subject of negotiation, and the concessions that the clinics will receive will depend upon their economic leverage and the level of their resolve. Clinics should try to maximize the hours of coverage and verify time the applicable time zone.

Moreover, this clause, like many vendor forms, omits any performance benchmarks that Vendor is required to meet in responding to software malfunctions. This is potentially a huge problem. At best, software

failure is an inconvenience; at worst, it can shut down clinic operations. Therefore, clinics need to be mindful to insist that response times and other performance requirements are specified in detail in the Maintenance Agreement. Please see Addendum for sample response times, penalties for failing to meet them, specification of contact persons, requirement of Vendor to create temporary work-arounds while trouble-shooting is implemented; etc.

3. Malfunction Correction

Correction of a Software Product Malfunction may, at Vendor's sole discretion, consist of any of the following: (1) re-coding of the software, (2) installation of a software patch, (3) a modification to the instructions or procedures for using the software, (4) replacement of the software with other software that is reasonably equivalent, or (5) other remedial action that Vendor considers to be reasonable under the circumstances to cause the Software Product to perform substantially in accordance with Vendor's standard user documentation with respect to such Software Product. Correction of a Hardware Product Malfunction may, at Vendor's sole discretion, consist of any of the following: (1) repair of the Product to within its Specifications; (2) replacement of the Product with other Hardware that is reasonably equivalent, or (3) such other remedial action that Vendor considers to be reasonable under the circumstances. In performing Maintenance, Vendor may install or replace Hardware parts or components as it deems necessary. Such parts or components may be new, used or refurbished. All parts and components replaced become the property of Vendor.

4. Termination of Coverage

If at any time in the sole discretion of Vendor, a Product can no longer be properly or economically maintained to its Specifications, Vendor may terminate the Maintenance coverage of the Product upon thirty days Notice to Customer, and thereafter neither Party shall have any further obligation to the other in respect of such Product's Maintenance (except for Maintenance charges or fees then accrued but unpaid).

Comment: This clause, like many vendor forms, permits the Vendor to terminate the Maintenance Agreement at any time. This is not acceptable as the clinics will need on-going maintenance and support. Therefore, the clinics should insist on a minimal period of time during which Vendor cannot terminate the Maintenance Agreement at-will.

5. Telephone Support

Vendor shall endeavor to respond to telephonic questions concerning covered Products from customer's personnel during Business Hours, subject to availability of Vendor personnel and other resources. Vendor does not guarantee that its telephone support resources will be sufficient to meet Customer's desires or requirements at any given time, or that every Customer question will be fully or accurately answered. Customer shall be solely responsible for all third party telecommunication charges with respect to such telephone calls.

6. Upgrades

Vendor shall determine in its sole discretion what, if any, Product enhancements updates, new versions or other upgrades will be provided at no charge as part of Maintenance coverage. Vendor reserves the right to establish charges for such upgrades as it deems suitable in its sole discretion from time to time.

Comment: Clinics should require Vendor to provide upgrades, corrections and Releases (as defined in the Addendum) free of additional charges. In addition, one of the major reasons that clinics are licensing software is assist them comply with new laws and regulations. Therefore, it is important to require the Vendor to provide Releases which incorporate the latest legal requirements.

7. Miscellaneous

Vendor reserves the right to charge its standard charges then in effect for parts, supplies, and other consumables related to providing Maintenance. Customer shall not be entitled to credit for any period of non-use of the Products by Purchaser for any reason. In the event any Maintenance charges are not paid when due Vendor may, in its sole discretion, withdraw Maintenance on covered Products as to which such delinquencies relate.

8. Limitations.

Customer's right to Maintenance is contingent upon the proper use of the Covered Product and does not include any of the following conditions, each of which may be grounds for suspension of maintenance by Vendor or imposition of additional surcharges by Vendor: (1) electrical work external to the Covered Product or maintenance of accessories, attachments or other devices not furnished by Vendor; (2) service caused by Customer provided supply items that do not meet Specifications; (3) repair or damage or increases in service time resulting from accident, transportation, neglect, air conditioning or

humidity control; (4) alterations which included, but are not limited to, any modification of the Covered Product by a Person other than Vendor; (5) furnishing expendable supply items or materials therefore; (6) relocation of the Covered Product to an unauthorized site; (7) adding or removing accessories, attachments or other devices; (8) service which is impractical for Vendor to render because of alterations in the Covered Product or its connection by mechanical or electrical means to another machine or device; (9) location of the Covered Product in an unsuitable, unsafe, or hazardous environment, as determined by Vendor; or (10) problems relating to or caused by operating environment including electrical power, heating, air conditioning, and humidity which are not within Vendor Specifications. Customer shall provide Vendor with full and free access to the Covered Products under circumstances suitable to providing the Maintenance required or requested. All diagnostic, test, and other Maintenance Software, Hardware, Documentation and similar property or materials used by Vendor in connection with installing or Maintaining any Covered Product (even if such items were shipped with the Covered Product) shall remain the exclusive property of Vendor and shall be for the sole use of Vendor and under its control, and Customer shall treat all such items and materials as confidential and proprietary property of Vendor.

9. Customer Responsibilities

Customer shall maintain on-site a Maintenance log for each Covered Product which shall include at least the following: type and serial number(s) of each covered Product receiving Maintenance; a description of any Product Malfunction; the date and time of Notice by Customer to Vendor of a Covered Product Malfunction under which Customer requests Maintenance; a description of the maintenance performed; and the time spent by Vendor personnel on each Maintenance call. Each Maintenance call shall be logged and shall be signed by Vendor's service representative and an authorized official of Customer. Customer shall provide Vendor, at no charge, adequate storage space for spare parts and working space. Customer shall also provide Vendor with suitable heat, light, ventilation, telephone and electric current outlets for use by Vendor's personnel during Maintenance activities. These facilities shall be within a reasonable distance of each Covered Product. Customer has sole responsibility for Malfunctions caused directly or indirectly by any of the following acts, omission, events and causes: (1) negligent or willful acts or omissions of the Customer, its employees or third parties; (2) damage or destruction due to accident, casualty or other acts of God; (3) events not under the control of Vendor; (4) modification of any Covered Product not authorized by Vendor; (5) connection of any Covered Product by mechanical or electrical means to equipment or devices not

manufactured by Vendor or supplied by Vendor unless such connection has been specifically in each instance authorized by Vendor; (6) work external to the Covered Product; (7) repair of damage, replacement of parts or increase in service time caused by neglect, accident or misuse by Customer, including, without limiting the generality of the foregoing, failure of electrical power or any other failure not attributable to a Covered Product; (8) painting or refinishing the case or exterior of any Covered Product, or furnishing material therefore; (9) changes or performing services connected with relocation of any Covered Product, or adding or removing accessories, attachments or other devices except as authorized by Vendor in writing; (10) repair of damage or increase in service time caused by relocation or movement of any Covered Product by Customer without the prior approval of Vendor; (11) consumable materials such as ribbons, paper, magnetic tape and cleaning materials; (12) repair of damage or increase in service time caused by use of any Covered Product for purposes other than that for which it is designed; and (13) additional Vendor service time or other costs resulting from failure by Customer to perform daily back-up of its hard disk data (for example, time spent recovering or rebuilding database indices or data).

10. Relocation

Vendor will continue to provide Maintenance for Covered Products relocated with Vendor's consent provided that Vendor personnel shall, at Vendor's then current hourly rates, supervise all packing and unpacking of the Covered Products and the reinstallation of the Covered Products at the new location. Any Damage to Covered Products while in transit shall be Customer's sole responsibility. Vendor may terminate Maintenance without Notice as to any Covered Product moved from the location scheduled above.

11. Definitions

"Business Hours" means any period during the hours from 7:00 a.m. to 6:00 p.m., Mountain time, Monday through Friday, exclusive of Vendor observed holidays.

"Maintenance" means the following Services in connection with any Product: (1) Services rendered to correct or ameliorate a Malfunction; (2) Services rendered to maintain the Product in regular working order, normal wear and tear excepted; (3) Services rendered in providing telephone support; and (4) Services rendered to make available certain enhancements, upgrades, or new versions of a Product.

"Malfunction" means, as to any Product, a recurring and verifiable material adverse deviation from the performance capabilities reflected

in the Specifications for such Product or the manufacturer’s most recently published user documentation for such Product where (and only where): (1) the Product is being used in accordance with usage, environmental and other standards or operational requirements reflected in such Specifications or documentation; and (2) the alleged Malfunction is verifiable by replication in a suitable test environment.

“**Non-Business Hours**” means any period not during Business Hours.

“**Term**” means, as to any Covered Product, the period commencing with the date of Delivery of the Covered Product and continuing for the number of successive months set forth in the schedule set forth above.

SCHEDULE OF COVERED PRODUCTS			
Product Description	Term*	CHARGE	
		Period**	Amount Per Period
See Software Maintenance Agreement – Schedule of Coverage (attached)	Ongoing	Monthly	see attached
LOCATION OF COVERED PRODUCTS:			
*number of consecutive months following Delivery date			
** A = annually S = semiannually Q = quarterly M = monthly			

Comment: While this Maintenance Agreement is long on requirements that clinics must meet and limitations of liability, it is short on Vendor’s obligations to perform such as response time requirements, obligation to provide updates and corrections, and Releases free of additional charge incorporating legal and regulatory requirements that clinics must meet. Please see Addendum for suggested terms.

Comment: Missing from this Maintenance Agreement are provisions dealing with fees. Please see Addendum for suggestions on specifying fees, capping fee increases, periods free maintenance, etc. Software maintenance fees can constitute a substantial portion of the revenue stream of Vendor and thus, is a major profit center for Vendor. Therefore, clinics need to (1) negotiate for pricing; and (2) if possible freeze that pricing or control it by making it subject to predictable increases. The Addendum one example of cost control by tying any increases to the Consumer Price Index. Like virtually all of the terms in the maintenance agreement and license agreement, the amount of any period of free maintenance will be the subject of negotiation, and the concessions that the clinics will receive will depend upon their economic leverage and the level of their resolve.

Comment: Another missing provision is a source code escrow provision. What is it a source code escrow and what is its purpose? Consider the following: suppose the Vendor goes bankrupt, or decides to no longer provide maintenance and support for the Software because of changed priorities, or is acquired by another company that decides to discontinue support? A source code escrow agreement is designed to address these risks by requiring the Vendor to deposit its source code of the Software (i.e. its secret, human-readable code and documentation which is converted to machine-readable object code which in turn, controls computer functions) and all updates into an escrow maintained by a third party company. The escrow holds the source code, updates and documentation in safekeeping for the Vendor, but is required to allow the customers (clinics) access to it under certain specified conditions such as bankruptcy of the Vendor, cessation of maintenance and support by the Vendor, etc. Theoretically, this access will enable the clinics to either maintain and support the Software themselves, or to retain contractors to do the same. However, in practice, many clinics will not have the capability to maintain their Software, and contractors hired to review source code and documentation may encounter difficulty as well, particularly if the Software is poorly documented. There is also the cost issue: i.e. who is going to pay for the escrow services? Like virtually all of the terms in the maintenance agreement and license agreement, the details of the source code escrow provisions will be the subject of negotiation, and the concessions that the clinics will receive will depend upon their economic leverage and the level of their resolve. Notwithstanding source code escrow provisions, the primary protection for clinics when licensing software and entering into agreements to maintain it, is to perform extensive due diligence investigation on the prospective Vendors to determine their stability and financial strength before entering into agreements with them.