

## **SOFTWARE LICENSE AGREEMENT**

THIS SOFTWARE LICENSE AGREEMENT ("Agreement") is made and entered into this \_\_\_\_ day of\_\_\_\_, 20\_\_ (the "Effective Date") by and between The University of Texas Health Science Center at San Antonio ("University"), a component of The University of Texas System ("System") and San Antonio Metropolitan Health Department having offices at 332 W. Commerce, San Antonio, TX 78205 ("Licensee").

### **RECITALS**

A. University is the owner of, or has acquired rights to, the Software and Documentation entitled "SmilesMaker©, which is a direct data entry program designed for use by community dental programs to collect personal health information (e.g., dental screening and sealant data) for children that runs on the FileMaker platform.

B. University desires to grant to Licensee and Licensee desires to obtain from University a nonexclusive license to use the Software and Documentation solely in accordance with the terms and on the conditions set forth in this Agreement.

NOW, THEREFORE, the parties hereto agree as follows:

### **1. DEFINITIONS.**

1.1 "Background Software" shall mean FileMaker Pro or equivalent.

1.2 "Designated Equipment" shall mean the hardware products identified on Exhibit "A" with which the Software is licensed for use.

1.3 "Documentation" shall mean all manuals, user documentation, and other related materials pertaining to the Software which are furnished to Licensee by University in connection with the Software.

1.4 "Software" shall mean the computer programs in machine readable object code form listed in Exhibit "A" attached hereto and any subsequent error corrections or updates supplied to Licensee by University pursuant to this Agreement. Exhibit "A" may be amended from time to time by the parties in writing.

### **2. GRANT OF RIGHTS.**

The License granted for Software under this Agreement authorizes Licensee on a nonexclusive basis to use the Software on the number of primary systems of Designated Equipment identified on Schedule A hereto for the license term set forth on Schedule A. The Software shall be used only on such primary systems if they are operating properly. If any primary system is down, the Software may be used on a backup system for that primary system.

### **3. DELIVERY.**

3.1 Software. University shall deliver to Licensee a master copy of the Software licensed hereunder in object code form, suitable for reproduction, and any Documentation, in electronic files only.

### **4. MODIFICATIONS.**

4.1 Error Corrections and Updates. University will provide Licensee with error corrections, bug fixes, patches or other updates to the Software licensed hereunder in object code form to the extent available in accordance with University's release schedule for a period of one (1) year from the date of shipment.

4.2 Other Modifications. Licensee may, from time to time, request that University incorporate certain features, enhancements or modifications into the Software. University may, in its sole discretion, undertake to incorporate such changes and distribute the Software so modified to all or any of University's licensees.

4.3 Title to Modifications. All such error corrections, bug fixes, patches, updates or other modifications shall be the sole property of University.

### **5. COPIES.**

5.1 Printed Matter. Except as specifically set forth herein, no Software or Documentation which is provided by University pursuant to this Agreement in human readable form, such as written or printed documents, shall be copied in whole or in part by Licensee without University's prior written agreement. Additional copies of printed materials may be obtained from University at the charges then in effect.

5.2 Machine Readable Matter. Except as specifically set forth herein, any Software provided in machine readable form may not be copied by Licensee in whole or in part, except for Licensee's backup or archive purposes. Licensee agrees to maintain appropriate records of the number and location of all copies of the Software and make such records available upon University's request. Licensee further agrees to reproduce all copyright and other proprietary notices on all copies of the Software in the same form and manner that such copyright and other proprietary notices are originally included on the Software.

### **6. LICENSE CONSIDERATION.**

6.1 License Consideration. In consideration of the license rights granted in Article 2 above, Licensee shall provide appropriate feedback relating to Software functionality, improvements or other such consideration as it applies to the Software and Documentation as set forth on Exhibit "A" attached hereto.

## **7. PROTECTION OF SOFTWARE.**

7.1 Proprietary Notices. Licensee agrees to respect and not to remove, obliterate, or cancel from view any copyright, trademark, confidentiality or other proprietary notice, mark, or legend appearing on any of the Software or output generated by the Software, and to reproduce and include same on each copy of the Software.

7.2 No Reverse Engineering. Licensee agrees not to modify, reverse engineer, disassemble, or decompile the Software, or any portion thereof.

7.3 Ownership. Licensee further acknowledges that all copies of the Software in any form provided by University or made by Licensee are the sole property of University and/or its suppliers. All titles, including but not limited to copyrights, in and to the Software and any copies thereof are owned by University, and all title and intellectual property rights in and to the content which may be accessed through use of the Software is the property of the respective content owner and is protected by applicable copyright or other intellectual property laws and treaties. This Agreement grants you no rights to use such content. All rights not expressly granted are reserved by University. Dissemination of product or product-related information either directly or indirectly is strictly prohibited. Licensee shall not have any right, title, or interest to any such Software or copies thereof except as provided in this Agreement, and further shall secure and protect all Software and Documentation consistent with maintenance of University's proprietary rights therein.

## **8. CONFIDENTIALITY.**

8.1 Acknowledgement. Licensee hereby acknowledges and agrees that the Software and Documentation constitute and contain valuable proprietary products and trade secrets of University and/or its suppliers, embodying substantial creative efforts and confidential information, ideas, and expressions. Accordingly, Licensee agrees to treat (and take precautions to ensure that its employees treat) the Software and Documentation as confidential in accordance with the confidentiality requirements and conditions set forth below.

8.2 Maintenance of Confidential Information. Each party agrees to keep confidential all confidential information disclosed to it by the other party in accordance herewith, and to protect the confidentiality thereof in the same manner it protects the confidentiality of similar information and data of its own (at all times exercising at least a reasonable degree of care in the protection of confidential information); provided, however, that neither party shall have any such obligation with respect to use of disclosure to others not parties to this Agreement of such confidential information as can be established to: (a) have been known publicly; (b) have been known generally in the industry before communication by the disclosing party to the recipient; (c) have become known publicly, without fault on the part of the recipient, subsequent to disclosure by the disclosing party; (d) have been known otherwise by the recipient before communication by the disclosing party; or (e) have been received by the recipient without any obligation of confidentiality from a source (other than the disclosing party) lawfully having possession of such information.

8.3 Injunctive Relief. Licensee acknowledges that the unauthorized use, transfer or disclosure of the Software and Documentation or copies thereof will (i) substantially diminish the value to University of the trade secrets and other proprietary interests that are the subject of this Agreement; (ii) render University's remedy at law for such unauthorized use, disclosure or transfer inadequate; and (iii) cause irreparable injury in a short period of time. If Licensee breaches any of its obligations with respect to the use or confidentiality of the Software or Documentation, University shall be entitled to equitable relief to protect its interests therein, including, but not limited to, preliminary and permanent injunctive relief.

8.4 Survival. Licensee's obligations under this Article 8 will survive the termination of this Agreement or of any license granted under this Agreement for whatever reason.

## **9. WARRANTIES; SUPERIOR RIGHTS.**

9.1 Ownership. Except for the rights, if any of the Government of the United States, as set forth hereinbelow, University represents its belief that it is the owner of the entire right, title, and interest in and to Software, and that it has the sole right to grant licenses thereunder, and that it has not knowingly granted licenses thereunder to any other entity that would restrict rights granted hereunder except as stated herein.

9.2 Government Rights. Licensee understands that the Software may have been developed under a funding agreement with the Government of the United States of America and, if so, that the Government may have certain rights relative thereto. This Agreement is explicitly made subject to the Government's rights under any such agreement and any applicable law or regulation, if any. To the extent that there is a conflict between any such agreement, applicable law or regulation and this Agreement, the terms of such Government agreement, applicable law or regulation shall prevail. Distribution of the Software to any government agency by Licensee shall not be subject to the payments set forth above.

9.3 Limited Warranty. University expressly disclaims any warranty for the Software, which is provided 'As Is' without any express or implied warranty or guarantee of any kind, including but not limited to any warranties of merchantability, noninfringement, or fitness of a particular purpose. University does not warrant or assume responsibility for the accuracy or completeness of any information, text, graphics, links or other items contained within the Software. University makes no warranties respecting any harm that may be caused by the transmission of a computer virus, worm, time bomb, logic bomb, or other such computer program. University further expressly disclaims any warranty or representation to Authorized Users or to any third party. University represents and warrants to Licensee that the Software, when properly installed by Licensee and used with the Designated Equipment, will perform substantially as described in University's then current Documentation for such Software for a period of ninety (90) days from the date of shipment.

9.4 Limitations. Notwithstanding the warranty provisions set forth in Section 9.3 above, all of University's obligations with respect to such warranties shall be contingent on Licensee's use of the Software in accordance with this Agreement and in accordance with University's instructions as provided by University in the Documentation, as such instructions may be amended,

supplemented, or modified by University from time to time. University shall have no warranty obligations with respect to any failures of the Software which are the result of accident, abuse, misapplication, extreme power surge or extreme electromagnetic field.

9.5 Licensee's Sole Remedy. University's entire liability and Licensee's exclusive remedy shall be, at University's option, either (a) return of the price paid or (b) repair or replacement of the Software upon its return to University; provided University receives written notice from Licensee during the warranty period of a breach of warranty. Any replacement Software will be warranted for the remainder of the original warranty period or thirty (30) days, whichever is longer.

9.6 Disclaimer of Warranties. UNIVERSITY DOES NOT REPRESENT OR WARRANT THAT ALL ERRORS IN THE SOFTWARE AND DOCUMENTATION WILL BE CORRECTED. THE WARRANTIES STATED IN SECTION 9.3 ABOVE ARE THE SOLE AND THE EXCLUSIVE WARRANTIES OFFERED BY UNIVERSITY. THERE ARE NO OTHER WARRANTIES RESPECTING THE SOFTWARE AND DOCUMENTATION OR SERVICES PROVIDED HEREUNDER, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF DESIGN, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE, EVEN IF UNIVERSITY HAS BEEN INFORMED OF SUCH PURPOSE. NO AGENT OF UNIVERSITY IS AUTHORIZED TO ALTER OR EXCEED THE WARRANTY OBLIGATIONS OF UNIVERSITY AS SET FORTH HEREIN.

9.7 Limitation of Liability. LICENSEE ACKNOWLEDGES AND AGREES THAT THE CONSIDERATION WHICH UNIVERSITY IS CHARGING HEREUNDER DOES NOT INCLUDE ANY CONSIDERATION FOR ASSUMPTION BY UNIVERSITY OF THE RISK OF LICENSEE'S CONSEQUENTIAL OR INCIDENTAL DAMAGES WHICH MAY ARISE IN CONNECTION WITH LICENSEE'S USE OF THE SOFTWARE AND DOCUMENTATION. ACCORDINGLY, LICENSEE AGREES THAT UNIVERSITY SHALL NOT BE RESPONSIBLE TO LICENSEE FOR ANY LOSS-OF-PROFIT, INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF THE LICENSING OR USE OF THE SOFTWARE OR DOCUMENTATION. Any provision herein to the contrary notwithstanding, the maximum liability of University to any person, firm or corporation whatsoever arising out of or in the connection with any license, use or other employment of any Software delivered to Licensee hereunder, whether such liability arises from any claim based on breach or repudiation of contract, warranty, tort or otherwise, shall in no case exceed the actual price paid to University by Licensee for the Software whose license, use, or other employment gives rise to the liability. The essential purpose of this provision is to limit the potential liability of University arising out of this Agreement. The parties acknowledge that the limitations set forth in this Article 9 are integral to the amount of consideration levied in connection with the license of the Software and Documentation and any services rendered hereunder and that, were University to assume any further liability other than as set forth herein, such consideration would of necessity be set substantially higher.

9.8. Software Maintenance. Customer understands that it must purchase separate support and maintenance services from Licensors for the SmilesMaker™ software. Absent purchase of these

services under a Software Support and Maintenance Agreement, Licensor shall have no obligation to provide assistance to Customer beyond the terms of this agreement.

## **10. INDEMNIFICATION**

Licensee and University acknowledge they are subject to, and comply with, the applicable provisions of the Texas Tort Claims Act, as set out in the Civil Practice and Remedies Code, Section 101.001, *et. seq.*, and the remedies authorized therein regarding claims or causes of action that may be asserted by third parties for accident, injury or death.

## **11. INSURANCE.**

University, as a member of The University of Texas System (“System”), and Licensee, as a Home-rule municipality, are both agencies of the State of Texas and are self-insured. Licensee and University have and will maintain in force during the term of this Agreement adequate insurance to cover its indemnification obligations hereunder.

## **12. DEFAULT AND TERMINATION.**

12.1 Events of Default. This Agreement may be terminated by the nondefaulting party if any of the following events of default occur: (1) if a party materially fails to perform or comply with this Agreement or any provision hereof; (2) if either party fails to strictly comply with the provisions of Section 9 (Confidentiality) or makes an assignment in violation of Section 13 (Nonassignability); (3) if a party becomes insolvent or admits in writing its inability to pay its debts as they mature, or makes an assignment for the benefit of creditors; (4) if a petition under any foreign, state, or United States bankruptcy act, receivership statute, or the like, as they now exist, or as they may be amended, is filed by a party; or (5) if such a petition is filed by any third party, or an application for a receiver is made by anyone and such petition or application is not resolved favorably within ninety (90) days.

12.2 Effective Date of Termination. Termination due to a material breach of Articles 2 (Grant of Rights), 5 (Copies), 7 (Protection of Software), or 8 (Confidentiality) shall be effective on notice. In all other cases, termination shall be effective thirty (30) days after notice of termination to the defaulting party if the defaults have not been cured within such thirty (30) day period.

12.3 Obligations on Termination. Within ten (10) days after termination of this Agreement, Licensee shall cease and desist all use of the Software and Documentation and shall return to University all full or partial copies of the Software and Documentation in Licensee's possession or under its control.

**13. NOTICES.** All notices, authorizations, and requests in connection with this Agreement shall be deemed given (i) five days after being deposited in the U.S. mail, postage prepaid, certified or registered, return receipt requested; or (ii) one day after being sent by overnight courier, charges prepaid, with a confirming fax; and addressed as first set forth above or to such other address as the party to receive the notice or request so designates by written notice to the other.

**14. NONASSIGNABILITY.** Licensee shall not assign this Agreement or its rights hereunder without the prior written consent of University.

**15. GOVERNING LAW; JURISDICTION AND VENUE.** The validity, interpretation, construction and performance of this Agreement shall be governed by the laws of the State of Texas. The Texas state courts of County, Texas (or, if there is exclusive federal jurisdiction, the United States District Court for the District of Texas) shall have exclusive jurisdiction and venue over any dispute arising out of this Agreement, and Licensee hereby consents to the jurisdiction of such courts.

**16. EXPORT REQUIREMENTS.**

The Software, Derivative Products, Documentation and all related technical information or materials are subject to export controls and are licensable under the U.S. Government export regulations. Licensee will comply strictly with all legal requirements established under these controls and will not export, reexport, divert, transfer or disclose, directly or indirectly the Software, Derivative Products, Documentation and any related technical information or materials without the prior approval of the U.S. Department of Commerce.

**17. GOVERNMENT CONTRACTS.** If the Software or Documentation to be furnished hereunder are to be used in the performance of a government contract or subcontract, the software shall be provided on a "restricted rights" basis only and Licensee shall place a legend, in addition to applicable copyright notices, in the form provided under the governmental regulations. University shall not be subject to any flowdown provisions required by the governmental customer unless agreed to by University in writing.

**18. SEVERABILITY.** If any provision of this Agreement shall be held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remaining provisions shall remain in full force and effect.

**19. MISCELLANEOUS.** This Agreement and its exhibits contain the entire understanding and agreement between the parties respecting the subject matter hereof. This Agreement may not be supplemented, modified, amended, released or discharged except by an instrument in writing signed by each party's duly authorized representative. All captions and headings in this Agreement are for purposes of convenience only and shall not affect the construction or interpretation of any of its provisions. Any waiver by either party of any default or breach hereunder shall not constitute a waiver of any provision of this Agreement or of any subsequent default or breach of the same or a different kind.

IN WITNESS WHEREOF, the parties have caused their duly authorized representatives to execute this Agreement as of the date first set forth above.

**The University of Texas Health Science Center at San Antonio**

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Annaliese Cothron, MS  
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**San Antonio Metropolitan Health Department**

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Thomas Schlenker, MD, MPH  
Director, San Antonio Metropolitan Health District

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Robert F. Greenblum  
City Attorney



## **EXHIBIT A**

### **SOFTWARE AND CONSIDERATION**

Description of

Software: SmilesMaker, an Electronic Direct Data Entry to collect Basic Screening Survey data and other preventive dental services. This Software is protected by a registered copyright.