

SOFTWARE SUPPORT AND MAINTENANCE AGREEMENT

This Software Support and Maintenance Agreement (“Agreement”) is between The University of Texas Health Science Center at San Antonio Dental School, an institution of higher education and Texas state agency (“Licensor”) and ___San Antonio Metropolitan Health Department_____ (“Customer”) for the support and maintenance of the SmilesMaker™ software licensed to Customer by Licensor.

- A. Term** This agreement is effective as of the date of execution and shall terminate on September 30, 2014. This Agreement may be renewed for 2 additional 1 year periods upon agreement of the parties..
- B. Definitions.** All capitalized terms not defined below shall have the meaning set forth in the Agreement.
1. **“Enhancement”** - Any modification or addition that, when made or added to the Licensed Software, materially changes its utility, efficiency, functional capability, or application, but that does not constitute solely an Error Correction. Enhancements may be designated by Licensor as minor or major, depending on Licensor’s assessment of their value and of the function added to the preexisting Licensed Software.
 2. **“Error”** - Any failure of the Licensed Software to conform in all material respects to any specifications provided to Customer by Licensor. However, any nonconformity resulting from Customer’s misuse, improper use, alteration, or damage of the Licensed Software, or Customer’s combining or merging the Licensed Software with any hardware or software not supplied or identified as compatible by Licensor, shall not be considered an Error.
 3. **“Error Correction”** - Either a modification or an addition or deletion that, when made or added to the Licensed Software, establishes material conformity of the Licensed Software to any specifications provided by Licensor to Customer, or a procedure or routine that, when observed in the regular operation of the Licensed Software, eliminates the practical adverse effect on Customer of such nonconformity.
 4. **“Workaround”** means a temporary solution to an Error that Licensor has implemented, or enabled Customer to implement and that allows the Software to regain functionality to provide major software functions in accordance with the published specifications.
- C. Standard Software Support Services**
1. Customer Responsibilities.
 - a. **Errors.** Customer agrees to notify Licensor in writing promptly following the discovery of any Error by email at smilesmaker@uthscsa.edu. Upon discovery of an Error by Customer, Customer agrees, if requested by Licensor, to submit promptly to Licensor a listing of output, screen shots, and any other information, including the operating conditions under which the Error occurred or was discovered, that Licensor may reasonably be required to reproduce the

Error. All service conversations and associated backup information will be considered as Licensor Confidential information.

- b. Customer agrees to maintain its equipment

2. Licensor Responsibilities

- a. Licensor hereby agrees to distribute to Customer all major releases of the software product and for any software modules separately licensed. Customer agrees to update software and operate the Product with current versions of software. Technical support is available on two versions of the software at a time, the current version (as notated by Product Support) and the previous version.
- b. Licensor hereby agrees to distribute to Customer all major releases of the software product and for any software modules separately licensed. Customer agrees to update software and operate the Product with current versions of software. Technical support is available on two versions of the software at a time, the current version (as notated by Product Support) and the previous version.
- c. Major releases shall include new features, functions, performance enhancements, and major bug fixes. Minor releases not distributed under this agreement may be released to production from time to time. These minor releases are restricted to changes of non-functional features, cosmetic features, correct minor bugs or other changes which Licensor designates as minor. Other releases which are not standard production releases are not covered by this Software Support and Maintenance Agreement. These will be custom versions done for specific customer(s) or users which are not for general production release.
- d. This software maintenance agreement will be in force for a period specified in this Agreement for the covered Product(s). Extensions of the Software Support and Maintenance Agreement coverage shall be purchased in 12 month increments and shall be scheduled to allow coverage periods to be contiguous. Gaps in coverage are not allowed. In the event of a gap in coverage, customer shall pay standard rates for all gap periods before they may purchase a new Software Support and Maintenance Agreement.
- e. Method of distribution of updated software code shall be at the sole discretion of Licensor and may be via internet from Licensor's Server, or other commonly supported electronic media or file transfer method.
- f. Notification of availability of new major and general releases: users registered on Licensor's website as the email contact for updates shall receive email notification of software releases. The Licensor website at [www.milesofsmiles.uthscsa.edu/smilesmaker] will also have information on the latest released software versions.

g. The Support Services include:

- Phone support from [9am – 4pm Central Time Monday through Friday]
- Prompt installation of latest security patches for any component software
- Database maintenance
- Fixes for any software fault or defect which is found during the term of the Agreement
- Access to Licensor's trouble ticketing system. This allows you to enter, view and report on any issues related to your system.
- Upgrades which may be required due to changes in any of the third party software licenses

1. Contact process:

Person: Annaliese Cothron

Phone: 210-567-3661

Email: smilesmaker@uthscsa.edu

Hours: 9am- 4pm, CST, Monday-Friday

Type of Support: Technical, Data Management (per contract designation)

h. Exclusions from Support Services. Licensor shall have no obligation to provide support or troubleshooting services for any software not purchased from Licensor or for any Customer hardware. Customer shall bear all responsibility for any malfunction or damage to the Product caused by such non-Licensor purchased products. Licensor shall have no obligation to provide support or troubleshooting services in connection with use of the Product or for any failure or defect in the Product caused by: (i) the improper use, alteration, or damage of the Product by Customer or persons not authorized by Licensor; (ii) modifications to the Product not provided or approved in writing by Licensor; or (iii) hardware, applications or other software not provided or approved in writing by Licensor.

i. Additional Services. If Licensor performs services at Customer's request beyond the scope of the support services set forth in the Agreement, Customer shall be billed at Licensor's then current charges for such services. Licensor shall be under no obligation to provide any such services.

j. Except as otherwise expressly authorized herein, the Customer/User may not: (i) make any copies or duplicates of software; (ii) reverse translate, decompile, disassemble, or reverse engineer the Products, or use the Confidential Information for competitive analysis; and (iii) remove any Product identification or notices of any

proprietary or copyright restrictions from the Products. Further, Customer/User agrees not to translate, and to restrict its end-user from translating, any portion of the software or associated documentation into any other format or language without a Licensor C-level manager's prior written consent.

D. Payments

- a. Customer shall pay the support and maintenance fees in total of **\$4,800.00 for 150 hours of software support** in United States funds without deductions for taxes, assessments, fees, or charges of any kind. Payments cover services in attached "Exhibit A" in conjunction with chosen tier-level of support. Support is provided until **September 30, 2014** after which all software support will be terminated, excluding any error correction, unless renewed. Thereafter, support and maintenance fees shall be \$9600.00 per year. Checks shall be made payable to Licensor and shall be forwarded to the Office at Licensor as follows:

The University of Texas Health Science Center at San Antonio
Department of Comprehensive Dentistry
Dental School, Mail Code 7917
Attention: Annaliese Cothron
7703 Floyd Curl Drive
San Antonio, TX 78253

- b. Taxes and Other Charges. Customer shall be responsible for paying all (i) sales, use, excise, value-added, or other tax or governmental charges imposed on the licensing or use of the Software or Documentation hereunder, (ii) freight, insurance and installation charges, and (iii) import or export duties or like charges.
- c. All Software Support and Maintenance fees are non-refundable.

E. LIMITATION OF LIABILITY AND REMEDIES

- a. **Licensor warrants that the support service will be performed in a professional manner. Licensor's entire liability and Customer's exclusive remedy shall be the repair or replacement, at Licensor's sole discretion, of the Hardware and/or Software which do not meet the specifications stated in the Licensor end user documentation. Any replacement Products are warranted for the remainder of the original warranty period or for ninety (90) days, whichever is longer.**
- b. **THE WARRANTY AS SET FORTH HEREIN IS IN LIEU OF ALL OTHER WARRANTIES, WHETHER EXPRESSED, IMPLIED OR STATUTORY, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.**
- c. **Licensor will use commercially reasonable efforts to provide corrections or workaround solutions for any problem or issue reported and determined to be in the Software or the**

documentation at no cost to Customer for the term of this Agreement. While it is Licensor's goal to provide an acceptable resolution for incoming problems/issues and incidents, Licensor cannot predict a resolution time and is unable to guarantee that all problems or issues can be resolved or addressed.

- d. IN NO EVENT SHALL LICENSOR BE LIABLE TO CUSTOMER FOR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES; LOST PROFITS; LOST SALES OR BUSINESS EXPENDITURES; INVESTMENTS; OR COMMITMENTS IN CONNECTION WITH ANY BUSINESS, LOSS OF ANY GOODWILL, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT, THE SERVICES RENDERED HEREUNDER OR USE OF THE SOFTWARE OR DOCUMENTATION, HOWEVER CAUSED, ON ANY THEORY OF LIABILITY, AND WHETHER OR NOT LICENSOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.**

F. HIPAA; Customer Records

Under this Agreement, Licensor may (a) create, (b) receive from or on behalf of Customer, or (c) have access to, records or record systems (collectively, "Customer Records"). Among other things, Customer Records may contain data protected or made confidential or sensitive by Applicable Laws, including the Health Insurance Portability and Accountability Act. Licensor represents, warrants, and agrees that it will: (a) hold Customer Records in strict confidence and will not use or disclose Customer Records except as (i) permitted or required by this Agreement, (ii) required by Applicable Laws, or (iii) otherwise authorized by Customer in writing; (b) safeguard Customer Records according to reasonable administrative, physical and technical standards (such as standards established by (i) the National Institute of Standards and Technology and (ii) the Center for Internet Security, as well as the Payment Card Industry Data Security Standards) that are no less rigorous than the standards by which Licensor protects its own confidential information; and (c) continually monitor its operations and take any action necessary to assure that Customer Records are safeguarded and the confidentiality of Customer Records is maintained in accordance with all Applicable Laws and the terms of this Agreement.

To the extent required by the provisions of the Health Insurance Portability and Accountability Act ("HIPAA") and the regulations promulgated thereunder, Licensor does hereby assure Customer that it will appropriately safeguard protected health information made available to or obtained by Licensor pursuant to this Agreement or any Service Schedule ("PHI"). Without limiting the obligations of Licensor otherwise set forth in this Agreement or imposed by applicable law, Licensor agrees to comply with applicable requirements of law relating to PHI and with respect to any task or other activity Licensor performs on behalf of Customer. Specifically, Licensor shall:

(a) not use or disclose PHI other than as permitted or required by this Agreement or as required by law;

(b) implement administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of any electronic PHI that it creates, receives, maintains or transmits on behalf of the Customer and otherwise use appropriate safeguards to prevent use or disclosure of PHI, other than as provided for by this Agreement;

(c) report to Customer any use or disclosure of PHI not provided for by this Agreement, and report any security incident, of which Licensor becomes aware;

(d) ensure that any subcontractors or agents to whom Licensor provides PHI received from, or created or received by Licensor on behalf of, Customer agree to essentially the same restrictions and conditions that apply to Licensor with respect to PHI and implement reasonable and appropriate safeguards with respect to PHI;

(e) upon Customer's written request, make PHI available to the Customer as necessary for Customer to respond to individuals' requests for access to PHI about them, provided that the PHI in Licensor's possession constitutes a Designated Record Set and Licensor has been specifically engaged by Customer to so maintain and service such PHI on behalf of Customer;

(f) upon Customer's written request, make PHI available to Customer for amendment and incorporate any amendments to the PHI in accordance with applicable law, provided that the PHI in Licensor's possession constitutes a Designated Record Set and Licensor has been specifically engaged by Customer to so maintain and service such PHI on behalf of Customer;

(g) make available to Customer the information in its possession required to provide an accounting of disclosures of PHI as required by applicable law;

(h) mitigate, to the extent practicable, any harmful effect that is known to Licensor of a use or disclosure of PHI by Licensor in violation of the requirements of this Agreement or of law;

(i) provide notice of a breach of unsecured PHI to Customer without unreasonable delay, and in no case later than thirty (30) days after discovery of a breach. The notification shall include, to the extent possible, the identification of each individual whose unsecured PHI has been, or is reasonably believed by Licensor to have been, accessed, acquired, used, or disclosed. Licensor shall provide Customer with any other available information that Customer is required to include in notification to the Individual under applicable law;

(j) make Licensor's internal practices, books, and records relating to the use and disclosure of PHI received from Customer available to the Secretary of the United States Health & Human Services for purposes of determining Customer's compliance with applicable law; and

(k) upon expiration or termination of this Agreement, return to Customer or destroy all PHI in its possession as a result of this Agreement and retain no copies of PHI, if it is feasible to do so. If return or destruction is not feasible, Licensor agrees to extend all protections contained

in this Agreement to Licensor' use and/or disclosure of any retained PHI, and to limit further uses and/or disclosures to the purposes that make the return or destruction of the PHI infeasible.

Licensor agrees that it will negotiate in good faith an amendment to this Agreement if, and to the extent required by, the provisions of HIPAA and regulations promulgated thereunder, in order to assure that this Agreement is consistent therewith.

G. Indemnification

Customer 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.

H. Default and Termination

a. 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 F (HIPAA) or makes an assignment in violation of Section J (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.

b. Effective Date of Termination. Termination due to a material breach of 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.

I. 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.

If to Licensor:

The University of Texas Health Science Center at San Antonio
Department of Comprehensive Dentistry
Dental School, Mail Code 7917
Attention: Annaliese Cothron
7703 Floyd Curl Drive
San Antonio, TX 78253

If to Customer:

San Antonio Metropolitan Health Department
332 W. Commerce
San Antonio, TX 78205

J. NONASSIGNABILITY. Customer shall not assign this Agreement or its rights hereunder without the prior written consent of Licensor.

K. 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 Bexar County, Texas (or, if there is exclusive federal jurisdiction, the United States District Court for the Western District of Texas) shall have exclusive jurisdiction and venue over any dispute arising out of this Agreement, and Customer hereby consents to the jurisdiction of such courts.

L. 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

Annaliese Cothron, MS
Biostatistician
Department of Comprehensive Dentistry

Spencer Redding, DDS, Med
Professor and Chair
Department of Comprehensive Dentistry

David Cappelli, DMD, MPH, PhD
Director, Dental Public Health Residency
Department of Comprehensive Dentistry

William Dodge, DDS
Dean, Dental School
UTHSCSA

Andrea Marks, MBA, CPA
Vice-President and Chief Financial Officer
UTHSCSA

San Antonio Metropolitan Health Department

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

Robert F. Greenblum
City Attorney

EXHIBIT A

SmilesMaker Technical Support Service Pricing Plan

Tier One (up to 50 hours): **\$1,500 per year**

- Telephone and email support to answer questions and troubleshoot technical difficulties related to software and data storage (if applicable)
 - Server storage troubleshooting (if applicable), log-in/access issues, general functionality of SmilesMaker
- Three Skype phone calls per year, one hour maximum if additional troubleshooting is needed

Tier Two (up to 100 hours): **\$3,000 per year**

- Telephone and email support to answer questions and troubleshoot technical difficulties related to software and data storage (if applicable)
 - Server storage troubleshooting (if applicable), log-in/access issues, general functionality of SmilesMaker
- Ten Skype phone calls per year, one hour maximum if additional troubleshooting is needed
- Basic administrative duties
 - User account and password maintenance, manage customized personnel lists, generate basic reporting functions
- Up to three **minor** changes/customizations implemented based on user need

Tier Three (up to 150 hours): **\$5,000 per year**

- Telephone and email support to answer questions and troubleshoot technical difficulties related to software and data storage (if applicable)
 - Server storage troubleshooting (if applicable), log-in/access issues, general functionality of SmilesMaker, hardware/computer-related issues, data-related issues, internet interconnectivity troubleshooting
- Twenty Skype phone calls per year, one hour maximum if additional troubleshooting is needed
- Intermediate administrative duties
 - User account and password maintenance, manage customized personnel lists, generate intermediate reporting functions
- Up to six **minor** changes/customizations implemented based on user need

Tier Four (up to 300 hours): **\$8,000 per year**

- Telephone and email support to answer questions and troubleshoot technical difficulties related to software and data storage (if applicable)
 - Server storage troubleshooting (if applicable), log-in/access issues, general functionality of SmilesMaker, hardware/computer-related issues, data-related issues, internet interconnectivity troubleshooting
- Telephone and email support to answer questions regarding logistics, program operations, etc.
- Unlimited Skype phone calls per year
- Advanced administrative duties
 - User account and password maintenance, manage customized personnel lists, generate all reporting functions, manage incorporation of local copies of SmilesMaker, manage upload of demographic spreadsheets, etc.
- Up to 10 **minor** changes/customizations implemented based on user need

Additional Terms of Service:

- Issues related to functionality of SmilesMaker or server maintenance that are the fault of the developer will be corrected at **no cost** to the user.
- Tier pricing does **NOT** include pricing for server storage. Technical support only includes troubleshooting, management, or coordination of data stored on the server, dependent upon the Tier chosen.
- All service pricing is “up to” the amount of hours in the Tier chosen. Should additional services be desired past the amount of hours allotted for that service Tier, you may upgrade to the next Tier and pay the difference in cost, or services may be purchased at an hourly rate.
- Minor changes/customization will be determined by amount of time and the process necessary to implement such changes. They are considered on a case-by-case basis. It is ultimately the decision of the Developer as to what constitutes a minor change. Any minor changes made are still subject to fall under the hourly guidelines of the Tier purchased.
- Training in use of SmilesMaker or programmatic operations is not included in the above technical support outlines. Training is purchased a la carte.
- If you have any questions, please contact Ms. Annaliese Cothron (Cothron@uthscsa.edu) or Dr. David Cappelli (Cappelli@uthscsa.edu).