AN ORDINANCE 2014-04-10-0234

AUTHORIZING SOFTWARE AGREEMENTS WITH THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER SAN ANTONIO DENTAL SCHOOL FOR THE SAN ANTONIO METROPOLITAN HEALTH DISTRICT'S USE OF SMILESMAKER SOFTWARE AND DOCUMENTATION FOR THE MEDICAID 1115 WAIVER PROGRAM FOR AN AMOUNT UP TO $24,000.00, COMMENCING UPON EXECUTION AND TERMINATING ON SEPTEMBER 30, 2014 WITH TWO, ONE-YEAR RENEWAL OPTIONS.

*　　　*　　　*　　　*　　　*

WHEREAS, SmilesMaker software was developed as part of the Oral Health Workforce Grant, a collaborative project between the University of Texas Health Science Center-San Antonio (UTHSCSA) and the San Antonio Metropolitan Health District (Metro Health); and

WHEREAS, SmilesMaker is a data entry program designed for use by community dental programs to collect personal health information, such as dental screening and sealant data; and

WHEREAS, authorization of this agreement will allow Metro Health to move forward with the implementation of goals set forth in the department strategic plan and Medicaid 1115 Waiver oral health project; **NOW THEREFORE,**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. An agreement with University of Texas Health Science Center-San Antonio, to provide the San Antonio Metropolitan Health District with SmilesMaker Software, for an amount up to $24,000.00 commencing upon execution and terminating on September 30, 2014, with the option to renew for two, additional one-year periods, is hereby approved. A copy of the Agreement and Software license are attached hereto and is incorporated by reference as **Attachment 1**.

SECTION 2. Funding in the amount of $4,800.00 for this ordinance is available for Fund 29658000, Internal Order 836000000011 and General Ledger 5201040, as part of the Fiscal Year 2014 Budget.
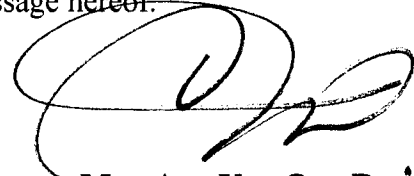
SECTION 3. Funding in the amount of $19,200.00 for this ordinance as part of Fiscal Years 2015 and 2016's Budget is contingent upon City Council approval of the City's operating budget and the availability of funds.

SECTION 4. Payment not to exceed the budgeted amount is authorized to University of Texas Health Science Center San Antonio Dental School and should be encumbered with a purchase order.
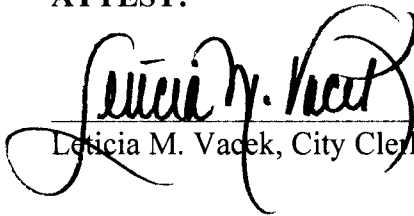
SECTION 5. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance, may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

SECTION 6. This ordinance shall be effective immediately upon passage by eight affirmative votes; otherwise it shall be effective on the tenth day after passage hereof.

PASSED and APPROVED this 10th day of April, 2014.

M A Y O R
Julián Castro

ATTEST:

Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:

By:

Robert F. Greenblum, City Attorney

Agenda Item:	22 (in consent vote: 4, 5, 6, 7, 8, 9, 12, 15, 16, 18, 19, 20, 21, 22, 23, 24, 26, 27)
Date:	04/10/2014
Time:	09:31:12 AM
Vote Type:	Motion to Approve
Description:	An Ordinance authorizing software agreements with the University of Texas Health Science Center San Antonio Dental School for the San Antonio Metropolitan Health District's use of SmilesMaker software and documentation for the Medicaid 1115 Waiver Program for an amount up to $24,000.00, commencing upon execution and terminating on September 30, 2014 with two, one-year renewal options. [Gloria Hurtado, Assistant City Manager; Dr. Thomas Schlenker, Director, Public Health]
Result:	Passed

Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor	x					
Diego Bernal	District 1		x			x	
Ivy R. Taylor	District 2		x				
Rebecca Viagran	District 3		x				x
Rey Saldaña	District 4		x				
Shirley Gonzales	District 5		x				
Ray Lopez	District 6		x				
Cris Medina	District 7		x				
Ron Nirenberg	District 8		x				
Joe Krier	District 9		x				
Michael Gallagher	District 10		x				

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 <u>San Antonio Metropolitan Health Department</u> ("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 mutual written 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

1

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

3

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 $9,600.00 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' 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' 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' 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. Customer is solely responsible for keeping itself compliant with data collected and how it is stored.

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   Robert F. Greenblum
Director, San Antonio Metropolitan Health District   City Attorney

EXHIBIT A

SmilesMaker Technical Support Service Pricing Plan

<u>**Tier One (up to 50 hours):**</u>   **$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

<u>**Tier Two (up to 100 hours):**</u> **$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

<u>**Tier Three (up to 150 hours):**</u>   **$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).

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 Licensor 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

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

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.