

Comment: This sample Addendum is one example of how a clinic might respond to a typical, one-sided, unfair, pro-vendor Maintenance Agreement. Most vendors will not accept clinics' form of agreements, but will consider "addenda" modifying vendors' form agreements. Why? Perhaps it is easier for the vendors' contract administrators to monitor addenda to their own form agreements than to monitor customized agreement that they are not familiar with. Therefore, these materials have adopted the "addendum" approach to modifying vendor's form of agreement.

SAMPLE CLINIC ADDENDUM TO SAMPLE PRO-VENDOR MAINTENANCE AGREEMENT*

This Addendum to the Sample Maintenance Agreement By and Between Vendor and Customer ("Addendum") amends that certain form agreement of Vendor entitled "Sample Maintenance Agreement" ("Maintenance Agreement") executed on _____, 200__ ("Effective Date") between Vendor and Customer.

This Addendum is an integral part of the Maintenance Agreement and except as set forth herein, subject to its terms and conditions. In the event of any conflict between the Maintenance Agreement, and/or this Addendum, this Addendum shall control. Except as to those portions of the Maintenance Agreement which are modified by this Addendum, the terms and conditions of the Maintenance Agreement shall continue in full force and effect. The Maintenance Agreement, as modified by this Addendum, and this Addendum, including its Appendices and attachments, is sometimes referred to as "the Maintenance Agreement."

The numbering of the Sections below correspond to the numbering in the Agreement.

Definitions. The following definitions shall be added to the Agreement.

Comment: When first reading any agreement which contains "definitions," it is generally helpful to first proceed to the main body of the agreement and as each defined term is encountered, to then refer back to the definitions section. Having the benefit of context and background will make the defined terms more understandable.

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

“Acceptance Date” shall have the meaning set forth in the Addendum to the License Agreement.

“Addendum to the License Agreement” means the addendum entered into between Vendor and Customer dated _____, 200__ which amends the license agreement between Vendor and Customer dated _____, 200__.

“Business Hours” shall mean the hours of 7:30 a.m. and 8:00 p.m. [*specify Customer’s time zone; e.g. Pacific Standard Time*], Monday through Friday, and 7:30 a.m. and 5:00 p.m., Saturday, excluding national holidays.

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

“Covered Product(s)” means the software and/or hardware products listed in the schedule at the end of the Agreement.

“Maintenance Agreement” means the agreement between Vendor and Customer which sets forth the terms of Vendor’s provisions of Maintenance to Customer.

“Regulatory Requirements” means the then-current applicable federal, state and laws, rules, regulations, including without limitation, provisions pertaining to Medi-Cal, Family PACT claims processing requirements, HIPAA, any required output format for patient data, etc.

“Releases” means updates, corrections, feature enhancements and upgrades, including those with additional functionality to the Software, as the Vendor may, from time to time, produce and make generally available to Customer.

“Software” shall have the meaning set forth in the Addendum to the License Agreement.

“Term” means, as to any Covered Product, the period commencing upon the Acceptance Date (as that term is defined in the Addendum to the License Agreement), and continuing for the number of successive months set forth in the schedule contained in the Maintenance Agreement.

“Warranty Repair” shall have the meaning set forth in the Addendum to the License Agreement.

1. Vendor Obligations. Section 1 of the Maintenance Agreement shall be deleted in its entirety and the following substituted in its place:

1.1 Covered Products. Vendor shall provide Maintenance for each Covered Product during the Term applicable to such Covered Product. Vendor agrees that “Covered Products” shall include, but not be limited to, the “Software,” including any “Releases,” as those terms are defined in the Addendum to the License Agreement. In addition, Maintenance shall cover any changes or customization performed by the Vendor.

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

1.2 Limitations. Vendor shall have no obligation to provide any Maintenance in respect of any product which is not a Covered Product. Vendor does not warrant or guarantee the availability, quality, or effectiveness of Maintenance provided to Customer except as otherwise expressly provided herein. Vendor shall have no obligation to provide Maintenance in respect of any version of the Software which is not the most current version then generally available or the version immediately previous to the most current version then generally available, or which contains modifications or changes not previously approved by Vendor. Provided however, that notwithstanding anything herein to the contrary, Vendor shall troubleshoot the defect in or failure of the System of which the Covered Product is a part, and if such defect or failure is not attributable to Covered Product(s) but is then covered by another vendor’s maintenance and warranty agreement, Vendor shall assist Customer in resolving the defect or failure with the party providing such maintenance or warranty. Vendor shall initiate the reporting of such problem to the appropriate hardware or software vendor, as the case may be, and shall coordinate the correction of same.

Comment: While Vendor will resist maintaining software and hardware not specified in the Maintenance Agreement (i.e. products which are not “Covered Products,” clinics should be careful to make sure that Vendor will at least trouble-shoot the problem and reasonably assist the clinics to ascertain the source of the failure or malfunction.

2. Availability. Section 2 of the Maintenance Agreement shall be deleted in its entirety and the following substituted in its place:

2.1 Availability. Vendor will provide Maintenance during Business Hours. Vendor will provide Customer with a written list of national holidays prior to this Agreement being executed and thereafter a list of the next year’s national at least fifty

(50) days before the start of every calendar year that Maintenance is provided. Maintenance shall include telephone consultation with, and advice from, Vendor's service personnel, and diagnostic support through service personnel dialing into Customer's System (as defined in the Addendum to the License Agreement. However, if Maintenance is rendered outside of Business Hours, Customer shall pay an hourly basis at the rate of \$50.00. Vendor shall advise Customer prior to commencing any work that would fall outside of Business Hours and hence result in the per hour charge.

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

2.2 Response Times.

Comment: The sample Vendor's Maintenance Agreement, like many vendor forms, omits any performance benchmarks that Vendor is required to meet in responding to software malfunctions. This is potentially a huge problem. At best, software failure is an inconvenience; at worst, it can shut down clinic operations. Therefore, clinics need to be mindful to insist that response times and other performance requirements are specified in detail in the Maintenance Agreement.

(a) General. Customer may telephone toll-free to Vendor regarding consultations, assistance and advice on the use of the Covered Products and the identification and correction of errors, defects and non-conformities. The maximum response time for providing a return call after a telephone request has been placed by Customer is as set forth below. Vendor shall provide support, including correction of emergency problems, during Business Hours with the guaranteed response times as set forth below. In addition to the Level 1 guaranteed response times specified below, Vendor shall have no more than one (1) working day following Customer's notification in which to respond by phone to inform Vendor of the intended software emergency fix.

(b) Defect Priorities and Response Times:

Level 1	Data unavailability or data corruption resulting in complete Software unavailability. "Data unavailability" means that the data is not available at the normal point of use	60 minute response time to service call. Immediate efforts to resolve, continuous to resolution.
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Level 2	Major function of the Software is unavailable, with material adverse impact on normal operations.	2 Hour response time. Continuous effort to resolve problem.
Level 3	A function of the Software is not available, is incomplete or incorrect, but a practical workaround is available or no immediate material adverse impact.	Response during Business Hours. Resolution within reasonable time.

(c) **Failure to Respond to Remedial Calls.** In the event Vendor fails to meet the support guaranteed response times, either by telephone or on-site, as specified, herein, Customer may at Customer's election, either: (A) Receive a fifty percent (50%) credit against the subsequent calendar month's support charges; if Customer pays for Maintenance Services annually, the credit will be one-twenty-fourth (1/24) of the annual maintenance fees; or (B) terminate this Agreement for failure to meet response time obligations on five (5) non-consecutive, successive occasions in any given year or on three (3) or more non-consecutive, occasions in any month; in which case, Customer shall have available to you all remedies at law and in equity for breach.

Comment: Like virtually all of the terms in the maintenance agreement and license agreement, the amount of any penalty or credit for Vendor's failure to timely respond will be the subject of negotiation, and the concessions that the clinics will receive will depend upon their economic leverage and the level of their resolve.

2.3 Contact Persons.

(a) **Customer's Contact Persons.** Customer shall designate two (2) people on Customer's staff (one primary and one back-up) who will be notified by Vendor of Software problems. These two people will be the points-of-contact in resolving the reported problems. Vendor and Customer shall discuss the problem and make a determination as to which Level such problem corresponds to. If these persons cannot agree on the Level of the problem, they shall escalate the problem to their respective managers until the vice presidential level is reached. In addition to the Level 1 guaranteed response times, Vendor shall use reasonable best efforts to correct any problem within twenty-four (24) hours or, if correction is not feasible within such period, within a reasonable period of time as the parties mutually agreed upon.

(b) **Vendor's Contact Persons.** Vendor shall designate two (2) persons on Vendor's staff (one primary and one back-up) who will be notified by Customer of Software problems. Vendor shall provide Customer with the name of such persons along with a copy of his/her resume and references. Customer may contact such persons and shall have the right to reasonably reject one or both. Upon receiving Customer's written notification of such rejection, Vendor shall use reasonable efforts to promptly provide qualified substitute personnel.

2.4 Help Desk. Promptly after Customer has notified Vendor of the error, defect or non-conformity, Vendor shall promptly assign an identification number to the problem and a person troubleshooting such problem, and access to all listings or summaries pertaining to Customer's reports of such errors, defects or non-conformities and Vendor's correction efforts. Such assigned person shall provide Customer with email updates on the status of the correction. If such problems have not been corrected within twenty-four (24) hours after the initiation of such telephone support, Customer shall submit to Vendor a listing of output and all other data which Vendor may reasonably request in order to reproduce operating conditions similar to those present when error, defect or nonconformity was discovered. In the event that such problems are not corrected within three (3) working days after Vendor receives from Customer such listing of output and other data, Vendor shall, upon request from Customer, provide on-site services within the next twenty-four (24) hours at no additional cost to Customer.

2.5 Temporary Workaround. Whenever possible, Vendor shall suggest temporary workaround solutions until repair of problems can be accomplished.

Comment: Clinics will need temporary solutions while malfunction is being resolved, and Vendor should provide temporary workarounds so that the clinics can continue to function.

4. Termination of Coverage. The following shall be added to Section 4 of the Maintenance Agreement:

Notwithstanding anything in the Maintenance Agreement to the contrary, Vendor agrees not to terminate the Maintenance Agreement for the five (5) year period commencing one (1) year after the Acceptance Date as defined in the License Agreement. However, Customer may terminate the Maintenance Agreement at any time provided Customer gives the Vendor at least 60 days prior written notice. In the event that Vendor discontinues Maintenance coverage of the Software, Customer may perform such services itself, and Customer may use the source code for such purposes as provided in "Additional Terms," Section B (below) of this Addendum.

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

6. Upgrades. Section 6 of the Maintenance Agreement shall be deleted in its entirety and the following substituted in its place:

(a) **Releases.** Vendor may from time to time release to its customers and licensees Releases which would provide valuable new features or improvements to the Software. As part of the Maintenance to be provided hereunder, all such Releases shall be offered to Customer at no additional charge, and thereafter shall be considered Software licensed to Customer to and subject to the terms and conditions of the Maintenance Agreement, and Vendor shall install all Releases, and provide general user assistance by telephone in connection with Releases.

Comment: Clinics should be careful to make sure that Releases will be considered a Covered Product in which the Vendor is obligated to provide services.

(b) **Regulatory Requirements.** Vendor shall maintain and update the Software as is necessary to make it appropriate, correct, complete and consistent with the then-current applicable Regulatory Requirements and other industry standards such as those promulgated by other agencies. Such Releases shall be made as soon as possible but not later than six months prior to the mandated effective date. The provisions of the License Agreement, including, without limitation, Warranty Repair (as defined in the License Agreement) will be applicable to Releases. Vendor will ensure that all changes that it makes to the Software because of Maintenance are incorporated into subsequent Releases.

Comment: One of the major reasons that clinics are licensing software is assist them comply with new laws and regulations. Therefore, it is important to require the Vendor to provide Releases which incorporate the latest legal requirements.

(c) **Notifications and Updates.** Vendor may, from time to time, produce notifications, updates, or corrections of existing problems relating to the Software. As part of Maintenance, Vendor will make all notifications, updates or corrections applicable to the Software available to Customer at no additional charge, and will endeavor to deliver such information to Customer within thirty (30) days of the date Vendor makes such information available to any of its licensees.

Comment: The Clinics should insist that Vendor timely provide updates and corrections free of additional charge.

ADDITIONAL TERMS

The following new provisions shall be added to the Maintenance Agreement:

A. Maintenance Fees.

Comment: Like virtually all of the terms in the maintenance agreement and license agreement, the amount of any period of free maintenance will be the subject of negotiation, and the concessions that the clinics will receive will depend upon their economic leverage and the level of their resolve.

(1) Period of Free Maintenance. Maintenance shall commence on the Acceptance Date, provided however, that there shall be no charges to Customer for such Maintenance until one (1) year after the occurrence of the Acceptance Date. Provided further however, that:

(a) Any Maintenance attributable to Warranty Repair shall be at Vendor's sole cost; and

(b) If modules of the Software are implemented in a staggered fashion over a period of time in lieu of implementing all of the Software at the same time, if the Acceptance Date for any such module has not occurred, or if any such module is not in compliance with the Specifications, or if Warranty Repair fails to correct the non-conformity, the maintenance fees pursuant to the Software Maintenance fees shall not be charged with respect to such module until that module complies with the Specifications.

(c) Vendor shall provide, at its sole cost:

(i) Quarterly audit/checks in the first year following the Acceptance Date; and

(ii) Semi-annual (twice per year) audit/checks in the second year following the Acceptance Date; and

(iii) Access to user conference and groups.

(2) Schedule of Maintenance Fees. The Maintenance fees (both flat fees and hourly charges) are as specified in Schedule 1, attached hereto.

(3) CPI Increases to Maintenance Fees. Commencing one year (1) after the commencement of the date when the Vendor is authorized to charge Customer for Maintenance as specified above, and on each anniversary date of the calendar year thereafter, ("the Adjustment Date"), the Maintenance fees shall be adjusted to reflect any increase in the Consumer Price Index of the Bureau of Labor Statistics of the Department of Labor applicable for all Urban Consumers in Your metropolitan area (the "CPI") for the month immediately preceding the Adjustment Date, (the "Adjustment CPI"), as compared with the CPI in effect for the same month in the immediately preceding calendar year, (the "Base CPI"), as follows: the monthly Maintenance Fees payable for the month immediately preceding any adjustment for changes in the CPI shall be

multiplied by a fraction the numerator of which shall be the Adjustment CPI and the denominator of which shall be the Base CPI. The sum so calculated shall constitute the new monthly Maintenance Fees hereunder; provided however, notwithstanding anything herein to the contrary, the maximum increase resulting from a CPI adjustment for any calendar year as calculated herein shall not exceed three percent (3%) of the Maintenance fees of the immediately preceding year. In the event the compilation and/or publication of the CPI shall be transferred to any other governmental department or bureau or agency or shall be discontinued, then the index most nearly the same as the CPI shall be used to make calculations.

Comment: Software maintenance fees can constitute a substantial portion of the revenue stream of Vendor and thus, is a major profit center for Vendor. Therefore, clinics need to (1) negotiate for pricing; and (2) if possible freeze that pricing or control it by making it subject to predictable increases. The above is one example of cost control by tying any increases to the Consumer Price Index.

B. Source Code Program.

Comment: What is a source code escrow and what is its purpose? Consider the following: suppose the Vendor goes bankrupt, or decides to no longer provide maintenance and support for the Software because of changed priorities, or is acquired by another company that decides to discontinue support? A source code escrow agreement is designed to address these risks by requiring the Vendor to deposit its source code of the Software (i.e. its secret, human-readable code and documentation which is converted to machine-readable object code which in turn, controls computer functions) and all updates into an escrow maintained by a third party company. The escrow holds the source code, updates and documentation in safekeeping for the Vendor, but is required to allow the customers (clinics) access to it under certain specified conditions such as bankruptcy of the Vendor, cessation of maintenance and support by the Vendor, etc. Theoretically, this access will enable the clinics to either maintain and support the Software themselves, or to retain contractors to do the same. However, in practice, many clinics will not have the capability to maintain their Software, and contractors hired to review source code and documentation may encounter difficulty as well, particularly if the Software is poorly documented. There is also the cost issue: i.e. who is going to pay for the escrow services? Like virtually all of the terms in

the maintenance agreement and license agreement, the details of the source code escrow provisions will be the subject of negotiation, and the concessions that the clinics will receive will depend upon their economic leverage and the level of their resolve. Notwithstanding source code escrow provisions, the primary protection for clinics when licensing software and entering into agreements to maintain it, is to perform extensive due diligence investigation on the prospective Vendors to determine their stability and financial strength before entering into agreements with them.

(1) **Establishment of Escrow and Enrollment of Customer.** Vendor shall establish a program in which Vendor enters into an escrow agreement with an independent escrow service in which such escrow shall hold the then latest version of Vendor's source code and documentation of the Software. Promptly after the execution of the Maintenance Agreement, Vendor shall enroll Customer in such program to enable Customer to have access to such source code and documentation as set forth hereunder.

(2) **Duty to Deposit Source Code and Documentation Into Escrow and to Update Deposit.** Within thirty (30) days after any Release, update or correction is made to the Software becomes available to Customer, Vendor shall place in the escrow, at no charge to Customer, a fully commented and documented copy of the current source code. Vendor represents and warrants to Customer that the source code deposited with the escrow agent will at all times be the source code version of the current Release of the Software, as offered to Customer from time to time.

(3) **Customer's Access to Source Code and Documentation.** Customer shall have a license to access to the Software's source code promptly after the occurrence of an "**Impact Event.**" An Impact Event shall consist of (a) any rejection or termination of the Maintenance Agreement, or of the source code escrow agreement with the third party escrow by Vendor or its successors or representatives in breach of the provisions of the Maintenance Agreements or such source code agreement, including in all events any rejection or termination of the such agreements or any proposal to do so under Title 11 of the United States Code, as now constituted or hereafter amended (the "Bankruptcy Code"), or any other federal or state bankruptcy, insolvency, receivership, or similar law; (b) failure of a trustee, including Vendor as debtor in possession, in any bankruptcy case hereafter filed by or against Vendor either to assume such agreements within fifteen (15) days after the filing of the initial bankruptcy petition or to perform the agreements within the meaning of Section 365(a)(4)(i) of the Bankruptcy Code; (c) the termination of substantially all of Vendor's ongoing business operations relating to the subject to the agreements, (and/or Vendor's obligations to provide Maintenance; (d) any liquidation of Vendor, or any sale, assignment, or foreclosure of or upon assets that are necessary for the performance by Vendor of its responsibilities under the agreements; and (e) a decision by Vendor or its successors or representatives to discontinue providing Maintenance respecting the Software.

(4) **License.** In the event that a copy of the source code is authorized hereunder to be delivered out of escrow to Customer, Customer shall immediately obtain, without any further action, authorization, or instrument, a paid-up, irrevocable, perpetual, nonexclusive, nontransferable license from Vendor to use, modify, maintain, and update the source code in any manner that may be necessary or appropriate to enable Customer to use the Software for its intended purposes as specified in the Agreement.

(5) **Reasonably Understandable.** Vendor represents and warrants that the source code of the Software is and shall be understandable and useable by a trained computer-programming contractor who is generally familiar with medical management systems, though not necessarily those incorporating the Software. Vendor further represents and warrants that the Software does not involve any proprietary languages or programming components that such a contractor could not reasonably be expected to understand, except to the extent the source code contains sufficient commentary to enable such contractor to understand and use such languages or components. Vendor further represents and warrants that the source code includes all of the devices, programming, and documentation necessary for the maintenance of the Software by Customer upon release of the source code pursuant to this Agreement, except for devices, programming, and documentation commercially available to Customer on reasonable terms through readily known sources other than Vendor.

IN WITNESS WHEREOF, the parties hereto have caused this Addendum to be executed by their duly authorized representatives as of the Effective Date below.

Effective Date: _____, 200__

Vendor: _____ **Customer:** _____

By: _____ By: _____
Printed Name: _____ Printed Name: _____
Title: _____ Title: _____

SCHEDULE 1
MAINTENANCE FEES
[attach]