# Orchard Software Corporation ("Orchard")
# Laboratory Information, Outreach and Integration System
# Agreement for
# Santa Barbara County Public Health Department ("CLIENT")
### Valid if signed by March 31, 2015

This Agreement ("Agreement") is dated this _____ day of March, 2015 (the "Effective Date"), and governs the acquisition of an Orchard® Copia® Laboratory Outreach & Integration System and Orchard® Harvest™ Laboratory Information System ("System") by the County of Santa Barbara, a political subdivision of the State of California ("CLIENT") and defines the on-going business relationship related to CLIENT's acquisition and use of the System.

I.  **Configuration:** The configuration for CLIENT is as follows: Nine (9) concurrent Harvest Client Licenses. With Integrated Harvest LIS Microbiology Module. Copia Laboratory Outreach & Integration System application, to be used in conjunction with Harvest LIS, with web access for up to twenty (20) concurrent users.

II. **Hardware Components:**

1.  CLIENT will provide the servers and workstation hardware. Minimum specifications are outlined in Attachment A.

2.  Ancillary Hardware: Provided By CLIENT as outlined in Attachment A.

3.  Ancillary Hardware: Provided By Orchard as outlined in Attachment A.

4.  CLIENT will provide all necessary cabling, phone lines, dedicated fax line(s), and support services required to interface the System to CLIENT's existing **LAN and/or WAN**.

5.  NOTE: If any workstations on the System network require communications via a Wide Area Network, then CLIENT will be responsible for providing and maintaining a secure link of at least 512kbps (preferably T1), such as access to a network infrastructure or dedicated data line, and all necessary terminating hardware between the remote workstations and the primary System network.

6.  CLIENT assumes all responsibility to provide network connectivity for all computers that are to connect to the System. This applies to computers located both on Local and Wide Area networks. CLIENT is also responsible for SSL certificates and VPN deployments for those computers and users connecting to the System from a Wide Area Network connection.

7.  If CLIENT desires to deploy the System in either a Virtual Machine or Virtual Desktop Infrastructure, then Orchard can provide recommendations for the requirements of the System within these deployment options. Orchard is not responsible for the selection, installation, or support of either the Virtual environment or the VDI systems.

III. **Software:** Orchard will provide the following:

1.  **Software Components: Provided by Orchard.**

1a. Application License for Orchard Harvest Laboratory Information System for 64-bit Microsoft Windows;

1b. Nine (9) concurrent Harvest LIS Licenses;

1c. Integrated Harvest LIS Microbiology Module;

1d. Application License for Copia Laboratory Outreach and Integration System for 64-bit Microsoft Windows;

1e. Copia System Web access for up to twenty (20) concurrent users;

1f. Server and user licenses (as necessary) for remote access utilities;

1g. Integrated ZetaFax Software Module to allow for outbound faxing from <u>one (1) line</u> to be used exclusively with the System; and

1h. CLIENT shall receive a copy of all installed Software (to be used only for backup purposes).

2. **Right to Use.** Orchard hereby grants to CLIENT the right to use the above-listed licensed software on a non-exclusive basis until this Agreement is terminated pursuant to Section XVII. Orchard represents and warrants to CLIENT that Orchard has the right to license the same.

3. **Documentation.** CLIENT shall have the right to copy and use written manuals and documentation of the software provided by Orchard under this Agreement (including, but not limited to, the Training Outline and Operator's Manual.) CLIENT shall have the right to excerpt and post such materials onto an Internet website for instructional or reference purposes only, and limited to the materials directly related to the Internet-enabled portions of the System described in this Agreement.

4. **ZetaFax Software**. Orchard shall provide support for the ZetaFax Software as set forth in Section VIII, except that all fees related to upgrades, updates and/or new versions of the ZetaFax Software must be paid by CLIENT as directed by Orchard.

5. **Third Party Software.** All third party software provided by Orchard and required to operate the System is set forth in this Agreement. Orchard agrees and acknowledges that it hereby grants to CLIENT (and has all rights necessary to make such grant) all licenses and rights necessary to enable CLIENT to use such third party software to operate the System in the manner contemplated under this Agreement. To the fullest extent possible, Orchard will pass on to CLIENT all applicable warranties on such third party software so that CLIENT, either in its own name or through Orchard, may enforce the terms of any applicable warranty which has been extended to Orchard by such third party vendors to the same extent to which Orchard itself may enforce such warranties. Orchard will take such steps as may be reasonably requested by CLIENT to cooperate in the enforcement of such third party warranties. Except as specifically provided with respect to the ZetaFax Software, CLIENT will not be responsible for any fees for its use or maintenance of any third party software; however, in the case of a need for replacement of any licensed copies of third party software due to loss or destruction of the licensed back up copies, CLIENT will have to purchase new copies.

6. **Test Environment.** Orchard agrees to supply software at no additional charge to allow CLIENT to set up a test environment.

IV. <u>**Interfaces**</u>: Orchard will provide the interfaces listed below as part of this Agreement. The instrument and imaging system interfaces listed below will be completed during the System installation outlined in this Agreement. The instruments and imaging systems must be installed and ready to interface prior to the completion of the System installation as documented in the project plan (as defined in Section V).

1. **Main Site:**
   1a. TeCAN* or Panther
   1b. PR4100 Reader
   1c. Leader HC
   1d. ABI 7500 Fast

      1e.     Lightcycler
      1f.     Biotek Reader (Celestis / Qiagen)*

*Instrument Interfaces will be completed pending full model identification, review of the instruments interface specifications, and as determined in the project plan as agreed upon between Orchard and CLIENT.

2. **Other Interfaces:**

    2a.    McKesson Horizon Practice Plus Billing System Interface:  Orchard will receive patient demographic information sent from McKesson Horizon Practice Plus Billing System and Orchard will send billing information to McKesson Horizon Practice Plus Billing System. Details of implementation and go live will be included in the Project Plan. Orchard will take responsibility to lead the team comprised of representatives from McKesson, Orchard, and CLIENT to successfully complete the interface.

    2b.    GE Centricity Electronic Medical Records System Interface:  Orchard will receive orders sent from GE Centricity Electronic Medical Records System and Orchard will send finalized patient result information to GE Centricity Electronic Medical Records System. Details of implementation and go live will be included in the Project Plan. Orchard will take responsibility to lead the team comprised of representatives from GE, Orchard, and CLIENT to successfully complete the interface.

    2c.    CalREDIE Interface:  Orchard will send finalized patient result information to CalREDIE. Details of implementation and go live will be included in the Project Plan. Orchard will take responsibility to lead the team comprised of representatives from CalREDIE, Orchard, and CLIENT to successfully complete the interface.

    2d.    Additional Interfaces and Reference Laboratory Interfaces will be quoted as requested.

3. **Right to Use.**  Orchard hereby grants to CLIENT the right to use the interfaces listed above on a non-exclusive basis until this Agreement is terminated pursuant to Section XVII. Orchard represents and warrants to CLIENT that Orchard has the right to license the same.

4. CLIENT shall be responsible for ensuring that each instrument, imaging system and/or other information system interfaced has, in working order, all necessary software and input/output ports for interfacing with the System.

5. CLIENT is responsible for all costs and expenses imposed by other vendors for their portions of an interface.

6. Orchard is not responsible for the interfacing limitations of host computer system or reference laboratory to be interfaced.

7. An interface between the System and any host computer system or reference laboratory requires cooperation of all parties – Orchard, CLIENT, and the host computer vendor or reference laboratory – to be successfully completed.  It is CLIENT's responsibility to contact the other parties and secure commitments to complete their portions of the interface prior to the start of the project.

8. Orchard will validate that the components Orchard provides to make an interface effective are in place and functioning correctly. If an interface is not functioning completely or correctly due to a component provided by another vendor, then CLIENT will not delay acceptance of the System. It is the responsibility of CLIENT to contact the vendor in order to assure that the device is in working order and that all software and components necessary to accomplish the interface are available and of the correct revision level.

9. If any instrumentation, with interfaces outlined in this Agreement, is not installed and ready to be interfaced prior to the completion of the System installation as outlined in the project plan, then Orchard will supply quotations for the interfaces to be completed at another time under a separate agreement.

V.    **Installation and Training:**

1. A Project Plan will be mutually agreed upon between CLIENT and Orchard and will be used as the primary coordination document for the entire installation project. Updates to the Project Plan will be made only upon the mutual agreement of CLIENT and Orchard.

2. Installation and training will begin based on the Project Plan agreed upon by CLIENT and Orchard.

3. Installation and training expenses, including but not limited to airfare, hotel and per diem, are included in the System purchase price.

4. Orchard's technical staff will set up all computer hardware provided by Orchard, establish all physical connections, and set up all licensed software on-site at CLIENT's facility.

5. Installation and training will consist of:

   5a.    One (1) person to attend Harvest LIS System Administrator Training (Training in Carmel, Indiana).

   5b.    One (1) person to attend Harvest LIS Microbiology Training (Training in Carmel, Indiana).

   5c.    Two (2) people to attend Copia System Administrator Training (Training in Carmel, Indiana).

   5d.    Up to fifteen (15) weeks of on-site installation and training that may be completed on-site at CLIENT's facility, to facilitate the set up and installation of the System as described in the configuration as outlined in Section I. Configuration.

6. It is understood that installation and training may not be on contiguous time frames.

7. All travel arrangements for the CLIENT's employee(s) to the off-site training included within this Agreement will be scheduled in advance of the class. Once travel arrangements are made, any charges relating to changes requested by the CLIENT will be the responsibility of the CLIENT. This includes all changes, transfers, cancellations, etc. to hotel, transportation, and airfare.

8. All travel arrangements for Orchard's employee(s) to the CLIENT facility for the installation and training included within this agreement will be scheduled in advance of the time on-site. Once travel arrangements are made, any charges relating to changes made at the CLIENT's request will be the responsibility of the CLIENT. This includes changes, transfers, cancellations, etc. to hotel, transportation, and airfare.

9. On-site Working Week: A week consists of 32 on-site hours and 8 hours of travel for a total of 40 hours; hours available for scheduling are during a standard business week, Monday through Friday, and exclude weekends and holidays. Weeks with multiple Orchard staff members on-site will be counted as multiple weeks, one per person.

10. CLIENT will assign two people to act as project coordinators for the entire project: One person for laboratory decisions, and one for IT decisions.

11. One Harvest LIS System Administrator and three operators will be trained and certified. Training will occur at Orchard's corporate office and on-site at CLIENT, OR solely on-site at CLIENT.

12. One Copia System Administrator will be trained and certified. Training will occur solely on-site at CLIENT.

13. Training will be coordinated between Orchard and CLIENT in advance. Individual Orchard Systems Engineers will not be expected to work more than 12 hours during a 24-hour period.

14. Completion of System installation is defined as delivery of hardware, software and interfaces, training, and Orchard's verification of the System, for the System configuration outlined in this Agreement.

VI.     **No Included Software Modifications or Customizations:**  No modifications or customizations to the version of the System current as of the Effective Date are included as part of this Agreement. CLIENT will receive all general release software upgrades as part of the standard support agreement, for so long as CLIENT maintains a support agreement.

VII.    **Modifications or Customizations at the Direction of CLIENT**:  To the extent that the parties contract for modifications or customizations (all of which are outside the scope of this Agreement, as set forth in Section VI), Orchard shall own all such modifications or customizations even if made at the direction of and/or with the input of CLIENT.  The parties agree that any and all intellectual property rights in and to such modifications or customizations (including but not limited to any copyrights) are owned solely by Orchard, and CLIENT hereby agrees to assign, convey, and otherwise transfer to Orchard free of charge all of its right, title, and interest in and to such intellectual property rights, and agrees to execute any documentation necessary to carry out such assignment, conveyance and transfer. For avoidance of doubt, the parties acknowledge that such modifications or customizations (and the accompanying intellectual property rights) shall be included within the software licensed to CLIENT hereunder, and may be used by CLIENT on a non-exclusive basis pursuant to the grant herein.

VIII.   **Service and Support**:

1. For one full year from the date of completion of System installation, online telephone software service and support will be provided by Orchard as part of (i.e., included in) the purchase price, including modem diagnostics and all general release software upgrades to the System. For purposes of this Agreement, System installation is defined as delivery of hardware, software and interfaces, training, and Orchard's verification of the System, for the System configuration outlined in this Agreement.  Orchard agrees that support pricing, for the System configuration outlined in this Agreement, shall not increase by more than 3.0% per year for years two through five, and no more than 4.0% per year for years six through ten.

    1a.    Following year one, and provided that CLIENT is current on payment of all amounts due to Orchard under this Agreement or any other agreement between the parties, the annual Silver software support agreement for the System configuration outlined in this Agreement will be $35,293.00 and is subject to increase if the System is expanded.

    1b.    System Expansion includes additional licenses or users of any type, modules, additional host interfaces, and reference laboratory interfaces.

    1c.    CLIENT is responsible for installation and maintenance of an Internet connection or VPN to the System to accommodate remote technical support by Orchard.

2. Orchard represents that it has the skills, expertise, and licenses/permits necessary to perform the service and support required under this Agreement. Accordingly, Orchard shall perform all such service and support in the manner and according to the standards observed by a competent practitioner of the same

profession in which Orchard is engaged. All products of whatsoever nature, which Orchard delivers to CLIENT pursuant to this Agreement, shall be prepared in a first class and workmanlike manner and shall conform to the standards of quality normally observed by a person practicing in Orchard's profession.

IX. **Investment and Payment Terms:** Investment in the System is $294,110.00, to be paid as described in Attachment B. Sales tax will be collected when applicable.

X. **Taxes:** Orchard shall pay all taxes, levies, duties, and assessments of every nature due in connection with any work under this Agreement and shall make any and all payroll deductions required by law. CLIENT shall not be responsible for paying any taxes on Orchard's behalf, and should CLIENT be required to do so by state, federal, or local taxing agencies, Orchard agrees to promptly reimburse CLIENT for the full value of such paid taxes plus interest and penalty, if any. These taxes shall include, but not be limited to, the following: FICA (Social Security), unemployment insurance contributions, income tax, disability insurance, and workers' compensation insurance.

XI. **Hardware Warranty:** All new hardware components provided by Orchard are warranted by the original manufacturer and may be repaired or replaced at the option of the manufacturer. CLIENT should contact Orchard first so that a determination may be made as to the required corrective action.

XII. **Representations and Warranties:**

1. **Licensed Software**. Orchard hereby represents and warrants that the Licensed Software will conform in all material respects to the functional specifications included in this Agreement and the Operator's Manual supplied with the System for a period of ninety (90) days after the completion of System installation. In the event of a breach of this representation and warranty, Orchard will take such actions as may be necessary to conform the Licensed Software to the functional specifications at no additional charge to CLIENT. THE WARRANTY SET FORTH IN THIS SECTION XII IS THE ONLY WARRANTY MADE BY ORCHARD RELATING TO THE LICENSED SOFTWARE. ORCHARD EXPRESSLY DISCLAIMS, AND CLIENT HEREBY EXPRESSLY WAIVES, ALL OTHER WARRANTIES EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. ORCHARD DOES NOT WARRANT THAT THE LICENSED SOFTWARE WILL MEET CLIENT'S REQUIREMENTS OR THAT THE OPERATION OF THE LICENSED SOFTWARE WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT ERRORS IN THE LICENSED SOFTWARE CAN OR WILL BE CORRECTED. ORCHARD'S LIMITED WARRANTY IS IN LIEU OF ALL LIABILITIES OR OBLIGATIONS OF ORCHARD FOR DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE USE OR PERFORMANCE OF THE LICENSED SOFTWARE.

2. **Debarment and Suspension**. Orchard represents and warrants to CLIENT that it and its employees and principals are not debarred, suspended, or otherwise excluded from or ineligible for, participation in federal, state, or county government contracts. Orchard certifies that it shall not contract with a subcontractor that is so debarred or suspended.

3. **Conflict of Interest**. Orchard represents and warrants to CLIENT that Orchard presently has no employment or interest and shall not acquire any employment or interest, direct or indirect, including any interest in any business, property, or source of income, which would conflict in any manner or degree with the performance of services required to be performed under this Agreement. Orchard further covenants that in the performance of this Agreement, no person having any such interest shall be employed by Orchard. CLIENT retains the right to waive a conflict of interest disclosed by Orchard if CLIENT determines it to be immaterial, and such waiver is only effective if provided by CLIENT to Orchard in writing.

XIII.   **Access to Source Code:**  In the unlikely event that continued support of the CLIENT's System by Orchard or its successor is not available during any active support period during the term of this Agreement (i.e., a declaration of bankruptcy, cessation of business by Orchard or any other dissolution of Orchard Software Corporation) a complete copy of the most current version of the System source code, with internal documentation, will be provided to CLIENT (in confidence) for the sole purpose of maintaining the licensed use of the System at CLIENT's laboratory location at the time of the Effective Date, and to provide laboratory information for CLIENT's patients only. Except for such individual use by CLIENT at its business location(s) for the purposes of maintaining its laboratory information system, such code and documentation shall at all times be maintained in confidence. No disclosure of such information shall be made other than that required to carry out the foregoing except by the authority of Orchard. No rights to all or any part of the source code shall be transferred to CLIENT pursuant to this Agreement other than rights of use by CLIENT explicitly provided in this Section XIII.

XIV.   **Business Associate:**  The parties agree to the terms and conditions set forth in Attachment C – HIPAA Business Associate Agreement (BAA), attached hereto and incorporated herein by reference.

XV.    **Options (Not Included in this Agreement):**

1. CLIENT may contract, as a separate agreement, with Orchard for additional software, hardware and support at any time during the term of this Agreement.

   1a.   Bi-directional Host Interfaces (EMR, LIS, HIS, etc.) - $9,500.00 each
   - Host system Copia will accept orders from Host system.
   - Copia will electronically send finalized patient results to Host system.
   - Does NOT include any necessary charges from other vendors.

   1b.   Unidirectional Host Interfaces (EMR, LIS, HIS, etc.) - $6,500.00 each
   - Copia will electronically send finalized patient results to Host system.
   - Does NOT include any necessary charges from other vendors.

   1c.   CDC Interface / File Transfer - $6,500.00
   - Orchard will send finalized patient result information to the CDC via LRN-B interface.

   1d.   Reference Laboratory Interface - $13,500.00 each

   1e.   Historical Data Conversion - To be quoted upon review of current data export file
   - Includes extraction, conversion (by Korchek Technologies) and import (by Orchard).
   - Details of the Historical Data Conversion will be outlined in a project plan between Korchek Technologies, Orchard and CLIENT.

   1f.   Bar Code Scanner (Motorola Symbol DS4208) - $515.00 each

   1g.   Bar Code Scanner (Motorola DS6707 DC) - $620.00 each

   1h.   Zebra LP2824 Plus Bar Code Label Printer - $515.00 each

   1i.   Zebra GX420t Bar Code Label Printer - $920.00 each

   1j.   Zebra ZT230 Bar Code Label Printer - $1,900.00 each

   1k.   Additional Harvest LIS User License - $7,900.00 each

1l. Additional Copia User License - $920.00 each

1m. Additional On-site Implementation Week - $7,900.00 each

1n. On-site Week for Training - $7,900.00 each

1o. Additional Seat for Harvest LIS System Administrator Training - $3,900.00 each

1p. Additional Seat for Copia System Administrator Training - $3,900.00 each

1q. Additional Seat for Harvest LIS Microbiology Training - $3,500.00 each

1r. Seat for Harvest LIS Advanced User Training - $3,900.00 each

2. The pricing for the options listed above will be effective for twelve (12) months from the Effective Date of this Agreement.

XVI. **Indemnification and Insurance:** The parties agree to the terms and conditions set forth in Attachment D – Indemnification and Insurance, attached hereto and incorporated herein by reference.

XVII. **Term and Termination:** This Agreement is effective as of the Effective Date and shall continue until terminated as set forth herein. Grounds for termination are as follows:

1. **By CLIENT.** CLIENT may, by written notice to Orchard, terminate this Agreement in whole or in part at any time, whether for CLIENT's convenience, for nonappropriation of funds, or because of the failure of ORCHARD to fulfill the obligations herein.

    1a. For Convenience. CLIENT may terminate this Agreement in whole or in part upon thirty (30) days written notice. During the thirty (30) day period, Orchard shall, as directed by CLIENT, wind down and cease its services as quickly and efficiently as reasonably possible, without performing unnecessary services or activities and by minimizing negative effects on CLIENT from such winding down and cessation of services.

    1b. For Nonappropriation of Funds. Notwithstanding any other provision of this Agreement, in the event that no funds or insufficient funds are appropriated or budgeted by federal, state or county governments, or funds are not otherwise available for payments in the fiscal year(s) covered by the term of this Agreement, then CLIENT will notify Orchard of such occurrence and CLIENT may terminate or suspend this Agreement in whole or in part, with or without a prior notice period. Subsequent to termination of this Agreement under this provision, CLIENT shall have no obligation to make payments with regard to the remainder of the term.

    1c. For Cause. Should Orchard default in the performance of this Agreement or materially breach any of its provisions, CLIENT may, at CLIENT's sole option, terminate or suspend this Agreement in whole or in part by written notice. Upon receipt of notice, Orchard shall immediately discontinue all services affected (unless the notice directs otherwise) and notify CLIENT as to the status of its performance. The date of termination shall be the date the notice is received by Orchard, unless the notice directs otherwise.

2. **By Orchard.** Should CLIENT fail to pay Orchard all or any part of the payments set forth in Attachment B when due, Orchard may, at Orchard's option terminate this Agreement if such failure is not remedied by CLIENT within thirty (30) days of written notice to CLIENT of such late payment.

XVIII. **Effect of Termination:** Upon termination of this Agreement by any party for whatever reason, CLIENT shall have no further right to access and use the System, and CLIENT shall uninstall the licensed Software from its servers and workstation hardware. If this Agreement is terminated by CLIENT based upon a breach by Orchard, and such termination occurs before completion of System installation, then Orchard shall refund the applicable pro rata amount of costs and fees paid by CLIENT to Orchard. If termination by CLIENT based upon a breach by Orchard occurs after the completion of System installation, or if this Agreement is terminated for any other reason, then no costs or fees shall be refunded to CLIENT; *provided, however*, that if CLIENT terminates this Agreement based upon a breach by Orchard within the twelve (12) months immediately following completion of System installation, then Orchard will refund to CLIENT the applicable pro rata amount of prepaid fees for service and support only.

Further, upon termination, Orchard shall deliver to CLIENT all data, estimates, graphs, summaries, reports, and all other property, records, documents or papers as may have been accumulated or produced by Orchard in performing this Agreement, whether completed or in process, except such items as CLIENT may, by written permission, permit Orchard to retain.

XIX. **Records, Audit and Review:** Orchard shall keep such business records pursuant to this Agreement as would be kept by a reasonably prudent practitioner of Orchard's profession and shall maintain such records for at least four (4) years following the termination of this Agreement. All accounting records shall be kept in accordance with generally accepted accounting principles. CLIENT shall have the right to audit and review all such documents and records, not more than once in any calendar year, at any time during Orchard's regular business hours and upon reasonable notice. In addition, if this Agreement exceeds ten thousand dollars ($10,000.00), Orchard shall be subject to the examination and audit of the California State Auditor, at the request of CLIENT or as part of any audit of CLIENT, for a period of three (3) years after final payment under the Agreement (Cal. Govt. Code Section 8546.7). Orchard shall participate in any audits and reviews, whether by CLIENT or the State, at no charge to CLIENT. If federal, state or county audit exceptions are made relating to this Agreement, Orchard shall reimburse all costs incurred by federal, state, and/or county governments associated with defending against the audit exceptions or performing any audits or follow-up audits, including but not limited to: audit fees, court costs, attorneys' fees based upon a reasonable hourly amount for attorneys in the community, travel costs, penalty assessments and all other costs of whatever nature. Immediately upon notification from CLIENT, Orchard shall reimburse the amount of the audit exceptions and any other related costs directly to CLIENT as specified by CLIENT in the notification.

XX. **Designated Representative:** Ellen Willis-Conger at phone number 805-681-5446 is the representative of CLIENT and will administer this Agreement for and on behalf of CLIENT. Curt Johnson at phone number 800-856-1948 is the authorized representative for Orchard. Changes in designated representatives shall be made only after advance written notice to the other party.

XXI. **Notices:** Any notice or consent required or permitted to be given under this Agreement shall be given to the respective parties in writing, by personal delivery or facsimile, or with postage prepaid by first class mail, registered or certified mail, or express courier service, as follows:

>       To CLIENT:    Ellen Willis-Conger
>                     300 N. San Antonio Road, Bldg. 1
>                     Santa Barbara, CA 93110
>                     Fax:
>
>       To Orchard:   Curt Johnson
>                     701 Congressional Boulevard, Suite 360
>                     Carmel, IN  46032
>                     Fax:

or at such other address or to such other person that the parties may from time to time designate in accordance with this Notices section.  If sent by first class mail, notices and consents under this section shall be deemed to be received five (5) days following their deposit in the U.S. mail.  This Notices section shall not be construed as meaning that either party agrees to service of process except as required by applicable law.

XXII.    **Assignment:**  Orchard shall not assign, transfer or subcontract this Agreement or any of its rights or obligations under this Agreement without the prior written consent of CLIENT and any attempt to so assign, subcontract or transfer without such consent shall be void and without legal effect and shall constitute grounds for termination.   All representations, covenants and warranties set forth in this Agreement, by or on behalf of, or for the benefit of any or all of the parties hereto, shall be binding upon and inure to the benefit of such party, its successors and assigns.

XXIII.   **Non-Exclusive Agreement:**  Orchard understands that this is not an exclusive Agreement and that CLIENT shall have the right to negotiate with and enter into contracts with others providing the same or similar services as those provided by Orchard as CLIENT desires.

XXIV.   **Independent Contractor:**  It is mutually understood and agreed that Orchard (including any and all of its officers, agents and employees), shall perform all of its services under this Agreement as an independent contractor as to CLIENT and not as an officer, agent, servant, employee, joint venturer, partner or associate of CLIENT. Furthermore, CLIENT shall have no right to control, supervise, or direct the manner or method by which Orchard shall perform its work and function.  However, CLIENT shall retain the right to administer this Agreement so as to verify that Orchard is performing its obligations in accordance with the terms and conditions hereof.  Orchard understands and acknowledges that it shall not be entitled to any of the benefits of a CLIENT employee, including but not limited to vacation, sick leave, administrative leave, health insurance, disability insurance, retirement, unemployment insurance, workers' compensation and protection of tenure. Orchard shall be solely liable and responsible for providing to, or on behalf of, its employees all legally-required employee benefits.  In addition, Orchard shall be solely responsible and save CLIENT harmless from all matters relating to payment of Orchard's employees, including compliance with Social Security withholding and all other regulations governing such matters. It is acknowledged that during the term of this Agreement, Orchard may be providing services to others unrelated to the CLIENT or to this Agreement.

XXV.    **No Publicity or Endorsement:**  Orchard shall not use CLIENT's name or logo or any variation of such name or logo in any publicity, advertising or promotional materials.  Orchard shall not use CLIENT's name or logo in any manner that would give the appearance that CLIENT is endorsing Orchard.  Orchard shall not in any way contract on behalf of or in the name of CLIENT.  Orchard shall not release any informational pamphlets, notices, press releases, research reports, or similar public notices concerning the CLIENT or its projects, without obtaining the prior written approval of CLIENT.

XXVI.   **CLIENT Property and Information:**  All of CLIENT's property, documents, and information provided for Orchard's use in connection with the services shall remain CLIENT's property, and Orchard shall return any such items whenever requested by CLIENT and whenever required according to the Section XVIII of this Agreement.  Orchard may use such items only in connection with providing the services.  Orchard shall not disseminate any CLIENT property, documents, or information without CLIENT's prior written consent.

XXVII.  **Non-Discrimination:**  CLIENT hereby notifies Orchard that CLIENT's Unlawful Discrimination Ordinance (Article XIII of Chapter 2 of the Santa Barbara County Code) applies to this Agreement and is incorporated herein by this reference with the same force and effect as if the ordinance were specifically set out herein and Orchard agrees to comply with said ordinance.

XXVIII. **Severability:** If any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, then such provision or provisions shall be deemed severable from the remaining provisions hereof, and such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

XXIX. **Remedies Not Exclusive:** No remedy herein conferred upon or reserved to either party is intended to be exclusive of any other remedy or remedies, and each and every such remedy, to the extent permitted by law, shall be cumulative and in addition to any other remedy given hereunder or now or hereafter existing at law or in equity or otherwise.

XXX. **Section Headings:** The headings of the several sections shall be solely for convenience of reference and shall not affect the meaning, construction or effect hereof.

XXXI. **No Waiver of Default:** No delay or omission of either party to exercise any right or power arising upon the occurrence of any event of default shall impair any such right or power or shall be construed to be a waiver of any such default or an acquiescence therein; and every power and remedy given by this Agreement to such party shall be exercised from time to time and as often as may be deemed expedient in the sole discretion of that party.

XXXII. **Compliance with Law:** Orchard shall, at its sole cost and expense, comply with all County, State and Federal ordinances and statutes now in force or which may hereafter be in force with regard to this Agreement. The judgment of any court of competent jurisdiction, or the admission of Orchard in any action or proceeding against Orchard, whether CLIENT is a party thereto or not, that Orchard has violated any such ordinance or statute, shall be conclusive of that fact as between Orchard and CLIENT.

XXXIII. **Governing Law and Jurisdiction:** This Agreement shall be governed by the laws of the State of California. Any litigation regarding this Agreement or its contents shall be filed in the County of Santa Barbara, if in state court, or in the federal district court nearest to Santa Barbara County, if in federal court.

XXXIV. **Survival:** All provisions of this Agreement which by their nature are intended to survive the termination or expiration of this Agreement shall survive such termination or expiration.

XXXV. **Time Essence:** Time is of the essence in this Agreement and each covenant and term is a condition herein.

XXXVI. **Shipping and Freight Cost:** All goods will be shipped FOB destination, prepaid by Orchard.

XXXVII. **Authority:** All signatories and parties to this Agreement warrant and represent that they have the power and authority to enter into this Agreement in the names, titles and capacities herein stated and on behalf of any entities, persons, or firms represented or purported to be represented by such entity(ies), person(s), or firm(s) and that all formal requirements necessary or required by any state and/or federal law in order to enter into this Agreement have been fully complied with. Furthermore, by entering into this Agreement, Orchard hereby warrants that it shall not have breached the terms or conditions of any other contract or agreement to which Orchard is obligated, which breach would have a material effect hereon.

XXXVIII. **Execution of Counterparts:** This Agreement may be executed in any number of counterparts and each of such counterparts shall for all purposes be deemed to be an original; and all such counterparts, or as many of them as the parties shall preserve undestroyed, shall together constitute one and the same instrument.

XXXIX. **Entire Agreement:** In conjunction with the matters considered herein, this Agreement contains the entire understanding and agreement of the parties and there have been no promises, representations, agreements, warranties or undertakings by any of the parties, either oral or written, of any character or nature hereafter

binding except as set forth herein.  This Agreement may be altered, amended or modified only by an instrument in writing, executed by the parties to this Agreement and by no other means.  Each party waives their future right to claim, contest or assert that this Agreement was modified, canceled, superseded, or changed by any oral agreements, course of conduct, waiver or estoppel.

Agreement for Services of Independent Contractor between the County of Santa Barbara (CLIENT) and Orchard Software Corporation.

**IN WITNESS WHEREOF,** the parties have executed this Agreement as of the Effective Date.

| **ATTEST:** | **COUNTY OF SANTA BARBARA:** |
|---|---|
| Mona Miyasato<br>County Executive Officer<br>Clerk of the Board | |

By: _____          By: _____
         Deputy Clerk                                    Chair, Board of Supervisors

                                             Date: _____

| **RECOMMENDED FOR APPROVAL:** | **APPROVED AS TO ACCOUNTING FORM:** |
|---|---|
| Takashi Wada, MD, MPH<br>Director / Deputy Health Officer | Robert W. Geis, CPA<br>Auditor-Controller |

By: _____          By: _____
         Director                                        Deputy

| **APPROVED AS TO FORM:** | **APPROVED AS TO FORM:** |
|---|---|
| Ray Aromatorio, ARM, AIC<br>Risk Management | Michael C. Ghizzoni<br>County Counsel |

By: _____          By: _____
         Risk Manager                              Deputy County Counsel

Agreement for Services of Independent Contractor between the County of Santa Barbara (CLIENT) and Orchard Software Corporation.

**IN WITNESS WHEREOF,** the parties have executed this Agreement as of the Effective Date.

**ORCHARD SOFTWARE CORPORATION**

By: _____

Authorized Representative

Name: _____

Title: _____

# Attachment A
# Hardware Components:

1. **CLIENT will provide the server and workstation hardware.** Minimum recommended specifications are outlined below.

   1a. **Any Necessary Harvest LIS Workstation Configurations:  Provided by CLIENT**
   Modern Desktop Process (1.89 GHz or better)
   4+ GB of Memory
   250GB of Hard Drive Space
   Windows Professional Edition (Home is not supported)

   1b. **Any Necessary Copia Workstation Configurations:  Provided by CLIENT**
   Modern Desktop Process (1.89 GHz or better)
   4+ GB of Memory
   250GB of Hard Drive Space
   Windows Professional Edition (Home is not supported)
   Internet Explorer 7+ or Firefox 3.5+
   Up-to-date Java Release

   1c. **One (1) Harvest LIS Network Server Configuration:  Provided by CLIENT**
   Modern Server Processors (Intel Xeon quad core 2.0GHz or above)
   20+ GB of Memory
   600GB of Hard Drive Space (Raid 1+0 preferred for performance)
   An Offsite Backup Solution

   OR

   **One (1) Harvest LIS Virtual Server Configuration:  Provided by CLIENT**
   Operating System (OS) = Windows 2008 R2 SP1, 64-bit or Later
   Processor Core Allocation = Minimum 4
   Random Access Memory (RAM) = 16GB **Statically** Allocated
   OS Store = 60GB + RAM Allocation
   Storage = 300GB (can be dynamically allocated)
   Storage Performance = **150 Input / Output Per Second (IOPS)**
   Application = Orchard System Client / Server Software with Local 4th Dimension (4D) Database

   1d. **One (1) Copia SQL Database Server Configuration:  Provided by CLIENT**
   Modern Server Processors
   32+ GB of Memory
   600GB of Hard Drive Space (Raid 1+0 preferred for performance)
   An Offsite Backup Solution

   OR

   **One (1) Copia SQL Database Virtual Server Configuration:  Provided by CLIENT**
   Operating System (OS) = Windows 2008 R2 SP1, 64-bit or Later
   Processor Core Allocation = Minimum 4
   Random Access Memory (RAM) = 32+ GB **Statically** Allocated
   OS Store = 60GB + RAM Allocation
   Database Storage = 300GB

Application = Microsoft SQL Server 2008 R2

1e. **TBD Number of Copia Tomcat Server Configurations (minimum two):  Provided by CLIENT**
Modern Server Processor
8+ GB of Memory
250GB of Hard Drive Space (Raid 1 minimum)
An Offsite Backup Solution

OR

**TBD Number of Copia Tomcat Virtual Server Configurations (minimum two):  Provided by CLIENT**
Operating System (OS) = Windows 2008 R2 SP1, 64-bit or Later
Processor Core Allocation = Minimum 2
Random Access Memory (RAM) = 8GB **Statically** Allocated
OS Store = 75GB + RAM Allocation
Application = Apache Tomcat 6

2. **Ancillary Hardware:  Provided By CLIENT.**
    2a. Any Necessary High Speed Laser Printer(s)
    2b. Any Necessary Laser Printer(s)
    2c. Any Necessary Zebra LP2824 Plus, Zebra GX420t, or Zebra ZT230 Bar Code Label Printer(s)
    2d. Any Necessary Symbol Bar Code Scanner(s) with associated cables and software.

3. **Ancillary Hardware:  Provided By Orchard.**
    3a. All serial port expansion cards, hubs, and connectors necessary to establish the Orchard Harvest Network and all interfaces listed in this Agreement.
    3b. Modem to accommodate single line faxing; modem will be connected to one of the Orchard Harvest workstations.

4. CLIENT will provide all necessary cabling, phone lines, dedicated fax line(s), and support services required to interface the System to CLIENT's existing LAN and/or WAN.

5. NOTE: If any workstations on the System network require communications via a Wide Area Network, then CLIENT will be responsible for providing and maintaining a physical link of at least 512kbps (preferably T1), such as access to a network infrastructure or dedicated data line and all necessary terminating hardware between the remote workstations and the System network hub.

6. CLIENT assumes all responsibility to provide network connectivity for all computers that are to connect to the System. This applies to computers located both on Local and Wide Area Networks. CLIENT is also responsible for SSL certificates and VPN deployments for those computers and users connecting to the System from a Wide Area Network connection.

7. If CLIENT desires to deploy the System in either a Virtual or Thin Client environment, then Orchard can provide recommendations for the requirements of the System within these deployment options. Orchard is not responsible for the selection, installation, or support of either the Virtual or Thin Client environment.

# Attachment B
# Investment and Payment Terms:

A. For Orchard services to be rendered under this Agreement, Orchard shall be paid a total contract amount, including cost reimbursements, not to exceed $ 294,110.00. Sales tax will be collected when applicable.

B. Payment for services and /or reimbursement of costs shall be made upon Orchard's satisfactory performance, based upon the scope and methodology contained in the Agreement as determined by CLIENT.

C. Upon completion of the work for each milestone and/or delivery to CLIENT of item(s) specified below, Orchard shall submit to the CLIENT DESIGNATED REPRESENTATIVE an invoice or certified claim on the County Treasury for the service performed in accomplishing each milestone. These invoices or certified claims must cite the assigned Board Contract Number.  The CLIENT DESIGNATED REPRESENTATIVE shall evaluate the quality of the service performed and/or item(s) delivered and if found to be satisfactory shall initiate payment processing. CLIENT shall pay invoices or claims for satisfactory work within 30 days of receipt of correct and complete invoices or claims from Orchard.

| Percentage of Total Contract Amount | Milestone Description | Maximum Amount Chargeable* |
|---|---|---|
| 25% | 25% of purchase price due following initial consultation and acceptance of an Orchard Project Manager | $73,527.50 |
| 25% | 25% of the purchase price upon initial enrollment of CLIENT representatives in the System Admin Training Classes | $73,527.50 |
| 25% | 25% of purchase price upon completion of the hardware and software installation | $73,527.50 |
| 25% | 25% of purchase price due upon completion of the system installation including completion of the McKesson Horizon Practice Plus Billing System and GE Centricity EMR interfaces as agreed upon in this Agreement | $73,527.50 |

The CalREDIE interface included as part of this Agreement may be completed after the initial system installation.  CLIENT may withhold payment equal to $6,500.00 for the CalREDIE interface until the interface is completed with full functionality as intended for end use and documented in interface specifications and interface project plan.

The final milestone payment above shall not be made until all services, except for the CalREDIE interface as noted above, have been completed and item(s) as specified in the Agreement have been delivered and found to be satisfactory.

*Sales tax will be collected when applicable.

D. CLIENT's failure to discover or object to any unsatisfactory work or billings prior to payment will not constitute a waiver of CLIENT's right to require Orchard to correct such work or billings or seek any other legal remedy.

# Attachment C
# HIPAA Business Associate Agreement (BAA):

**May 2013**

This Business Associate Agreement ("BAA") supplements and is made a part of the Agreement between County of Santa Barbara, a political subdivision of the State of California (referred to herein as "Covered Entity") and Orchard Software Corporation (referred to herein as "Business Associate").

<u>RECITALS</u>

Covered Entity wishes to disclose certain information to Business Associate pursuant to the terms of the Agreement, some of which may constitute Protected Health Information ("PHI") (defined below).

Covered Entity and Business Associate intend to protect the privacy and provide for the security of PHI disclosed to Business Associate pursuant to the Agreement in compliance with the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 ("HIPAA"), the Health Information Technology for Economic and Clinical Health Act, Public Law 111-005 ("HITECH Act"), and 45 CFR Parts 160 and 164, Subpart C (the "Security Rule"), Subpart D (the "Data Breach Notification Rule") and Subpart E (the "Privacy Rule") (collectively, the "HIPAA Regulations").

As part of the HIPAA Regulations, the Privacy Rule and the Security Rule (defined below) require Covered Entity to enter into a contract containing specific requirements with Business Associate prior to the disclosure of PHI, as set forth in, but not limited to, Title 45, Sections 164.314(a), 164.502(e) and 164.504(e) of the Code of Federal Regulations (C.F.R.) and contained in this BAA.

In consideration of the mutual promises below and the exchange of information pursuant to this BAA, the parties agree as follows:

A. Definitions

1. **Breach** shall have the meaning given to such term under the HITECH Act [42 U.S.C. Section 17921].

2. **Business Associate** shall have the meaning given to such term under the Privacy Rule, the Security Rule, and the HITECH Act, including but not limited to, 42 U.S.C. Section 17938 and 45 C.F.R. Section 160.103.

3. **Covered Entity** shall have the meaning given to such term under the Privacy Rule and the Security Rule, including, but not limited to, 45 C.F.R. Section 160.103.

4. **Data Aggregation** shall have the meaning given to such term under the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.501.

5. **Designated Record Set** shall have the meaning given to such term under the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.501.

6. **Electronic Protected Health Information** means Protected Health Information that is maintained in or transmitted by electronic media.

7. **Electronic Health Record** shall have the meaning given to such term in the HITECH Act, including, but not limited to, 42 U.S.C. Section 17921.

8. **Health Care Operations** shall have the meaning given to such term under the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.501.

9. **Privacy Rule** shall mean the HIPAA Regulation that is codified at 45 C.F.R. Parts 160 and 164, Subparts A and E.

10. **Protected Health Information or PHI** means any information, whether oral or recorded in any form or medium: (i) that relates to the past, present or future physical or mental condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual; and (ii) that identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual, and shall have the meaning given to such term under the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.501. Protected Health Information includes Electronic Protected Health Information [45 C.F.R. Sections 160.103, 164.501].

11. **Protected Information** shall mean PHI provided by Covered Entity to Business Associate or created or received by Business Associate on Covered Entity's behalf.

12. **Security Rule** shall mean the HIPAA Regulation that is codified at 45 C.F.R. Parts 160 and 164, Subparts A and C.

13. **Unsecured PHI** shall have the meaning given to such term under the HITECH Act and any guidance issued pursuant to such Act including, but not limited to, 42 U.S.C. Section 17932(h).

B. Obligations of Business Associate

1. **Permitted Uses.** Business Associate shall not use Protected Information except for the purpose of performing Business Associate's obligations under the Agreement and as permitted under the Agreement and this BAA. Further, Business Associate shall not use Protected Information in any manner that would constitute a violation of the Privacy Rule or the HITECH Act if so used by Covered Entity. However, Business Associate may use Protected Information (i) for the proper management and administration of Business Associate, (ii) to carry out the legal responsibilities of Business Associate, or (iii) for Data Aggregation purposes for the Health Care Operations of Covered Entity [45 C.F.R. Sections 164.504(e)(2)(ii)(A) and 164.504(e)(4)(i)].

2. **Permitted Disclosures.** Business Associate shall not disclose Protected Information except for the purpose of performing Business Associate's obligations under the Agreement and as permitted under the Agreement and this BAA. Business Associate shall not disclose Protected Information in any manner that would constitute a violation of the Privacy Rule or the HITECH Act if so disclosed by Covered Entity. However, Business Associate may disclose Protected Information (i) for the proper management and administration of Business Associate; (ii) to carry out the legal responsibilities of Business Associate; (iii) as required by law; or (iv) for Data Aggregation purposes for the Health Care Operations of Covered Entity. If Business Associate discloses Protected Information to a third party, Business Associate must obtain, prior to making any such disclosure, (i) reasonable written assurances from such third party that such Protected Information will be held confidential as provided pursuant to this BAA and only disclosed as required by law or for the purposes for which it was disclosed to such third party, and (ii) a written agreement from such third party to immediately notify Business Associate of any breaches of confidentiality of the Protected Information, to the extent the third party has obtained knowledge of such breach [42 U.S.C. Section 17932; 45 C.F.R. Sections 164.504(e)(2)(i), 164.504(e)(2)(i)(B), 164.504(e)(2)(ii)(A) and 164.504(e)(4)(ii)].

3. **Prohibited Uses and Disclosures.** Business Associate shall not use or disclose Protected Information for fundraising or marketing purposes. Business Associate shall not disclose Protected Information to a health plan for payment or health care operations purposes if the patient has requested this special restriction, and has paid out of pocket in full for the health care item or service to which the PHI solely relates [42 U.S.C. Section 17935(a)]. Business Associate

shall not directly or indirectly receive remuneration in exchange for Protected Information, except with the prior written consent of Covered Entity and as permitted by the HITECH Act, 42 U.S.C. section 17935(d)(2); however, this prohibition shall not affect payment by Covered Entity to Business Associate for services provided pursuant to the Agreement. Business Associate shall mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of PHI by Business Associate in violation of this Agreement, the BAA, or the HIPAA Regulations.

4. **Appropriate Safeguards.** Business Associate shall implement appropriate safeguards as are necessary to prevent the use or disclosure of Protected Information otherwise than as permitted by the Agreement or this BAA, including, but not limited to, administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of the Protected Information, in accordance with 45 C.F.R. Sections 164.308, 164.310, and 164.312. [45 C.F.R. Section 164.504(e)(2)(ii)(B); 45 C.F.R. Section 164.308(b)]. Business Associate shall comply with the policies and procedures and documentation requirements of the HIPAA Security Rule, including, but not limited to, 45 C.F.R. Section 164.316 [42 U.S.C. Section 17931].

5. **Reporting of Improper Access, Use or Disclosure.** Business Associate shall report to Covered Entity in writing of any access, use or disclosure of Protected Information not permitted by the Agreement and this BAA, and any Breach of Unsecured PHI, as required by the Data Breach Notification Rule, of which it becomes aware without unreasonable delay and in no case later than 60 calendar days after discovery [42 U.S.C. Section 17921; 45 C.F.R. Section 164.504(e)(2)(ii)(C); 45 C.F.R. Section 164.308(b)].

6. **Business Associate's Subcontractors and Agents.** Business Associate shall ensure that any agents and subcontractors to whom it provides Protected Information, agree in writing to the same restrictions and conditions that apply to Business Associate with respect to such PHI and implement the safeguards required by paragraph B.4 above with respect to Electronic PHI [45 C.F.R. Section 164.504(e)(2)(ii)(D); 45 C.F.R. Section 164.308(b)]. Business Associate shall implement and maintain sanctions against agents and subcontractors that violate such restrictions and conditions and shall mitigate the effects of any such violation (see 45 C.F.R. Sections 164.530(f) and 164.530(e)(1)).

7. **Access to Protected Information.** To the extent that the Covered Entity keeps a designated record set then Business Associate shall make Protected Information maintained by Business Associate or its agents or subcontractors in Designated Record Sets available to Covered Entity for inspection and copying within five (5) days of a request by Covered Entity to enable Covered Entity to fulfill its obligations under state law [Health and Safety Code Section 123110] and the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.524 [45 CF.R. Section 164.504(e)(2)(ii)(E)]. If Business Associate maintains an Electronic Health Record, Business Associate shall provide such information in electronic format to enable Covered Entity to fulfill its obligations under the HITECH Act, including, but not limited to, 42 U.S.C. Section 17935(e).

8. **Amendment of PHI for Business Associate who is Required to Maintain a Record Set.** If Business Associate is required to maintain a designated record set on behalf of the Covered Entity the Business Associate shall within ten (10) days of receipt of a request from Covered Entity for an amendment of Protected Information or a record about an individual contained in a Designated Record Set, Business Associate or its agents or subcontractors shall make such Protected Information available to Covered Entity for amendment and incorporate any such amendment to enable Covered Entity to fulfill its obligations under the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.526. If any individual requests an amendment of Protected Information directly from Business Associate or its agents or subcontractors, Business

Associate must notify Covered Entity in writing within five (5) days of the request. Any approval or denial of amendment of Protected Information maintained by Business Associate or its agents or subcontractors shall be the responsibility of Covered Entity [45 C.F.R. Section 164.504(e)(2)(ii)(F)].

9. **Accounting Rights.** Within ten (10) days of notice by Covered Entity of a request for an accounting of disclosures of Protected Information, Business Associate and its agents or subcontractors shall make available to Covered Entity the information required to provide an accounting of disclosures to enable Covered Entity to fulfill its obligations under the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.528, and the HITECH Act, including but not limited to 42 U.S.C. Section 17935(c), as determined by Covered Entity. Business Associate agrees to implement a process that allows for an accounting to be collected and maintained by Business Associate and its agents or subcontractors for at least six (6) years prior to the request. However, accounting of disclosures from an Electronic Health Record for treatment, payment or health care operations purposes are required to be collected and maintained for only three (3) years prior to the request, and only to the extent that Business Associate maintains an electronic health record and is subject to this requirement. At a minimum, the information collected and maintained shall include: (i) the date of disclosure; (ii) the name of the entity or person who received Protected Information and, if known, the address of the entity or person; (iii) a brief description of Protected Information disclosed and (iv) a brief statement of purpose of the disclosure that reasonably informs the individual of the basis for the disclosure, or a copy of the individual's authorization, or a copy of the written request for disclosure. In the event that the request for an accounting is delivered directly to Business Associate or its agents or subcontractors, Business Associate shall within five (5) days of a request forward it to Covered Entity in writing. It shall be Covered Entity's responsibility to prepare and deliver any such accounting requested. Business Associate shall not disclose any Protected Information except as set forth in Sections B.2. of this BAA [45 C.F.R. Sections 164.504(e)(2)(ii)(G) and 165.528].   The provisions of this subparagraph shall survive the termination of this Agreement.

10. **Governmental Access to Records.** Business Associate shall make its internal practices, books and records relating to the use and disclosure of Protected Information available to Covered Entity and to the Secretary of the U.S. Department of Health and Human Services (Secretary) for purposes of determining Business Associate's compliance with the Privacy Rule [45 C.F.R. Section 164.504(e)(2)(ii)(H)]. Business Associate shall provide to Covered Entity a copy of any Protected Information that Business Associate provides to the Secretary concurrently with providing such Protected Information to the Secretary.

11. **Minimum Necessary.** Business Associate (and its agents or subcontractors) shall request, use and disclose only the minimum amount of Protected Information necessary to accomplish the purpose of the request, use, or disclosure [42 U.S.C. Section 17935(b); 45 C.F.R. Section 164.514(d)(3)].   Business Associate understands and agrees that the definition of "minimum necessary" is in flux and shall keep itself informed of guidance issued by the Secretary with respect to what constitutes "minimum necessary."

12. **Data Ownership**.  Business Associate acknowledges that Business Associate has no ownership rights with respect to the Protected Information.

13. **Business Associate's Insurance.**  Business Associate represents and warrants that it purchases commercial insurance to cover its exposure for any claims, damages or losses arising as a result of a breach of the terms of this BAA.

14. **Notification of Possible Breach.** During the term of the Agreement, Business Associate shall notify Covered Entity within twenty-four (24) hours of any suspected or actual breach of security, or any access, use or disclosure of Protected Information not permitted by the

Agreement or this BAA or unauthorized use or disclosure of PHI of which Business Associate becomes aware and/or any actual or suspected use or disclosure of data in violation of any applicable federal or state laws or regulations. Business Associate shall take (i) prompt corrective action to cure any such deficiencies and (ii) any action pertaining to such unauthorized disclosure required by applicable federal and state laws and regulations. [42 U.S.C. Section 17921; 45 C.F.R. Section 164.504(e)(2)(ii)(C); 45 C.F.R. Section 164.308(b)]

15. **Breach Pattern or Practice by Covered Entity.** Pursuant to 42 U.S.C. Section 17934(b), if the Business Associate knows of a pattern of activity or practice of the Covered Entity that constitutes a material breach or violation of the Covered Entity's obligations under the Agreement or this BAA or other arrangement, the Business Associate must take reasonable steps to cure the breach or end the violation. If the steps are unsuccessful, the Business Associate must terminate the Agreement or other arrangement if feasible, or if termination is not feasible, report the problem to the Secretary. Business Associate shall provide written notice to Covered Entity of any pattern of activity or practice of the Covered Entity that Business Associate believes constitutes a material breach or violation of the Covered Entity's obligations under the Agreement or this BAA or other arrangement within five (5) days of discovery and shall meet with Covered Entity to discuss and attempt to resolve the problem as one of the reasonable steps to cure the breach or end the violation.

16. **Audits, Inspection and Enforcement.** Within ten (10) days of a written request by Covered Entity, Business Associate and its agents or subcontractors shall allow Covered Entity to conduct a reasonable inspection of the facilities, systems, books, records, agreements, policies and procedures relating to the use or disclosure of Protected Information pursuant to this BAA for the purpose of determining whether Business Associate has complied with this BAA; provided, however, that (i) Business Associate and Covered Entity shall mutually agree in advance upon the scope, timing and location of such an inspection, (ii) Covered Entity shall protect the confidentiality of all confidential and proprietary information of Business Associate to which Covered Entity has access during the course of such inspection; and (iii) Covered Entity shall execute a nondisclosure agreement, upon terms mutually agreed upon by the parties, if requested by Business Associate. The fact that Covered Entity inspects, or fails to inspect, or has the right to inspect, Business Associate's facilities, systems, books, records, agreements, policies and procedures does not relieve Business Associate of its responsibility to comply with this BAA, nor does Covered Entity's (i) failure to detect or (ii) detection, but failure to notify Business Associate or require Business Associate's remediation of any unsatisfactory practices, constitute acceptance of such practice or a waiver of Covered Entity's enforcement rights under the Agreement or this BAA, Business Associate shall notify Covered Entity within ten (10) days of learning that Business Associate has become the subject of an audit, compliance review, or complaint investigation by the Office for Civil Rights.

C. Termination

1. **Material Breach.** A breach by Business Associate of any provision of this BAA, as determined by Covered Entity, shall constitute a material breach of the Agreement and shall provide grounds for immediate termination of the Agreement, any provision in the Agreement to the contrary notwithstanding [45 C.F.R. Section 164.504(e)(2)(iii)].

2. **Judicial or Administrative Proceedings.** Covered Entity may terminate the Agreement, effective immediately, if (i) Business Associate is named as a defendant in a criminal proceeding for a violation of HIPAA, the HITECH Act, the HIPAA Regulations or other security or privacy laws or (ii) a finding or stipulation that the Business Associate has violated any standard or requirement of HIPAA, the HITECH Act, the HIPAA Regulations or other security or privacy laws is made in any administrative or civil proceeding in which the party has been joined.

3. **Effect of Termination.** Upon termination of the Agreement for any reason, Business Associate shall, at the option of Covered Entity, return or destroy all Protected Information that Business Associate or its agents or subcontractors still maintain in any form, and shall retain no copies of such Protected Information. If return or destruction is not feasible, as determined by Covered Entity, Business Associate shall continue to extend the protections of Section B of this BAA to such information, and limit further use of such PHI to those purposes that make the return or destruction of such PHI infeasible. [45 C.F.R. Section 164.504(e)(ii)(2(I)]. If Covered Entity elects destruction of the PHI, Business Associate shall certify in writing to Covered Entity that such PHI has been destroyed.

D. Indemnification

If Business Associate fails to adhere to any of the privacy, confidentiality, and/or data security provisions set forth in this BAA or if there is a Breach of PHI in Business Associate's possession and, as a result, PHI or any other confidential information is unlawfully accessed, used or disclosed, Business Associate agrees to reimburse Covered Entity for any and all costs, direct or indirect, incurred by Covered Entity associated with any Breach notification obligations. Business Associate also agrees to pay for any and all fines and/or administrative penalties imposed for such unauthorized access, use or disclosure of confidential information or for delayed reporting if it fails to notify the Covered Entity of the Breach as required by this BAA.

E. Disclaimer

Covered Entity makes no warranty or representation that compliance by Business Associate with this BAA, HIPAA, the HITECH Act, or the HIPAA Regulations will be adequate or satisfactory for Business Associate's own purposes. Business Associate is solely responsible for all decisions made by Business Associate regarding the safeguarding of PHI.

F. Certification

To the extent that Covered Entity determines that such examination is necessary to comply with Covered Entity's legal obligations pursuant to HIPAA relating to certification of its security practices, Covered Entity or its authorized agents or contractors, may, at Covered Entity's expense, examine Business Associate's facilities, systems, procedures and records as may be necessary for such agents or contractors to certify to Covered Entity the extent to which Business Associate's security safeguards comply with HIPAA, the HITECH Act, the HIPAA Regulations or this BAA.

G. Amendment to Comply with Law

The parties acknowledge that state and federal laws relating to data security and privacy are rapidly evolving and that amendment of the Agreement or this BAA may be required to provide for procedures to ensure compliance with such developments. The parties specifically agree to take such action as is necessary to implement the standards and requirements of HIPAA, the HITECH Act, the Privacy Rule, the Security Rule and other applicable laws relating to the security or confidentiality of PHI. The parties understand and agree that Covered Entity must receive satisfactory written assurance from Business Associate that Business Associate will adequately safeguard all Protected Information. Upon the request of either party, the other party agrees to promptly enter into negotiations concerning the terms of an amendment to this BAA embodying written assurances consistent with the standards and requirements of HIPAA, the HITECH Act, the Privacy Rule, the Security Rule or other applicable laws. Covered Entity may terminate the Agreement upon thirty (30) days written notice in the event (i) Business Associate does not promptly enter into negotiations to amend the Agreement or this BAA when requested by Covered Entity pursuant to this

Section or (ii) Business Associate does not enter into an amendment to the Agreement or this BAA providing assurances regarding the safeguarding of PHI that Covered Entity, in its sole discretion, deems sufficient to satisfy the standards and requirements of applicable laws.

H.   Assistance in Litigation of Administrative Proceedings

Business Associate shall make itself, and any subcontractors, employees or agents assisting Business Associate in the performance of its obligations under the Agreement or this BAA, available to Covered Entity, at no cost to Covered Entity, to testify as witnesses, or otherwise, in the event of litigation or administrative proceedings being commenced against Covered Entity, its directors, officers or employees based upon a claimed violation of HIPAA, the HITECH Act, the Privacy Rule, the Security Rule, or other laws relating to security and privacy, except where Business Associate or its subcontractor, employee or agent is named adverse party.

I.   No Third-Party Beneficiaries

Nothing express or implied in the Agreement or this BAA is intended to confer, nor shall anything herein confer, upon any person other than Covered Entity, Business Associate and their respective successors or assigns, any rights, remedies, obligations or liabilities whatsoever.

J.   Effect on Agreement

Except as specifically required to implement the purposes of this BAA, or to the extent inconsistent with this BAA, all other terms of the Agreement shall remain in force and effect.

K.   Entire Agreement of the Parties

This BAA supersedes any and all prior and contemporaneous business associate agreements between the parties and constitutes the final and entire agreement between the parties hereto with respect to the subject matter hereof. Covered Entity and Business Associate acknowledge that no representations, inducements, promises, or agreements, oral or otherwise, with respect to the subject matter hereof, have been made by either party, or by anyone acting on behalf of either party, which are not embodied herein. No other agreement, statement or promise, with respect to the subject matter hereof, not contained in this BAA shall be valid or binding.

L.   Interpretation

The provisions of this BAA shall prevail over any provisions in the Agreement that may conflict or appear inconsistent with any provision in this BAA. This BAA and the Agreement shall be interpreted as broadly as necessary to implement and comply with HIPAA, the HITECH Act, the Privacy Rule and the Security Rule. The parties agree that any ambiguity in this BAA shall be resolved in favor of a meaning that complies and is consistent with HIPAA, the HITECH Act, the Privacy Rule and the Security Rule.

# Attachment D
# Indemnification and Insurance

## 1. INDEMNIFICATION

Indemnification pertaining to other than Professional Services:

Orchard shall defend, indemnify and save harmless CLIENT, its officers, agents and employees from any and all claims, demands, damages, costs, expenses (including attorney's fees), judgments or liabilities arising out of this Agreement or occasioned by the performance or attempted performance of the provisions hereof; including, but not limited to, any act or omission to act on the part of Orchard or its agents or employees or other independent contractors directly responsible to Orchard; except those claims, demands, damages, costs, expenses (including attorney's fees), judgments or liabilities resulting from the sole negligence or willful misconduct of CLIENT.

Orchard shall notify CLIENT immediately in the event of any accident or injury arising out of or in connection with this Agreement.

Indemnification pertaining to Professional Services:

Orchard shall defend, indemnify and save harmless CLIENT, its officers, agents and employees from any and all claims, demands, damages, costs, expenses (including attorney's fees), judgments or liabilities arising out of the negligent performance or attempted performance of the provisions hereof; including any willful or negligent act or omission to act on the part of Orchard or its agents or employees or other independent contractors directly responsible to Orchard to the fullest extent allowable by law.

Orchard shall notify CLIENT immediately in the event of any accident or injury arising out of or in connection with this Agreement.

## 2. INSURANCE

Without limiting Orchard's indemnification of CLIENT, Orchard shall procure the following required insurance coverages at its sole cost and expense. All insurance coverage is to be placed with insurers which (1) have a Best's rating of no less than A: VII, and (2) are admitted insurance companies in the State of California. All other insurers require the prior approval of CLIENT. Such insurance coverage shall be maintained during the term of this Agreement. Failure to comply with the insurance requirements shall place Orchard in default. Upon request by CLIENT, Orchard shall provide a certified copy of any insurance policy to CLIENT within ten (10) working days.

2.1. **Workers' Compensation Insurance**: Statutory Workers' Compensation and Employers Liability Insurance shall cover all Orchard's staff while performing any work incidental to the performance of this Agreement. The policy shall provide that no cancellation, or expiration or reduction of coverage shall be effective or occur until at least thirty (30) days after receipt of such notice by CLIENT. In the event Orchard is self-insured, it shall furnish a copy of Certificate of Consent to Self-Insure issued by the Department of Industrial Relations for the State of California. This provision does not apply if Orchard has no employees as defined in Labor Code Section 3350 et seq. during the entire period of this Agreement and Orchard submits a written statement to CLIENT stating that fact.

2.2. **General and Automobile Liability Insurance**: The general liability insurance shall include bodily injury, property damage and personal injury liability coverage, shall afford coverage for all premises,

operations, products and completed operations of Orchard and shall include contractual liability coverage sufficiently broad so as to include the insurable liability assumed by Orchard in the indemnity and hold harmless provisions of the Indemnification Section of this Agreement.  The automobile liability insurance shall cover all owned, non-owned and hired motor vehicles that are operated on behalf of Orchard pursuant to Orchard's activities hereunder.  Orchard shall require all subcontractors to be included under its policies or furnish separate certificates and endorsements to meet the standards of these provisions by each subcontractor.  CLIENT, its officers, agents, and employees shall be Additional Insured status on any policy.  A cross liability clause, or equivalent wording, stating that coverage will apply separately to each named or additional insured as if separate policies had been issued to each shall be included in the policies.  A copy of the endorsement evidencing that the policy has been changed to reflect the Additional Insured status must be attached to the certificate of insurance.  The limit of liability of said policy or policies for general and automobile liability insurance shall not be less than $1,000,000 per occurrence and $2,000,000 in the aggregate.  Any deductible or Self-Insured Retention {SIR} over $10,000 requires approval by CLIENT.

Said policy or policies shall include a severability of interest or cross liability clause or equivalent wording.  Said policy or policies shall contain a provision of the following form:

"Such insurance as is afforded by this policy shall be primary and non-contributory to the full limits stated in the declarations, and if CLIENT has other valid and collectible insurance for a loss covered by this policy, that other insurance shall be excess only."

If the policy providing liability coverage is on a 'claims-made' form, Orchard is required to maintain such coverage for a minimum of three years following completion of the performance or attempted performance of the provisions of this Agreement.  Said policy or policies shall provide that CLIENT shall be given thirty (30) days written notice prior to cancellation or expiration of the policy or reduction in coverage.

2.3.    **Professional Liability Insurance**.  Professional liability insurance shall include coverage for the activities of Orchard's professional staff with a combined single limit of not less than $1,000,000 per occurrence or claim and $2,000,000 in the aggregate.  Said policy or policies shall provide that CLIENT shall be given thirty (30) days written notice prior to cancellation, expiration of the policy, or reduction in coverage.  If the policy providing professional liability coverage is on a 'claims-made' form, Orchard is required to maintain such coverage for a minimum of three (3) years (ten years [10] for Construction Defect Claims) following completion of the performance or attempted performance of the provisions of this Agreement.

Orchard shall submit to the office of the designated CLIENT representative certificate(s) of insurance documenting the required insurance as specified above prior to this Agreement becoming effective.  CLIENT shall maintain current certificate(s) of insurance at all times in the office of the designated CLIENT representative as a condition precedent to any payment under this Agreement.  Approval of insurance by CLIENT or acceptance of the certificate of insurance by CLIENT shall not relieve or decrease the extent to which Orchard may be held responsible for payment of damages resulting from Orchard's services of operation pursuant to the Agreement, nor shall it be deemed a waiver of CLIENT's rights to insurance coverage hereunder.

In the event Orchard is not able to comply with CLIENT's insurance requirements, CLIENT may, at its sole discretion and at Orchard's expense, provide compliant coverage.

The above insurance requirements are subject to periodic review by CLIENT.  CLIENT's Risk Manager is authorized to change the above insurance requirements, with the concurrence of County Counsel, to include additional types of insurance coverage or higher coverage limits, provided that such change is reasonable based on changed risk of loss or in light of past claims against CLIENT or inflation.  This option may be exercised during any amendment of this Agreement that results in an increase in the nature of CLIENT's risk and such change of provisions will be in effect for the term of the amended Agreement.  Such change

pertaining to types of insurance coverage or higher coverage limits must be made by written amendment to this Agreement. Orchard agrees to execute any such amendment within thirty (30) days of acceptance of the amendment or modification.