

**CONTRACT**  
**SOFTWARE MAINTENANCE AGREEMENT**

by and between

**CUYAHOGA COUNTY, OHIO**

and

**Charles H. Brenner, Ph.D.**

THIS AGREEMENT (the "Contract") is made and entered into this 12 day of January 2012, by and between Cuyahoga County, Ohio ("the County"), on behalf of the Cuyahoga County Medical Examiner's Office, and **Charles H. Brenner, Ph.D.**, with offices located at, 6801 Thornhill Drive, Oakland, California 94611 ("the Provider").

WHEREAS, Charles H. Brenner, created a system of computer programs (referred to below as "Programs") comprising DNA-VIEW for DNA identification analysis and PATER for serological analysis and reporting which the County has been utilizing since 2006; and

WHEREAS, Charles H. Brenner, is the Licensor and the sole source provider of maintenance, including update, support, warranty and technical assistance of DNA-VIEW and PATER Software at the Cuyahoga County Medical Examiner's Office; and

WHEREAS, the County has a present need for renewal of software maintenance, including update, support, warranty and technical assistance of DNA-VIEW and PATER Software, at the Cuyahoga County Medical Examiner's Office; and

WHEREAS, Charles H. Brenner and the County entered into a License Agreement, dated August 4, 2006, whereby the County acquired certain rights in the Programs (the "License Agreement"), a copy of which is attached as Schedule B; and

WHEREAS, the County desires to avail itself of software maintenance including update, support, warranty and technical assistance service on DNA-VIEW and PATER Software located at the Cuyahoga County Medical Examiner's Office and Charles H. Brenner is willing to provide such service to the County all upon the terms and conditions set forth herein, and listed on Schedule A.

NOW, THEREFORE, in consideration of mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Charles H. Brenner and the County agree as follows:

ARTICLE I – AGREEMENT AND TERM

- 1.1 Scope of Agreement. During the term of this Contract, Charles H. Brenner shall provide the County with software maintenance including: update, support, warranty and technical assistance of DNA VIEW and PATER Software, as listed on Schedule A – Maintenance Agreement & Invoice for Account # 5126946. In the event that a discrepancy exists between the terms of Schedule A and this agreement, the terms of this agreement will be controlling and binding.
- 1.2 Term. The term of this Contract shall commence as of October 1, 2011; and, unless earlier terminated in accordance with the provisions of this Contract shall continue in effect for a period of two years from commencement date **(10/1/11 – 9/30/13)**. The cost of this Contract shall not exceed Five Thousand Dollars and Zero Cents **(\$5,000.00)**.
- 1.3 Independent Agreement. This Contract is not intended to override or supersede the original license agreement entered into in the year 2006.

## ARTICLE II - SCOPE OF WORK

- 2.1 Software maintenance including: update, support, warranty and technical assistance of DNA-VIEW and PATER Software. Charles H. Brenner hereby agrees to render the services identified in Article 1.1 and Maintenance Agreement & Invoice for Account #5126946 and Terms attached hereto and incorporated by reference as Schedule A at a total price not exceed Five Thousand Dollars and Zero Cents **(\$5,000.00)**.

## ARTICLE III - PAYMENT AND INVOICING

- 3.1 Payment. During the term of this contract, the County shall pay Charles H. Brenner for the services outlined in Schedule A upon receipt of said invoice and approval of the County Executive.
- 3.2 Invoicing. Charles H. Brenner shall invoice the County for the services outlined in Schedule A (attached hereto) upon execution of this Contract. Charles H. Brenner shall submit original invoice(s) to the following address:

Cuyahoga County Information Services Center  
Business Department  
1255 Euclid Avenue, 4<sup>th</sup> floor  
Cleveland, Ohio 44115

## ARTICLE IV - INDEMNITIES AND LIABILITIES

- 4.1 Subcontracting. This Contract was awarded to Charles H. Brenner based upon Charles H. Brenner's unique qualifications and skills, and no task required to be performed under this contract by Charles H. Brenner shall be subcontracted to third parties without the express written consent of Cuyahoga County.
- 4.2 Indemnification. Charles H. Brenner shall indemnify and hold harmless and defend the

County, its employees, officers, servants, and agents, from and against any and all damage, liability, claims, losses, actions, judgments, expenditures and expenses, based upon or arising out of injuries or damages to persons or property (including loss of data) caused by or sustained in connection with the performance of this Contract arising from the acts, errors or omissions of Charles H. Brenner, his employees, agents, servants, or officers. The provisions of this Section shall survive the termination or expiration of this Contract. To the extent considered necessary by the County, any sums due Charles H. Brenner under this Contract may be retained by County until all of County's claims for indemnification pursuant to this Contract have been settled or otherwise resolved.

- 4.3 Indemnification of Infringement Claim. Charles H. Brenner will further indemnify, defend, and hold the County, its employees, officers, servants, and agents, harmless from and against any and all damages, amounts paid in settlement and reasonable fees and costs (including reasonable attorneys' fees) (collectively "Adverse Consequences") arising out of or relating to a claim that any part of Charles H. Brenner's products, services, or maintenance provided under this Contract or License Agreement infringes upon any third party's copyright, trademark, service mark, trade secret, patent, or other claimed third party proprietary rights, existing as of the date hereof (a "Third Party Infringement Claim"). Charles H. Brenner represents that no Third Party Infringement Claims are outstanding or have been threatened as of the Effective Date of this Agreement. The County shall notify Charles H. Brenner promptly if it becomes aware of any Third Party Infringement Claim. The County hereby gives Charles H. Brenner the necessary authority, and shall provide such information and assistance as is necessary (at Charles H. Brenner's expense with respect to reasonable out-of-pocket costs), to enable Charles H. Brenner to defend, compromise or settle a Third Party Infringement Claim; provided that, Charles H. Brenner will consult and share all relevant information with the County in connection with all stages of such defense, compromise or settlement. In addition, if the County is prevented by a Third Party Infringement Claim from using any part of Charles H. Brenner's system (DNA-VIEW and PATER Software) or documentation in substantially the manner contemplated by this Contract, Charles H. Brenner, at the County's sole option and Charles H. Brenner's sole expense, shall procure for the County the right to continue such use or shall replace or modify the infringing item.
- 4.4 Condition Precedent to Indemnification. The indemnities in Article IV are conditioned upon the County providing Charles H. Brenner prompt written notice of the claim, allegation or action for which indemnification is sought, together with full information and reasonable cooperation and full opportunity to control the response thereto and the defense thereof.
- 4.5 Warranties. All of Charles H. Brenner services will be performed by qualified personnel and will be of a professional quality conforming to best practices of the industry.
- 4.6 Charles H. Brenner acknowledges that as a political subdivision, the County is prohibited by law from entering into an indemnification agreement and that no provision of this Contract or any other contract or agreement between Charles H. Brenner and the County

may be interpreted to obligate the County to indemnify Charles H. Brenner or any other party.

## ARTICLE V - DISPUTE RESOLUTION AND TERMINATION

### 5.1 Dispute Resolution.

a) In the event of any dispute or disagreement between Charles H. Brenner and the County, either with respect to the interpretation of any provision of this Contract or with respect to the performance by Charles H. Brenner or the County hereunder, which cannot be resolved in the normal course of business, then upon written notice of either party, each party will appoint a designated officer whose task it will be to meet for the purpose of endeavoring in good faith to resolve such dispute or to negotiate for an adjustment to such section or provision of this Contract. The designated officers shall meet as often as the parties reasonably deem necessary in order to gather and furnish to the other all information with respect to the matter in issue which the parties believe to be appropriate and germane in connection with its resolution. Such officers will discuss the problem and/or negotiate the applicable section or provision without the necessity of any formal proceedings relating thereto. During the course of such negotiation, all reasonable requests made by one party to the other for information will be honored in order that each of the parties may be fully advised in the negotiations. The specific format for such discussions will be left to the discretion of the designated officers but may include the preparation of agreed upon statements of fact or written statements of position furnished to the other party. No formal proceedings for the binding arbitration of such dispute may be commenced until (i) resolution as contemplated in this clause has been unsuccessful and (ii) either of the parties concludes in good faith that amicable resolution through continued negotiation of the matter in issue does not appear likely and so notifies the other party.

(b) The rights and obligations of the parties under this provision shall not limit either party's right to terminate this Contract as may be otherwise permitted hereunder.

5.2 Termination for Default. Either party may terminate this Contract, in whole or in part, whenever such party determines that the other has failed satisfactorily to fulfill its obligations and responsibilities hereunder and is unable to cure such failure within a reasonable period of time, not to exceed thirty (30) calendar days or such longer period of time as may be specified in writing by the terminating party, taking into consideration the gravity and nature of the default. Such termination shall be referred to as "Termination for Default". Upon determination by either party hereto that the other has failed to satisfactorily perform its obligations and responsibilities hereunder, the party seeking termination shall notify the defaulting party in writing of the failure and of the time period that has been established to cure such failure, which time period shall be not less than ten (10) days. If the defaulting party is unable to cure the failure within the specified time period, the party seeking to terminate may, by giving written notice thereof to the defaulting party, terminate this Contract, in full or in part, as of the date specified in the

notice of termination. Charles H. Brenner, however, shall be paid for all services and/or materials provided on or prior to the date of termination.

- 5.3 Termination for Financial Instability. In the event that Charles H. Brenner becomes financially unstable to the point of (i) ceasing to conduct business in the normal course, (ii) making a general assignment for the benefit of creditors, or (iii) suffering or permitting the appointment of a receiver for its business or its assets, or there is a filing by or against Charles H. Brenner of a meritorious petition in bankruptcy under any bankruptcy or debtor's law, the County may, at its option, immediately terminate this Contract under Section 5.2, the "Termination for Default" clause, by giving written notice thereof.

#### ARTICLE VI – ADHERENCE TO ELECTRONIC SIGNATURE POLICY OF COUNTY

- 6.1. By entering into this Contract, Charles H. Brenner, its officers, employees, subcontractors, sub-grantees, agents or assigns, to conduct this transaction by electronic means by agreeing that all documents requiring county signatures may be executed by electronic means, and that the electronic signatures affixed by Cuyahoga County to said documents shall have the same legal effect as if that signature was manually affixed to a paper version of the document.
- 6.2 Charles H. Brenner further agrees to be bound by the provisions of Chapter 304 and 1306 of the Ohio Revised Code as they pertain to Electronic Transactions and to comply with the electronic signature policy of Cuyahoga County.

#### ARTICLE VII – MISCELLANEOUS

- 7.1 Notices. Wherever one party is required or permitted to give notice to the other pursuant to this Contract, such notice shall be deemed given when delivered by hand, via certified mail with return receipt requested, via overnight courier with signature required, and addressed as follows:

In the case of the County:

Cuyahoga County Information Services Center  
ATTN: Jeff Mowry  
1255 Euclid Avenue, 4<sup>th</sup> floor  
Cleveland, Ohio 44115

In the case of Charles H. Brenner:

Charles H. Brenner, Ph. D.  
6801 Thornhill Drive  
Oakland, California 94611

Either party may from time to time change its designated recipient or address for notification purposes by giving the other party written notice of the new designated recipient or address and the date upon which it will become effective.

- 7.2 Severability. If, and only to the extent that, any provision of this Contract is declared or found to be illegal, unenforceable or void, then both parties shall be relieved of all obligations arising under such provision, it being the intent and agreement of the parties that this Contract shall be deemed amended by modifying such provision to the extent necessary to make it legal and enforceable while preserving its intent. If that is not possible, another provision that is legal and enforceable and achieves the same objective shall be substituted. If the remainder of this Contract is not affected by such declaration or finding and is capable of substantial performance, then the remainder shall be enforced to the extent permitted by law.
- 7.3 Waiver. No delay or omission by either party in the exercise of any right or power shall impair any such right or power or be construed to be a waiver thereof. A waiver by either of the parties of any of the covenants, conditions or agreements to be performed by the other or any breach thereof shall not be construed to be a waiver of any succeeding breach thereof or of any other covenant, condition or agreement herein contained. No change, waiver, or discharge hereof shall be valid unless in writing and signed by an authorized representative of the party against which such change, waiver, or discharge is sought to be enforced.
- 7.4 Survival of Terms. Termination or expiration of this Contract for any reason shall not release either party from any liabilities or obligations set forth in this Contract which (i) the parties have expressly agreed shall survive any such termination or expiration, or (ii) remain to be performed or by their nature would be intended to be applicable following any such termination or expiration.
- 7.5 Record Audit Retention. Charles H. Brenner agrees to make all pertinent contractual books and records and other documents pertaining to this Contract available to the County and its designated agents for purpose of audit and examination upon reasonable request during the term of this Contract and for a period of two (2) years from the expiration date or final payment under this Contract, whichever is later; provided however, that should Charles H. Brenner be notified that an audit has been commenced pursuant to Ohio Revised Code Sec. 117.11 during said period, for which the aforesaid books and records are material, the aforesaid records shall be retained pending the completion of said audit.
- 7.6 Headings and Interpretation. The article and section headings used herein are for reference and convenience only, and shall not enter into the interpretation hereof.
- 7.7 Governing Law. This Contract shall be subject to interpretation under the laws of the State of Ohio.

- 7.8 Social Security Act. Charles H. Brenner shall be and remain an independent Charles H. Brenner with respect to all services performed hereunder and agrees to and does hereby accept full and exclusive liability for payment of any and all contributions or taxes for social security, unemployment insurance, or old age retirement benefits, pensions, or annuities now or hereafter imposed under any Local, State or Federal Law which are measured by the wages, salaries, or other remuneration paid to persons employed by Charles H. Brenner for work performed under the terms of this contract and further agrees to obey all lawful rules and regulations and to meet all lawful requirements which are now or hereafter may be issued or promulgated under said respective laws by and duly authorized State or Federal officials; and said Charles H. Brenner also agrees to indemnify and save harmless Cuyahoga County from such contributions or taxes or liability.
- 7.9 Assignment. Charles H. Brenner shall not assign, transfer, convey or otherwise dispose of this Contract, or its right to execute it, or its right, title or interest in or to it or any part thereof, or assign, by power of attorney or otherwise, any of the monies due or to become due under this Contract without approval of the County Executive by resolution.
- 7.10 Contract Processing. Charles H. Brenner shall submit one (1) original contractual agreement with original signature to the following:

Cuyahoga County Information Services Center  
Business Department  
1255 Euclid Avenue, 4th Floor  
Cleveland, Ohio 44115

- 7.11 Commencement of Contract Performance. In order to protect the interest of Cuyahoga County this contract must be executed by the County Executive before compensation for the services or products set forth in this contract can be provided. In the event that services are provided by Charles H. Brenner prior to the execution of this contract by the County Executive, the same will be provided at Charles H. Brenner's risk, and payment therefore cannot, and will not, be made unless and until this contract is approved by the County Executive. Upon approval by the County Executive of this contract, however, any and all prior performance under this contract shall be deemed ratified and said performance shall be deemed to be included in this contract. Payment(s) for said prior performance shall not increase the amount of the contract limit.
- 7.12 Entire Agreement and Modification. This Contract, including any Schedules and documents referred to in this Contract or attached hereto, each of which is incorporated herein, constitutes the entire and exclusive statement of the agreement between the parties with respect to its subject matter and there are no oral or written representations, understandings or agreements relating to this Contract which are not fully expressed herein. The parties agree that any other terms or conditions included in any quotes, acknowledgments, bills of lading or other forms utilized or exchanged by the parties shall not be incorporated herein or be binding unless expressly agreed upon in writing by authorized representatives of the parties. No modification, change or amendment hereof

shall be valid unless such is in writing and signed by the authorized representative of the party against which such modification, change or amendment is sought to be enforced.

- 7.13 Public Records Request. If the County receives a public records request for any Programs, then the County shall advise the requestor that the records requested are considered to contain trade secret information, and shall promptly notify Charles H. Brenner of the request. Thereafter, Charles H. Brenner shall have sole responsibility for initiating or defending such legal action as he deems necessary to prevent public disclosure of such Programs, and shall pay all costs and expenses associated therewith, including any legal fees or expenses incurred by the County. The County shall, to the extent legally permissible without being required to initiate legal action, maintain the confidentiality of the Programs until the matter is resolved by legal action, provided that Charles H. Brenner agrees to indemnify, defend and hold harmless the County from any claims, losses, liabilities, costs and expenses incurred by the County as a result thereof.
- 7.14 Competitive Programs/Trade Secret. For purposes of this contract/agreement, Trade Secret means "trade secret" as that term is defined under Ohio Revised Code §1333.61(D). The Programs are valuable and proprietary software which Licensor, Charles H. Brenner, considers to be a Trade Secret. The County (Licensee) may not make the Programs available to any other person or entity. Adequate steps must be taken to prevent unauthorized disclosure or use of the Programs. No use of the Programs will be allowed in order to write or benefit of a similar nature.
- 7.15 Schedules Incorporated by Reference. The following Schedules are attached hereto and are incorporated herein:
- Schedule A:  
Charles H. Brenner - Maintenance Agreement & Invoice for Account # 5126946 dated September 19, 2011.
- 7.16 Relationship of Parties. Charles H. Brenner is performing pursuant to this Contract only as an independent contractor. Charles H. Brenner has the sole obligation to supervise, manage, contract, direct, procure, perform or cause to be performed its obligations set forth in this Contract, except as otherwise agreed upon by the parties. Nothing set forth in this Contract shall be construed to create the relationship of principal and agent between Charles H. Brenner and the County. Neither party shall act or attempt to act or represent itself, directly or by implication, as an agent of the other party or its affiliates or in any manner assume or create any obligation on behalf of, or in the name of the other party or its affiliates.

IN WITNESS WHEREOF, the County and Charles H. Brenner have each caused this Contract to be signed and delivered by its duly authorized representative as of the date first written.

CHARLES H. BRENNER, PH. D.

CUYAHOGA COUNTY, OHIO



Edward FitzGerald, County Executive

*Ed FitzGerald/apc*

2012-06-05 09:48:47

BY: \_\_ Charles H Brenner

*CH Brenner*

BY: \_\_\_\_\_

Edward FitzGerald, County Executive

