



## Software Maintenance & Support Program Agreement

This Software Maintenance & Support Program Agreement ("Agreement") is made and entered into as of the date of the Customer signature as set forth on the Software Order Form by and between MIDMARK CORPORATION ("Midmark"), an Ohio corporation, having a place of business at 690 Knox St., Suite 100, Torrance, CA 90502, and the customer identified on the Software Order Form ("Customer").

### RECITALS

The Software Maintenance & Support Program is an annual, fee-based, program that includes technical support, maintenance, and software updates.

NOW, THEREFORE, Midmark and Customer, agree as follows:

### 1 Definitions

- 1.1 **Device Type** means the integration/interface Software access of each category of Midmark Devices as separately identified on the Software Order Form.
- 1.2 **EULA** means the Midmark End-User License Agreement, the terms and conditions of which are available for review at <http://www.midmark.com/support/diagnostic-software-device-end-user-license-agreement>.
- 1.3 **Midmark Products** means the Software, Midmark diagnostic devices (the "Midmark Devices"), and all Related Materials.
- 1.4 **Patient Data** means any information or data in any format or media, electronic or otherwise, that is collected, created, received, maintained or disseminated by Customer, that is provided by, through or on behalf of Customer, its personnel, clients or affiliates, and that is acquired by Midmark or Midmark personnel by virtue of access to Customer premises, personnel, clients, data or computers, or that is otherwise acquired in the course of performing under this Agreement.
- 1.5 **Program** means the maintenance and support program provided by Midmark with respect to the Software.
- 1.6 **Protected Health Information** means protected health information as defined in 45 C.F.R. §160.103 and electronic information related to the health of any identifiable person as defined under any federal and state law governing privacy or the disposition of personal data, including without limitation, federal and state medical privacy laws.
- 1.7 **Related Materials** means any materials provided at any time to Customer by an EMR vendor or Midmark in connection with the Midmark Products.
- 1.8 **Software** means all software purchased by Customer under the terms of this Agreement and the applicable Software Order Form, including all documentation, explanatory written materials and files, content and code, whether on discs, in read only memory, or on any other media or in any other form, as well as Updates made during Customer's enrollment in the Program. It does not include any software embedded in any Midmark Devices or any Related Materials for such software.
- 1.9 **Software Order Form** means the order form to which this Agreement is attached, as well as any additional orders entered into by the parties subsequent to execution of this Agreement.
- 1.10 **System Requirements** means the current Minimum Computer/System Requirements, available at <http://www.midmark.com/docs/default-source/marketing-collateral/99-99-00741011-g.pdf?sfvrsn=4>.
- 1.11 **Updates** mean modifications, patches, and/or minor feature changes to the Software, as determined by Midmark, and not defined as an Upgrade.
- 1.12 **Upgrades** mean new features or enhancements to the Software that significantly add, enhance, or increase product features or major functionality. Upgrades are "Software" hereunder if Customer acquires those Upgrades on the terms and conditions as determined by Midmark.

### 2 Software License

- 2.1 **License.** Subject to the terms and conditions of the EULA, Midmark licenses to Customer the number of "Seats" of the Software for integration/connectivity to certain Midmark Devices, as specified on the Software Order Form. The license rights that are granted in connection with a "Seat" are as set forth on the Software Order Form.
- 2.2 **Usage:** The licensing of the Software by Midmark to Customer is subject to the terms and conditions of the EULA, as it now exists and as modified from time-to-time by Midmark.

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### 3 System Compatibility

Midmark Software is tested for proper function with the operating systems (OS) identified on the [System Requirements](#). Do not operate the Software with an OS other than those specified in the minimum system requirements as listed in the [System Requirements](#).

3.1.1 It is the Customer's responsibility to verify that Customer's network environment meets the System Requirements are the minimum specifications for the Software to function properly and are subject to change as updates or changes are made by an EMR vendor or Midmark.

3.1.2 Customer agrees that consultation with Midmark Technical Service is necessary prior to any upgrades or changes to Customer's OS. Future releases of currently approved OS should not be used until Midmark has conducted necessary performance tests with the Software.

3.1.3 Customer assumes all risk of running the Software with an OS not verified by Midmark. Midmark shall not be responsible for providing services under the Program that are in excess of what is typically provided for customers with verified OS compatibility, and such excess services, if provided at Midmark's election, shall be at an additional expense as determined by Midmark.

3.1.4 Customer agrees that Midmark is not responsible for, nor obligated to change, Software as a result of Customer's change in business practices, policies, or procedures.

### 4 Maintenance & Support Program

Midmark will provide or assist Customer with Software installation, consulting, technical, updates and similar support services with respect to use and functionality of the Software pursuant to this Agreement during any paid Program enrollment. Said support is subject to the payment of applicable Program fees as outlined in the Software Order Form and compliance by the Customer with the terms of this Agreement.

#### 4.1 Program Enrollment and Fees

Customer agrees to pay Midmark the Program fees in accordance with the terms of this Agreement and as outlined in the Software Order Form.

4.1.1 Customer will automatically be enrolled in the Program for one (1) year (Initial Program Term), beginning on the date of the Software installation. Program enrollment can be renewed by Customer for additional one (1) year terms unless written notice of termination is given to Midmark by the Customer prior to the expiration of the Initial Program Term or then applicable Program renewal term

4.1.2 If in any rolling calendar year, commencing with the earliest Program enrollment then in effect, Customer has more than one (1) Program renewal date, Midmark may, at its election, require Customer to pay a pro-rata amount of the Program fees for the later renewal periods during that rolling year, with such proration to be based upon the time between the commencement of the rolling year and the later renewal date, as compared to the time between the later renewal date and the end of the rolling year. If Midmark makes that election, the Program for which the proration occurs will now have a renewal date at the beginning of the next rolling year. By way of example, Customer orders Software #1 maintenance and support on January 1, 2017, and Software #2 maintenance and support on July 1, 2017. When the renewal for Software #1 maintenance and support occurs on January 1, 2018, Midmark may elect that Customer pay approximately 1/2 of the total Program fees for renewal of maintenance and support for Software #2 at that time, in which case the renewal for maintenance and support for Software #2 will then next occur on January 1, 2019.

4.1.3 Program fees are annual flat fees calculated as 15% of the Software License and are payable in advance. Program fees and payment terms for the Initial Program Term are set forth on the Software Order Form. Subsequent Program enrollment will be billed annually to customer.

4.1.4 After the Initial Program Term expires, Midmark may adjust its fees and provide Customer prior written notice at least sixty (60) days prior to when such fee adjustment is to take effect. Such fee adjustment may be for no more than the greater of the following amounts: (i) Five percent (5.0%); or (ii) the increase in the Consumer Price Index for All Urban Consumers (CPI-U) as published by the Bureau of Labor Statistics of the United States Department of Labor, or any reasonable replacement index, from August of the calendar year two (2) years prior, to August of the preceding calendar year. By way of example, for a price increase effective January 2017, the applicable indices are for August 2015 and August 2016. Price changes will not occur more often than once per calendar year.

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## 4.2 Support

4.2.1 During Program enrollment, Midmark will provide phone and e-mail based consultation and support with respect to use and functionality of the Software during Midmark's regular business hours. The contact information for this support is as follows:

Phone: 800.624.8950, option 2

E-mail: techsupport@midmark.com

Current Hours of Operation: Monday – Friday, 5:00 am to 5:00 pm PST

*(Hours are subject to change and do not include holidays)*

4.2.2 Updates. Midmark may choose to initiate Updates to the Software. If any Update to the Software for a particular Device Type is released while Customer is actively enrolled in the Program as to every license of that Device Type, that Update will be made available to Customer at no additional charge. If any license for a Device Type is not actively enrolled in the Program, Midmark will provide the Update to Customer upon Customer's compliance with Section 4.3.2 of this Agreement as to each license of that Device Type that is not actively enrolled in the Program

4.2.3 Upgrades. Midmark may choose to initiate Upgrades and make them available for purchase. If Midmark releases any Upgrades, Midmark will make the Upgrades available for purchase by Customer at Midmark's generally applicable pricing and terms for those Upgrades, during Customer's active enrollment in the Program.

4.2.4 Implementation and Installation. Customer agrees to cooperate with Midmark to allow Midmark reasonable access to Customer's computer system for the purpose of effectuating any support services for Software hosted by Customer's computer system. Installation services or support services outside of Midmark's regular business hours may be subject to additional charges.

Initial installation fee quoted will cover a typical implementation up to the hours purchased. A typical implementation consists of one server and one client setup, unless otherwise detailed in a statement of work. Statement of work is required for enterprise software solutions, such as, Midmark Connect for Cerner, IQiA, IQiC, and IQiE. The statement of work will detail implementation services provided by Midmark along with customer and EMR responsibilities. Additional implementation services such as re-installation, additional client workstations and software upgrades, are subject to installation fees. Maintenance and support does not cover Implementation Services. Implementation services are scheduled and based on availability.

## 4.3 Program Term, Termination, Reinstatement

Customer enrollment in Midmark's Program is in accordance with Section 4 of this Agreement.

4.3.1 If Program enrollment lapses or is terminated, the Customer's Software license will continue, provided the Customer remains in compliance with all requirements of this Agreement, including the terms and conditions of the EULA. Customer will no longer receive any further maintenance and support services as outlined in this Agreement.

4.3.2 If Program enrollment lapses, Customer may resume Program coverage by paying an amount no greater than the Program fees that would have been due if such coverage had been continued over the lapsed period, and Program fees for the current Program year. Upon such payment, Midmark will provide to Customer any Updates that were released during the lapsed enrollment period.

4.3.3 If Program enrollment lapses and the Software has undergone an Upgrade during the period of non-enrollment Customer will be able to purchase the Upgrade by purchasing the Upgrade at Midmark's then current fees and other terms and conditions through a new agreement.

## 5 Indemnification

5.1 Midmark and Customer will indemnify and hold one another and the other's officers, employees, directors, subcontractors, agents and representatives harmless from and against any and all claims, losses, costs, damages, and expenses, including reasonable attorneys' fees, that arise out of or relate to: (i) the indemnifying party's infringement or alleged infringement of a third party's trade secrets, proprietary information, trademarks, or copyright; or (ii) any actions or omissions by the indemnifying party, or any of its officers, employees, directors, agents or representatives.

5.2 The indemnification obligations imposed under this Section 5 will survive the expiration or termination of this Agreement.

## 6 Warranty Disclaimer

6.1 Midmark represents and warrants that the Software will conform and function substantially and operate in all material respects in accordance with Midmark's applicable user documentation for the Software.

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- 6.2 Midmark represents and warrants that it either owns or has the right to license the Software to the Customer. Midmark warrants that the Software does not infringe any third party copyright, patent, other proprietary rights or trade secrets. Midmark will not ship or distribute any Software to Customer that Customer is not legally authorized to use.
- 6.3 Midmark represents and warrants to Customer that:
- 6.3.1 The Program services performed hereunder will be completed in a professional and workmanlike substantially in accordance with the customary standards of the technical support industry for manner similar services and will comply in all material respects with this Agreement;
- 6.3.2 All personnel who perform any portion of the Program services at the direction of Midmark under this Agreement are either: (i) Midmark's employees (W-2 employees) and doing so in the course of their employment with Midmark; or (ii) Subcontractors and doing so pursuant to agreements with Midmark effecting an assignment of all rights in and to any work product;
- 6.3.3 The Program services will be performed solely by personnel who are fully authorized to lawfully work in the United States;
- 6.3.4 Midmark has all licenses, rights, title, and interests, as well as all permits and similar permissions, required by applicable law, rule, or regulation necessary to perform its obligations hereunder; and
- 6.3.5 Any work product developed hereunder does not infringe any third party's intellectual property rights and is free from any liens, encumbrances, or claims.
- 6.4 The warranties set forth under this Section 6 constitute the sole warranties made by Midmark with respect to the Software and Program services. EXCEPT FOR THE WARRANTIES SET FORTH UNDER THIS SECTION 6 OF THIS AGREEMENT, CUSTOMER ACKNOWLEDGES AND AGREES THAT THE SOFTWARE AND PROGRAM SERVICES ARE PROVIDED "AS-IS" WITH ALL FAULTS, WITHOUT ANY OTHER WARRANTIES OF ANY KIND, AND MIDMARK AND ITS LICENSORS DISCLAIM ANY AND ALL OTHER WARRANTIES, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.
- 6.5 MIDMARK AND ITS LICENSORS DO NOT WARRANT THAT THE SOFTWARE:
- IS ERROR FREE;
  - CAN BE USED WITHOUT PROBLEMS OR INTERRUPTIONS;
  - IS FREE FROM VULNERABILITY TO INTRUSION OR ATTACK BY VIRUSES OR OTHER METHODS; OR
  - WILL MEET USER'S REQUIREMENTS.

## 7 Limitations on Liability

- 7.1 MIDMARK SHALL NOT BE LIABLE FOR AND HEREBY DISCLAIMS ANY AND ALL DIRECT, SPECIAL, INDIRECT, INCIDENTAL, EXEMPLARY, AND CONSEQUENTIAL DAMAGES OR DELAY, INCLUDING BUT NOT LIMITED TO DAMAGES FOR LOSS OF PROFITS OR INCOME, LOSS OF DATA, LOSS OF USE, DOWN TIME, COVER, AND EMPLOYEE AND INDEPENDENT CONTRACTOR WAGES, PAYMENTS, AND BENEFITS. IN NO EVENT SHALL THE TOTAL LIABILITY OF MIDMARK TO CUSTOMER FOR ALL DAMAGES ARISING OUT OF OR RELATING TO A MIDMARK DEVICE TYPE EXCEED THE LICENSE AND PROGRAM FEES PAID TO MIDMARK FOR THAT MIDMARK DEVICE TYPE DURING THE ONE (1) YEAR PERIOD IMMEDIATELY PRECEDING THE DATE ON WHICH MIDMARK RECEIVES WRITTEN NOTICE OF CUSTOMER'S DISPUTE.

## 8 Exclusions

- 8.1 This Agreement only covers the items outlined on the Software Order Form, and does not cover Midmark Devices not listed thereon, new or alternate Software operating environments or EMR programs, or specialized or new maintenance or support services. If Customer wishes to add or remove items outlined on the Software Order Form after it has been fully executed and changes have been made to the terms and conditions of this Program, the added items may be subject to then current fees and then current terms and conditions.
- 8.2 The Program does not cover services required due to the failure or interruption of any electrical power, or any accident or cause external to the Software, including, but not limited to, problems or malfunctions related to Customer's network, database, third party software products, and/or Customer's hardware, operator error, or Customer's negligence or willful misconduct.

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**9 Patient Data Privacy**

9.1 It is understood that any Patient Data may be considered Protected Health Information subject to applicable regulatory laws and regulations relating to the protection of Protected Health Information, including without limitation the federal rules and regulations imposed by the Health Insurance Portability and Accountability Act of 1996, as amended from time to time ("HIPAA"). Nothing herein is intended to grant or allow Midmark access to any Patient Data. In this regard, during any implementation or installation process involving access by Midmark to Customer's computer system, Customer shall use its best efforts to not allow access to Patient Data.

**10 Export Control**

10.1 Customer acknowledges and agrees the Customer may not use the Software or export or re-export the Software except as permitted by applicable United States law.

**11 Governing Law**

11.1 This Agreement shall be deemed to be executed and to be performed in the State of Ohio, and shall be exclusively governed by, construed and interpreted in accordance with the laws of the State of Ohio as to all matters, including but not limited to matters of validity, construction, effect and performance, excluding choice of law principles that would require application of the laws of another jurisdiction.

**12 Assignment**

12.1 Customer may, with Midmark's prior written consent, assign all of its rights and obligations under this Agreement to: (i) a parent corporation or a subsidiary in which the assigning party holds a fifty percent (50%) or greater ownership interest; or (ii) the purchaser of all or substantially all of the party's assets or the assets of one of its business divisions. If Customer proposes an assignment, Midmark's written consent shall, at a minimum, be conditioned upon: (i) the assignee agreeing in writing to assume all of Customer's obligations hereunder; and (ii) Midmark's determination, in its reasonable discretion, that the assignee has the ability and creditworthiness to assume those obligations.

12.2 Except as set forth in Section 12.1, no rights or obligations under this Agreement may be assigned or delegated by Customer without the prior written consent of Midmark, which consent shall be at Midmark's discretion.

**13 Miscellaneous**

13.1 **Force Majeure.** Neither of the parties shall be liable to the other for any delay or failure to perform due to causes beyond its reasonable control.

13.2 **Notices.** All notices under this Agreement will be given in writing and will be sent by certified mail, return receipt requested, or by prepaid overnight courier such that proof of delivery will be obtained, and will be addressed as set forth below or to such other address as may be specified in a prior written notice to the other party:

**If to Midmark:**

Midmark Corporation  
ATTN: Legal or Contracts Dept.  
690 Knox Street, Suite 100  
Torrance, California 90502

**If to Customer:** *Leave blank if this information is the same information listed on the attached Software Order Form.*

Customer Name:

Attn:

Address:

City, State, Zip

Code: Email:

Phone:

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Neither party shall refuse acceptance of delivery of any such notice. Refusal to accept delivery is acknowledgment for receipt of notice.

- 13.3 **Relationship.** This Agreement does not make either party the employee, agent, or legal representative of the other for any purpose whatsoever. Neither party is granted any right or authority to assume or to create any obligation or responsibility, express or implied, on behalf of or in the name of the other party is granted. In fulfilling its obligations pursuant to this Agreement, each party will be acting as an independent contractor.
- 13.4 **Severability.** In the event that any of the terms of this Agreement are in conflict with any rule of law or statutory provision or otherwise unenforceable under the laws or regulations of any government or subdivision thereof, such terms will be deemed stricken from this Agreement, but such invalidity or unenforceability will not invalidate any of the other terms of this Agreement and this Agreement will continue in force, unless the invalidity or unenforceability of any such provisions of this Agreement substantially violates, comprises an integral part of, or is otherwise inseparable from the remainder of this Agreement.
- 13.5 **Counterparts.** This Agreement may be executed in counterparts, and each such counterpart will be deemed an original hereof.
- 13.6 **Waiver.** The waiver or failure of either party to exercise any right in any respect provided for herein shall not be deemed to be a waiver of any further right hereunder. Failure, neglect, or delay by either party to enforce the provisions of this Agreement or its rights or remedies at any time will not be construed or deemed to be a continuing or further waiver of such party's rights under this Agreement and will not in any way affect the validity of the whole or any part of this Agreement or prejudice the right to take subsequent action.
- 13.7 **Entire Agreement.** This Agreement expressly supersedes any and all previous agreements either written or oral between the parties. In the event the parties agree subsequent to execution of this Agreement upon the addition or removal of a type of Midmark Device, or to a change in any fee chargeable to Customer, Customer hereby authorizes Midmark to update the applicable Software Order Form to reflect the parties' agreement, which updated Agreement shall be binding on Customer.
- 13.8 **Conflict.** In the event of a conflict between the terms of this Agreement and the EULA, the terms of this Agreement shall control.