



## Monterey County Board of Supervisors

168 West Alisal Street,  
1st Floor  
Salinas, CA 93901  
831.755.5066

### Board Order

#### Agreement No.: A-13929

Upon motion of Supervisor Parker, seconded by Supervisor Adams and carried by those members present, the Board of Supervisors hereby:

- a. Authorized the Deputy Purchasing Agent for Natividad Medical Center (NMC) or his designee to execute an agreement with Blue Elm Company LLC. for Master Software License & Maintenance services at NMC for an amount not to exceed \$19,200 with an agreement term retroactive May 1, 2018 through April 30, 2019;
- b. Authorized the Deputy Purchasing Agent for NMC or his delegate to execute up to three (3) future amendments for extended software maintenance in future years, provided that the annual cost of the extended maintenance does not exceed \$3,600 per year;
- c. Authorized the Deputy Purchasing Agent for NMC or his designee to execute up to three (3) future amendments which are not related to extended annual maintenance provided that the cost does not exceed ten percent (10%) (\$1,920) of the original cost of the agreement per each amendment; and
- d. Approved the NMC Chief Executive Officer's recommendation to accept non-standard indemnification, insurance, limitations on liability, additional insured or blank endorsement and limitations on warranty and indemnity provisions within the agreement.

PASSED AND ADOPTED on this 22nd day of May 2018, by the following vote, to wit:

AYES: Supervisors Alejo, Salinas, Phillips, Parker and Adams

NOES: None

ABSENT: None

I, Nicholas E. Chiulos, Acting Clerk of the Board of Supervisors of the County of Monterey, State of California, hereby certify that the foregoing is a true copy of an original order of said Board of Supervisors duly made and entered in the minutes thereof of Minute Book 81 for the meeting May 22, 2018.

Dated: June 8, 2018  
File ID: A 18-168

Nicholas E. Chiulos, Acting Clerk of the Board of Supervisors  
County of Monterey, State of California

By Denise Hancock  
Deputy

# Master Software License & Maintenance Agreement

This Master Software License & Maintenance Agreement ("Master Agreement") made this 1st day of May, 2018, by and between Blue Elm Company LLC, a limited liability company, existing under the laws of The Commonwealth of Massachusetts and having its principal place of business at 220 Alder Road, Westwood, Massachusetts 02090, (hereinafter called "BLUE ELM") and, the County of Monterey, a political subdivision of the State of California, on behalf of Natividad Medical Center, an acute care hospital a corporation having its principal place of business at 1441 Constitution Boulevard, Salinas, California 93906, (hereinafter called "Customer").

Whereas BLUE ELM warrants that it has developed or is developing computer programs, the executable versions of which, and any physical embodiments of such versions, and related documentation being together hereinafter called "SOFTWARE PROPERTY". Customer desires to obtain from Blue Elm the right to use SOFTWARE PROPERTY and obtain maintenance and support ("Maintenance") which is subject to the terms and conditions of this Master Agreement and the applicable Order Form (both being herein called collectively "Agreement") identifying the specific SOFTWARE PROPERTY and Maintenance.

NOW THEREFORE, the parties hereto hereby agree as follows:

## 1. LICENSE GRANT

Subject to Customer compliance with the terms and conditions of the Agreement, including but not limited to payment of applicable fees for SOFTWARE PROPERTY and Maintenance obtained hereunder, BLUE ELM grants Customer a limited, non-exclusive, non-transferable (except as expressly permitted herein) license (without the rights to sublicense (except as expressly permitted herein)) to use SOFTWARE PROPERTY in object form and solely for Customer's business purposes. Such use shall extend to use by Customer and Customer's Authorized End Users. "Authorized End Users" means Customer employees and Customer Affiliate's employees and independent contractors; provided that any outsourcers, facilities management providers, or application service providers must be approved by BLUE ELM, which consent shall not be unreasonably withheld. Use of the SOFTWARE PROPERTY by Authorized End Users shall at all times remain Customer responsibility and liability. Customer may use the SOFTWARE PROPERTY for the operation of Customer Affiliate's internal data processing where an "Affiliate" shall mean any entity for which Customer holds greater than a fifty percent (50%) interest. BLUE ELM shall retain all license rights, title, and interest to SOFTWARE PROPERTY (including, without limitation, all improvements, modifications and derivatives developed by BLUE ELM). The type of license Customer acquires is designated in the Order Form for the SOFTWARE PROPERTY and may include:

- a. **Perpetual License:** A perpetual license to use the SOFTWARE PROPERTY which may only be terminated by BLUE ELM as set forth in Paragraph 5(c) herein.
- b. **Subscription License:** A license to use the SOFTWARE PROPERTY for a specific length of time (the "Term") as set forth in the applicable Order Form. When the license expires at the end of the Term, Customer, all Affiliates and Authorized End Users must stop using the SOFTWARE PROPERTY if Customer has not obtained a new license.

## 2. DELIVERY

- a. BLUE ELM agrees to deliver and Customer agrees to receive within sixty (60) days of Order Form execution, or as otherwise specified on the Order Form, ("Deliver-By Date") an executable version of and documentation for the SOFTWARE PROPERTY for use on Customer's computer system(s).
- b. BLUE ELM agrees to provide Customer with implementation services necessary to install and achieve operational status of SOFTWARE PROPERTY. Any additional consulting and custom software development services will be made available under separate agreement.
- c. Delivery shall be made electronically over the Internet. All implementation, maintenance, and service work shall be done remotely over the Internet from BLUE ELM offices.

- d. Acceptance. Customer may evaluate the SOFTWARE PROPERTY for a period of five (5) business days ("Acceptance Period") following the achievement of operational status, per paragraph 2(b), as determined by the good faith judgement of BLUE ELM's implementation staff. If at any time during the Acceptance Period the SOFTWARE PROPERTY does not meet Customer's expectations, Customer may terminate this Agreement by written notice to BLUE ELM. In the event of such a termination, BLUE ELM shall refund to Customer all fees paid, including license, service and support for the Software. At the conclusion of the Acceptance Period, the SOFTWARE PROPERTY will be deemed accepted and Customer may no longer terminate this Agreement under the terms of this paragraph.
- e. If customization of the SOFTWARE PROPERTY beyond that specified on Order Form is requested by Customer and assented to by BLUE ELM, then
  - Customer, with advice from BLUE ELM, will specify in writing all the parameters necessary for BLUE ELM to modify the SOFTWARE PROPERTY;
  - BLUE ELM will furnish Customer a written price quotation for such modifications; and
  - If Customer mutually agrees in writing to such price quotation then BLUE ELM will furnish Customer with an Amendment to the Order Form, adjusting the delivery dates and adjusting the prices listed on the Order Form, for execution by both parties. Until and unless said Amendment, or any amendment, is executed by both parties then this Agreement shall remain in full force and effect in its original form.

### 3. INVOICE PAYMENT TERMS

- a. The price for the SOFTWARE PROPERTY, Maintenance, and any additional services shall be specified in each Order Form. Except as provided in the applicable Order Form or in the event of a written amendment, there are no other fees or charges to be paid by Customer for the SOFTWARE PROPERTY and Maintenance. BLUE ELM shall render an invoice to Customer for the applicable license fees and Maintenance. The invoice shall set forth the amounts claimed by BLUE ELM for the applicable period, together with an itemized basis for the amounts claimed, and such other information pertinent to the invoice. Customer shall certify the invoice, either in the requested amount or in such other amount as Customer approves in conformity with this Agreement, and shall promptly submit such invoice to the County Auditor-Controller for payment. The County Auditor-Controller shall pay the amount certified within thirty (30) days of receiving the certified invoice ("Due Date"). If Customer disagrees with BLUE ELM on the amount of an invoice, Customer shall work with BLUE ELM in good faith to correct the invoice. Pending settlement or resolution of the dispute, Customer's non-payment of such disputed items shall not constitute default by Customer.
- b. All amounts payable hereunder shall exclude all applicable sales, use and other taxes. Customer is responsible for payment of all such taxes, excluding taxes based on BLUE ELM's income, personal property, personnel, or similar taxes not directly based on Customer's use or consumption of BLUE ELM's products and services.

### 4. LICENSE PAYMENT TERMS

Customer agrees to pay the total license fee as specified on Order Form for the rights granted herein to use the SOFTWARE PROPERTY.

### 5. TERM AND TERMINATION

- a. Term. This Agreement shall be effective when signed by both parties and remain in effect, unless earlier terminated as provided herein. The term of the Maintenance portion of the Agreement is governed by Section 6 (Maintenance Contract Period).
- b. Termination for Default. If either party materially breaches the Agreement, or any of its provisions, the other party may terminate the Agreement and any applicable Order Form as it pertains to the breaching party after

notifying the breaching party in writing and the breaching party fails to cure such breach no later than thirty (30) days after receiving written notice of default.

- c. Termination by BLUE ELM. In the event that any license payment due BLUE ELM under this Agreement is delinquent for ninety (90) days past the Due Date, then BLUE ELM may, at its sole discretion, terminate the license to the SOFTWARE PROPERTY. Additionally, BLUE ELM may notify Customer at any time after five (5) years following the Initial Service Period that it is discontinuing offering Maintenance for the SOFTWARE PROPERTY to the general public. Such discontinuation will take effect on the date specified by BLUE ELM in a notice of discontinuation, which date shall not be earlier than six (6) months from the date of discontinuation. BLUE ELM will make its best commercial effort to provide a substitute offering if Maintenance to the SOFTWARE PROPERTY is discontinued. If a substitute offering is not available or accepted by Customer, BLUE ELM will have the right to terminate the Maintenance and refund any pre-paid fees for Maintenance covering the remaining Renewal Service Period.
- d. Termination by Customer. Customer's payments to BLUE ELM under this Agreement are funded by local, state and federal governments. If funds from local, state and federal sources are not obtained and continued at a level sufficient to allow for Customer's purchase of the indicated quantity of services, then Customer may give written notice of this fact to BLUE ELM, and the obligations of the parties under the Maintenance portion of this Agreement shall terminate immediately, or on such date thereafter, as Customer may specify in its notice, unless in the meanwhile the parties enter into a written amendment modifying this Agreement.
- e. Termination for Convenience. After the Initial Service Period, Customer may terminate Maintenance at any time for its own convenience by providing sixty (60) days written notice to BLUE ELM.
- f. Effect of Termination. In the event of termination of the license to the SOFTWARE PROPERTY, Customer will cease use of the SOFTWARE PROPERTY immediately, and provide remote access to BLUE ELM for the sole purpose of erasing all copies of the SOFTWARE PROPERTY, from Customer's systems.

## 6. MAINTENANCE CONTRACT PERIOD

Maintenance performed by BLUE ELM to the SOFTWARE PROPERTY is governed under the terms and conditions of this Maintenance portion of the Agreement, provided that Customer purchases such Maintenance on an annual basis. During the term of the Service Period, BLUE ELM will provide Customer access to all new versions, releases, updates, enhancements, corrections, and amendments to the SOFTWARE PROPERTY (collectively, "Updates") at no additional cost. If the SOFTWARE PROPERTY is ever displaced by BLUE ELM (or another renamed product is distributed), Customer shall review the new product at no additional charge. The initial service period ("Initial Service Period") of the Maintenance shall be for three (3) years commencing immediately after the SOFTWARE PROPERTY warranty period expires as defined in Paragraph 8(b). Upon the expiration of the Initial Service Period, Maintenance shall automatically renew for successive one (1) year terms (each a "Renewal Service Period") unless Customer provides notice of termination or non-renewal no less than thirty (30) days prior to expiration of the then-current service period. The Initial Service Period and any Renewal Service Period are referred to herein collectively as the "Service Period." BLUE ELM shall provide Customer with at least sixty (60) days prior written notice of any fee increase applicable to the Renewal Service Period that is about to commence. BLUE ELM's fees hereunder shall be fixed during the Initial Service Period. Thereafter, BLUE ELM may increase such fees for a Renewal Service Period in accordance with Section 8(b) (Maintenance Payment Terms) below.

## 7. DELIVERY OF MAINTENANCE SERVICE

- a. In addition to any warranty obligations hereunder, BLUE ELM will provide and Customer will accept Maintenance service on the SOFTWARE PROPERTY, unless otherwise defined on Order Form. Maintenance includes access to remote Maintenance personnel in order to assist Customer in the use of the SOFTWARE PROPERTY.
- b. BLUE ELM will provide reasonable Updates to the SOFTWARE PROPERTY to ensure that it continues to function properly.

- c. BLUE ELM will provide Customer with Maintenance service and support via telephone and/or e-mail contact with BLUE ELM personnel for the purpose of promptly responding to and resolving problems originating in the SOFTWARE PROPERTY ("Errors").
- d. The Maintenance service and support recited in Paragraph 7(c) above shall be available between the hours of 9:00 a.m. and 4:00 p.m. Monday through Friday Eastern Time, excluding Massachusetts legal holidays and the day following Thanksgiving.
- e. If Errors recited in Paragraph 7(c) above are reasonably deemed by BLUE ELM to originate in computer hardware or in communications equipment or in software not covered by a BLUE ELM warranty or maintenance agreement or result from modifications to the SOFTWARE PROPERTY listed in Order Form made by anyone other than BLUE ELM, then BLUE ELM's responsibility shall be limited to providing assistance and advice to enable Customer to determine appropriate remedial action to be taken by Customer or others (not by BLUE ELM) to resolve such Errors; provided, however, BLUE ELM may agree to perform such modifications, assistances and support at mutually agreed upon rates via an amendment to the Order Form.
- f. If the Errors recited in Paragraph 7(c) above are reasonably deemed by BLUE ELM to result from errors or Defects in the SOFTWARE PROPERTY listed in Order Form, then BLUE ELM shall correct such Errors or Defects in the SOFTWARE PROPERTY and shall exercise its best efforts to assure that the same is accomplished in as expeditious a manner as possible. "Errors or defects in the SOFTWARE PROPERTY" are defined as failures of the SOFTWARE PROPERTY to operate or to produce output in substantial conformity to descriptions of such operation or output in the program documentation provided on the Order Form.
- g. If Errors recited in Paragraph 7(c) above are reasonably deemed by BLUE ELM to originate from incorrect Use of the SOFTWARE PROPERTY or by a hardware malfunction which results in database errors requiring BLUE ELM's assistance for correction, then at BLUE ELM's option, the associated consulting time shall be billed to Customer at mutually agreed upon rates. "Incorrect Use of the SOFTWARE PROPERTY" is defined as data processing procedures not in conformity with descriptions of such procedures on the Order Form.

## 8. MAINTENANCE PAYMENT TERMS

- a. During the Initial Service Period, Customer will pay to BLUE ELM for Maintenance the fees as specified on the Order Form at the commencement of each Service Period in accordance with Section 3(a) (Invoice Payment Terms). Invoices will be sent to Customer annually, at the commencement of any Maintenance Service Period.
- b. Upon expiration of the Initial Service Period, the Maintenance fee may be increased once per year upon sixty (60) days written notice to Customer prior to the beginning of any Renewal Service Period at a rate not to exceed the greater of three percent (3%) or the percentage equal to the percentage change in the Consumer Price Index during the twelve (12) month period preceding the date on which BLUE ELM notifies Customer of such increase. For these purposes, the "Consumer Price Index" shall mean the Consumer Price Index for All Urban Consumers, U.S., All Items (1982-84 = 100). BLUE ELM shall provide sixty (60) days written notice of such increase to Customer. In the event of such notice, Customer may terminate the Maintenance portion of the Agreement as of the effective date of the increase by providing written notice to BLUE ELM of such termination. Such notice from Customer shall not be subject to the sixty (60) day requirement provided under Paragraph 5.
- c. In addition to the above charges, the consulting time referred to in Paragraph 7(g) associated with the performance of services by BLUE ELM to Customer under this Agreement shall be borne by Customer, and shall be invoiced separately to Customer when, as, and if incurred by BLUE ELM; provided that the parties shall mutually agree in a written amendment to the rates for the consulting time prior to the performance of any consulting time by BLUE ELM.
- d. Customer wishing to rejoin Maintenance within a two (2) year period of no cover can do so subject to the payment of a reinstatement fee which will be provided by BLUE ELM on request. The reinstatement fee shall be equal to the amount of the unpaid Maintenance that would have been paid if coverage had not lapse.

- e. The Maintenance fees do not provide for any travel by BLUE ELM personnel to Customer's site. There shall be no travel or expenses reimbursement associated with the Maintenance services unless pre-approved in writing by Customer. All travel shall be mutually agreed to between BLUE ELM and Customer.

## 9. WARRANTIES

- a. BLUE ELM represents and warrants to Customer that it is the developer and sole owner of the SOFTWARE PROPERTY and to the best of BLUE ELM's knowledge, Customer's permitted use of any Software, product or design provided hereunder shall not violate or infringe any registered patent, copyright, trade secret or other intellectual property right of any third party. BLUE ELM further represents and warrants that (i) it has the full power, capacity, and authority to enter into and perform this Agreement and to make the grant of rights contained herein; (ii) its performance under this Agreement and the SOFTWARE PROPERTY shall at all times comply with all applicable federal, state and local laws and regulations; (iii) it will perform all services in a professional and competent manner using properly qualified and trained personnel; (iv) the SOFTWARE PROPERTY provided hereunder is and when delivered to Customer will be free from viruses, spyware, and other similar harmful and destructive code; (v) neither BLUE ELM nor any of its owners, officers, directors, employees or agents has been excluded from payment for federal health care programs or appears on the List of Excluded Individuals/Entities of the Office of the Inspector General of the Department of Health and Human Services; and (vi) BLUE ELM has not been sanctioned, excluded or debarred under Medicare, Medicaid, or any other state or federal program. BLUE ELM agrees to report immediately, with relevant factual detail, to Customer any sanction, exclusion or debarment of BLUE ELM's or of any its owners, officers, directors, employees, or agents under Medicare, Medicaid, or any other state or federal program.
- b. BLUE ELM represents and warrants that during the term of this Agreement and during any term of Maintenance, the SOFTWARE PROPERTY will materially conform to the requirements of this Agreement and the applicable Specifications. BLUE ELM further represents and warrants the SOFTWARE PROPERTY will act substantially as described in its user manuals and documentation for a period of sixty (60) days from the actual delivery date thereof. In any event of any breach of the foregoing warranty, BLUE ELM, at its sole discretion and expense, will modify the SOFTWARE PROPERTY and correct any program errors reported in writing by Customer so that it complies with the foregoing warranty. During the sixty (60) day warranty period maintenance service and support regarding the use of the SOFTWARE PROPERTY will be provided between the hours of 9 a.m. and 4 p.m. Eastern Time, Monday through Friday via telephone contact with BLUE ELM personnel to resolve material program errors originating in the SOFTWARE PROPERTY. "Program errors" are defined as failures of the SOFTWARE PROPERTY to function in a manner, which conforms substantially to descriptions in the Order Form, this Agreement, use manuals and documentation. Any modifications of the SOFTWARE PROPERTY made by anyone other than BLUE ELM shall relieve BLUE ELM of all obligations under this Paragraph 9(b).
- c. Customer acknowledges BLUE ELM is not responsible for changes MEDITECH may make to its system which may render the SOFTWARE PROPERTY inoperable. BLUE ELM will make a best faith effort to keep SOFTWARE PROPERTY operable with all future versions of MEDITECH's software. Should SOFTWARE PROPERTY become inoperable with MEDITECH and BLUE ELM is unable to correct such issue within sixty (60) days, Customer may terminate the Maintenance portion of this Agreement immediately and receive a pro-rated refund of any pre-paid Maintenance fees.
- d. Disclaimer. EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT, NEITHER PARTY MAKES ANY OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, QUIET ENJOYMENT, QUALITY OF INFORMATION, OR TITLE/NONINFRINGEMENT AND ALL SUCH WARRANTIES ARE HEREBY SPECIFICALLY DISCLAIMED.

## 10. LIMITATION ON LIABILITY AND INDEMNITY

- a. Except for the parties' respective indemnity obligations under this Agreement, for either party's breach of its confidentiality or security obligations under this Agreement, and for claims based upon fraud or the willful,

malicious or grossly negligent conduct of the liable party: (i) in no event will either party be liable to the other party or to any third party for any lost revenue, profit, or data, or for special, indirect, consequential, incidental, or punitive damages however caused and regardless of the theory of liability arising out of or in connection with this Agreement, the use of or inability to use the SOFTWARE PROPERTY or the services provided hereunder, even if the other party has been advised of the possibility of such damages; and (ii) in no event will either party's aggregate liability to the other party in any cause of action, whether in contract, tort (including negligence) or otherwise, pertaining to any software or services provided hereunder, exceed the amount equal to the total fees paid to BLUE ELM by Customer under this Agreement during the twelve (12) month period immediately preceding such claim. The foregoing limitations shall apply even if the above-stated warranty fails of its essential purpose.

- b. BLUE ELM agrees to indemnify, defend and hold harmless Customer and its affiliates and their respective officers, agents, and employees, with respect to any actual third party claim, expense (including reasonable attorneys' fees), liability, loss, fine or damages, in any way arising out or in connection with: (i) any personal injury or damage to real or tangible personal property caused or incurred by BLUE ELM or its personnel; (ii) the breach by BLUE ELM or its personnel of its confidentiality or security obligations under this Agreement, including any breach incident involving Customer Data in BLUE ELM's possession, custody, or control; (iii) the non-compliance by BLUE ELM or its personnel with applicable law; (iv) the infringement, misappropriation, or other violation of intellectual property rights; (v) the grossly negligent acts or omissions or willful misconduct of BLUE ELM or its personnel; and (vi) the performance of this Agreement or Customer's use of the SOFTWARE PROPERTY in connection with this Agreement, including damages caused to Customer's system from use of the SOFTWARE PROPERTY, excepting any loss caused by Customer's negligence or willful misconduct. Notwithstanding the foregoing, BLUE ELM shall have no indemnity obligation for intellectual property infringement claims arising from (i) specifications provided by Customer; (ii) use of the Customer intellectual property or BLUE ELM intellectual property in combination with software and/or hardware that is not approved or provided by BLUE ELM; or (iii) Customer's failure to implement an update or enhancement to the Customer intellectual property and/or BLUE ELM intellectual property, provided BLUE ELM provides the update or enhancement free of charge and provides Customer with notice that implementing the update or enhancement would avoid the infringement.
- c. Customer agrees to indemnify, defend and hold harmless BLUE ELM and its affiliates and their respective officers, agents, and employees, with respect to any actual third party claim, expense (including reasonable attorneys' fees), liability, loss, fine or damages, in any way arising out or in connection with: (i) the negligent acts or omissions or willful misconduct of Customer or its personnel; (ii) Customer's unauthorized use of the SOFTWARE PROPERTY in connection with this Agreement; (iii) any personal injury or damage to real or tangible personal property caused or incurred by Customer or its personnel; and (iv) any issues caused by SOFTWARE PROPERTY where a maintenance contract was offered by BLUE ELM but not accepted or terminated by Customer.
- d. The indemnified party shall give the indemnifying party prompt notice of any indemnified claims, permit the indemnifying party to control the defense and settlement of such claims, and reasonably cooperate with the indemnifying party in connection with the defense and settlement of such claims; provided, that settlements shall require prior approval by the indemnitee.
- e. If the SOFTWARE PROPERTY becomes or is likely to become the subject of an infringement claim indemnified under Section 10(b), then, in addition to defending the claim and paying any damages and attorneys' fees as required above, BLUE ELM shall, at its option and in its sole discretion, either (a) immediately replace or modify the SOFTWARE PROPERTY, without loss of material functionality or performance, to make it non-infringing, or (b) immediately procure for Customer the right to continue using the SOFTWARE PROPERTY pursuant to this Agreement. Any costs associated with implementing either of the above alternatives will be borne by BLUE ELM. If BLUE ELM fails to provide one of the foregoing remedies within forty-five (45) days of notice of the claim, either party may terminate this Agreement and BLUE ELM shall refund to Customer the prorated portion of all pre-paid fees.

## 11. CONFIDENTIALITY AND DATA SECURITY

- a. Confidentiality Information. During the course of this Agreement, each party (the "Disclosing Party") may disclose to the other party (the "Receiving Party") certain non-public information or materials relating to the Disclosing Party's products, intellectual property, algorithms and techniques, business, business plans, marketing programs and efforts, customer lists, customer information, financial information and other confidential information and trade secrets ("Confidential Information"). Customer's Confidential Information shall also include Customer Data and any and all information relating to the access of Customer's systems, network or computers and BLUE ELM shall comply with any instructions from Customer related to such access. Confidential Information does not include information that: (a) is or becomes publicly available through no breach by the Receiving Party of this Agreement; (b) was previously known to the Receiving Party prior to the date of disclosure, as evidenced by contemporaneous written records; (c) was acquired from a third party without any breach of any obligation of confidentiality; (d) was independently developed by the Receiving Party hereto without reference to Confidential Information of the Disclosing Party; or (e) is required to be disclosed pursuant to a subpoena or other similar order of any court or government agency, provided, however, that the Receiving Party upon receiving such subpoena or order shall (i) promptly inform the Disclosing Party in writing and provide a copy thereof, (ii) cooperate with the Disclosing Party in limiting disclosure of the Disclosing Party's Confidential Information, and (iii) shall only disclose that Confidential Information necessary to comply with such subpoena or order.
- b. Protection of Confidential Information. Except as expressly provided herein, the Receiving Party will not use or disclose any Confidential Information of the Disclosing Party without the Disclosing Party's prior written consent, except disclosure to and subsequent uses by the Receiving Party's authorized employees or consultants on a need-to-know basis, provided that such employees or consultants have executed written agreements restricting use or disclosure of such Confidential Information that are at least as restrictive as the Receiving Party's obligations under this Section 11(Confidentiality). Subject to the foregoing nondisclosure and non-use obligations, the Receiving Party agrees to use at least the same care and precaution in protecting such Confidential Information as the Receiving Party uses to protect the Receiving Party's own Confidential Information and trade secrets, and in no event less than reasonable care. Each party acknowledges that due to the unique nature of the other Party's Confidential Information, the Disclosing Party will not have an adequate remedy in money or damages in the event of any unauthorized use or disclosure of its Confidential Information. In addition to any other remedies that may be available in law, in equity or otherwise, the Disclosing Party shall be entitled to seek injunctive relief to prevent such unauthorized use or disclosure. Neither party shall remove or alter any proprietary markings (e.g., copyright and trademark notices) on the other party's Confidential Information. The Receiving Party shall promptly notify the Disclosing Party upon discovery of any unauthorized use or disclosure of the Confidential Information of the Disclosing Party. On the Disclosing Party's written request or upon expiration or termination of this Agreement for any reason, the Receiving Party will promptly return or destroy, at the Disclosing Party's option, all originals and copies of all documents and materials it has received containing the Disclosing Party's Confidential Information.
- c. No Publicity. During the term of this Agreement and at all times after the termination or expiration of this Agreement, BLUE ELM shall not make any media release or other public announcement relating to or referring to this Agreement without Customer's prior written consent. BLUE ELM shall acquire no right to use, and shall not use, without Customer's prior written consent, the terms or existence of this Agreement, the names, trade names, trademarks, service marks, artwork, designs, or copyrighted materials, of Customer, its related or affiliated companies, its employees, and assigns: (a) in any advertising, publicity, press release, customer list, presentation or promotion; (b) to express or to imply any endorsement of BLUE ELM or BLUE ELM's software or services; or (c) in any manner other than expressly in accordance with this Agreement.
- d. Data Security. BLUE ELM will maintain and enforce information and data privacy and security procedures with respect to its access, use and storage of all Customer Data (defined below) that (a) are at least equal to industry standards taking into consideration the sensitivity of the relevant Customer Data, and the nature and scope of the services to be provided, (b) are in accordance with Customer's reasonable security requirements, (c) comply with all applicable international, foreign, federal, state and local laws, statutes, rules, orders and regulations, and (d) provide reasonably appropriate administrative, technical, and physical safeguards to protect against accidental or



unlawful destruction, loss, alteration or unauthorized disclosure, access or use of Customer Data. Without limiting the generality of the foregoing, BLUE ELM will take all reasonable measures to secure and defend its location and equipment against "hackers" and others who may seek, without authorization, to modify or access BLUE ELM systems or the information found therein without the consent of Customer. BLUE ELM agrees to use, deploy, and maintain commercially available anti-virus and anti-malware software on its systems. BLUE ELM will periodically test its systems for potential areas where security could be breached. BLUE ELM will report to Customer within two (2) days any breaches of security or unauthorized access to BLUE ELM systems that BLUE ELM detects or becomes aware of that could impact Customer. BLUE ELM will use diligent efforts to remedy such breach of security or unauthorized access in a timely manner and deliver to Customer a root cause assessment and future incident mitigation plan with regard to any breach of security or unauthorized access affecting Customer Data. For purposes of this Agreement, "Customer Data" means all data, content, material, and other information provided by Customer to BLUE ELM or otherwise transmitted outside of Customer's network to BLUE ELM for use in connection with the SOFTWARE PROPERTY including Protected Health Information and personally identifiable information of Customer's customers.

- e. BAA. The parties shall enter into a Business Associate Agreement ("BAA"), attached hereto as Exhibit A, setting forth the parties' obligations regarding Protected Health Information ("PHI") that may be disclosed or transmitted to BLUE ELM under the terms of this Agreement. The BAA shall be deemed incorporated herein. If a conflict arises between the terms and conditions of the BAA and the terms and conditions of this Master Agreement, any Order Form, attachment, exhibit, or schedule, the BAA shall control.

## 12. TITLE

BLUE ELM retains all right, title, copyright, patent, trademark, trade secret and all other proprietary interests to all SOFTWARE PROPERTY and any derivatives thereof. No title, copyright, patent, trademark, trade secret or other right of intellectual property not expressly granted under the Agreement is exchanged between the parties.

## 13. RESPONSIBILITIES OF CUSTOMER

- a. Customer agrees to limit access to any and all SOFTWARE PROPERTY to those of its Authorized End Users who must have access to such SOFTWARE PROPERTY in order to make proper use of the same in Customer's operations.
- b. Customer agrees to notify BLUE ELM promptly in writing upon Customer's knowledge of the circumstances concerning any possession, use or study of the SOFTWARE PROPERTY by any person, corporation or other entity (other than Customer's Authorized End Users) including, but not limited to, the name(s) and addressees) of such person(s), corporations or other entities.
- c. Customer agrees that it will not, at any time, without written permission of BLUE ELM copy, duplicate or permit any person, corporation, or other entity, to copy or duplicate the SOFTWARE PROPERTY or any part thereof, except to the extent required for creation of back-up copies of those portions of the SOFTWARE PROPERTY that could be erased or altered by accidental malfunction of Customer's computer system and except to the extent required for use of the SOFTWARE PROPERTY on the Customer's computer systems.
- d. Customer agrees that it will not, at any time, attempt to modify, de-compile, reverse engineer or in any way attempt to recreate the source code of the SOFTWARE PROPERTY.
- e. It is mutually agreed by Customer and BLUE ELM that all materials, documentation, modifications and Updates furnished to Customer by BLUE ELM under this Agreement shall be subject to the same restrictions and rights of use as apply to the SOFTWARE PROPERTY under this Agreement.
- f. Customer will be responsible for providing remote access through VPN and RDP to computer(s) where SOFTWARE PROPERTY is installed for both implementation and Maintenance support.

- g. Customer will provide to BLUE ELM access to all applicable MEDITECH documentation, provided BLUE ELM's access does not conflict with any confidentiality obligation or limitation Customer has with MEDITECH, to assist BLUE ELM in maintaining currency of the SOFTWARE PROPERTY.
- h. Customer agrees to not distribute SOFTWARE PROPERTY outside of Customer's (or its affiliate's) site.

#### 14. RESTRICTIONS ON TRANSFER

- a. Neither party shall assign this Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld. Notwithstanding the foregoing, either party may assign this Agreement, without the other party's consent, to any Affiliate, or in the event of a merger, acquisition, or sale of all or substantially all of its assets.
- b. The SOFTWARE PROPERTY shall at all times remain the property of BLUE ELM subject to the provisions hereof and the license of use granted hereunder specifically excludes any right of reproduction, sale, lease, sublicense or any other transfer or disposition of the SOFTWARE PROPERTY or any portion thereof by Customer except in accordance with Section 12.

#### 15. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon the heirs, successors and permitted assigns of the parties hereto.

#### 16. OTHER TERMS AND CONDITIONS, IF ANY

- a. If there is a conflict or inconsistency between the terms and conditions of the Master Agreement and the terms and conditions of an Order Form, except with regard to an express amendment to the Master Agreement, the terms and conditions of the Master Agreement will control.
- b. Unless specifically specified otherwise, all dollar amounts on invoices and Order Forms are in USD.
- c. Notice. Any notice required or permitted under this Agreement will be in writing and will be effective as noted when sent by any of the following methods: (A) upon delivery if by personal delivery; (B) the next business day if sent by reputable overnight courier (e.g., UPS) or first-class, priority, air or express mail, with postage prepaid and confirmation of receipt requested; or (C) upon delivery if by facsimile transmission or e-mail, provided that a confirmation copy is delivered by another method under subparts (A) or (B). The sending party will address each such notice to the receiving party at the address set forth on the first page of this Agreement, or at such other address as the receiving party designates in writing for this purpose.
- d. Force Majeure. If either party cannot perform any of its obligations because of any act of God, court order, fire, riot, war, or any other causes beyond a party's reasonable control, and provided further that the party could not have mitigated, avoided or prevented the cause or delay through the exercise of reasonable care and precautions (a "Force Majeure Event"), then the non-performing party will: (i) immediately notify the other party; (ii) take reasonable steps to resume performance as soon as possible; and (iii) not be considered in breach during the duration of the Force Majeure Event. In the event a Force Majeure Event continues for a period of fifteen (15) business days, Customer may terminate any part of this Agreement by providing written notice to BLUE ELM with no further liability to BLUE ELM and BLUE ELM will refund the pro-rated portion of any pre-paid Maintenance fees.
- e. Subcontractors. BLUE ELM shall be and remain responsible to Customer for (a) the performance of all Services, including Services performed or provided by BLUE ELM's subcontractors, and (b) the acts and omissions of BLUE ELM's subcontractors in connection with the performance or provision of any of the Services.
- f. Insurance. During the term of this Agreement, BLUE ELM shall, at its own expense, at all times during the term of this Agreement, maintain, and require its subcontractors to maintain, in full force and effect the following insurance policies in the following amounts: (a) comprehensive commercial general liability insurance with coverage of at least one million dollars (\$1,000,000) per occurrence and three million dollars (\$3,000,000) in the

annual aggregate; (b) professional liability insurance or similar insurance for technology companies for any negligent or otherwise wrongful acts or omissions by BLUE ELM with coverage of at least one million dollars (\$1,000,000) per occurrence and three million dollars (\$3,000,000) in annual aggregate; (c) workers' compensation and employers' liability insurance with limits to conform with the lesser of the amount required by applicable law or one million dollars (\$1,000,000) each accident; and (d) Professional E&O Insurance with at least two million dollars (\$2,000,000) per occurrence and three million dollars (\$3,000,000) annual aggregate limit, that if underwritten on a claims made insuring agreement, shall be maintained for a period of not less than two (2) years after the expiration of this Agreement. BLUE ELM shall provide certificate(s) of insurance upon request.

**17. LEGAL CONSTRUCTION**

The validity and effect of this Contract shall be determined in accordance with the laws of the State of California, without regard to its conflict of laws principles.

**18. AGREEMENT NOT TO BE CONSTRUED AGAINST DRAFTER**

All parties to this Agreement have had a full opportunity to obtain legal advice concerning this Agreement or have declined to obtain such advice. The fact that this Agreement may be drafted by an attorney for one of the parties or by one of the parties is a matter of convenience to all parties. Accordingly, the parties agree that the rule of construction that an instrument or document is to be construed and interpreted most strictly against the drafter of the instrument or document shall not apply in the construction or interpretation of this Agreement.

**19. ENTIRE AGREEMENT**

This Agreement, including any addenda, Order Forms, and attachments, is the entire agreement between the parties and supersedes all prior or contemporaneous representations, understandings or agreements, and excludes all warranties, expressed or implied, with reference to the subject matter hereof, and it may not be modified or amended except by an agreement in writing between the parties hereto. No shrink-wrap, click-wrap, click-through, click-accept, online terms or website terms shall modify any of the terms and conditions of this Agreement. If any provision of this Agreement is held by a court of competent jurisdiction to be illegal, invalid or unenforceable, then such provision shall (so far as it is invalid or unenforceable) be given no effect and shall be deemed not to be included, but without invalidating any of the remaining provisions of this Agreement. The failure of either party to require the performance of any item or obligation of this Agreement, shall not prevent a subsequent enforcement of such term or obligation or be deemed a waiver of any subsequent enforcement of such term or obligation or be deemed a waiver of any subsequent breach. Sections 5(f), 8(a), 10-12, and 16-19 of these terms and conditions will survive the termination of the Agreement. This Agreement may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original and all of which when taken together shall constitute one Agreement.

IN WITNESS WHEREOF, each party has executed this Agreement as a sealed instrument as of the date first above written.

County of Monterey on behalf of Natividad Medical Center ("Customer")

By Kristen Aldrich for Gary R Gray CEO Print Kristen Aldrich  
Title Deputy Purchasing Agent Date 6-8-18

Blue Elm Company

By [Signature] Print John J. Mackey  
Title President Date May 1, 2018

APPROVED AS TO FORM  
[Signature]  
10

Reviewed as to fiscal provisions  
[Signature]  
Auditor-Controller  
County of Monterey 5-3-18

# Order Form

## DrAuditor

This Order form ("Order Form") made this 1<sup>st</sup> day of May, 2018, is being entered into pursuant to the terms and conditions of the Master Software License & Maintenance Agreement dated the 1st day of May, 2018 between Blue Elm Company LLC ("BLUE ELM") and the County of Monterey, a political subdivision of the State of California, on behalf of Natividad Medical Center ("Customer") (the "Master Agreement").

Whereas BLUE ELM warrants that it has developed or is developing computer programs to audit Medical Information Technology, Inc. ("MEDITECH") based data repositories ("Data Repository" or "DR") in their C/S, MAGIC or MAT (6.x) product lines, the executable versions of which, and any physical embodiments of such versions, and related documentation being together called **DrAuditor** (herein "SOFTWARE PROPERTY"), and WHEREAS Customer desires to obtain from BLUE ELM the right to use said SOFTWARE PROPERTY.

### 1. LICENSE

This perpetual license is for use with one (1) MEDITECH live DR database set and one (1) MEDITECH test DR database set based on MEDITECH's transactional HCIS system(s); a set of databases for 6.x includes one (1) MAT and one (1) NPR DR databases; for CS and MAGIC a set includes one (1) NPR DR database.

### 2. DELIVERY

BLUE ELM will install and configure the SOFTWARE PROPERTY on one (1) computer specified by the Customer.

### 3. PAYMENTS

Customer agrees to pay a one-time license fee of \$16,000.00 and an annual maintenance fee of \$3,200.00 in accordance with Section 3 (Invoice Payment Terms) of the Master Agreement.

### 4. EXECUTION DEADLINE

If this Order Form is not executed prior to August 31, 2018, this Order Form will become invalid and may not be executed thereafter.

### 5. PRODUCT OVERVIEW

The general purpose of the DrAuditor application is to provide a mechanism to validate MEDITECH MAGIC, C/S and MAT HCIS application data in a Data Repository product. The approach DrAuditor uses to perform data validation analysis is to capture sample batches of current data from within a MAGIC, C/S or MAT application database and compare the sample batches with data stored within the DR. Sample batch data that has not been modified since the last transfer to the DR should exist and precisely match the corresponding data in the DR. The DrAuditor software identifies instances when DR data is missing or inaccurate.

Features of the DrAuditor Application include:

- The ability to audit any standard MEDITECH HCIS table in the DR.
- The ability to select multiple DR tables for audit analysis.
- Audit batch sample rate selectivity to adjust the tradeoff between statistical significance of the analysis and processing time to complete the analysis.
- Scheduling of audits to run one-time or periodically (e.g., monthly).

- The ability to analyze the same sample batch multiple times over a period of time.
- Discrepancy Reports for:
  1. Table volume (rows) compared to DR tables.
  2. Table entries (rows) missing from DR tables.
  3. Inaccurate column data in DR tables.

Ancillary MEDITECH data repositories (e.g., Home Health, Long Term Care) are not included as part of the standard DrAuditor installation.

The DrAuditor application is developed utilizing Microsoft Visual Studio® programming environment. The application uses an object-oriented programming (OOP) design that provides for easy modification and support. DrAuditor is comprised of two major components – a client and a server. The server is responsible for the majority of processing involved in auditing DR data. The client allows a user to create and run audits and view audit results. DrAuditor also dynamically generates C/S, MAT and MAGIC programs that are run on C/S, MAT or MAGIC machines/networks where they generate sample data.

Auditing DR data utilizing the DrAuditor application is a three-step process. These processes are integrated into easy to use and familiar looking wizards. The steps are:

1. Entering the parameters for the audit
2. Running the audit
  - a. Sampling data from transactional system
  - b. Analyzing the sample data in the DR
3. Reviewing reports

Parameters that can be configured prior to running an audit include choosing the application and or tables to be audited and selecting the sample size (i.e., percentage of data) to extract from the MEDITECH transactional application database into the sample batch. Depending on the results of the analysis, the last two steps may be repeated multiple times. Re-analyzing allows the batch sample data to be checked over consecutive days to determine if corrective measures are functioning. Re-sampling data allows a predefined audit to be run on a regular (e.g., quarterly) basis. Running the audit consists of initiating the audit to run and monitoring its progress. Once complete, the results of the analysis can be compiled and reports generated to view the findings.

The DrAuditor performs extensive data analysis and therefore requires a mid-level workstation class hardware to perform its intended functions. Since the DrAuditor software is broken down into two major components there are two sets of requirements for an installation. The installation of the client can occur on the server device, usually without the need for additional hardware upgrades.


DrAuditor Windows Service Machine Minimum Hardware/Software requirements:

- PC with 4 processors (physical or virtual) (8 processors recommended)
- 8 Gb of memory (16 Gb recommended)
- 50 Gb of available disk space
- Windows Vista/7/8/2007/2008/2012 Professional/Server
- Windows .NET 4.5.2 Framework
- Network access to the Data Repository SQL Server
- 1 SQL Server database on Data Repository SQL Server (must be 2008 R2 or greater)
- Network access to the MEDITECH transactional application machines (C/S, MAT, or MAGIC network)
- MEDITECH C/S, MAT Client and/or MAGIC Workstation software
- PCAnywhere, Remote Desktop, or VNC access to PC
- Network access from the Internet (VPN)
- Internet access for support purposes (blueelm.com and all subdomains)

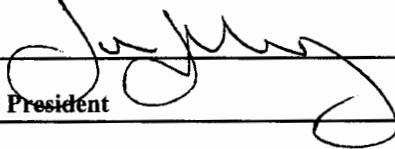
DrAuditor Client Minimum Hardware/Software requirements:

- PC with 2 processors (physical or virtual)
- 4 Gb of memory
- 10 Gb of available disk space
- Windows Vista/7/8/2008/2012 Professional/Server
- Windows .NET 4.5.2 Framework
- Network access to the Data Repository
- Network access to the DrAuditor Server
- Internet access for support purposes (blueelm.com and all subdomains)

Natividad Medical Center ("Customer")

By  for Garry Gray CEO Print Kristen Aldrich  
Title Deputy Purchasing Agent Date 6-8-18

Blue Elm Company

By  Print John J. Mackey  
Title President Date May 1, 2018

## **BUSINESS ASSOCIATE AGREEMENT**

This Business Associate Agreement (“BAA”) effective Blue Elm Company LLC, May 1, 2018 (“Effective Date”), is entered into by and among between the County of Monterey, a political subdivision of the State of California, on behalf of Natividad Medical Center (“Covered Entity”) and Blue Elm Company LLC, (“Business Associate”) (each a “Party” and collectively the “Parties”).

### **RECITALS**

A. WHEREAS, Business Associate provides certain Services for Covered Entity that involve the Use and Disclosure of Protected Health Information (“PHI”) that is created, received, transmitted, or maintained by Business Associate for or on behalf of Covered Entity.

B. WHEREAS, The Parties are committed to complying with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), as amended by the Health Information Technology for Economic and Clinical Health Act (the “HITECH Act”), and their implementing regulations, including the Standards for the Privacy of Individually Identifiable Health Information, 45 C.F.R. Part 160 and Part 164, Subparts A and E (the “Privacy Rule”), the Breach Notification Standards, 45 C.F.R. Part 160 and 164 subparts A and D (the “Breach Notification Rule”), and the Security Standards, 45 C.F.R. Part 160 and Part 164, Subpart C (the “Security Rule”), (collectively “HIPAA”), all as amended from time to time.

C. WHEREAS, The Parties are also committed to complying with the California Confidentiality Laws (defined below).

D. WHEREAS, To the extent that Business Associate is performing activities in connection with covered accounts for or on behalf of Covered Entity, the Parties are also committed to complying with applicable requirements of the Red Flag Rules issued pursuant to the Fair and Accurate Credit Transactions Act of 2003 (“Red Flag Rules”).

E. WHEREAS, The Privacy and Security Rules require Covered Entity and Business Associate to enter into a business associate agreement that meets certain requirements with respect to the Use and Disclosure of PHI. This BAA, sets forth the terms and conditions pursuant to which PHI, and, when applicable, Electronic Protected Health Information (“EPHI”) shall be handled, in accordance with such requirement.

NOW THEREFORE, in consideration of the mutual promises below and the exchange of information pursuant to this BAA, the Parties agree as follows:

### **AGREEMENT**

#### **1. DEFINITIONS**

*Approved by the County of Monterey Board of Supervisors on 11/01/16  
and revised on 12/09/16*

**1.1** All capitalized terms used in this BAA but not otherwise defined shall have the meaning set forth in the Privacy Rule, the Breach Notification Rule, or the Security Rule.

(a) "Breach" shall have the same meaning as "breach" as defined in 45 C.F.R. § 164.402 and shall mean the access, acquisition, Use, or Disclosure of PHI in a manner not permitted under the Privacy Rule that compromises the privacy or security of the PHI; the term "Breach" as used in this BAA shall also mean the unlawful or unauthorized access to, Use or Disclosure of a patient's "medical information" as defined under Cal. Civil Code § 56.05(j), for which notification is required pursuant to Cal. Health & Safety Code 1280.15, or a "breach of the security of the system" under Cal. Civil Code §1798.29.

(b) "California Confidentiality Laws" shall mean the applicable laws of the State of California governing the confidentiality of PHI or Personal Information, including, but not limited to, the California Confidentiality of Medical Information Act (Cal. Civil Code §56, et seq.), the patient access law (Cal. Health & Safety Code §123100 et seq.), the HIV test result confidentiality law (Cal. Health & Safety Code §120975, et seq.), the Lanterman-Petris-Short Act (Cal. Welf. & Inst. Code §5328, et seq.), and the medical identity theft law (Cal. Civil Code 1798.29).

(c) "Protected Health Information" or "PHI" shall mean 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; (ii) that identifies the individual or with respect to which there is a reasonable basis to believe the information that can be used to identify the individuals, and (iii) is provided by Covered Entity to Business Associate or created, maintained, received, or transmitted by Business Associate on Covered Entity's behalf. **PHI includes EPHI.**

(d) "Services" shall mean the services for or functions on behalf of Covered Entity performed by Business Associate pursuant to a Services Agreement between Covered Entity and Business Associate to which this BAA applies.

## **2. PERMITTED USES AND DISCLOSURES OF PHI**

Unless otherwise limited herein, Business Associate may:

(a) Use or Disclose PHI to perform Services for, or on behalf of, Covered Entity, provided that such Use or Disclosure would not violate the Privacy or Security Rules, this BAA, or California Confidentiality Laws;

(b) Use or Disclose PHI for the purposes authorized by this BAA or as otherwise Required by Law;

(c) Use PHI to provide Data Aggregation Services for the Health Care Operations of Covered Entity, if required by the Services Agreement and as permitted by 45 C.F.R. § 164.504(e)(2)(i)(B);

*Approved by the County of Monterey Board of Supervisors on 11/01/16  
and revised on 12/09/16*



(d) Use PHI if necessary for the proper management and administration of Business Associate or to carry out the legal responsibilities of Business Associate as permitted by 45 C.F.R. § 164.504(e)(4)(i);

(e) Disclose PHI for the proper management and administration of Business Associate or to carry out the legal responsibilities of Business Associate as permitted under 45 C.F.R. § 164.504(e)(4)(ii), provided that Disclosures are Required by Law, or Business Associate obtains reasonable assurances from the person to whom the information is Disclosed that it will remain confidential and be Used or further Disclosed only as Required by Law or for the purpose for which it was Disclosed to the person, and that such person will notify the Business Associate of any instances of which such person is aware that the confidentiality of the information has been breached;

(f) Use PHI to report violations of law to appropriate Federal and state authorities, consistent with 45 C.F.R. § 164.502(j)(1); and

(g) De-identify any PHI obtained by Business Associate under this BAA in accordance with 45 C.F.R. § 164.514 and Use or Disclose such de-identified information only as required to provide Services pursuant to the a Services Agreement between the Parties, or with the prior written approval of Covered Entity.

### **3. RESPONSIBILITIES OF THE PARTIES WITH RESPECT TO PHI**

**3.1. Responsibilities of Business Associate.** With regard to its Use and/or Disclosure of PHI, Business Associate shall:

(a) Notify the Privacy Officer of Covered Entity, in writing, of: (i) any Use and/or Disclosure of the PHI that is not permitted or required by this BAA; (ii) any Security Incident of which Business Associate becomes aware; and (iii) any suspected Breach. Such notice shall be provided within five (5) business days of Business Associate's discovery of such unauthorized access, acquisition, Use and/or Disclosure. Notwithstanding the foregoing, the Parties acknowledge the ongoing existence and occurrence of attempted but ineffective Security Incidents that are trivial in nature, such as pings and other broadcast service attacks, and unsuccessful log-in attempts. The Parties acknowledge and agree that this Section 3.1(a) constitutes notice by Business Associate to Covered Entity of such ineffective Security Incidents and no additional notification to Covered Entity of such ineffective Security Incidents is required, provided that no such Security Incident results in a Breach. A ransomware attack shall not be considered an ineffective Security Incident and shall be reported to Covered Entity, irrespective of whether such Security Incident results in a Breach. Business Associate shall investigate each Security Incident or unauthorized access, acquisition, Use, or Disclosure of PHI, or suspected Breach that it discovers and shall provide a summary of its investigation to Covered Entity, upon request. If Business Associate or Covered Entity determines that such Security Incident or unauthorized access, acquisition, Use, or Disclosure, or suspected Breach constitutes a Breach, then Business Associate shall comply with the requirements of Section 3.1(a)(i) below;

*Approved by the County of Monterey Board of Supervisors on 11/01/16  
and revised on 12/09/16*

(i) Business Associate shall provide a supplemental written report in accordance with 45 C.F.R. § 164.410(c), which shall include, to the extent possible, the identification of each individual whose PHI has been, or is reasonably believed by the Business Associate to have been, accessed, acquired, Used or Disclosed during the Breach, to Covered Entity without unreasonable delay, but no later than five (5) business days after discovery of the Breach;

(ii) Covered Entity shall have sole control over the timing and method of providing notification of such Breach to the affected individual(s), the appropriate government agencies, and, if applicable, the media. Business Associate shall assist with the implementation of any decisions by Covered Entity to notify individuals or potentially impacted individuals;

(b) In consultation with the Covered Entity, Business Associate shall mitigate, to the extent practicable, any harmful effect that is known to the Business Associate of such improper access, acquisition, Use, or Disclosure, Security Incident, or Breach. Business Associate shall take prompt corrective action, including any action required by applicable State or federal laws and regulations relating to such Security Incident or non-permitted access, acquisition, Use, or Disclosure. Business Associate shall reimburse Covered Entity for its reasonable costs and expenses in providing any required notification to affected individuals, appropriate government agencies, and, if necessary the media, including, but not limited to, any administrative costs associated with providing notice, printing and mailing costs, public relations costs, attorney fees, and costs of mitigating the harm (which may include the costs of obtaining up to one year of credit monitoring services and identity theft insurance) for affected individuals whose PHI or Personal Information has or may have been compromised as a result of the Breach;

(c) Implement appropriate administrative, physical, and technical safeguards and comply with the Security Rule to prevent Use and/or Disclosure of EPHI other than as provided for by this BAA;

(d) Obtain and maintain a written agreement with each of its Subcontractors that creates, maintains, receives, Uses, transmits or has access to PHI that requires such Subcontractors to adhere to the substantially the same restrictions and conditions with respect to PHI that apply to Business Associate pursuant to this BAA;

(e) Make available all internal practices, records, books, agreements, policies and procedures and PHI relating to the Use and/or Disclosure of PHI received from, created, maintained, or transmitted by Business Associate on behalf of Covered Entity to the Secretary of the Department of Health and Human Services ("Secretary") in a time and manner designated by the Secretary for purposes of determining Covered Entity's or Business Associate's compliance with the Privacy Rule. In addition, Business Associate shall promptly make available to Covered Entity such books, records, or other information relating to the Use and Disclosure of PHI for purposes of determining whether Business Associate has complied with this BAA or maintains adequate security safeguards, upon reasonable request by Covered Entity;

(f) Document Disclosures of PHI and information related to such Disclosure and, within thirty (30) days of receiving a written request from Covered Entity, provide to Covered Entity such information as is requested by Covered Entity to permit Covered Entity to respond to a request by an individual for an accounting of the Disclosures of the individual's PHI in accordance with 45 C.F.R. § 164.528. At a minimum, the Business Associate shall provide the Covered Entity with the following information: (i) the date of the Disclosure; (ii) the name of the entity or person who received the PHI, and if known, the address of such entity or person; (iii) a brief description of the PHI Disclosed; and (iv) a brief statement of the purpose of such Disclosure which includes an explanation of the basis for such Disclosure. In the event the request for an accounting is delivered directly to the Business Associate, the Business Associate shall, within ten (10) days, forward such request to the Covered Entity. The Business Associate shall implement an appropriate recordkeeping process to enable it to comply with the requirements of this Section;

(g) Subject to Section 4.4 below, return to Covered Entity within thirty (30) days of the termination of this BAA, the PHI in its possession and retain no copies, including backup copies;

(h) Disclose to its Subcontractors or other third parties, and request from Covered Entity, only the minimum PHI necessary to perform or fulfill a specific function required or permitted hereunder;

(i) If all or any portion of the PHI is maintained in a Designated Record Set:

(i) Upon ten (10) days' prior written request from Covered Entity, provide access to the PHI to Covered Entity to meet a request by an individual under 45 C.F.R. § 164.524. Business Associate shall notify Covered Entity within ten (10) days of its receipt of a request for access to PHI from an Individual; and

(ii) Upon ten (10) days' prior written request from Covered Entity, make any amendment(s) to the PHI that Covered Entity directs pursuant to 45 C.F.R. § 164.526. Business Associate shall notify Covered Entity within ten (10) days of its receipt of a request for amendment of PHI from an Individual;

(j) If applicable, maintain policies and procedures to detect and prevent identity theft in connection with the provision of the Services, to the extent required to comply with the Red Flag Rules;

(k) To the extent that Business Associate carries out one or more of Covered Entity's obligations under the Privacy Rule, Business Associate shall comply with the requirements of the Privacy Rule that apply to Covered Entity in the performance of such obligations;

(l) Unless prohibited by law, notify the Covered Entity within five (5) days of the Business Associate's receipt of any request or subpoena for PHI. To the extent

that the Covered Entity decides to assume responsibility for challenging the validity of such request, the Business Associate shall cooperate fully with the Covered Entity in such challenge; and

(m) Maintain policies and procedures materially in accordance with State Confidentiality Laws and industry standards designed to ensure the security and integrity of the Covered Entity's data and protect against threats or hazards to such security.

### **3.2 Business Associate Acknowledgment.**

(a) Business Associate acknowledges that, as between the Business Associate and the Covered Entity, all PHI shall be and remain the sole property of the Covered Entity.

(b) Business Associate further acknowledges that it is obligated by law to comply, and represents and warrants that it shall comply, with HIPAA and the HITECH Act. Business Associate shall comply with all California Confidentiality Laws, to the extent that such state laws are not preempted by HIPAA or the HITECH Act.

(c) Business Associate further acknowledges that uses and disclosures of protected health information must be consistent with NMC's privacy practices, as stated in NMC's Notice of Privacy Practices. The current Notice of Privacy Practices can be retrieved online at: <http://www.natividad.com/quality-and-safety/patient-privacy>. Business Associate agrees to review the NMC Notice of Privacy Practices at this URL at least once annually while doing business with NMC to ensure it remains updated on any changes to the Notice of Privacy Practices NMC may make.

**3.3 Responsibilities of Covered Entity.** Covered Entity shall, with respect to Business Associate:

(a) Provide Business Associate a copy of Covered Entity's notice of privacy practices ("Notice") currently in use;

(b) Notify Business Associate of any changes to the Notice that Covered Entity provides to individuals pursuant to 45 C.F.R. § 164.520, to the extent that such changes may affect Business Associate's Use or Disclosure of PHI;

(c) Notify Business Associate of any changes in, or withdrawal of, the consent or authorization of an individual regarding the Use or Disclosure of PHI provided to Covered Entity pursuant to 45 C.F.R. § 164.506 or § 164.508, to the extent that such changes may affect Business Associate's Use or Disclosure of PHI; and

(d) Notify Business Associate of any restrictions on Use and/or Disclosure of PHI as provided for in 45 C.F.R. § 164.522 agreed to by Covered Entity, to the extent that such restriction may affect Business Associate's Use or Disclosure of PHI.

## **4. TERM AND TERMINATION**

*Approved by the County of Monterey Board of Supervisors on 11/01/16  
and revised on 12/09/16*

**4.1 Term.** This BAA shall become effective on the Effective Date and shall continue in effect unless terminated as provided in this Section 4. Certain provisions and requirements of this BAA shall survive its expiration or other termination as set forth in Section 5 herein.

**4.2 Termination.** If Covered Entity determines in good faith that Business Associate has breached a material term of this BAA, Covered Entity may either: (i) immediately terminate this BAA and any underlying Services Agreement; or (ii) terminate this BAA and any underlying Services Agreement within thirty (30) days of Business Associate's receipt of written notice of such breach, if the breach is not cured to the satisfaction of Covered Entity.

**4.3 Automatic Termination.** This BAA shall automatically terminate without any further action of the Parties upon the termination or expiration of Business Associate's provision of Services to Covered Entity.

**4.4 Effect of Termination.** Upon termination or expiration of this BAA for any reason, Business Associate shall return all PHI pursuant to 45 C.F.R. § 164.504(e)(2)(ii)(J) if, and to the extent that, it is feasible to do so. Prior to returning the PHI, Business Associate shall recover any PHI in the possession of its Subcontractors. To the extent it is not feasible for Business Associate to return or destroy any portion of the PHI, Business Associate shall provide Covered Entity with a statement that Business Associate has determined that it is infeasible to return or destroy all or some portion of the PHI in its possession or in possession of its Subcontractors. In such event, Business Associate shall: (i) retain only that PHI which is necessary for Business Associate to continue its proper management and administration or carry out its legal responsibilities; (ii) return to Covered Entity the remaining PHI that the Business Associate maintains in any form; (iii) continue to extend the protections of this BAA to the PHI for as long as Business Associate retains PHI; (iv) limit further Uses and Disclosures of such PHI to those purposes that make the return or destruction of the PHI not feasible and subject to the same conditions as set out in Section 2 above, which applied prior to termination; and (v) return to Covered Entity the PHI retained by Business Associate when it is no longer needed by Business Associate for its proper management and administration or to carry out its legal responsibilities.

## **5. MISCELLANEOUS**

**5.1 Survival.** The respective rights and obligations of Business Associate and Covered Entity under the provisions of Sections 2.1, 4.4, 5.7, 5.8, 5.11, and 5.12 shall survive termination of this BAA until such time as the PHI is returned to Covered Entity or destroyed. In addition, Section 3.1(i) shall survive termination of this BAA, provided that Covered Entity determines that the PHI being retained pursuant to Section 4.4 constitutes a Designated Record Set.

**5.2 Amendments; Waiver.** This BAA may not be modified or amended, except in a writing duly signed by authorized representatives of the Parties. To the extent that any relevant provision of HIPAA, the HITECH Act, or California Confidentiality

*Approved by the County of Monterey Board of Supervisors on 11/01/16  
and revised on 12/09/16*

Laws is materially amended in a manner that changes the obligations of the Parties, the Parties agree to negotiate in good faith appropriate amendment(s) to this BAA to give effect to the revised obligations. Further, no provision of this BAA shall be waived, except in a writing duly signed by authorized representatives of the Parties. A waiver with respect to one event shall not be construed as continuing, or as a bar to or waiver of any right or remedy as to subsequent events.

**5.3 No Third Party Beneficiaries.** Nothing express or implied in this BAA is intended to confer, nor shall anything herein confer, upon any person other than the Parties and the respective successors or assigns of the Parties, any rights, remedies, obligations, or liabilities whatsoever.

**5.4 Notices.** Any notices to be given hereunder to a Party shall be made via U.S. Mail or express courier to such Party's address given below, and/or via facsimile to the facsimile telephone numbers listed below.

If to Business Associate, to:

Blue Elm Company LLC.  
Attn: Jennifer Fortin  
Phone: 978-819-4806  
Fax: 978-856-3569

If to Covered Entity, to:

Natividad Medical Center  
Attn: Compliance/Privacy Officer  
1441 Constitution Blvd.  
Salinas, CA 93906  
Phone: 831-755-4111  
Fax: 831-755-6254

Each Party named above may change its address and that of its representative for notice by the giving of notice thereof in the manner hereinabove provided. Such notice is effective upon receipt of notice, but receipt is deemed to occur on next business day if notice is sent by FedEx or other overnight delivery service.

**5.5 Counterparts; Facsimiles.** This BAA may be executed in any number of counterparts, each of which shall be deemed an original. Facsimile copies hereof shall be deemed to be originals.

**5.6 Relationship of Parties.** Notwithstanding anything to the contrary in the Services Agreement, Business Associate is an independent contractor and not an agent of Covered Entity under this BAA. Business Associate has the sole right and obligation to supervise, manage, contract, direct, procure, perform, or cause to be performed all Business Associate obligations under this BAA.

*Approved by the County of Monterey Board of Supervisors on 11/01/16  
and revised on 12/09/16*

**5.7 Choice of Law; Interpretation.** This BAA shall be governed by the laws of the State of California. Any ambiguities in this BAA shall be resolved in a manner that allows Covered Entity and Business Associate to comply with the Privacy Rule, the Security Rule, and the California Confidentiality Laws.

**5.8 Indemnification.** Business Associate shall indemnify, defend, and hold harmless the County of Monterey (the "County"), its officers, agents, and employees from any claim, liability, loss, injury, cost, expense, penalty or damage, including costs incurred by the County with respect to any investigation, enforcement proceeding, or third party action, arising out of, or in connection with, a violation of this BAA or a Breach that is attributable to an act or omission of Business Associate and/or its agents, members, employees, or Subcontractors, excepting only loss, injury, cost, expense, penalty or damage caused by the negligence or willful misconduct of personnel employed by the County. It is the intent of the Parties to provide the broadest possible indemnification for the County. This provision is in addition to, and independent of, any indemnification provision in any related or other agreement between the Parties.

**5.9 Applicability of Terms.** This BAA applies to all present and future Service Agreements and Business Associate relationships, written or unwritten, formal or informal, in which Business Associate creates, receives, transmits, or maintains any PHI for or on behalf of Covered Entity in any form whatsoever. This BAA shall automatically be incorporated in all subsequent agreements between Business Associate and Covered Entity involving the Use or Disclosure of PHI whether or not specifically referenced therein. In the event of any conflict or inconsistency between a provision of this BAA and a provision of any other agreement between Business Associate and Covered Entity, the provision of this BAA shall control unless the provision in such other agreement establishes additional rights for Business Associate or additional duties for or restrictions on Business Associate with respect to PHI, in which case the provision of such other agreement will control.

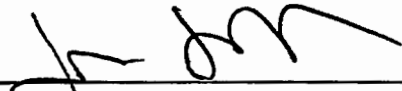
**5.10 Legal Actions.** Promptly, but no later than five (5) business days after notice thereof, Business Associate shall advise Covered Entity of any actual or potential action, proceeding, regulatory or governmental orders or actions, or any material threat thereof that becomes known to it that may affect the interests of Covered Entity or jeopardize this BAA, and of any facts and circumstances that may be pertinent to the prosecution or defense of any such actual or potential legal action or proceeding, except to the extent prohibited by law.

**5.11 Audit or Investigations.** Promptly, but no later than five (5) calendar days after notice thereof, Business Associate shall advise Covered Entity of any audit, compliant review, or complaint investigation by the Secretary or other state or federal agency related to compliance with HIPAA, the HITECH Act, or the California Confidentiality Laws.


IN WITNESS WHEREOF, each of the undersigned has caused this BAA to be duly executed in its name and on its behalf as of the Effective Date.

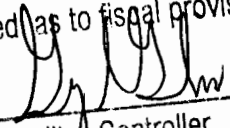
*Approved by the County of Monterey Board of Supervisors on 11/01/16  
and revised on 12/09/16*

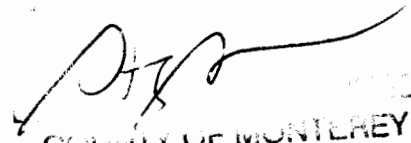
**BUSINESS ASSOCIATE**

By:   
Print Name John Mackey  
Print Title President  
Date: 2018-03-30

**COVERED ENTITY**

By:  for Gary R Gray  
Print Name: Kristen Aldrich  
Print Title: Deputy Purchasing Agent  
Date: 6-8-18

Reviewed as to fiscal provisions  
  
Auditor-Controller  
County of Monterey 5-3-18

  
COUNTY OF MONTEREY