

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In re:

Intrepid USA, Inc.,

Debtor.

Case No. 04-40416  
(Jointly Administered)

Chapter 11 Case

---

**NOTICE OF HEARING AND MOTION (1) TO REQUIRE ASSUMPTION OR  
REJECTION OF EXECUTORY CONTRACT, (2) TO COMPEL TIMELY  
PERFORMANCE UNDER FRANCHISE AGREEMENT AND (3) TO GRANT  
ADMINISTRATIVE EXPENSE PRIORITY FOR POST-PETITION AMOUNTS  
DUE UNDER FRANCHISE AGREEMENTS**

---

TO: The entities specified in Local Rule 9013-3(a).

1. Janet and Allen Hawley, TKO Stat, Inc., and InWest, Inc. (hereinafter the "Montana Franchisees"), by their undersigned counsel, hereby move the Court for the relief requested below and give notice of hearing.

2. The Court will hold a hearing on this Motion at 10:30 a.m. on September 22, 2004, before the Honorable Nancy C. Dreher in Courtroom No. 7 West, United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota.

3. Any response to this Motion must be filed and delivered not later than September 17, 2004, which is three (3) days (excluding weekends or holidays) before the time and date set for the hearing, or filed and served by mail not later than September 13, 2004, which is seven (7) days (excluding weekends and holidays) before the date set for the hearing.

**UNLESS A RESPONSE OPPOSING THIS MOTION IS TIMELY FILED, THE COURT MAY GRANT THIS MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and Bankruptcy Rule 5005. This motion proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B) and (O). The petition commencing this Chapter 11 case was filed on January 29, 2004 ("Petition Date"). This case is presently pending in this Court.

5. This Motion arises under 11 U.S.C. §§ 365(d)(2) and 503(b). This Motion is filed under Bankruptcy Rule 9014 and Local Rules 9006-1 through 9017-1. The Montana Franchisees request an order of this Court requiring Intrepid U.S.A., Inc. and Intrepid Affiliates, Inc. (hereinafter referred to as Intrepid USA and Affiliates, individually, and the Debtors, collectively) to determine within a specified period of time whether to assume or reject the Franchise Agreements (as defined below); to timely perform the estate's obligations under the Franchise Agreements pending such assumption or rejection; and granting the Montana Franchisees a claim entitled to administrative expense priority for all amounts due under the Franchise Agreements and related documents incurred during the pendency of this Chapter 11.

6. The Montana Franchisees are franchisees with seven offices in Montana servicing thirty-four Montana counties which provide personal care and/or home health care services in such counties. Janet and Allen Hawley (the "Hawleys") originally entered into a franchise agreement in 1991 with Western Medical Services, Inc. ("Western") to conduct business out of the Billings, Montana office which services six counties (see agreement attached as Exhibit A). In 1998 the Hawleys and their daughter Kristine Carlson ("Carlson") purchased through an entity known as Western Medical Services of Flathead County, Montana, Inc., another franchise from Western located in Kalispell, Montana, servicing five counties (see agreement attached as Exhibit B). The Kalispell franchise was subsequently assigned to a corporation wholly owned

by Carlson known as TKO Stat, Inc.

7. During late 1999 and early 2000, Western, the franchisor under the Franchise Agreements, sold their business to Intrepid U.S.A., Inc., one of the Debtors. Intrepid USA thereafter assigned all of the franchises to Intrepid Affiliates, Inc., also a Debtor. During the year 2002, the Debtors made six other Montana franchise locations available to the Montana Franchisees. Carlson, utilizing an entity known as InWest, Inc., purchased personal care service and/or home health care service franchises in Butte, Montana, servicing five counties; Bozeman, Montana, servicing four counties; Sidney, Montana; Helena, Montana, servicing four counties; Great Falls, Montana, servicing six counties; and Havre, Montana, servicing four counties. No written purchase agreement or franchise agreement was entered into with the Debtors with respect to these six locations. InWest closed the Sidney, Montana, location approximately three months ago.

8. The eight Montana locations have been operated as franchises of the Debtors. The Montana Franchisees provide management and care services through local staff, and the Debtors own all of the licenses (Medicare and Medicaid) and any certificates of need. The Debtors bill for the services which the Montana Franchisees provide, collect all of the revenues, pay certain expenses, including payroll for field staff, and retain 8% of the revenues as a franchise fee. Under the Franchise Agreements, the balance of the revenues is required to be paid to the Montana Franchisees on a four-week basis.

9. Immediately after acquiring the franchise business, the Debtors began dismantling such business. In 2000, they offered all franchisees the option to buy each of their respective franchises at a 75% discount off the formula price set forth in the standard franchise agreement.

On information and belief, all but three franchisees accepted the offer, and bought their franchise at the discounted price. The Montana Franchisees did not accept the buy out offer and elected to retain the franchises.

10. At about the same time the Debtors began offering the above-described buy out program, they also began reducing the services provided under the Franchise Agreements. The Montana Franchisees allege that the reduction of services constitutes a substantial, material and continuing default under the Franchise Agreements. Such defaults are set forth in detail in the supporting Affidavit of Janet and Allen Hawley accompanying this motion.

11. In early April 2004, the Montana Franchisees were anticipating the receipt of their monthly net revenues under the Franchise Agreements for their eight franchises from the Debtors; however, the Debtors failed to pay such revenues to the Montana Franchisees. The Debtors issued checks that were subsequently dishonored because they had been written on closed accounts. These checks totaled \$134,649.64. It was at or about this time that the Montana Franchisees discovered that Intrepid USA had filed a petition under Chapter 11 in the District of Minnesota. The Montana Franchisees further discovered that on April 12, 2004, Intrepid Affiliates, Inc. filed a petition under Chapter 11.

12. The Debtors are also in default under the Franchise Agreements for failure to pay additional pre-petition revenues due to the Montana Franchisees. The Montana Franchisees cannot identify exactly how much money the Debtors owe them for pre-petition periods because they have been unable to receive complete financials from the Debtors. However, the Montana Franchisees believe that such amount is not less than \$229,235.01, which the Debtors have failed and refuse to pay to the Montana Franchisees.

13. Since the commencement of the Chapter 11 cases, the Debtors have failed to provide required services under the Franchise Agreements and have altered the historical payment practices so as to withhold post-petition sums due to the Montana Franchisees. Each and every post-petition payment has been late, and only paid after the Montana Franchisees and/or their counsel have contacted the Debtors to demand such payment. The Debtors have provided little or no accounting from which the Montana Franchisees can determine what amounts they are being paid for, whether the Debtors have correctly billed for services and whether the correct amounts are being paid to the Montana Franchisees. The lack of accounting and failure to timely pay all post-petition amounts due the Montana Franchisees has caused significant financial hardship to the Montana Franchisees and has also significantly and perhaps irreparably damaged the Montana Franchisees' business relations with clients and the agencies with whom the Montana Franchisees work. To the best of their ability to estimate, the Montana Franchisees estimate that the post-petition defaults and failures of the Debtors to perform their obligations under the Franchise Agreement are causing the Montana Franchisees damage in the amount of approximately \$25,000 per month, most or all of which amounts constitute a claim which is entitled to priority under 11 U.S.C. § 502(a).

14. The Franchise Agreements constitute executory contracts within the meaning of 11 U.S.C. § 365. As set forth above, and as set forth with greater specificity in the attached Affidavit of Janet and Allen Hawley, the Debtors are in default of their obligations under the Franchise Agreements and such actions are causing substantial harm to the business of the Montana Franchisees, as well as substantial monetary damages. The Montana Franchisees request an order of this Court pursuant to 11 U.S.C. § 365(d)(2), ordering the Debtors to

determine on or before September 30, 2004, whether they intend to assume or reject the Franchise Agreements, and further directing that the Debtors timely pay to the Montana Franchisees all post-petition obligations due under the Franchise Agreements during the pendency of their motion to assume or reject, and granting the Montana Franchisees administrative expense priority pursuant to 11 U.S.C. § 503(b) for all amounts due under the Franchise Agreements from the petition date through the date of assumption or rejection.

15. Pursuant to Local Rule 9013(2)(c), the Montana Franchisees hereby give notice of their intention to offer oral testimony at the hearing of this matter from the following witnesses:

Janet Hawley  
Allen Hawley  
Kristine Carlson

The witnesses intend to testify as to the facts and circumstances surrounding the Franchise Agreements, the Debtors' defaults under the Franchise Agreements, and the harm being caused by the Debtors' failure to assume or reject the Franchise Agreements and timely pay their obligations thereunder.

WHEREFORE, Montana Franchisees respectfully request the order of this Court as follows:

(A) Directing the Debtors pursuant to 11 U.S.C. § 365(d)(2) to assume or reject the Franchise Agreements with the Montana Franchisees not later than September 30, 2004;

(B) Directing the Debtors to timely perform all of their post-petition obligations under the Franchise Agreements pending determination as to assumption or rejection, including, but not limited to, the payment of amounts due under the Franchise Agreements;

(C) Granting administrative expense priority to the Montana Franchisees for all amounts due under the Franchise Agreements following the commencement of Chapter 11 proceedings; and

(D) Granting such other and further relief as to the Court seems just and equitable.

Dated this 11th day of August, 2004.

/e/ Larry B. Ricke  
Steven D. DeRuyter (#0022287 )  
Larry B. Ricke (#0121800)

LEONARD, STREET AND DEINARD  
Professional Association  
150 South Fifth Street, Suite 2300  
Minneapolis, Minnesota 55402  
Telephone: 612-335-1500  
Facsimile: 612-335-1657

ATTORNEYS FOR JANET AND ALLEN  
HAWLEY, TKO STAT, INC., AND  
INWEST, INC.

# FRANCHISE AGREEMENT

# EXHIBIT A



THIS AGREEMENT, by and between WESTERN MEDICAL SERVICES, INC. having its principal place of business at 301 Lennon Lane, Walnut Creek, California ("Western"), and

ALLEN HAWLEY and JANET HAWLEY

("Franchisee").

1. Grant of Franchise and Exclusive Territory. We hereby grant you an exclusive franchise to operate a (health care supplemental staffing service) (home care agency) (circle one or both) in the following city, county or geographical area (hereinafter sometimes called your "exclusive territory"):

City of Billings, Montana

County of Yellowstone

a. Health Care Supplemental Staffing Service. The term "health care supplemental staffing" or "supplemental staffing" as used in this Agreement shall include, but not be limited to, provision of such services as facility staffing, occupational nursing and health care staff to licensed home health agencies.

b. Home Care Agency. The term "home care" or "home care agency" as used in this Agreement shall include, but not be limited to, provision of private duty, continuous care, assisted living, personal care, and companion services, as well as home health agency business. The term "home health agency" business shall include part-time or intermittent home health care services, as well as Medicare or Medicaid services, and is also covered by the Addendum to Franchise Agreement for Home Health Agency Business and is also subject to the terms and conditions of that Agreement. In order to do home health agency business, you must first be approved by Western's Medicare/Accreditation Certification Committee ("the Certification Committee") and you must comply at all times with any requirements of state, federal or local law and any JCAHO (Joint Commission on Accreditation of Health Care Organizations) or comparable accreditation standards and execute the Addendum to Franchise Agreement for Home Health Agency Business.

c. Territory. You may recruit and sell or provide the services specified above outside your exclusive territory until such time as the nonexclusive territory is assigned by us to another Western office, whether company-owned, franchised or licensed. You shall not, directly or indirectly, recruit and sell or provide any supplemental staffing or home care services within any area or territory assigned by us to another company-owned, franchised or licensed Western office. If you elect to engage in permanent placement agency business, you must first enter into a separate agreement with Western. The agreement shall require that you conduct such business under the name "Western Staff Services" for a service fee of five percent (5%) of sales. ~~Western shall invoice you for two percent (2%) of sales if Western does not have the invoice.~~

## 2. Terms and Conditions for Renewal.

a. Commencement. You shall commence the operation of your Western franchise on or before the following date, unless otherwise agreed in writing:

April 19, 1998

b. Terms and Conditions for Renewal. This Agreement shall be in effect for an initial period of five (5) years from the date on which Western signs this Agreement and shall be automatically renewed every five (5) years thereafter at no additional fee, unless sooner terminated, and provided that there is no material breach or uncured default by you of any of the terms of this Agreement. Western reserves the right to require that you sign the then current form of Franchise Agreement in order to effectuate the renewal provided the grant of exclusive territory and Western's service fee will not change.

3. Western's Obligations. We shall be obligated as follows:

~~a. Training. We shall furnish you and your office manager a training course of methods to be used in operating the franchise, the time and place of which shall be~~

~~designated by Western. You shall be responsible for your own living expenses and transportation, if any, in connection with your attendance at that course.~~

b. Loan of Manuals. We shall loan you a copy of our operating manuals which contain complete instructions on how to operate a Western franchise. We reserve the right to revise the manuals from time to time. Should this Agreement be terminated, whether by you or by us, you promptly shall return our manuals in good condition or forfeit the deposit referred to in Paragraph 5.b. If you refuse to do so, Western reserves the right to obtain a court order for the immediate return of our manuals upon termination of this Agreement.

c. Special Licenses. The franchise fee(s) include the cost of a nursing pool license for a health care supplemental staffing service, if required. The initial fee(s) include a home health agency license, if required, as well as Medicare and JCAHO or comparable accreditation, for a home care franchise, provided you are approved by the Certification Committee and you sign such additional documentation as may be required by Western. The cost of any other special license or fee to do health care supplemental staffing or home care business shall be shared between you and Western, sixty-eight percent (68%) your share, and thirty-two percent (32%) Western's share. However, the cost of a license required of all businesses is not a reimbursable or shared cost.

d. Supplemental Staffing and Home Care Employee Payrolls. We shall fund all payrolls for Western's supplemental staffing and home care employees, including the payment of all payroll taxes and other related payroll costs, workers' compensation, liability and fidelity bond insurance. The supplemental staffing and home care employees always shall be the lawful employees of Western, even if they were first recruited by you before entering into this Agreement. We shall process the supplemental staffing and home care employee payroll checks using a remote payroll system, handle all accounting and other details incident to the supplemental staffing and home care employee payrolls, and prepare and file the necessary payroll reports and returns.

e. Customer Invoicing. We shall invoice all of Western's customers serviced by the franchise, supervise all collections, make adjustments and settlements, commence legal proceedings in Western's name when we deem it necessary to collect the trade accounts receivable, and otherwise handle all the accounting and other details incident to the collection of the customer accounts. The customer lists, including the right to service customers, and the customer accounts always shall be the property of, and belong to, Western, even if they were first serviced by you before entering into this Franchise Agreement.

f. Remote Payroll Processing. We shall lease to you a remote payroll processing system which you must use in the operation of the franchise under the terms set forth in a remote payroll addendum to this Agreement. You shall take whatever steps are necessary to ensure the accuracy of the payroll data.

g. Western Telephone Line(s). Western shall own the license to use the primary telephone number, all rollover numbers and all other telephone numbers used in the operation of the franchise, whether or not published. We shall advance all installation, monthly service and usage charges and deduct them from our remittance to you, except for the initial telephone line connection charge and the basic monthly service charges for at least one primary telephone number listed in Western's name. To facilitate our doing so, you shall review the monthly telephone bills on receipt and promptly submit them to Western. All contract forms required by the telephone company for the Western telephone number(s) shall be executed by a corporate officer of Western. You shall not add, delete or otherwise change any Western telephone line, number, listing or directory advertisement without our prior written approval. You shall not use any Western telephone line or number in your operation of any other business. The telephone line(s) used in the franchise operation always shall be answered in such a way as to identify them exclusively as Western line(s). You shall not answer them in the name of another business you directly or indirectly own nor shall you couple any other name with the Western name. If you operate another business in accordance with Paragraph 6.a., you shall at all times use a separate telephone number for that business. You shall pay the costs of purchasing or leasing the necessary telephone equipment. In the event you relocate the franchise, you must obtain our prior written approval of any new telephone number, and you shall pay all charges for subsequently relocating the Western telephone line(s). You shall request that the primary telephone number for the new franchise be "STAT WMS" or 782-8967, if available.

h. Telephone Directories. You shall ensure that the primary telephone number for the franchise be listed each year in the white pages of the local telephone directory. You also shall place each year in the yellow pages of the most widely circulated directory a trademark listing or a display advertisement in the trade name of "Western

Medical Services" using our then current logo(s). You shall have the right to approve in advance the directory and the listing or advertisement. You shall not remove, change or fail to renew an approved listing or advertisement without our prior consent.

i. National Accounts. Whenever feasible, we shall help you bid on and service national accounts. The discounting of billing rates or the provision of other accommodations to Western's customers may be required. Such rates, discounts and accommodations, if any, shall be set by us. If you elect not to fill a job order or service a particular account, Western reserves the right to provide such service in your exclusive territory when we deem it important for Western's business development. In that event, Western shall retain all the gross profit, or suffer the loss, derived therefrom.

j. Customer Contracts. Whenever feasible, we shall assist you in obtaining contracts from companies and governmental entities in your territory and those with offices in more than one city. We shall use our best efforts to consult with you about appropriate local rates to use in bidding. When Western is the successful bidder, you may furnish the necessary personnel to fill assignments in your exclusive territory at the rates stipulated in our bid. Should you decline to do so, we reserve the right to furnish such personnel. In that event, Western shall retain all the gross profit, or suffer the loss, derived therefrom. You shall forward all written bids for such contracts and related contract documents or purchase orders to our corporate office Medical Division for review, approval and signature.

k. Acquisitions. If we acquire a competitor with an office or offices in your exclusive territory, and we choose to continue operating the office(s), we will offer you an opportunity to participate in the purchase. Your share of the purchase price would be sixty-eight percent (68%) of the total price allocated to that office or those offices. Should you decline to participate, and in order to complete the transaction, Western shall have the right to operate the acquired business locally, using the acquired company's business name or a name other than Western.

l. Sales and Promotional Programs. We shall develop sales and promotional programs to assist you in your efforts to generate more business and increase the sales of the franchise.

m. Publicity and Direct Mail. In addition to your efforts, we shall publicize the trade names of Western and conduct direct mailings of promotional advertising and sales materials, all at our discretion and expense.

~~n. On Site Assistance. After you commence the franchise operation, we shall make available to you at our expense one of our trained representatives to assist you in the development and promotion of sales under this Agreement, and to perform other appropriate and helpful services.~~

o. Start-Up Operating Forms. We shall furnish you with the start-up operating forms and supplies listed on Schedule A. You have the option at your expense to purchase other Western advertising items or promotional materials at the then current catalog prices.

4. Franchisee's Obligations. You shall be obligated as follows:

a. Incorporation. If you are presently organized as a corporation, you shall change its name to "Western Medical Services of (name of local city or county), Inc." If you are not presently organized as a corporation, you shall form a corporation named "Western Medical Services of (name of local city or county), Inc." to operate the franchise. You shall promptly assign your right, title and interest in this Agreement to that corporation on a form which we shall provide. We shall reimburse you a maximum of Five Hundred Dollars (\$500) for the costs of changing your corporate name or incorporating. You shall change your corporate name or form your corporation and provide a certified copy of your amended or new articles of incorporation and related information regarding your corporation and your shareholders to our Legal Department. The original shareholders and any future shareholders of your corporation shall execute a ratification and guaranty of this Agreement, jointly and severally, whereby you and they shall be personally liable for full compliance with this Agreement on the part of the Franchisee.

b. Personal Involvement. This Agreement is designed for owner-operators. Therefore, at least one of the key personnel as defined in Paragraph 7.b. must attend the training course referred to in Paragraph 3.a. and be on-site and actively involved in the operation of the franchise at all times. In the absence of key personnel due to death, disability or circumstances beyond your reasonable control, Western shall have the right to approve the franchise operating personnel. Should Western deem the viability of the franchise operation to be endangered, we shall have the option to terminate the franchise, take over the operation of the franchise and pay you fifty percent (50%) of the gross profit we remit to you as long as we choose to operate the franchise, but not more than six (6) periods.

c. Compliance with Western's Procedures, Programs and Policies. You shall adhere to Western's procedures, programs, policies, standards and ethics as presently outlined in our training courses, published in our operating manuals and directives, or as later amended or promulgated at our sole discretion for the continued success and development of Western's business. If, in the exercise of our commercially reasonable judgment, we do not permit you to fill a particular job order or service a specific customer, you may not service that customer outside this Agreement,

on your own, without our written consent and you must comply with any conditions which we may impose in this regard. We shall have the right to determine which local Western office, whether company-owned, franchised or licensed, will service customers outside your exclusive territory on the basis of geographical proximity, priority of servicing the customer, customer preference, and any other commercially reasonable grounds. From time to time we may change or update our programs, and the acquisition of equipment, supplies, furnishings or other goods, or the completion of additional training for you or your regular staff employees may be necessary. If your participation in these changes or updates is mandatory, the reasonable costs shall be shared. You shall pay sixty-eight percent (68%) of the costs and Western shall pay thirty-two percent (32%) of the costs. If your participation is optional, these costs shall not be shared.

d. Western's Service Marks, Trademarks, Trade Names and Logos.

1) Ownership and Use. You shall use only our service marks, trademarks, trade names, and logos in the operation of the franchise within your exclusive territory. You shall not use any other marks, trade names or logos in connection therewith nor any combination, abbreviation or derivation thereof without our prior written approval. You acknowledge that Western's trade names enjoy the goodwill of the public for providing qualified, experienced and bonded staffing and home care employees without discrimination on the basis of race, color, religion, national origin, mental or physical disability, sex or age. You shall not at any time do or cause to be done anything contesting or impairing Western's service marks, trademarks, trade names and logos.

2) Changes in Service Marks, Trademarks, Trade Names and Logos. We reserve the right to change our service marks, trademarks, trade names and logos whenever we reasonably believe that such changes are commercially necessary and may be beneficial. You shall promptly conform to any changes upon notice from Western.

e. Franchise Office Development. You shall in good faith use your best efforts to promote Western's service marks, trademarks, trade names and logos to develop the franchise. For its proper development, a minimum of ten (10) personal customer or prospect calls each week is required.

f. Other Businesses. Subject to Paragraph 6.a., you may conduct noncompetitive business activities with Western's prior written approval, provided that you at all times conduct them in a responsible manner and in good faith.

g. Office Premises and Operations. You shall establish and maintain at your expense at least one franchise office and each franchise office shall be properly identified as a Western office, located in a place suitable for interviewing applicants and must be approved by us. However, Western shall have no liability for the franchise office lease(s) or rental obligations. The franchise office(s) must be kept in a neat and clean manner. The franchise office(s) shall be staffed according to our rules and regulations and shall be open during hours which are normal to this type of business in your community. The telephones must be answered in person during business hours and in accordance with Paragraph 3.g. We may inspect the franchise office premises at any time during normal business hours without prior notice for the purpose of determining whether you are in full compliance with the terms of this Agreement and, specifically, for quality assurance purposes. You shall correct promptly any deficiencies in the franchise office premises and franchise operations about which we advise you in writing.

h. Signage and Advertising. You shall consult with us concerning signage for the franchise office(s). You shall use only the name "Western Medical Services" or such other name(s) as we may authorize in writing, and otherwise comply with our advertising guidelines.

i. Compliance with All Laws. You shall adhere to all applicable federal, state and local laws, ordinances and regulations pertaining to employment practices and the rendering of staffing services and the provision of health care. You shall post conspicuously in the franchise office(s) all notices required by law. You shall notify our Legal Department in writing no later than five (5) days after: 1) you or the franchise office(s) are served with a demand letter, summons, complaint, or subpoena in any legal or administrative proceeding; or 2) you become aware that you or the franchise office(s) are the subject of any lawsuit, complaint to, audit or investigation by any governmental authority or agency.

j. Time Cards. You shall forward to us each week the time cards of Western's staffing and home care employees which have been approved by Western's customers for the previous workweek.

k. In-House Temporary Help or Payroll Service. You shall comply with Western's operating manuals as regards the restricted circumstances in which you may use temporary help or payroll service as a customer of Western. You acknowledge and understand that such restrictions apply to you and the franchise office(s), any affiliated corporation in which you own stock, and any business or entity which you own in whole or in part, directly or indirectly.

l. Customer Remittances. If you receive remittances from Western's customers at any time, you shall not encash them and you must promptly forward them to us for deposit. You shall not commingle any remittances from Western's customers with any other funds or property.

INITIAL  
HERE  
AND  
SIGN

m. Security Agreements and Evidence of Indebtedness. Upon request by Western, our banks or lenders, you shall execute such documentation as may be reasonably necessary to secure or otherwise evidence your indebtedness to us, if any, including limited powers of attorney.

n. Insurance. We shall carry insurance covering Western's staffing and home care employees and the liabilities of Western in the staffing and home care operations. You shall purchase and maintain at all times during the term of this Agreement policies of insurance covering the franchise operation in the minimum amounts specified on Schedule B, naming Western and its affiliated companies as additional insureds.

o. "Temp To Hire". Liquidated Damages. If a customer desires to hire a Western employee, the provisions of Schedule C shall apply.

p. Independent Contractor. Except for the limited agency relationship described in Paragraph 4.q., you shall act as an independent contractor in the operation of the franchise. You shall use only your full corporate name, "Western Medical Services of (name of local city or county), Inc.," in your dealings with your suppliers, trade vendors, lessors, banking institutions, government agencies, the regular staff employees hired to assist you, as well as Western's customers and employees and, in particular, you shall use that name on any bank account for the franchise operation. You shall make timely payment of all bills and expenses of the franchise, other than those which we may be obligated to pay in accordance with this Agreement, and you shall be solely liable for all operating expenses of the franchise including, but not limited to, rent, utilities, payroll obligations and related taxes for your regular staff employees, insurance (other than for Western's supplemental staffing and home care employees) as specified on Schedule B, advertising, supplies, telephone charges, equipment rental or leasing, and all fines, penalties, assessments or liens pertaining to all the foregoing except as otherwise provided hereunder. Nothing in this Agreement shall be construed to create the relationship of joint venturers, partners, employer or employee between us and you or between us and any of your regular staff employees hired to assist you in the operation of the franchise, and you shall not expressly or impliedly hold yourself out as a joint venturer, partner, employee or representative of Western. You shall not expressly or impliedly state or suggest that you have the power to bind Western or to incur any liability on Western's behalf. In granting this franchise, Western does not authorize you to use Western's corporate name in any capacity other than what is provided in this Agreement, and you shall not sign Western's corporate name on any bid, purchase order, contract or other written instrument or use Western's corporate name on any bank account which is owned by you or the corporation which operates the franchise.

q. Limited Agency. You shall act as an agent of Western only for the limited purposes of hiring on the payroll of Western the types of employees specified in paragraph 1, soliciting job orders for the types of business specified in paragraph 1 on account of and for the benefit of Western, and assigning those employees to work for Western's customers in accordance with gross profit margin schedules acceptable to Western and at billing rates which will be mutually established from time to time.

r. Audit. You shall make Western's records, forms and materials in your possession, custody or control as well as the books and records of the franchise operation available for review and audit during normal business hours by our designated representative(s). You shall retain such books and records as prescribed in the then current version of our operating manuals. At our request you shall cooperate with our designated representative(s) to arrange on-site visits of our customers' premises. You shall pay Western any amount found owing to us according to our audit report no later than fifteen (15) days from our written demand, unless we agree to compromise or accept other payment arrangements. If an audit discloses any gross negligence or intentional misconduct on your part or by anyone acting on your behalf, you shall reimburse us for our incurred expenses as set forth in the then current version of our operating manuals.

5. Western's Franchise Fee(s) and Other Compensation.

a. Initial Franchise Fee(s). As evidence of your good faith intention to actively develop the franchise for our mutual benefit, you shall pay us the initial franchise fee(s) as set forth in Schedule D. The fee(s) are nonrefundable upon execution of this Agreement by Western. The fee for a home care agency business shall also include the Addendum to Franchise Agreement for Home Health Agency Business, subject to your approval by the Certification Committee.

b. Security Deposit. Unless included in the initial franchise fee(s), you shall post a Five Hundred Dollar (\$500) security deposit for our operating manuals entrusted to you. Upon the termination of this Agreement, the security deposit shall be refunded or credited to you after you have promptly returned our manuals, equipment and other property in good condition.

c. Accounting Periods. Our accounting system shall consist of periodic intervals as described in our operating manuals. We reserve the right change the periods at our discretion.

d. Western's Service Fee. At the end of each period, we shall advance to you the gross profit (defined in Paragraph 5.e.) derived from the operation of the franchise, less eight percent (8%) of the gross sales (defined in Paragraph 5.f.) derived from the operation of the franchise which we will retain as our service fee, except that for purposes of calculating the service fee only, temp-to-hire liquidated damages shall

not be included in gross sales. Instead of a service fee, liquidated damages shall be shared as set forth on Schedule C. The periodic remittances to you are subject to the collectibility of Western's customer accounts in a timely manner, as provided in Paragraph 5.i.

e. Definition of Gross Profit. Gross profit is defined as gross billings of supplemental staffing and home care services including any taxes levied thereon for any period less discounts, payroll and other direct labor costs based on Western's payroll cost factors (which include payroll taxes, unemployment insurance, workers' compensation, liability, fidelity bond, bid surety and performance bond insurance, any other insurance required by law, taxes levied on gross billings) and any special expenses (e.g., drug testing, safety equipment and background investigation) required by Western's customers or by law.

f. Definition of Gross Sales. Gross sales is defined as the total amount of all sales derived from the supplemental staffing or home care business, including, but not limited to, sales of supplemental staffing or home care services, transfer of personnel services, and "temp-to-hire" liquidated damages, and any sales discounts, less reimbursable expenses and excluding Medicare Home Health Agency Business as defined in the Addendum to the Franchise Agreement for Home Health Agency Business.

g. Minimum Per Period Fee. After the first thirteen (13) periods, Western shall be entitled to a minimum per period fee of One Thousand Dollars (\$1,000) as partial compensation for our payroll and billing services. If Western's compensation based on gross sales is less than One Thousand Dollars (\$1,000) in any period, you shall pay Western the difference.

h. Remittances to Franchisee. We shall remit to you the remaining gross profit as soon as practicable after each period ends. Our accounting to you for each period shall be deemed correct unless you take exception thereto in writing within sixty (60) days of issuance. This does not limit our right to audit, correct or revise our accounting to you. We shall deduct from your share of the gross profit any amounts which you may owe to Western. We reserve the right to charge such deductions to any of your franchise settlement or license statements, until such time as your indebtedness to us is fully satisfied, without waiving our right to collect by other means. If you owe any amounts to Western and our remittance to you is insufficient for us to make such deductions, you shall make full payment of the difference to Western within fifteen (15) days of issuance of a franchise settlement or license statement showing a deficit balance or our making written demand on you. If we agree to accept installment payments pursuant to a promissory note, you shall pay interest on the unpaid principal balance at an amount equal to two (2) percentage points over the then current prime rate of Bank of America NT&SA or the highest rate allowed by applicable law, whichever is less.

i. Unforeseeable Losses. In the event of payroll fraud, theft or other employee dishonesty claims, property damage, bodily injury, personal injury, or other liability claims by Western's customers or third parties, Western shall evaluate such claims on a case-by-case basis to determine whether to charge you for all or a portion of the loss, depending on whether you have complied with our operating procedures, programs and policies.

j. Bad Debt Write-Offs. We shall share losses from uncollectible customer accounts together with any contractual losses, payroll fraud, adjustments, disputes with customers, fees, costs and expenses of collection or suit, by you bearing sixty-eight percent (68%) of the losses and Western bearing thirty-two percent (32%) of the losses, provided that you have complied with our credit granting criteria and all other procedures. If you fail to comply with our credit granting criteria and other procedures, you will bear one hundred percent (100%) of the losses, if any. To help you prepare for bad debt write-offs, we shall establish a deposit payable account ("bad debt reserve") by withholding from the amount due you one percent (1%) of each period's net billing commencing with the first period in which you operate the franchise. The maximum amount in this account will be Three Thousand Dollars (\$3,000), unless we exercise our right to increase it by deducting from the gross profit we remit to you any amount we deem necessary to cover the potential bad debt loss. We shall pay interest on the bad debt reserve at the "business savings rate" of Bank of America NT&SA, calculated with respect to the balance on the first day of each period, credited at the end of each period, and adjusted once annually at the start of our fiscal year. If there is a bad debt loss which exhausts this reserve account, we will reestablish this reserve. We may also, in our discretion, bill you for this deficit and require payment within fifteen (15) days of our demand, or agree to a reasonable plan for repayment. In addition to the bad debt reserve, we will deduct from the gross profit we remit to you one hundred percent (100%) of the amount of any invoice to a customer which remains unpaid after one hundred thirteen (113) days from the invoice date, as long as your office provides both home care and supplemental staffing services. If you are not authorized to provide home care or if you cease to provide home care, the deduction will be made after eighty-five (85) days from the invoice date. Should we deem it advisable to write off a customer account as a potential bad debt at an earlier time, we may do so. Upon termination of this Agreement, the remainder of the bad debt reserve, if any, will be remitted to you as soon as all pending financial matters are settled.

k. Recoupment of Bad Debt. When any bad debt write-off is later collected wholly or partially, we shall credit you sixty-eight percent (68%) of the amount

lected, less collection costs, such as contingent commissions, outside attorneys' fees, costs of suit and litigation expenses incurred or advanced by Western in furtherance of our collection efforts. Western may, at our sole discretion, refer any delinquent account receivable to a collection agency or retain a collection attorney and make any other collection efforts or decisions we deem reasonable. Any monies recovered shall be applied first to recoup our collection costs. The balance of any such monies shall be paid to you, or deducted, in appropriate circumstances, pursuant to this Agreement.

**6. Noncompetition Covenant.** As long as you are our Franchisee, and for two (2) years after the termination or nonrenewal of this Agreement, you, individually, and the corporation which is to operate the franchise, as well as all officers, directors and shareholders of such corporation, and the third parties identified below, shall be jointly and severally obligated as set forth in this Paragraph. If you later marry, or if your partner(s), or the officers, directors and shareholders change to include persons or entities whose identities are not presently known to Western, you shall inform our Legal Department promptly for the purpose of requiring them to execute covenants substantively identical to those set forth herein or otherwise in accordance with Paragraph 7.

**a. Competitive Business.** You shall not, directly or indirectly, establish, participate in establishing, facilitate, allow or condone the establishment of a business competitive with Western, its affiliated divisions or companies, franchisees or licensees; be connected directly or indirectly as an employee, proprietor, stockholder, director, equity holder, officer, partner, creditor, independent contractor, consultant, volunteer, referral source, or otherwise, in the operation of any such competitive business; solicit, divert, or otherwise adversely influence, affect or interfere with any of Western's business relationships with our customers, prospective customers, employees, prospective employees, independent contractors, vendors, suppliers or anyone else. We deem to be competitive any business rendering any of the services described in Paragraph 1, as well as employee leasing services, billing services, secretarial services, data or word processing services, legal or paralegal services, and other similar services, unless we expressly agree otherwise in writing. If you wish to operate a permanent placement agency or licensed nurses' registry you shall, after disclosure pursuant to any applicable franchise disclosure laws, enter into a license agreement with Western Staff Services, Inc. and, in conformity with applicable state licensing laws, do such business under the name for a service fee of five percent (5%) of sales if Western handles the invoicing and two percent (2%) if Western does not handle invoicing. This restriction applies to businesses which are operated within your exclusive territory or service area and within any territory or service area of any Western office whether company owned, franchised or licensed.

**b. Third Parties.** You shall require all employees (whether regular or temporary), independent contractors, consultants or volunteers who may render services in or regarding the operation of the franchise to execute a noncompetition, confidentiality and nondisclosure agreement on a form provided by Western. You shall have each such agreement signed before you commence doing business pursuant to this Agreement and before hiring new employees, retaining contractors, allowing consultants or volunteers access to the franchise operation or the use of our proprietary information, confidential data and trade secrets, as defined below. You shall send our Legal Department a signed copy of each agreement within five (5) days of signature. If Western elects to enforce such agreement, you shall pay sixty-eight percent (68%) of the outside attorneys' fees, costs of suit and litigation expenses.

**c. Injunction and Damages.** You hereby consent to the issuance of an injunction enjoining you from the operation of a competitive business. As damages in that event would be extremely difficult to determine, you shall pay us liquidated damages equal to twelve percent (12%) of all sales made in violation of this Agreement, or all damages which Western may prove or to which it otherwise may be entitled.

**d. Proprietary Information, Confidential Data, and Trade Secrets.** You shall not use, divulge, copy, disclose to third parties, directly or indirectly derive compensation or profit from, any of our proprietary information as defined hereinafter, confidential data or trade secrets, nor shall you allow anyone else to do any of the foregoing, except as necessary in the proper operation of the franchise or as otherwise authorized by us in writing. Western's policies, procedures, practices, techniques, forms, manuals and methods of operation are and shall remain Western's property. "Proprietary information" specifically includes all information, data, ideas, operating manuals, forms, supplies and materials provided to you in furtherance of this Agreement, (without regard to the form thereof, whether written, visual, audio, graphic, illustrated, computerized, or in any format or medium) such as: sales records and analyses; marketing, advertising and promotional materials; customer contracts; bids, proposals and billing rates; business plans; personnel records; employee lists; application cards; assignment records; customer lists; customer profiles; customer contact sheets; customer service records; identities of customers' ordering sources; patient care and treatment records; telephone numbers used in the operation of the franchise; and any other forms, manuals, documents, writings, methods, techniques and information related thereto which are not readily available to the public and would help in the creation or operation of a competitor of Western. You shall maintain the proprietary information in strictest confidence as it constitutes confidential data and trade secrets of Western in which you shall have a limited right of use, but no ownership interest.

## **7. Franchisee's Corporate Status.**

**a. Individual Covenants.** You hereby represent and covenant that no shares of stock have been, or will be, issued or sold to any person or entity who is in any way connected with a competitive business. You shall obtain a written noncompetition covenant on a form which we will provide, from all shareholders, prospective shareholders, officers and directors of your corporation who have not signed or guaranteed this Agreement. We will provide the form of such covenant(s) which shall apply only during the time that those persons are associated, in whatever capacity, with the corporation which operates the franchise, and for two (2) years thereafter. You shall promptly provide a signed copy of the covenant(s) to our Legal Department before such persons become associated with the operation of the franchise.

**b. Key Personnel.** We deem the shareholders of your corporation whom we have approved as of the time you commence doing business as our Franchisee and anyone who purchases the franchise or your corporation pursuant to Paragraph 9.a. to be key personnel. In no event shall the key personnel own less than fifty-one percent (51%) of the outstanding capital stock of your corporation, whether voting or otherwise, unless the provisions of Paragraph 9 have been satisfied.

**c. Shareholders' Identities.** Before opening the franchise office(s), and periodically thereafter at our request, you shall send us a statement setting forth the names, addresses, business and residence telephone numbers and occupations of all shareholders, officers and directors of your corporation, and the classes and numbers of shares issued to each shareholder. You shall report immediately to us any proposed change in the share holdings or capital structure of your corporation before the effective date of such change.

**d. Stock Certificates.** All stock certificates issued by your corporation shall bear the following restrictive legend or endorsement: "This certificate is subject to the terms and provisions of a Franchise Agreement between Western and this corporation."

## **8. Termination.**

**a. Cause For Immediate Termination by Franchisor.** We shall have the right to terminate this Agreement immediately by mailing, faxing or personally serving you with a written notice stating our reasons. Just and reasonable cause for our doing so shall include, but not be limited to: a material breach of this Agreement; a misrepresentation or omission relating to your becoming our Franchisee; immoral or unethical business conduct in the operation of the franchise or otherwise; dishonesty; conviction of a felony; abandonment of the franchise; illegal conduct which may reasonably be construed as damaging to Western; insolvency or bankruptcy, whether voluntary or involuntary; the filing of a bill in equity or other proceeding for the appointment of a receiver for the franchise operation; an assignment for the benefit of your creditors; taking or appropriating for your own use any property or funds belonging to Western; instructing a Western customer to remit payment of our invoices to you rather than to Western; failure to devote your full-time, best efforts to the franchise operation (unless approved by us in advance); repeated failure to comply with the requirements of this Agreement; or failure to pay a deficit balance due to Western. We may seek any other relief, damages and remedies in equity or at law as well as reasonable attorneys' fees, costs of suit and litigation expenses.

**b. Termination by Franchisee.** If you wish to terminate this Agreement, you shall give Western at least sixty (60) days' advance notice in writing. During that notice period, you shall continue to devote your best efforts to maintain the operation of the franchise unless we make satisfactory arrangements for an earlier termination. You shall cooperate with Western to expedite the transfer of your franchise to us and we may take possession of and exclusively operate the franchise, at our expense, provided we continue to remit to you your share of the gross profit less other deductions and your indebtedness until the effective date of termination.

**c. Billing Minimums.** We shall have the option to terminate this Agreement on written notice to you if the total sales of supplemental staffing and home care generated by the franchise, expressed in billing dollars, do not meet the minimum billing dollars set forth on Schedule D. However, this Agreement shall remain in effect if you pay Western a sum equal to twelve percent (12%) of the difference between the actual number of dollars billed and the guaranteed billing minimums during the preceding twenty-four (24) weeks multiplied by the average rate of dollars billed for the same twenty-four (24) weeks. That sum shall be paid to Western within fifteen (15) days of delivery of such notice or this Agreement shall terminate immediately. In the absence of key personnel due to death or disability, and in the event Western does not exercise its option under Paragraph 4.b., the billing minimums shall be sixty percent (60%) of the billing minimums required by Schedule D for the next twenty-four (24) weeks, as recalculated on a per period basis. If the billing falls below such minimums in any of the twenty-four (24) weeks, Western shall have the right to terminate this Agreement immediately. The full billing minimums of Schedule D again shall apply thereafter.

**d. Immediate Return of Western's Property.** If for any reason this Agreement is terminated, all of your rights as our Franchisee shall cease including, but not limited to, your limited right to use Western's proprietary information, confidential data and trade secrets. You immediately shall turn over to us, at your expense if we request that you ship to us, all such proprietary information, confidential data and trade secrets in an orderly manner and in a condition suitable for our ongoing business use. You also immediately shall cooperate in transferring the Western telephone listing(s) and number(s) as we direct and you shall relinquish any claim to the use of such number(s).

e. Disassociation. Upon termination of this agreement and for so long as Paragraph 6 is effective, you shall not advertise or state for any commercial purpose or in any public medium that you were affiliated with Western as our Franchisee or formerly operated a Western office or offices. You shall cease using in any manner whatsoever the trade names of "Western Medical Services," any abbreviation, combination or derivation thereof or any similar name, all our other licensed trade names, our service marks, trademarks and logos. You shall vacate promptly your corporate name and delete any reference to Western, and you shall provide our Legal Department with satisfactory evidence of your having done so.

f. Right of Offset. Upon termination of this Agreement for any reason, we shall have the right to offset any amounts owing to Western against any amounts Western owes you.

9. Sale or Transfer of Majority Interest(s). A majority interest in the franchise or your corporation may be sold or transferred as provided below:

a. Procedure. You, your legal heirs or personal representatives upon your death, or those shareholder(s) owning fifty-one percent (51%) or more of the stock in your corporation may sell or transfer the franchise or the shares of stock to persons or entities approved by us. You shall notify us before listing or advertising the franchise for sale or transfer. We shall not unreasonably withhold our approval of such sale. You and the prospective purchaser(s) or transferee(s) must do the following: (1) submit to us a legally binding offer or agreement in writing without any contingencies (except for Western's approval) which establishes a separate purchase price for the franchise as distinguished from your other business interests; (2) submit a completed and signed Qualifying Executive Questionnaire, the form of which we shall furnish to you on request; (3) tender a cashier's check payable to Western equal to Western's "shared equity," defined in Paragraph 9.b. below, which amount shall be refunded in full less our out-of-pocket expenses in the event we do not approve the sale or transfer; and (4) agree that the purchaser(s) or transferee(s) will attend the next scheduled training program at our corporate office as provided in Paragraph 3.a. The purchase price shall include any internal allocations of the component parts for income tax purposes such as noncompetition covenants, goodwill, consulting or management contracts, but not the book value of the furniture, furnishings, fixtures and office equipment unless owned by or leased from Western.

b. Shared Equity on Resale. Since we jointly develop the goodwill associated with the franchise, and will incur expenses and devote resources in the transition of ownership, twenty-five percent (25%) of the first Five Hundred Thousand Dollars (\$500,000) of the purchase price and ten percent (10%) of any amount over Five Hundred Thousand Dollars (\$500,000) (the "shared equity") shall be paid to Western. In no event, however, shall the shared equity be less than One Thousand Dollars (\$1,000). We reserve the right to require that the entire purchase price be paid directly to us as escrow holder. In such event we shall remit your share to you or to the selling shareholder(s), after deducting our share and any amounts which you then owe us. If the proposed sale is rescinded for any reason whatsoever, we may retain at our discretion the shared equity or we may exercise our option to purchase the franchise or stock. If we do so, the franchise will be purchased, as provided below, at the same price as would have been paid by the prospective purchaser(s) had the proposed sale not been rescinded. The price paid by Western in that event shall be reduced by the amount of the shared equity.

c. Minority Interest(s). Owners of minority interests in the franchise or your corporation may sell their interests to facilitate a sale to a third party. The minority owner(s) may choose not to sell, and remain minority owner(s), subject to Western's right of first refusal. In the event that we exercise our right of first refusal, we reserve the right to require the minority owner(s) to sell their shares to us at the same price pro rata as we would pay to the majority seller(s).

d. Right of First Refusal. For a period of fifteen (15) business days after we receive all of the items specified in Paragraph 9.a. above, Western shall have the option to purchase the franchise at the same total price or price per share as would be paid to you or to your shareholder(s) by the prospective purchaser(s), reduced by our twenty-five percent (25%) shared equity in the first Five Hundred Thousand Dollars (\$500,000) and ten percent (10%) of any amount over Five Hundred Thousand Dollars (\$500,000) and any other amounts which you owe us. The balance shall be paid upon your signing and submitting to us a voluntary termination agreement on a form provided by us.

e. Consummation of Sale. If Western approves the purchaser(s) of the franchise, thereby waiving our right of first refusal provided for in Paragraph 9.d. you or your shareholder(s) shall consummate the sale no later than thirty (30) days thereafter by having the purchaser(s) or transferee(s) sign a replacement Franchise Agreement on the then current form and by your signing a voluntary termination agreement on a form provided by us. If the terms and conditions of the sale are changed after Western's approval, you or your selling shareholder(s) again must follow the procedures of Paragraph 9.

10. Sale or Transfer of Minority Interest(s). You shall advise us promptly of any sale or transfer of a minority interest of the franchise and provide us with documentation of the sale or transfer price. A sale or transfer of minority interest(s) shall not be subject to our shared equity until the controlling interest passes. Western then will be entitled to twenty-five percent (25%) of the first Five Hundred Thousand Dollars (\$500,000) and ten percent (10%) of any amount over Five Hundred Thousand

Dollars (\$500,000) of the purchase price for each interest or share which has been sold or transferred since the time you commenced doing business under this Agreement.

#### 11. Rights to Purchase.

a. Franchisee's Right to Purchase. After you have operated the franchise for twenty-six (26) full periods, you shall have the right to purchase our interest in the intangible assets of the franchise. The intangible assets would include the Western nursing pool or home health agency license for your office, if any, the Western Medicare provider number, and the Joint Commission on Accreditation of Health Care Organizations (JCAHO) accreditation obtained in Western's name, subject to approval of you by the state, Medicare and JCAHO, respectively, under any transfer of ownership laws, regulations, or requirements. You shall give us sixty (60) days' advance notice in writing and pay us the sum total of our compensation (eight percent [8%] of the gross sales as defined in Paragraph 5.f., above, derived from the operation of the franchise) for the last twenty-six (26) periods. In addition, if applicable, you shall reimburse Western an amount equal to the percentage of the total allowed Medicare Reimbursable Costs for the Home Health Agency Business (as defined in Paragraph 1 of the Medicare Addendum) for the last twenty-six (26) periods, which is attributable to Western's allowed Medicare Home Office Reimbursable Costs.

b. Western's Right to Purchase. We shall have the right to purchase your interest in the intangible assets of the franchise upon giving you sixty (60) days' advance notice in writing. The purchase shall include, but not be limited to, this Agreement as well as all books and records developed in establishing the franchise. We shall pay you the sum total of the gross profit of the business, less our eight percent (8%) share of the gross sales as defined in Paragraph 5.f., above, derived from the operation of the franchise for the last twenty-six (26) periods or all the periods you have operated the franchise, whichever is less, and, if applicable, an amount equal to the allowed Medicare Reimbursable Costs (excluding the Direct costs associated with Western home care employees and the allowed Medicare Home Office Reimbursable Costs) for the last twenty-six (26) periods, which were or are to be included in the Medicare Cost Report pursuant to Paragraph 5.d. of the Medicare Addendum, after deducting any amounts you owe Western. The sale price of the franchise shall be determined and payable according to the provisions of this Paragraph, but in no event shall the sales price be less than three (3) times the initial franchise fee, if any. However, if the billing dollars of supplemental staffing or home care business for the sixty (60) day notice period are less than eighty-five percent (85%) of the average billing dollars for the twenty-four (24) weeks immediately preceding our giving of the notice, we may, at our discretion, revoke our offer without waiving our right to exercise this option again in the future. In the event that we exercise our option under this Paragraph, the noncompetition covenant of Paragraph 6 shall be applicable.

c. Contingent Waiver of Noncompetition Covenant. If you exercise your option to purchase under this Paragraph, we would not enforce the noncompetition covenant of Paragraph 6 against you, provided that: (1) as of the closing date of our purchase and sale, you deliver to us all our proprietary information, confidential data and trade secrets; (2) cease using our trade names, trademarks, service marks and logos; and (3) otherwise honor all your obligations with respect to our ownership of the franchise to use the Western telephone number(s). Should you fully comply with these requirements, we would allow you to transfer the information to your own application cards and job order forms from our employee and customer records which have been maintained in the franchise office(s), but we would not permit you to make or use photocopies of any of Western's proprietary information, confidential data and trade secrets. We would have the right to open a competing health care supplemental staffing or home care office or offices in Western's name in the same territory, should it be necessary to fulfill our contractual obligations to customers.

12. Franchisee's Defense and Indemnity Obligations. You shall defend, indemnify and hold Western and our affiliated corporations harmless from and against any and all claims including, but not limited to, reasonable attorneys' fees, costs of suit, and litigation expenses not expressly assumed by us under this Agreement and arising from breach of this Agreement or pertaining to your business activities as our Franchisee with interest on all such sums at the highest legal rate; however, you shall not be so obligated with respect to any claim based solely upon the alleged negligence or willful misconduct of Western. Your obligations hereunder shall include, but not be limited to, claims by your regular staff employees, Western's supplemental staffing and home care employees, Western's customers or prospective customers, and third parties, as well as all claims of your noncompliance with the terms and conditions of this Agreement and related documents. If Western is made a party to any administrative, legal or equitable proceeding or action in connection with your acts, failures to act, omissions, or other conduct by you or attributable to you, we shall have the right at your expense to retain defense counsel of our choice to represent and protect our interests. You shall promptly reimburse us pursuant to this Paragraph within fifteen (15) days after our written demand is delivered to you.

13. Nonexclusive Remedies. If the franchise is terminated because of your material breach or default, the remedies described in this Agreement shall not necessarily be exclusive. Nothing in this Agreement shall be construed to deprive Western of the right to recover for lost profits, injuries to our business reputation, loss of goodwill, or other damages whether general, special, incidental, consequential, statutory, or punitive, and we may seek all other appropriate relief and legal or equitable remedies.

\*\*until after the expiration of the two (2) year period of the non-competition covenant of Paragraph 6, unless it

14. **Survival of Covenants, Representations and Warranties.** The covenants, representations and warranties made under this Agreement shall survive its termination. The termination of this Agreement shall not extinguish any obligation which has accrued beforehand. All obligations which by their terms or by reasonable implication are to be performed, in whole or in part, after the termination of this Agreement shall survive its termination.

15. **Force Majeure.** If the operation of the franchise as contemplated by this Agreement is impaired due to circumstances beyond Western's control, including, but not limited to, labor union activity, enactment of any law, ordinance or regulation, acts of God or natural disasters, war or civil disorders, or any similar circumstances, we shall have the right to terminate this Agreement upon fifteen (15) days prior written notice, without any liability except for the payment to you of your share of the gross profit less other deductions and your indebtedness until the effective date of termination.

16. **Material Breach or Default.** Except as otherwise provided in Paragraph 8, we shall notify you in writing if you are in material breach or default of any terms or conditions of this Agreement and you shall have fifteen (15) days or the number of days provided by law, whichever is greater, after the delivery of our notice in which to cure your breach or default. If you do not do so within the time allowed, or if you have repeated a previous breach or default, we shall have the right to terminate this Agreement immediately and we shall not be responsible for any related losses, damages, costs, fees, expenses, fines, penalties or forfeitures.

17. **Attorneys' Fees.** The prevailing party in any action or proceeding, including any appeals therefrom, brought to interpret or enforce the terms of this Agreement shall be entitled to reasonable attorneys' fees, costs of suit and litigation expenses in addition to any other relief and legal or equitable remedies.

18. **Notices.** Notices shall be deemed to have been properly given and served by you or us when directed to either party at the respective addresses or facsimile numbers. You shall address them to our Legal Department and we shall address them to the franchise office(s), unless either party specifies a different address in writing. Notices may be delivered by facsimile (with simultaneous posting of a copy by first class mail), or by courier. Notices by facsimile shall be deemed delivered on transmission; by courier, on delivery; and by first class mail, three (3) days after posting.

19. **Miscellaneous Provisions.**

a. **Personal Pronouns.** The personal pronouns "we," "our" and "us" throughout this Agreement refer to Western as Franchisor, whereas "you" and "your" refer to Franchisee, in whatever your legal capacity at the date of execution of this Agreement and subsequently in the required corporate capacity, as well as the shareholders of your corporation.

b. **Construction.** Paragraph headings are for reference purposes only and shall not in any way modify the statements in the text of this Agreement. Each word shall be deemed to include any number or gender which the context requires. If there is any conflict between this Agreement and our operating manuals or our other directives, in their current or future versions, this Agreement shall control unless we otherwise agree in writing. Whenever a certain number of days are specified, they shall be calendar days unless otherwise stated.

c. **Governing Law.** This Agreement shall be deemed made in the state of your principal place of business, and its provisions shall be governed by and interpreted under the laws of that state.

d. **Amendments.** This Agreement may be amended only by a document signed by all the parties or their duly authorized agents.

e. **Waiver.** A waiver of any breach or default shall not be interpreted as a waiver of any subsequent breach or default.

f. **Severability.** Each provision of this Agreement shall be considered severable. If, for any reason, any provision is determined to be invalid or in conflict with any existing or future statute, regulation or ordinance, whether state, federal or local, that provision shall not impair the effectiveness of the remaining provisions.

g. **Acceptance by Western.** This Agreement and any amendments, addenda or modifications shall not be binding on Western until signed by a duly authorized corporate officer.

h. **Assignment or Pledge.** We reserve the right to assign or pledge all or part of this Agreement upon written notice. You shall not assign or pledge all or part of this Agreement to any person or entity other than the corporation which will operate the franchise. Any assignment, sublicense, management contract, sale, transfer or conveyance in violation of this Agreement, whether by operation of law or otherwise, shall be null and void.

20. **Binding Effect.** This Agreement shall be binding upon you, your successors and assigns, and the shareholders of the designated corporation which will operate the franchise, their personal representatives, successors, heirs and assigns.

21. **Entire Agreement.** This Agreement and the specified schedules constitute the entire contract between you and us, and replace or supersede any prior agreements, understandings or representations, whether written or oral, regarding the same subject matter.

22. **Acknowledgment.** You acknowledge that you have fully read and understood this Agreement. Your signature, and the signatures of all persons who ratify and guaranty it, shall constitute acceptance and your or their promise(s) to honor and perform Franchisee's obligations in a timely manner, as time is of the essence.

This Agreement is executed by Franchisee on this 20 day of April, 19 98

Witness: Usula Brese

Franchisee: Allen Hawley

By: ALLEN HAWLEY, Joint and Several

Franchisee: Janet H Hawley

By: JANET HAWLEY, Joint and Several

Title, if any: \_\_\_\_\_

This Agreement is executed by a duly authorized corporate officer of Franchisor on this 17th day of June, 19 98

Witness: Bobbi Long

Franchisor: WESTERN MEDICAL SERVICES, INC.

By: Michael J. Nicholson  
President

SHAREHOLDER RATIFICATION AND GUARANTY

In consideration of the representations and covenants set forth in the Franchise Agreement, each of the undersigned, individually and as shareholders of \_\_\_\_\_, jointly and severally, hereby ratifies, adopts, and affirms the Franchise Agreement, as the same may hereafter be amended or reconstituted, and personally guarantees the performance of any and all present and future obligations of the Franchisee thereunder.

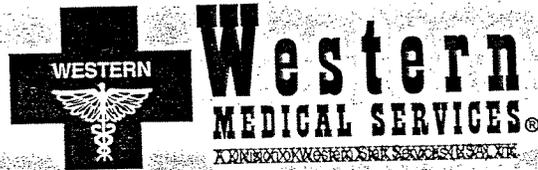
Witness: Usula Brese

Shareholders: Allen Hawley  
ALLEN HAWLEY

Usula Brese

Janet H Hawley  
JANET HAWLEY

# ADDENDUM TO FRANCHISE AGREEMENT FOR HOME HEALTH AGENCY BUSINESS



THIS ADDENDUM is made by and between the Western Medical Services, Inc. a California corporation (hereinafter "Western" or "We"), and ALLEN HAWLEY and JANET HAWLEY ("Franchisee" or "You"), with respect to the following facts:

## RECITALS

Western and Franchisee are parties to a Franchise Agreement, dated \_\_\_\_\_, pursuant to which Western has granted you an exclusive franchise to operate a medical temporary help service in a designated territory ("the Franchise Agreement").

Franchisee is a corporation having its principal place of business at  
636 Logan Lane  
Billings, Montana 59105

The parties now desire to operate a state licensed (where applicable), Medicare-certified and/or nationally accredited home health agency as an additional line of business, in accordance with the terms and conditions set forth below, subject to Franchisee's approval by Western's Governing Body, based on the criteria set forth on Schedule A to this Addendum.

In consideration of the foregoing premises and the mutual covenants contained herein, the parties agree as follows:

## AGREEMENT

### 1. Definitions.

a. "Home Health Agency Business" means all Home Health Services provided by Western and Franchisee, regardless of payor source.

b. "Home Health Services" means those services that a home health agency is permitted to provide under the scope of its state license (where applicable) and its Medicare or Medicaid certification, subject to any limitations set forth in this Addendum, and shall mean, at minimum: (a) part-time or intermittent skilled nursing care provided under the supervision of a licensed registered nurse; and (b) at least one of the following therapeutic services: physical therapy, occupational therapy, speech therapy, medical social services, or part-time or intermittent services of a home health aide.

c. "Fiscal Intermediary" means the entity that administers the Medicare or Medicaid Programs under contract with the U.S. Department of Health and Human Services, with respect to reimbursement of services provided to Medicare Program beneficiaries.

d. "Medicare Cost Report" means that report required to be filed by a Medicare-certified home health agency for the purpose of determining its annual Medicare reimbursement, and for determining whether payments made at the Medicare Interim Rate have resulted in overpayment or underpayment of actual Medicare Reimbursable Costs for the reported year.

e. "Medicare Interim Rate" means the rate established by the Medicare Fiscal Intermediary for reimbursement made to a home health agency, on an interim basis, for the cost of providing Home Health Services to Medicare beneficiaries. The Medicare Interim Rate is based on the estimated annual Medicare Reimbursable Costs for providing such services.

f. "Medicare Reimbursable Costs" means the costs associated with the provision of Home Health Services to Medicare beneficiaries, which are reimbursable by the Medicare Program under its applicable rules and regulations, as an allocation of Medicare Reportable Costs.

g. "Medicare Reportable Costs" means those costs which must be included in the Medicare Cost Report, as set forth in the applicable rules and regulations; and which include, but are not limited to, the following:

- 1) Salaries and wages;
- 2) Contracted or purchased services;
- 3) Payroll related benefits (FICA, pension, retirement, health insurance) and payroll taxes;
- 4) Fringe benefits;
- 5) Insurance, including, but not limited to, malpractice insurance;
- 6) Workers' compensation;
- 7) Rent;
- 8) Utilities;
- 9) Telephone;
- 10) Taxes and licenses;
- 11) Equipment and supplies, including, but not limited to, personal protective equipment;
- 12) Repairs and maintenance;
- 13) Depreciation;
- 14) Postage;
- 15) Recruitment;
- 16) Community education;
- 17) Transportation or travel expenses;
- 18) Waste disposal;
- 19) Training and education;
- 20) Advertising;
- 21) Interest; and
- 22) Legal, accounting, fiscal and other consulting services.

h. "Final Settlement" means the date Western accepts the Notice of Amount of Program Reimbursement (NPR) or final Medicare Cost Report as determined by the Medicare Fiscal Intermediary, and following the exhaustion of all reconsiderations and appeals, including all court proceedings, with respect to such Medicare Cost Report or NPR.

2. **Relationship To Franchise Agreement.** The Home Health Agency Business shall be governed by the Franchise Agreement as well as all amendments or other addenda thereto in addition to this Addendum. If any inconsistencies between the documents exist, this Addendum shall control, but only with respect to the Home Health Agency Business.

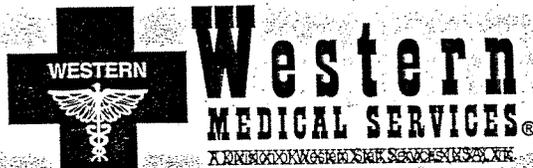
### 3. Responsibilities of Western.

a. **Licensure and Certification.** Western shall use its best efforts to obtain, in the divisional name of "Western Medical Services Home Health Agency," all required state licenses and approvals for the operation of a home health agency in the state in which the home health agency will be located; certification for participation in the Medicare Program; and, at our sole discretion, state Medicaid programs; and accreditation by a nationally recognized accreditation organization. You shall fully cooperate with us in this regard.

b. **Governing Body: Reservation of Authority.** The officers of Western (or such other persons appointed by Western) shall constitute the governing body of the Western Medical Services Home Health Agency (the "Governing Body"), and shall adopt and periodically review written bylaws, policies and procedures for the operation and management of the Home Health Agency Business and its fiscal affairs. The Governing Body must approve the engagement of the Administrator and the Supervisory Nursing Personnel in accordance with Section 4.f. below. Notwithstanding anything to the contrary herein, Western shall retain all authority not specifically delegated to Franchisee under this Addendum, and shall have all the power and responsibility that is required under federal and state laws to be retained and exercised by the holder of the license and/or certification, and that cannot properly be delegated under such laws.

c. **Participation in Government Payment Programs and Medicaid.** Western shall have sole discretion to decide whether to participate in government payment programs, including state Medicaid programs, for Home Health Services. If Western elects to do so, Western may establish policies and procedures to govern such participation, including administrative, clinical and accounting procedures, and you will abide by such policies and procedures.

# ADDENDUM TO FRANCHISE AGREEMENT FOR HOME HEALTH AGENCY BUSINESS



THIS ADDENDUM is made by and between the Western Medical Services, Inc. a California corporation (hereinafter "Western" or "We"), and ALLEN HAWLEY and JANET HAWLEY ("Franchisee" or "You"), with respect to the following facts:

## RECITALS

Western and Franchisee are parties to a Franchise Agreement, dated \_\_\_\_\_, pursuant to which Western has granted you an exclusive franchise to operate a medical temporary help service in a designated territory ("the Franchise Agreement").

Franchisee is a corporation having its principal place of business at

636 Logan Lane  
Billings, Montana 59105

The parties now desire to operate a state licensed (where applicable), Medicare-certified and/or nationally accredited home health agency as an additional line of business, in accordance with the terms and conditions set forth below, subject to Franchisee's approval by Western's Governing Body, based on the criteria set forth on Schedule A to this Addendum.

In consideration of the foregoing premises and the mutual covenants contained herein, the parties agree as follows:

## AGREEMENT

### 1. Definitions.

a. "Home Health Agency Business" means all Home Health Services provided by Western and Franchisee, regardless of payor source.

b. "Home Health Services" means those services that a home health agency is permitted to provide under the scope of its state license (where applicable) and its Medicare or Medicaid certification, subject to any limitations set forth in this Addendum, and shall mean, at minimum: (a) part-time or intermittent skilled nursing care provided under the supervision of a licensed registered nurse; and (b) at least one of the following therapeutic services: physical therapy, occupational therapy, speech therapy, medical social services, or part-time or intermittent services of a home health aide.

c. "Fiscal Intermediary" means the entity that administers the Medicare or Medicaid Programs under contract with the U.S. Department of Health and Human Services, with respect to reimbursement of services provided to Medicare Program beneficiaries.

d. "Medicare Cost Report" means that report required to be filed by a Medicare-certified home health agency for the purpose of determining its annual Medicare reimbursement, and for determining whether payments made at the Medicare Interim Rate have resulted in overpayment or underpayment of actual Medicare Reimbursable Costs for the reported year.

e. "Medicare Interim Rate" means the rate established by the Medicare Fiscal Intermediary for reimbursement made to a home health agency, on an interim basis, for the cost of providing Home Health Services to Medicare beneficiaries. The Medicare Interim Rate is based on the estimated annual Medicare Reimbursable Costs for providing such services.

f. "Medicare Reimbursable Costs" means the costs associated with the provision of Home Health Services to Medicare beneficiaries, which are reimbursable by the Medicare Program under its applicable rules and regulations, as an allocation of Medicare Reportable Costs.

g. "Medicare Reportable Costs" means those costs which must be included in the Medicare Cost Report, as set forth in the applicable rules and regulations, and which include, but are not limited to, the following:

- 1) Salaries and wages;
- 2) Contracted or purchased services;
- 3) Payroll related benefits (FICA, pension, retirement, health insurance) and payroll taxes;
- 4) Fringe benefits;
- 5) Insurance, including, but not limited to, malpractice insurance;
- 6) Workers' compensation;
- 7) Rent;
- 8) Utilities;
- 9) Telephone;
- 10) Taxes and licenses;
- 11) Equipment and supplies, including, but not limited to, personal protective equipment;
- 12) Repairs and maintenance;
- 13) Depreciation;
- 14) Postage;
- 15) Recruitment;
- 16) Community education;
- 17) Transportation or travel expenses;
- 18) Waste disposal;
- 19) Training and education;
- 20) Advertising;
- 21) Interest; and
- 22) Legal, accounting, fiscal and other consulting services.

h. "Final Settlement" means the date Western accepts the Notice of Amount of Program Reimbursement (NPR) or final Medicare Cost Report as determined by the Medicare Fiscal Intermediary, and following the exhaustion of all reconsiderations and appeals, including all court proceedings, with respect to such Medicare Cost Report or NPR.

2. **Relationship To Franchise Agreement.** The Home Health Agency Business shall be governed by the Franchise Agreement as well as all amendments or other addenda thereto in addition to this Addendum. If any inconsistencies between the documents exist, this Addendum shall control, but only with respect to the Home Health Agency Business.

### 3. Responsibilities of Western.

a. **Licensure and Certification.** Western shall use its best efforts to obtain, in the divisional name of "Western Medical Services Home Health Agency," all required state licenses and approvals for the operation of a home health agency in the state in which the home health agency will be located; certification for participation in the Medicare Program; and, at our sole discretion, state Medicaid programs; and accreditation by a nationally recognized accreditation organization. You shall fully cooperate with us in this regard.

b. **Governing Body; Reservation of Authority.** The officers of Western (or such other persons appointed by Western) shall constitute the governing body of the Western Medical Services Home Health Agency (the "Governing Body"), and shall adopt and periodically review written bylaws, policies and procedures for the operation and management of the Home Health Agency Business and its fiscal affairs. The Governing Body must approve the engagement of the Administrator and the Supervisory Nursing Personnel in accordance with Section 4.f. below. Notwithstanding anything to the contrary herein, Western shall retain all authority not specifically delegated to Franchisee under this Addendum, and shall have all the power and responsibility that is required under federal and state laws to be retained and exercised by the holder of the license and/or certification, and that cannot properly be delegated under such laws.

c. **Participation in Government Payment Programs and Medicaid.** Western shall have sole discretion to decide whether to participate in government payment programs, including state Medicaid programs, for Home Health Services. If Western elects to do so, Western may establish policies and procedures to govern such participation, including administrative, clinical and accounting procedures, and you will abide by such policies and procedures.

# ADDENDUM TO FRANCHISE AGREEMENT FOR HOME HEALTH AGENCY BUSINESS



## ADDENDUM TO FRANCHISE AGREEMENT FOR HOME HEALTH AGENCY BUSINESS



THIS ADDENDUM is made by and between the Western Medical Services, Inc. a California corporation (hereinafter "Western" or "We"), and WESTERN MEDICAL SERVICES OF FLATHEAD COUNTY, MT, INC. ("Franchisee" or "You"), with respect to the following facts:

### RECITALS

Western and Franchisee are parties to a Franchise Agreement, dated \_\_\_\_\_, pursuant to which Western has granted you an exclusive franchise to operate a medical temporary help service in a designated territory ("the Franchise Agreement").

Franchisee is a corporation having its principal place of business at  
2707 Highway 93 South  
Kalispell, Montana 59901

The parties now desire to operate a state licensed (where applicable), Medicare-certified and/or nationally accredited home health agency as an additional line of business, in accordance with the terms and conditions set forth below, subject to Franchisee's approval by Western's Governing Body, based on the criteria set forth on Schedule A to this Addendum.

In consideration of the foregoing premises and the mutual covenants contained herein, the parties agree as follows:

### AGREEMENT

#### I. Definitions.

a. "Home Health Agency Business" means all Home Health Services provided by Western and Franchisee, regardless of payor source.

b. "Home Health Services" means those services that a home health agency is permitted to provide under the scope of its state license (where applicable) and its Medicare or Medicaid certification, subject to any limitations set forth in this Addendum, and shall mean, at minimum: (a) part-time or intermittent skilled nursing care provided under the supervision of a licensed registered nurse; and (b) at least one of the following therapeutic services: physical therapy, occupational therapy, speech therapy, medical social services, or part-time or intermittent services of a home health aide.

c. "Fiscal Intermediary" means the entity that administers the Medicare or Medicaid Programs under contract with the U.S. Department of Health and Human Services, with respect to reimbursement of services provided to Medicare Program beneficiaries.

d. "Medicare Cost Report" means that report required to be filed by a Medicare-certified home health agency for the purpose of determining its annual Medicare reimbursement, and for determining whether payments made at the Medicare Interim Rate have resulted in overpayment or underpayment of actual Medicare Reimbursable Costs for the reported year.

e. "Medicare Interim Rate" means the rate established by the Medicare Fiscal Intermediary for reimbursement made to a home health agency, on an interim basis, for the cost of providing Home Health Services to Medicare beneficiaries. The Medicare Interim Rate is based on the estimated annual Medicare Reimbursable Costs for providing such services.

f. "Medicare Reimbursable Costs" means the costs associated with the provision of Home Health Services to Medicare beneficiaries, which are reimbursable by the Medicare Program under its applicable rules and regulations, as an allocation of Medicare Reportable Costs.

g. "Medicare Reportable Costs" means those costs which must be included in the Medicare Cost Report, as set forth in the applicable rules and regulations, and which include, but are not limited to, the following:

- 1) Salaries and wages;
- 2) Contracted or purchased services;
- 3) Payroll related benefits (FICA, pension, retirement, health insurance) and payroll taxes;
- 4) Fringe benefits;
- 5) Insurance, including, but not limited to, malpractice insurance;
- 6) Workers' compensation;
- 7) Rent;
- 8) Utilities;
- 9) Telephone;
- 10) Taxes and licenses;
- 11) Equipment and supplies, including, but not limited to, personal protective equipment;
- 12) Repairs and maintenance;
- 13) Depreciation;
- 14) Postage;
- 15) Recruitment;
- 16) Community education;
- 17) Transportation or travel expenses;
- 18) Waste disposal;
- 19) Training and education;
- 20) Advertising;
- 21) Interest; and
- 22) Legal, accounting, fiscal and other consulting services.

h. "Final Settlement" means the date Western accepts the Notice of Amount of Program Reimbursement (NPR) or final Medicare Cost Report as determined by the Medicare Fiscal Intermediary, and following the exhaustion of all reconsiderations and appeals, including all court proceedings, with respect to such Medicare Cost Report or NPR.

2. Relationship To Franchise Agreement. The Home Health Agency Business shall be governed by the Franchise Agreement as well as all amendments or other addenda thereto in addition to this Addendum. If any inconsistencies between the documents exist, this Addendum shall control, but only with respect to the Home Health Agency Business.

#### 3. Responsibilities of Western.

a. Licensure and Certification. Western shall use its best efforts to obtain, in the divisional name of "Western Medical Services Home Health Agency," all required state licenses and approvals for the operation of a home health agency in the state in which the home health agency will be located; certification for participation in the Medicare Program; and, at our sole discretion, state Medicaid programs; and accreditation by a nationally recognized accreditation organization. You shall fully cooperate with us in this regard.

b. Governing Body; Reservation of Authority. The officers of Western (or such other persons appointed by Western) shall constitute the governing body of the Western Medical Services Home Health Agency (the "Governing Body"), and shall adopt and periodically review written bylaws, policies and procedures for the operation and management of the Home Health Agency Business and its fiscal affairs. The Governing Body must approve the engagement of the Administrator and the Supervisory Nursing Personnel in accordance with Section 4.f. below. Notwithstanding anything to the contrary herein, Western shall retain all authority not specifically delegated to Franchisee under this Addendum, and shall have all the power and responsibility that is required under federal and state laws to be retained and exercised by the holder of the license and/or certification, and that cannot properly be delegated under such laws.

c. Participation in Government Payment Programs and Medicaid. Western shall have sole discretion to decide whether to participate in government payment programs, including state Medicaid programs, for Home Health Services. If Western elects to do so, Western may establish policies and procedures to govern such participation, including administrative, clinical and accounting procedures, and you will abide by such policies and procedures.

Western shall have the right to establish such reserves as may be reasonably necessary to provide against the contingencies of participation in such programs, similar to the Franchisee's Medicare Reserve established pursuant to Section 5.g. below, and after consultation with you.

d. Operating Manuals, Policies and Procedures. We shall provide you with operating manuals and written policies, procedures, directives and standards for the operation of the Home Health Agency Business, and any amendments to them that may be made from time to time. Upon termination of this Addendum or the Franchise Agreement, you immediately shall return all such materials, in good condition, to Western or forfeit any deposit(s).

e. Engagement and Employment of Caregivers. Western shall employ or, alternatively, independently contract with individuals responsible for patient care in the job categories listed in Schedule B to this Addendum. Individuals so employed shall be on the temporary or regular payroll, at Western's discretion, and Western as their employer shall meet all payroll obligations, including the payment of wages and salaries, payroll taxes, workers' compensation, liability and fidelity bond insurance with respect to such employees. Independent contractors shall be paid by Western in the manner of other trade accounts.

f. Billing and Collections. Western shall have the sole right to bill and collect from all clients and customers of the Home Health Agency Business, including patients and third party payors (whether government or private payors). Western shall supervise all collections, make all settlements, finance the temporary and regular payrolls and related payroll costs of Western employees, pay contractors, and otherwise handle all accounting and other details incident to the collection of the trade accounts receivable owned by Western.

g. Community Education. We shall assist you with community education, sales, promotions and marketing of the Home Health Agency Business as described in Paragraph 3 of the Franchise Agreement. All such sales, promotions or marketing activities, whether conducted by Western or you, shall conform with applicable federal, state and local laws, rules and regulations.

h. Office Supplies and Forms. We shall supply you, at Western's expense, with those office supplies and forms relating to the Home Health Agency Business listed in the supply catalog.

i. Patient Records. Any and all patient records and charts prepared or maintained in connection with the Home Health Agency Business shall be and remain the property of Western.

#### 4. Responsibilities of Franchisee.

a. Management Responsibilities. You shall have the responsibility and authority to conduct, manage and supervise the day-to-day operations of the Home Health Agency Business, in accordance with Western's procedures, programs, policies, standards, directives, ethics, and business practices and this Addendum; provided, however, that you shall have no authority to enter into any contract on behalf of Western, nor otherwise act as an agent of Western, except as specifically provided in the Franchise Agreement and this Addendum. You acknowledge and agree that the clients and customers of the Home Health Agency Business are Western's and that the employees of the Home Health Agency Business on Western's temporary and regular payrolls are Western's employees.

##### b. Name of Business, Signage and Telephones.

1) You shall operate the Home Health Agency Business under the name "Western Medical Services Home Health Agency." You shall operate the medical temporary help business under the name "Western Medical Services," except as provided in the Franchise Agreement.

2) You shall obtain, with Western's prior approval and at Western's expense, signage for the Home Health Agency Business. If the medical temporary help business and the Home Health Agency Business are conducted on the same premises, the signage must include both Western business names described in Section 4.b.1) above.

3) You shall fully cooperate with Western to obtain for Western a telephone number for the Home Health Agency Business listed in the name of "Western Medical Services Home Health Agency," which shall be distinct from the number used for the other "Western Medical Services" business you conduct pursuant to the Franchise Agreement. Such separately listed number shall be a number with the suffix acronym of "C-A-R-E," or other such acronym associated with Western, if available in your area. The terms and conditions of Paragraph 3.g. of the Franchise Agreement, with respect to payment of the installation and the basic monthly charges, Western's ownership of the telephone numbers, and the execution of telephone company contract forms, shall apply to the telephone line required under this Section 4.b.3). You shall place at least a trademark listing ad ("Yellow Pages" ad) in your local telephone directory for the Home Health Agency Business at the first available publication date, subject to our preap-

proval, and you shall renew the ad annually.

c. Office Space. You shall, at your own cost and expense, provide an appropriate office for the operation of the Home Health Agency Business. If permitted by law, you may operate the Home Health Agency Business in the office you establish pursuant to Paragraph 4.g. of the Franchise Agreement, so long as the Home Health Agency Business is properly identified pursuant to Section 4.b.1) above.

d. Scope of Business. The Home Health Agency Business you operate initially shall provide the following services; however, the subsequent addition or elimination of any therapeutic services shall be at Western's sole discretion:

- 1) Part-time or intermittent skilled nursing care;
- 2) Part-time or intermittent services of home health aides; and
- 3) Therapeutic services (check applicable services):
  - physical therapy
  - occupational therapy
  - speech therapy
  - medical social services
  - other (specify):

e. Western Personnel. On Western's behalf, you shall be responsible for recruiting, selecting, training, promoting, supervising, directing and terminating the personnel employed or contracted by Western, pursuant to Section 3.e. above, to provide Home Health Services. You shall comply with all applicable laws, whether federal, state or local, and you shall conform with Western's procedures, policies, directives and business practices in carrying out your responsibilities under this Section 4.e. You shall exercise your business judgment reasonably and in good faith in these matters to the extent that they may be discretionary.

##### f. Employment of Administrator and Supervisory Nursing Personnel.

1) Subject to the approval of Western and the Governing Body, you shall employ, at your own cost and expense, an Administrator, a Director of Nursing and/or a Supervising Registered Nurse, or similarly qualified and titled personnel, (collectively, the "Supervisory Nursing Personnel") to the extent required by federal, state and local laws and regulations governing licensed and certified home health agencies. If directed by Western or the Governing Body for good cause, you shall replace the Administrator, and any Supervisory Nursing Personnel, with others who are acceptable to Western and the Governing Body. For purposes of this Section, "good cause" shall exist if the Administrator or any of the Supervisory Nursing Personnel: (a) violates applicable laws, rules, regulations or standards; (b) commits any material act of dishonesty, gross carelessness or misconduct; (c) unjustifiably neglects his or her duties; (d) acts in any way that has a materially adverse effect on the business or reputation of Western; or (e) otherwise conducts himself or herself in a manner inconsistent with generally recognized standards for the conduct of Administrators or Supervisory Nursing Personnel in the community in which the Home Health Agency Business is operated, after being given notice and an opportunity to correct such conduct.

2) You shall enter into written employment agreements with the Administrator and all Supervisory Nursing Personnel, on a form approved by Western and the Governing Body. Such agreements shall include, at minimum, the following provisions:

- a) A description of duties, including those duties required under federal, state and local law, rules and regulations;
- b) The minimum hours of work, or full-time equivalent, required of each such employee;
- c) The compensation (including salary, bonuses, travel expenses, benefits, etc.) to be paid;
- d) A statement of qualifications including the federal, state and local legal requirements for the position, and a representation that such employees meet and shall continue to meet all such requirements;
- e) A covenant to comply with all Western policies and procedures and all legal requirements imposed on licensed and certified home health agencies;
- f) A representation that each such employee has not been excluded from the Medicare or Medicaid Programs, and has not been convicted of a criminal offense, under any federal or state law, related to neglect or abuse of a patient, or to the delivery of goods and services under the Medicare or Medicaid Programs;

g) The grounds for termination of each such employee; and  
 h) A requirement that each such employee execute written covenants to Western to maintain the confidentiality of the proprietary information of Western and not to compete with Western, on forms provided by Western.

- 3) With respect to the Administrator or any Supervisory Nursing

Personnel, Franchisee shall: (a) notify Western immediately upon the termination of employment of any of them; (b) inform Western immediately of any breach or potential breach of the confidentiality and non-competition covenants of their employment agreements; (c) consult with Western as to the need to litigate to enforce such confidentiality or non-competition covenants; and (d) fully cooperate with Western in filing and litigating actions to enforce the confidentiality or non-competition covenants. The cost of the litigation pursued under this Section 4.f., shall be shared by you paying sixty eight percent (68%) of the costs and Western paying thirty two percent (32%) of the costs.

4) Upon the approval of the Governing Body, a shareholder of Franchisee may act as Administrator or as Supervisory Nursing Personnel, provided each such person conforms with and is subject to all the provisions of this Section 4.f. and provided further that he or she meets the legal requirements therefor, is paid a reasonable salary commensurate with his or her responsibilities as an Administrator or Supervisory Nursing Personnel, and he or she otherwise conforms with and is subject to the provisions of this Section 4.f., whether or not a written agreement is executed.

g. Other Employees of the Franchisee. In addition to employing the management or supervisory employees set forth in Section 4.f. above, you may employ, at your own cost and expense, such employees as you may require to assist in the performance of your obligations under this Addendum, including employees for the following job categories:

- On-Call R.N.(s)
- On-Call Coordinator(s)
- Medical Coordinator(s)
- Team Secretary(ies)
- Other (specify):

Additional job categories shall be subject to the prior approval of Western, which shall not be unreasonably withheld. This Section 4.g. shall not apply to persons you may employ solely for the purpose of operating the Western franchise under the Franchise Agreement.

h. Medical and Other Supplies. You shall be responsible for providing, at your own cost and expense, such medical and other supplies that are required for the operation of the Home Health Agency Business, excluding the supplies provided by Western to you under Section 3.h. above.

i. Billing Information and Documentation. You shall submit to Western or its designee, for processing, all bills for the provision of Home Health Services by the Home Health Agency Business, under the office number established by Western for that purpose and in accordance with Western's accounting procedures, policies and business practices. You shall timely submit to Western or its designee accurate documentation with each bill as may be required by patients or third-party payors, including Medicare or Medicaid. You shall assist Western in its collection of the trade accounts receivable when requested.

j. Professional Liability Insurance. In addition to the insurance required under Paragraph 3.n. of the Franchise Agreement, you shall obtain at your own expense and maintain, at all times during the term of this Addendum as well as all renewal terms and for two (2) years after termination hereof, a policy or policies of professional liability insurance of no less than One Million Dollars (\$1,000,000.00) per claim and Three Million Dollars (\$3,000,000.00) aggregate per calendar year which insures you, your agents, employees and contractors, for any act, error or omission for which you or they may be liable in connection with the practice of his or her profession. Such policy or policies shall name Western and its parent company as additional insureds. All such policies shall contain an endorsement stating that they cannot be canceled or materially changed without thirty (30) days' prior written notice to Western. Before you commence doing business pursuant to this Addendum, you shall furnish Western's Legal Department with certificates of insurance confirming that such policy or policies are in full force and effect and that Western and its parent company are additional insureds. You likewise shall furnish renewal or replacement certificates annually or promptly upon obtaining such insurance from a different carrier.

k. Commencement Date. You shall cooperate fully and do all things reasonably necessary and convenient for Western to obtain and maintain the license, certification and/or accreditation of the Home Health Agency Business. You shall commence operations of the Home Health Agency Business at our instruction and as soon as practicable, provided all legal requirements for the operation of the Home Health Agency Business have been satisfied.

#### 5. Medicare Reimbursement.

a. Medicare Cost-Based Reimbursement Principle. With respect to the provision of Home Health Services to beneficiaries of the Medicare Program,

each party shall only be entitled to reimbursement or payment of those Medicare Reimbursable Costs incurred by each in the operation of the Home Health Agency Business. Such Costs are determined on an annual basis upon Final Settlement of the Medicare Cost Report for any fiscal year. The parties therefore shall do such things and make such adjustments between themselves that may be required in order to conform with the foregoing cost-based reimbursement principle, and as more fully set forth below.

b. Responsibility for Medicare Accounting. Western shall have sole responsibility to communicate with the Medicare Fiscal Intermediary on, and to make decisions with respect to, all matters related to Medicare accounting and reimbursement, including, but not limited to, the establishment of the Medicare Interim Rate, the filing of the Medicare Cost Report, and the exercise of any rights of reconsideration or appeal of reimbursement determinations. We shall consult with you and keep you informed of Western's actions on such matters, as is reasonably necessary for the proper operation of the Home Health Agency Business.

c. Preparation of the Medicare Cost Report. Western shall timely prepare, or cause to be prepared, the Medicare Cost Report, audited and unaudited financial statements, and any other reports that are required to be filed by governmental agencies or payors with respect to the Home Health Agency Business. Western may engage legal, accounting and other consultants and professionals, as necessary in Western's sole discretion and of our choice, to prepare such reports, and the costs associated with engagement of such professionals shall be considered a Medicare Reportable Cost.

d. Franchisee's Reporting of Medicare Reportable Costs. You shall timely report all Medicare Reportable Costs, with such documentation as Western deems necessary each period, for the purpose of reimbursement under Section 5.e., below, and for inclusion in the Medicare Cost Report. We shall assist you in identifying Medicare Reportable Costs that must be reported by you and in determining the manner and form for such reports; however, you shall be solely responsible for: (1) any disallowance of costs that results from your failure to comply with this Section 5.d.; (2) any Medicare Reportable Cost not included in the Medicare Cost Report and not reimbursed because of your failure to comply with this Section; and (3) any Medicare Reportable Cost not reimbursed under Section 5.e. below because of your failure to comply with this Section 5.d.

e. Periodic Medicare Reimbursement. Within four (4) weeks after the end of each period, Western shall reimburse you, based upon information submitted by you under Section 5.d. above, for the Medicare Reimbursable Costs incurred by you for the period, subject to the provisions of Sections 5.f. and 5.g. below, and in accordance with the methods and procedures set forth in Schedule C to this Addendum and illustrated on Schedule D hereto.

f. Annual Reconciliation of Medicare Reimbursement. Following Final Settlement of the Medicare Cost Report for any fiscal year, Western shall provide you a written statement showing whether payments made to you under Section 5.e. above resulted in overpayment or underpayment of your actual Medicare Reimbursable Costs. Western shall refund promptly to you the amounts of any such underpayment. You shall remit promptly to Western the amounts of any such overpayment.

#### g. Reserve for Medicare Contingencies.

1) Establishment of Franchisee's Medicare Reserve. For each and every fiscal year in which you operate a Home Health Agency Business pursuant to this Addendum, Western shall establish a fund on your behalf (the "Franchisee's Medicare Reserve") for the purpose of creating a reserve against contingencies that arise from your participation in the Medicare Program, including, but not limited to, the risks of overpayment and underpayment following Final Settlement of the Medicare Cost Report, and disallowances based on alleged fraud, lack of documentation, unreasonableness of costs, lack of medical necessity, or any other reason asserted under applicable rules and regulations. The Franchisee's Medicare Reserve shall be established for each fiscal year by setting aside twenty percent (20%) of the periodic Medicare reimbursement under Section 5.e. above. The monies that are set aside shall be held in an interest-bearing account until such time as a Notice of Amount of Program Reimbursement (NPR) or other Final Settlement of the Medicare Cost Report is issued by the Medicare Fiscal Intermediary and accepted by Western for the fiscal year that is the subject of the Franchisee's Medicare Reserve. The establishment of the Franchisee's Medicare Reserve shall in no way limit Western from establishing reserves for its own risks of participation in the Medicare Program.

2) Medicare Adjustments. When the Final Settlement of the Medicare Cost Report is issued by the Medicare Fiscal Intermediary and accepted by Western, Western shall issue an accounting of the Franchisee's Medicare Reserve to the Franchisee. In this accounting, Western shall recover from the Reserve all

of its Medicare Reimbursable Costs incurred by the Home Health Agency Business before any of the Reserve shall be returned to the Franchisee. All risks of underpayment by Medicare (except those attributable to Medicare disallowance of allotted Western Home Office Costs), whether due to any other disallowed costs or costs in excess of applicable limits on Home Health Agency costs per visit ("Medicare caps"), shall be borne by the franchisee. The remaining balance (whether positive or negative) in the Reserve after this adjustment is made shall be considered the Franchisee's Allocation of Medicare Overpayment.

3) Use of Franchisee's Medicare Reserve. Western shall use funds in the Franchisee's Medicare Reserve to pay the Franchisee's Allocation of Medicare Overpayment. In the event that such funds are insufficient to repay the Franchisee's Allocation of Medicare Overpayment, you shall provide funds to Western within ten (10) days of notice to remedy the insufficiency. If the Franchise Agreement and/or this Addendum are still in effect at the time of the notice to you of the insufficiency, Western may, at your request and at our sole discretion, advance funds to remedy the insufficiency and offset such advance from your current share of the gross profit under either the Franchise Agreement or this Addendum, until such advance is fully reimbursed.

4) Distribution of Franchisee's Medicare Reserve Following Final Settlement. Any portion of the Franchisee's Medicare Reserve remaining after payment of the Franchisee's Allocation of Medicare Overpayment or, where no overpayment exists, after Final Settlement of the Medicare Cost Report, shall be distributed to you, with accrued interest on balances due you at the then current annual rate of interest payable on business savings accounts by Bank of America NT&SA, no later than thirty (30) days from the date of Final Settlement of the Medicare Cost Report for the fiscal year in question.

5) Additional Reserves. Notwithstanding any other provision of this Addendum, Western may withhold from the periodic Medicare reimbursement under Section 5.e above any additional amounts that we deem reasonably necessary to reduce the risks of disallowance, overpayment, or recoupment, provided that: (a) Western provides you with a written notice at least fifteen (15) days before taking such action; and (b) the notice specifies: (1) the risks of disallowance, overpayment and recoupment likely to be asserted by the Fiscal Intermediary or the Medicare Program; (2) the extent to which the then current level of the Franchisee's Medicare Reserve is inadequate to meet such risks; (3) the amount to be additionally withheld and the manner and method of such withholding; (4) any limitations on the dollar amount or the duration of the period of additional withholding; and (5) your consultation rights with respect to the additional withholding.

Western shall consult with you in the event it is necessary to withhold such additional amounts, provided, however, that you shall respond to Western in writing within five (5) days after delivery of the required notice. Any additional amounts withheld pursuant to this Section 5.g. shall be added to the Franchisee's Medicare Reserve and be treated thereafter as part of such Reserve. In addition, Western may, at our sole discretion, seek adjustment of the Medicare Interim Rate by the Fiscal Intermediary as may be required to minimize the risk of Medicare overpayment.

h. Division of Medicare Underpayments. Any monies paid by the Medicare Program to Western because of underpayments identified in the NPR or on Final Settlement of the Medicare Cost Report for any fiscal year shall be allocated between the parties in proportion to each party's share of Medicare Reimbursable Costs, as shown on the NPR or final Medicare Cost Report. We shall submit to you your portion within fifteen (15) working days of our receipt of the remittance from Medicare.

#### 6. Compensation to Franchisee for Non-Medicare Home Health Agency Business.

a. Compensation to Franchisee. At the end of each period, Western shall compensate you for your services under this Addendum. Your compensation shall be the gross profit derived from the operation of the Home Health Agency Business as defined in section 6.b. below, less eight percent (8%) of the Gross Sales, as defined in the Franchise Agreement.

b. Definition of Gross Profit. "Gross Profit" for the purpose of this Section 6.b. is defined as gross billings at the usual and customary rate for all Home Health Agency Business (exclusive of Medicare business), including taxes levied thereon, for any period, less contractual allowances, direct labor costs and any mutually agreed upon expenses. Costs under this Addendum which are defined as direct labor costs under Paragraph 5.e. of the Franchise Agreement are "Direct Labor Costs" for the purpose of this Section 6.b., whether or not so specified.

c. Combining of Billing. For the sole purpose of determining the Gross Sales under Section 6.a., Western shall combine for each period the dollar value

of the hours of temporary help billed by you under the Franchise Agreement with the dollar value of the billings for the Home Health Agency Business (exclusive of Medicare business).

7. Term. The term of this Addendum is coterminant with the term of the Franchise Agreement and any extensions or renewals thereof, and this Addendum shall terminate whenever the Franchise Agreement terminates, for whatever reason, subject to the provisions for earlier termination under Section 8 below.

#### 8. Termination.

a. Termination By Franchisee. This Addendum may be terminated without cause by Franchisee on sixty (60) days' prior written notice to Western. During the sixty (60) day period, you shall continue to operate the Home Health Agency Business unless arrangements have been made for earlier transfer of operations. You shall cooperate with Western to expedite the transfer of the Home Health Agency Business, and at Western's option, we may take possession of and exclusively operate the Home Health Agency Business, at our expense, during the sixty (60) day period, provided we continue to remit to you such payments as may be due under Sections 5 and 6 of this Addendum.

b. Immediate Termination. Western may terminate this Addendum immediately, without further notice, and may take possession of and exclusively operate the Home Health Agency Business, upon any of the following events:

- 1) Conviction of Franchisee, or any of your principals, under federal or state law, of a criminal offense related to (a) the neglect or abuse of a patient; or (b) to the delivery of an item or service under the Medicare or Medicaid Programs, including the performance of administrative or management services;
- 2) Exclusion of Franchisee, or any of your principals, from participation in the Medicare or Medicaid Programs;
- 3) If required in order for Western to comply with any legal order issued or proposed to be issued by a federal, state or local government department, agency or commission;
- 4) Material breach of Paragraph 8 of the Franchise Agreement;
- 5) Material breach of Sections 9.b, 9.c, 9.d or 9.e below;
- 6) Failure to substantially comply with: (a) federal, state or local laws, rules, and regulations; or (b) Western's procedures, policies, standards, directives, ethics and business practices for the provision of clinical services, as determined by Western's Quality Assurance Department or designee;
- 7) Consistent failure to properly document claims or Medicare Reportable Costs, leading to substantial risk of non-reimbursement by patients and payors; or

8) Failure to maintain adequate personnel required for the Home Health Agency Business or to replace the Administrator or any Supervisory Nursing Personnel as may be required under Section 4.f. above.

c. Effect of Termination. The termination of this Addendum shall not automatically terminate the Franchise Agreement, nor any amendments or other addenda thereto. Notwithstanding the foregoing sentence, Western reserves the right to terminate the Franchise Agreement at any time on the grounds stated therein and in accordance with the provisions contained in Paragraph 8 thereof.

d. Distributions and Payments Following Termination. Unless otherwise specifically provided, following termination of this Addendum, we shall remit to you such payments as may be due to you under Sections 5 or 6 above, at the time and in the manner that such payments would have been made if this Addendum were in full force and effect; provided, however, that we may offset from such payments any amount due and owing to Western under this Addendum, the Franchise Agreement, any amendments or other addenda thereto, as well as any license agreements between you and Western.

e. Return of Materials Following Termination. All the provisions of Paragraph 8 of the Franchise Agreement shall apply equally with respect to your rights and obligations following the termination, for whatever reason, of this Addendum, whether or not the Franchise Agreement continues in full force and effect after the termination of this Addendum; except that you shall be required to turn over immediately to Western the items described therein which relate to your operation of the Home Health Agency Business.

#### 9. Miscellaneous.

a. Sale or Transfer of the Franchise. No transfers of your interest in the Home Health Agency Business may be made pursuant to Paragraph 9 of the Franchise Agreement by you, your legal heirs or representatives or, if you are a corporation, the shareholders owning fifty-one percent (51%) or more of the outstanding stock, to persons or entities who are not able to satisfactorily demonstrate to Western the ability to operate a Home Health Agency Business and meet all legal requirements related to the operation of a Medicare certified home health agency.

b. Access, Inspection and Audit. Western shall at all times be entitled

to access to the franchise office and the right to inspect, review and copy any and all of the books and records pertaining to the operation of the Home Health Agency Business, in order to ensure compliance with the terms of this Addendum.

c. Medicare Books and Records. For the purpose of implementing Section 1861(v)(1)(I) of the Social Security Act, as amended, and any written regulations thereto, during the term of this Addendum and for a period of four (4) years thereafter, you shall make available upon written request from the Secretary of HHS or the Comptroller General of the United States, or any of their duly authorized representatives, this Addendum and any of the books, documents and records that may be necessary to certify the nature and extent of the costs of providing Home Health Services to Medicare Program beneficiaries. If you carry out any of your duties pursuant to this Addendum through a subcontract with a value or cost of Ten Thousand Dollars (\$10,000) or more over a twelve (12) month period, you shall insert the required statutory clause in such subcontract, obligating the subcontractor to provide the same access and make available necessary documents.

d. Covenant Not to Compete.

1) For the term of this Addendum and for a period of two (2) years from and after its termination, you, individually; all your partners, if any; your spouse, if any; and the corporation which is to operate the Home Health Agency Business, as well as all officers, directors and shareholders of such corporation, shall be jointly and severally obligated to comply with the noncompetition, confidentiality and nondisclosure provisions of Paragraph 6 of the Franchise Agreement as regards the Home Health Agency Business, and Western shall be entitled to the injunctive relief, other remedies and damages more particularly described therein in the event of a breach of this Section 9.d.

2) To the extent that you, individually; your partners, if any; your spouse, if any; the corporation which is to operate the Home Health Agency Business, as well as all officers, directors and shareholders of such corporation;

and third parties have executed noncompetition, confidentiality and nondisclosure covenants as required by Paragraph 6 of the Franchise Agreement, those covenants shall be binding with respect to the Home Health Agency Business.

e. Proprietary Information, Confidential Data and Trade Secrets. Any proprietary information relating to the Home Health Agency Business, including its policies, procedures, practices, techniques, forms, manuals and methods of operations, are and shall remain the property of Western. "Proprietary Information" specifically includes all information, data, ideas, operating manuals, forms, supplies and materials provided to you in furtherance of this Addendum and more fully described in Paragraph 6.d. of the Franchise Agreement, reference to which is made for further particulars.

f. Survival of Covenants, Representations and Warranties. The covenants, representations and warranties made under this Addendum shall survive its termination as more fully provided in Paragraph 14 of the Franchise Agreement.

g. Entire Agreement. This Addendum (including its exhibits and schedules), the Franchise Agreement to which it is appended, and any amendments or other addenda thereto, together constitute the entire agreement between the parties concerning the operation of the Home Health Agency Business, and together supersede all other agreements, representations or communications, whether oral or written, between the parties relating to the transactions contemplated herein, or the subject matter hereof.



IN WITNESS WHEREOF, the undersigned have executed this Addendum on the dates below their signatures.

Western:

MEDICAL  
WESTERN MEDICAL SERVICES OF FLATHEAD COUNTY, INC.

By: [Signature]  
Signature

MICHAEL J. NICHOLSON  
Type or Print Name

President  
Type or Print Title

Dated: June 17, 1998

Franchisee:

WESTERN MEDICAL SERVICES OF FLATHEAD COUNTY, MT, INC  
Type or Print Name of Legal Entity, if any

[Signature] 4-20-98  
Signature

KRISTINE H. CARLSON  
Type or Print Name

[Signature]  
Type or Print Name

JANET HAWLEY  
Dated: April 20, 1998

**SHAREHOLDER RATIFICATION AND GUARANTY**

In consideration of the above and foregoing Addendum to Franchise Agreement for Home Health Agency Business, each of the undersigned on even date herewith, individually and as all the shareholders of WESTERN MEDICAL SERVICES OF FLATHEAD COUNTY, MT, INC, jointly and severally, hereby ratify, adopt and affirm the Agreement contained herein and as the same may hereafter be amended or reconstituted, and personally guarantee the performance of any and all present and future obligations hereunder.

Witness:

[Signature]  
[Signature]

Shareholders:

[Signature]  
KRISTINE H. CARLSON  
[Signature]  
JANET HAWLEY

# ADDENDUM TO FRANCHISE AGREEMENT FOR HOME HEALTH AGENCY BUSINESS

INITIAL  
HERE

## SCHEDULE C METHODS AND PROCEDURES FOR CALCULATING PERIODIC REIMBURSEMENT OF FRANCHISEE'S MEDICARE REIMBURSABLE COSTS

(Section 5.e.)

### A. Reporting Costs

1. For purposes of calculating Franchisee's Periodic Medicare Reimbursement under Section 5.e. of the foregoing Addendum to the Franchise Agreement ("this Addendum"), the following information shall be required, on a per period basis:
  - a. All costs incurred by Franchisee directly for the benefit of the Home Health Agency Business whether Medicare or non-Medicare, including, but not limited to, those costs identified at Section 1.g. of this Addendum;
  - b. All operating costs incurred by Franchisee for the mutual benefit of the Home Health Agency Business and the other lines of Western Medical Services supplemental staffing and private duty business operated by Franchisee; and
  - c. Documentation as requested by Western or otherwise required by law.
2. This information must be provided to Western within seven (7) days after the end of each period.

### B. Cost Allocation

Under current Medicare cost reporting requirements, operating costs generally are allocated using either the direct allocation or the indirect allocation method.

1. **Direct Allocation.** Under the direct allocation method, operating costs shall be allocated between the Home Health Agency Business and the other lines of Western Medical Services business, based upon actual records of the costs, or on approved direct allocations supported by adequate documentation. For example, under the direct allocation method, rent and the costs of office utilities may be allocated between the Home Health Agency Business and the other lines of Western Medical Services business based upon square footage or another appropriate and approved method. Staff salaries may be allocated based on actual and regular time studies for each staff.
2. **Indirect Allocation.** Western shall use the indirect allocation method to allocate operating costs between the Home Health Agency Business and the other lines of Western Medical Services business, unless the Franchisee requests and Western is able to obtain specific approval from the Medicare Fiscal Intermediary for direct allocation. Approval requires a substantial amount of documentation by Franchisee for costs.

Under the indirect method, operating costs are accumulated into a pool and allocated between the businesses based upon the ratio of direct costs for each business to total direct costs.

### C. Calculation of Periodic Medicare Reimbursement

1. For purposes of the calculation of the Franchisee's Periodic Medicare Reimbursement under Section 6.5 of this Addendum, costs that are incurred solely and directly for the Medicare Program shall be allocated directly to the Franchisee's Periodic Medicare Reimbursement. Such costs may include medical supplies, salaries of the Supervising RN incurred for billable visits, etc. For all other operating costs which are shared between the lines of Western Medical Services businesses, the indirect allocation method shall be used. However, if Franchisee elects and is approved to use the direct allocation method for specific categories of operating costs (such as staff salaries), the direct allocation method shall be used for those cost categories.
2. For the purpose of applying the indirect allocation method to the operating costs, the following definitions apply. "Combined Operating Costs" refers to those operating costs, excluding direct costs, that are applicable to all lines of Western Medical Services business operated by Franchisee under the Franchise Agreement and this Addendum, including supplemental staffing, private duty and the Home Health Agency Business. "Total Direct Costs" are the aggregate of direct costs for all lines of Western Medical Services business, using the definition of direct costs in Paragraph 5.e. of the Franchise Agreement.
3. In applying the indirect allocation method, Western shall calculate the ratio of direct costs for the Medicare billings to Total Direct Costs. This ratio is the "Medicare Direct Cost Ratio". Note that this ratio is for direct costs associated with Medicare business only and not with other Home Health Agency Business (non-Medicare Home Health Agency business). Western shall use the period end franchise statements as the basis for determining the Total Direct Costs.

The Combined Operating Costs reported by the Franchisee shall be multiplied by the Medicare Direct Cost Ratio, with the result being the "Gross Medicare Indirect Costs" to be reimbursed to the Franchisee. The Gross Medicare Indirect Costs shall be added to Franchisee's direct Medicare costs, if any, with the sum being the "Gross Medicare Reimbursable Costs."

The Gross Medicare Reimbursable Costs shall be reduced by the standard twenty percent (20%) reserve pursuant to Section 6.g. of this Addendum. The difference is the "Net Medicare Reimbursable Costs," and shall constitute the Franchisee's Periodic Medicare Reimbursement under Section 5.a. of this Addendum for the period in question.

#### SUMMARY OF CALCULATION OF FRANCHISEE'S MEDICARE REIMBURSEMENT

$$\begin{aligned} \text{Medicare Direct Cost Ratio} &= \text{Medicare direct costs} \div \text{Total Direct Costs} \\ \text{Gross Medicare Indirect Costs} &= \text{Combined Operating Costs} \times \text{Medicare Direct Cost Ratio} \\ \text{Gross Medicare Reimbursable Costs} &= \text{Franchisee's Medicare direct costs} + \text{Gross Medicare Indirect Costs} \end{aligned}$$

Registered Nurses

Licensed Practical Nurses

Home Health Aides

Home Companions or Sitters (not Medicare reimbursable)

Physical Therapists

Physical Therapist Assistants

Speech Therapists

Occupational Therapists

Occupational Therapy Assistants

Licensed Social Workers

Enterostomal Therapists

# ADDENDUM TO FRANCHISE AGREEMENT FOR HOME HEALTH AGENCY BUSINESS



## ADDENDUM TO FRANCHISE AGREEMENT FOR HOME HEALTH AGENCY BUSINESS



THIS ADDENDUM is made by and between the Western Medical Services, Inc. 1) Salaries and wages;  
~~Western Medical Services of Flathead County, MT, Inc.~~ a California corporation (here- 2) Contracted or purchased services;  
 inafter "Western" or "We"), and 3) Payroll related benefits (FICA, pension, retirement, health  
 WESTERN MEDICAL SERVICES OF FLATHEAD COUNTY, MT, INC. insurance) and payroll taxes;  
 ("Franchisee" or "You"), with respect to the following facts: 4) Fringe benefits;  
 5) Insurance, including, but not limited to, malpractice insurance;  
 6) Workers' compensation;  
 7) Rent;  
 8) Utilities;  
 9) Telephone;  
 10) Taxes and licenses;  
 11) Equipment and supplies, including, but not limited to, personal  
 protective equipment;  
 12) Repairs and maintenance;  
 13) Depreciation;  
 14) Postage;  
 15) Recruitment;  
 16) Community education;  
 17) Transportation or travel expenses;  
 18) Waste disposal;  
 19) Training and education;  
 20) Advertising;  
 21) Interest; and  
 22) Legal, accounting, fiscal and other consulting services.

### RECITALS

Western and Franchisee are parties to a Franchise Agreement, dated  
 pursuant to which Western has granted  
 you an exclusive franchise to operate a medical temporary help service in a des-  
 ignated territory ("the Franchise Agreement").

Franchisee is a corporation having its principal place of business at  
 2707 Highway 93 South  
 Kalispell, Montana 59901

The parties now desire to operate a state licensed (where applicable),  
 Medicare-certified and/or nationally accredited home health agency as an addi-  
 tional line of business, in accordance with the terms and conditions set forth  
 below, subject to Franchisee's approval by Western's Governing Body, based on  
 the criteria set forth on Schedule A to this Addendum.

In consideration of the foregoing premises and the mutual covenants con-  
 tained herein, the parties agree as follows:

### AGREEMENT

#### i. Definitions.

a. "Home Health Agency Business" means all Home Health Services  
 provided by Western and Franchisee, regardless of payor source.

b. "Home Health Services" means those services that a home health  
 agency is permitted to provide under the scope of its state license (where applic-  
 able) and its Medicare or Medicaid certification, subject to any limitations set  
 forth in this Addendum, and shall mean, at minimum: (a) part-time or intermittent  
 skilled nursing care provided under the supervision of a licensed registered nurse;  
 and (b) at least one of the following therapeutic services: physical therapy, occu-  
 pational therapy, speech therapy, medical social services, or part-time or inter-  
 mittent services of a home health aide.

c. "Fiscal Intermediary" means the entity that administers the Medicare  
 or Medicaid Programs under contract with the U.S. Department of Health and  
 Human Services, with respect to reimbursement of services provided to Medicare  
 Program beneficiaries.

d. "Medicare Cost Report" means that report required to be filed by a  
 Medicare-certified home health agency for the purpose of determining its annual  
 Medicare reimbursement, and for determining whether payments made at the  
 Medicare Interim Rate have resulted in overpayment or underpayment of actual  
 Medicare Reimbursable Costs for the reported year.

e. "Medicare Interim Rate" means the rate established by the Medicare  
 Fiscal Intermediary for reimbursement made to a home health agency, on an inter-  
 im basis, for the cost of providing Home Health Services to Medicare beneficia-  
 ries. The Medicare Interim Rate is based on the estimated annual Medicare  
 Reimbursable Costs for providing such services.

f. "Medicare Reimbursable Costs" means the costs associated with the  
 provision of Home Health Services to Medicare beneficiaries, which are reim-  
 burstable by the Medicare Program under its applicable rules and regulations, as  
 an allocation of Medicare Reportable Costs.

g. "Medicare Reportable Costs" means those costs which must be  
 included in the Medicare Cost Report, as set forth in the applicable rules and reg-  
 ulations, and which include, but are not limited to, the following:

h. "Final Settlement" means the date Western accepts the Notice of  
 Amount of Program Reimbursement (NPR) or final Medicare Cost Report as  
 determined by the Medicare Fiscal Intermediary, and following the exhaustion of  
 all reconsiderations and appeals, including all court proceedings, with respect to  
 such Medicare Cost Report or NPR.

2. Relationship To Franchise Agreement. The Home Health Agency  
 Business shall be governed by the Franchise Agreement as well as all amend-  
 ments or other addenda thereto in addition to this Addendum. If any inconsis-  
 tencies between the documents exist, this Addendum shall control, but only with  
 respect to the Home Health Agency Business.

#### 3. Responsibilities of Western.

a. Licensure and Certification. Western shall use its best efforts to  
 obtain, in the divisional name of "Western Medical Services Home Health  
 Agency," all required state licenses and approvals for the operation of a home  
 health agency in the state in which the home health agency will be located; cer-  
 tification for participation in the Medicare Program; and, at our sole discretion,  
 state Medicaid programs; and accreditation by a nationally recognized accredita-  
 tion organization. You shall fully cooperate with us in this regard.

b. Governing Body; Reservation of Authority. The officers of Western  
 (or such other persons appointed by Western) shall constitute the governing body  
 of the Western Medical Services Home Health Agency (the "Governing Body"),  
 and shall adopt and periodically review written bylaws, policies and procedures  
 for the operation and management of the Home Health Agency Business and its  
 fiscal affairs. The Governing Body must approve the engagement of the  
 Administrator and the Supervisory Nursing Personnel in accordance with Section  
 4.f. below. Notwithstanding anything to the contrary herein, Western shall retain  
 all authority not specifically delegated to Franchisee under this Addendum, and  
 shall have all the power and responsibility that is required under federal and state  
 laws to be retained and exercised by the holder of the license and/or certification,  
 and that cannot properly be delegated under such laws.

c. Participation in Government Payment Programs and Medicaid.  
 Western shall have sole discretion to decide whether to participate in government  
 payment programs, including state Medicaid programs, for Home Health  
 Services. If Western elects to do so, Western may establish policies and proce-  
 dures to govern such participation, including administrative, clinical and  
 accounting procedures, and you will abide by such policies and procedures.

Western shall have the right to establish such reserves as may be reasonably necessary to provide against the contingencies of participation in such programs, similar to the Franchisee's Medicare Reserve established pursuant to Section 5.g. below, and after consultation with you.

d. Operating Manuals, Policies and Procedures. We shall provide you with operating manuals and written policies, procedures, directives and standards for the operation of the Home Health Agency Business, and any amendments to them that may be made from time to time. Upon termination of this Addendum or the Franchise Agreement, you immediately shall return all such materials, in good condition, to Western or forfeit any deposit(s).

e. Engagement and Employment of Caregivers. Western shall employ or, alternatively, independently contract with individuals responsible for patient care in the job categories listed in Schedule B to this Addendum. Individuals so employed shall be on the temporary or regular payroll, at Western's discretion, and Western as their employer shall meet all payroll obligations, including the payment of wages and salaries, payroll taxes, workers' compensation, liability and fidelity bond insurance with respect to such employees. Independent contractors shall be paid by Western in the manner of other trade accounts.

f. Billing and Collections. Western shall have the sole right to bill and collect from all clients and customers of the Home Health Agency Business, including patients and third party payors (whether government or private payors). Western shall supervise all collections, make all settlements, finance the temporary and regular payrolls and related payroll costs of Western employees, pay contractors, and otherwise handle all accounting and other details incident to the collection of the trade accounts receivable owned by Western.

g. Community Education. We shall assist you with community education, sales, promotions and marketing of the Home Health Agency Business as described in Paragraph 3 of the Franchise Agreement. All such sales, promotions or marketing activities, whether conducted by Western or you, shall conform with applicable federal, state and local laws, rules and regulations.

h. Office Supplies and Forms. We shall supply you, at Western's expense, with those office supplies and forms relating to the Home Health Agency Business listed in the supply catalog.

i. Patient Records. Any and all patient records and charts prepared or maintained in connection with the Home Health Agency Business shall be and remain the property of Western.

#### 4. Responsibilities of Franchisee.

a. Management Responsibilities. You shall have the responsibility and authority to conduct, manage and supervise the day-to-day operations of the Home Health Agency Business, in accordance with Western's procedures, programs, policies, standards, directives, ethics, and business practices and this Addendum; provided, however, that you shall have no authority to enter into any contract on behalf of Western, nor otherwise act as an agent of Western, except as specifically provided in the Franchise Agreement and this Addendum. You acknowledge and agree that the clients and customers of the Home Health Agency Business are Western's and that the employees of the Home Health Agency Business on Western's temporary and regular payrolls are Western's employees.

##### b. Name of Business, Signage and Telephones.

1) You shall operate the Home Health Agency Business under the name "Western Medical Services Home Health Agency." You shall operate the medical temporary help business under the name "Western Medical Services," except as provided in the Franchise Agreement.

2) You shall obtain, with Western's prior approval and at Western's expense, signage for the Home Health Agency Business. If the medical temporary help business and the Home Health Agency Business are conducted on the same premises, the signage must include both Western business names described in Section 4.b.1) above.

3) You shall fully cooperate with Western to obtain for Western a telephone number for the Home Health Agency Business listed in the name of "Western Medical Services Home Health Agency," which shall be distinct from the number used for the other "Western Medical Services" business you conduct pursuant to the Franchise Agreement. Such separately listed number shall be a number with the suffix acronym of "C-A-R-E," or other such acronym associated with Western, if available in your area. The terms and conditions of Paragraph 3.g. of the Franchise Agreement, with respect to payment of the installation and the basic monthly charges, Western's ownership of the telephone numbers, and the execution of telephone company contract forms, shall apply to the telephone line required under this Section 4.b.3). You shall place at least a trademark listing ad ("Yellow Pages" ad) in your local telephone directory for the Home Health Agency Business at the first available publication date, subject to our preap-

proval, and you shall renew the ad annually.

c. Office Space. You shall, at your own cost and expense, provide an appropriate office for the operation of the Home Health Agency Business. If permitted by law, you may operate the Home Health Agency Business in the office you establish pursuant to Paragraph 4.g. of the Franchise Agreement, so long as the Home Health Agency Business is properly identified pursuant to Section 4.b.1) above.

d. Scope of Business. The Home Health Agency Business you operate initially shall provide the following services; however, the subsequent addition or elimination of any therapeutic services shall be at Western's sole discretion:

- 1) Part-time or intermittent skilled nursing care;
- 2) Part-time or intermittent services of home health aides; and
- 3) Therapeutic services (check applicable services):
  - physical therapy
  - occupational therapy
  - speech therapy
  - medical social services
  - other (specify):

e. Western Personnel. On Western's behalf, you shall be responsible for recruiting, selecting, training, promoting, supervising, directing and terminating the personnel employed or contracted by Western, pursuant to Section 3.e. above, to provide Home Health Services. You shall comply with all applicable laws, whether federal, state or local, and you shall conform with Western's procedures, policies, directives and business practices in carrying out your responsibilities under this Section 4.e. You shall exercise your business judgment reasonably and in good faith in these matters to the extent that they may be discretionary.

##### f. Employment of Administrator and Supervisory Nursing Personnel.

1) Subject to the approval of Western and the Governing Body, you shall employ, at your own cost and expense, an Administrator, a Director of Nursing and/or a Supervising Registered Nurse, or similarly qualified and titled personnel, (collectively, the "Supervisory Nursing Personnel") to the extent required by federal, state and local laws and regulations governing licensed and certified home health agencies. If directed by Western or the Governing Body for good cause, you shall replace the Administrator, and any Supervisory Nursing Personnel, with others who are acceptable to Western and the Governing Body. For purposes of this Section, "good cause" shall exist if the Administrator or any of the Supervisory Nursing Personnel: (a) violates applicable laws, rules, regulations or standards; (b) commits any material act of dishonesty, gross carelessness or misconduct; (c) unjustifiably neglects his or her duties; (d) acts in any way that has a materially adverse effect on the business or reputation of Western; or (e) otherwise conducts himself or herself in a manner inconsistent with generally recognized standards for the conduct of Administrators or Supervisory Nursing Personnel in the community in which the Home Health Agency Business is operated, after being given notice and an opportunity to correct such conduct.

2) You shall enter into written employment agreements with the Administrator and all Supervisory Nursing Personnel, on a form approved by Western and the Governing Body. Such agreements shall include, at minimum, the following provisions:

- a) A description of duties, including those duties required under federal, state and local law, rules and regulations;
- b) The minimum hours of work, or full-time equivalent, required of each such employee;
- c) The compensation (including salary, bonuses, travel expenses, benefits, etc.) to be paid;
- d) A statement of qualifications including the federal, state and local legal requirements for the position, and a representation that such employees meet and shall continue to meet all such requirements;
- e) A covenant to comply with all Western policies and procedures and all legal requirements imposed on licensed and certified home health agencies;
- f) A representation that each such employee has not been excluded from the Medicare or Medicaid Programs, and has not been convicted of a criminal offense, under any federal or state law, related to neglect or abuse of a patient, or to the delivery of goods and services under the Medicare or Medicaid Programs;

g) The grounds for termination of each such employee; and  
 h) A requirement that each such employee execute written covenants to Western to maintain the confidentiality of the proprietary information of Western and not to compete with Western, on forms provided by Western.

- 3) With respect to the Administrator or any Supervisory Nursing

Personnel, Franchisee shall: (a) notify Western immediately upon the termination of employment of any of them; (b) inform Western immediately of any breach or potential breach of the confidentiality and non-competition covenants of their employment agreements; (c) consult with Western as to the need to litigate to enforce such confidentiality or non-competition covenants; and (d) fully cooperate with Western in filing and litigating actions to enforce the confidentiality or non-competition covenants. The cost of the litigation pursued under this Section 4.f., shall be shared by you paying sixty eight percent (68%) of the costs and Western paying thirty two percent (32%) of the costs.

4) Upon the approval of the Governing Body, a shareholder of Franchisee may act as Administrator or as Supervisory Nursing Personnel, provided each such person conforms with and is subject to all the provisions of this Section 4.f. and provided further that he or she meets the legal requirements therefor, is paid a reasonable salary commensurate with his or her responsibilities as an Administrator or Supervisory Nursing Personnel, and he or she otherwise conforms with and is subject to the provisions of this Section 4.f., whether or not a written agreement is executed.

g. Other Employees of the Franchisee. In addition to employing the management or supervisory employees set forth in Section 4.f. above, you may employ, at your own cost and expense, such employees as you may require to assist in the performance of your obligations under this Addendum, including employees for the following job categories:

- On-Call R.N.(s)
- On-Call Coordinator(s)
- Medical Coordinator(s)
- Team Secretary(ies)
- Other (specify):

Additional job categories shall be subject to the prior approval of Western, which shall not be unreasonably withheld. This Section 4.g. shall not apply to persons you may employ solely for the purpose of operating the Western franchise under the Franchise Agreement.

h. Medical and Other Supplies. You shall be responsible for providing, at your own cost and expense, such medical and other supplies that are required for the operation of the Home Health Agency Business, excluding the supplies provided by Western to you under Section 3.h. above.

i. Billing Information and Documentation. You shall submit to Western or its designee, for processing, all bills for the provision of Home Health Services by the Home Health Agency Business, under the office number established by Western for that purpose and in accordance with Western's accounting procedures, policies and business practices. You shall timely submit to Western or its designee accurate documentation with each bill as may be required by patients or third-party payors, including Medicare or Medicaid. You shall assist Western in its collection of the trade accounts receivable when requested.

j. Professional Liability Insurance. In addition to the insurance required under Paragraph 3.n. of the Franchise Agreement, you shall obtain at your own expense and maintain, at all times during the term of this Addendum as well as all renewal terms and for two (2) years after termination hereof, a policy or policies of professional liability insurance of no less than One Million Dollars (\$1,000,000.00) per claim and Three Million Dollars (\$3,000,000.00) aggregate per calendar year which insures you, your agents, employees and contractors, for any act, error or omission for which you or they may be liable in connection with the practice of his or her profession. Such policy or policies shall name Western and its parent company as additional insureds. All such policies shall contain an endorsement stating that they cannot be canceled or materially changed without thirty (30) days' prior written notice to Western. Before you commence doing business pursuant to this Addendum, you shall furnish Western's Legal Department with certificates of insurance confirming that such policy or policies are in full force and effect and that Western and its parent company are additional insureds. You likewise shall furnish renewal or replacement certificates annually or promptly upon obtaining such insurance from a different carrier.

k. Commencement Date. You shall cooperate fully and do all things reasonably necessary and convenient for Western to obtain and maintain the license, certification and/or accreditation of the Home Health Agency Business. You shall commence operations of the Home Health Agency Business at our instruction and as soon as practicable, provided all legal requirements for the operation of the Home Health Agency Business have been satisfied.

#### 5. Medicare Reimbursement.

a. Medicare Cost-Based Reimbursement Principle. With respect to the provision of Home Health Services to beneficiaries of the Medicare Program,

each party shall only be entitled to reimbursement or payment of those Medicare Reimbursable Costs incurred by each in the operation of the Home Health Agency Business. Such Costs are determined on an annual basis upon Final Settlement of the Medicare Cost Report for any fiscal year. The parties therefore shall do such things and make such adjustments between themselves that may be required in order to conform with the foregoing cost-based reimbursement principle, and as more fully set forth below.

b. Responsibility for Medicare Accounting. Western shall have sole responsibility to communicate with the Medicare Fiscal Intermediary on, and to make decisions with respect to, all matters related to Medicare accounting and reimbursement, including, but not limited to, the establishment of the Medicare Interim Rate, the filing of the Medicare Cost Report, and the exercise of any rights of reconsideration or appeal of reimbursement determinations. We shall consult with you and keep you informed of Western's actions on such matters, as is reasonably necessary for the proper operation of the Home Health Agency Business.

c. Preparation of the Medicare Cost Report. Western shall timely prepare, or cause to be prepared, the Medicare Cost Report, audited and unaudited financial statements, and any other reports that are required to be filed by governmental agencies or payors with respect to the Home Health Agency Business. Western may engage legal, accounting and other consultants and professionals, as necessary in Western's sole discretion and of our choice, to prepare such reports, and the costs associated with engagement of such professionals shall be considered a Medicare Reportable Cost.

d. Franchisee's Reporting of Medicare Reportable Costs. You shall timely report all Medicare Reportable Costs, with such documentation as Western deems necessary each period, for the purpose of reimbursement under Section 5.e., below, and for inclusion in the Medicare Cost Report. We shall assist you in identifying Medicare Reportable Costs that must be reported by you and in determining the manner and form for such reports; however, you shall be solely responsible for: (1) any disallowance of costs that results from your failure to comply with this Section 5.d.; (2) any Medicare Reportable Cost not included in the Medicare Cost Report and not reimbursed because of your failure to comply with this Section; and (3) any Medicare Reportable Cost not reimbursed under Section 5.e. below because of your failure to comply with this Section 5.d.

e. Periodic Medicare Reimbursement. Within four (4) weeks after the end of each period, Western shall reimburse you, based upon information submitted by you under Section 5.d. above, for the Medicare Reimbursable Costs incurred by you for the period, subject to the provisions of Sections 5.f. and 5.g. below, and in accordance with the methods and procedures set forth in Schedule C to this Addendum and illustrated on Schedule D hereto.

f. Annual Reconciliation of Medicare Reimbursement. Following Final Settlement of the Medicare Cost Report for any fiscal year, Western shall provide you a written statement showing whether payments made to you under Section 5.e. above resulted in overpayment or underpayment of your actual Medicare Reimbursable Costs. Western shall refund promptly to you the amounts of any such underpayment. You shall remit promptly to Western the amounts of any such overpayment.

#### g. Reserve for Medicare Contingencies.

1) Establishment of Franchisee's Medicare Reserve. For each and every fiscal year in which you operate a Home Health Agency Business pursuant to this Addendum, Western shall establish a fund on your behalf (the "Franchisee's Medicare Reserve") for the purpose of creating a reserve against contingencies that arise from your participation in the Medicare Program, including, but not limited to, the risks of overpayment and underpayment following Final Settlement of the Medicare Cost Report, and disallowances based on alleged fraud, lack of documentation, unreasonableness of costs, lack of medical necessity, or any other reason asserted under applicable rules and regulations. The Franchisee's Medicare Reserve shall be established for each fiscal year by setting aside twenty percent (20%) of the periodic Medicare reimbursement under Section 5.e. above. The monies that are set aside shall be held in an interest-bearing account until such time as a Notice of Amount of Program Reimbursement (NPR) or other Final Settlement of the Medicare Cost Report is issued by the Medicare Fiscal Intermediary and accepted by Western for the fiscal year that is the subject of the Franchisee's Medicare Reserve. The establishment of the Franchisee's Medicare Reserve shall in no way limit Western from establishing reserves for its own risks of participation in the Medicare Program.

2) Medicare Adjustments. When the Final Settlement of the Medicare Cost Report is issued by the Medicare Fiscal Intermediary and accepted by Western, Western shall issue an accounting of the Franchisee's Medicare Reserve to the Franchisee. In this accounting, Western shall recover from the Reserve all

of its Medicare Reimbursable Costs incurred by the Home Health Agency Business before any of the Reserve shall be returned to the Franchisee. All risks of underpayment by Medicare (except those attributable to Medicare disallowance of allotted Western Home Office Costs), whether due to any other disallowed costs or costs in excess of applicable limits on Home Health Agency costs per visit ("Medicare caps"), shall be borne by the franchisee. The remaining balance (whether positive or negative) in the Reserve after this adjustment is made shall be considered the Franchisee's Allocation of Medicare Overpayment.

3) Use of Franchisee's Medicare Reserve. Western shall use funds in the Franchisee's Medicare Reserve to pay the Franchisee's Allocation of Medicare Overpayment. In the event that such funds are insufficient to repay the Franchisee's Allocation of Medicare Overpayment, you shall provide funds to Western within ten (10) days of notice to remedy the insufficiency. If the Franchise Agreement and/or this Addendum are still in effect at the time of the notice to you of the insufficiency, Western may, at your request and at our sole discretion, advance funds to remedy the insufficiency and offset such advance from your current share of the gross profit under either the Franchise Agreement or this Addendum, until such advance is fully reimbursed.

4) Distribution of Franchisee's Medicare Reserve Following Final Settlement. Any portion of the Franchisee's Medicare Reserve remaining after payment of the Franchisee's Allocation of Medicare Overpayment or, where no overpayment exists, after Final Settlement of the Medicare Cost Report, shall be distributed to you, with accrued interest on balances due you at the then current annual rate of interest payable on business savings accounts by Bank of America NT&SA, no later than thirty (30) days from the date of Final Settlement of the Medicare Cost Report for the fiscal year in question.

5) Additional Reserves. Notwithstanding any other provision of this Addendum, Western may withhold from the periodic Medicare reimbursement under Section 5.e above any additional amounts that we deem reasonably necessary to reduce the risks of disallowance, overpayment, or recoupment, provided that: (a) Western provides you with a written notice at least fifteen (15) days before taking such action; and (b) the notice specifies: (1) the risks of disallowance, overpayment and recoupment likely to be asserted by the Fiscal Intermediary or the Medicare Program; (2) the extent to which the then current level of the Franchisee's Medicare Reserve is inadequate to meet such risks; (3) the amount to be additionally withheld and the manner and method of such withholding; (4) any limitations on the dollar amount or the duration of the period of additional withholding; and (5) your consultation rights with respect to the additional withholding.

Western shall consult with you in the event it is necessary to withhold such additional amounts, provided, however, that you shall respond to Western in writing within five (5) days after delivery of the required notice. Any additional amounts withheld pursuant to this Section 5.g. shall be added to the Franchisee's Medicare Reserve and be treated thereafter as part of such Reserve. In addition, Western may, at our sole discretion, seek adjustment of the Medicare Interim Rate by the Fiscal Intermediary as may be required to minimize the risk of Medicare overpayment.

h. Division of Medicare Underpayments. Any monies paid by the Medicare Program to Western because of underpayments identified in the NPR or on Final Settlement of the Medicare Cost Report for any fiscal year shall be allocated between the parties in proportion to each party's share of Medicare Reimbursable Costs, as shown on the NPR or final Medicare Cost Report. We shall submit to you your portion within fifteen (15) working days of our receipt of the remittance from Medicare.

#### 6. Compensation to Franchisee for Non-Medicare Home Health Agency Business.

a. Compensation to Franchisee. At the end of each period, Western shall compensate you for your services under this Addendum. Your compensation shall be the gross profit derived from the operation of the Home Health Agency Business as defined in section 6.b. below, less eight percent (8%) of the Gross Sales, as defined in the Franchise Agreement.

b. Definition of Gross Profit. "Gross Profit" for the purpose of this Section 6.b. is defined as gross billings at the usual and customary rate for all Home Health Agency Business (exclusive of Medicare business), including taxes levied thereon, for any period, less contractual allowances, direct labor costs and any mutually agreed upon expenses. Costs under this Addendum which are defined as direct labor costs under Paragraph 5.e. of the Franchise Agreement are "Direct Labor Costs" for the purpose of this Section 6.b., whether or not so specified.

c. Combining of Billing. For the sole purpose of determining the Gross Sales under Section 6.a., Western shall combine for each period the dollar value

of the hours of temporary help billed by you under the Franchise Agreement with the dollar value of the billings for the Home Health Agency Business (exclusive of Medicare business).

7. Term. The term of this Addendum is coterminant with the term of the Franchise Agreement and any extensions or renewals thereof, and this Addendum shall terminate whenever the Franchise Agreement terminates, for whatever reason, subject to the provisions for earlier termination under Section 8 below.

#### 8. Termination.

a. Termination By Franchisee. This Addendum may be terminated without cause by Franchisee on sixty (60) days' prior written notice to Western. During the sixty (60) day period, you shall continue to operate the Home Health Agency Business unless arrangements have been made for earlier transfer of operations. You shall cooperate with Western to expedite the transfer of the Home Health Agency Business, and at Western's option, we may take possession of and exclusively operate the Home Health Agency Business, at our expense, during the sixty (60) day period, provided we continue to remit to you such payments as may be due under Sections 5 and 6 of this Addendum.

b. Immediate Termination. Western may terminate this Addendum immediately, without further notice, and may take possession of and exclusively operate the Home Health Agency Business, upon any of the following events:

- 1) Conviction of Franchisee, or any of your principals, under federal or state law, of a criminal offense related to (a) the neglect or abuse of a patient; or (b) to the delivery of an item or service under the Medicare or Medicaid Programs, including the performance of administrative or management services;
- 2) Exclusion of Franchisee, or any of your principals, from participation in the Medicare or Medicaid Programs;
- 3) If required in order for Western to comply with any legal order issued or proposed to be issued by a federal, state or local government department, agency or commission;
- 4) Material breach of Paragraph 8 of the Franchise Agreement;
- 5) Material breach of Sections 9.b, 9.c, 9.d or 9.e below;
- 6) Failure to substantially comply with: (a) federal, state or local laws, rules, and regulations; or (b) Western's procedures, policies, standards, directives, ethics and business practices for the provision of clinical services, as determined by Western's Quality Assurance Department or designee;
- 7) Consistent failure to properly document claims or Medicare Reportable Costs, leading to substantial risk of non-reimbursement by patients and payors; or

8) Failure to maintain adequate personnel required for the Home Health Agency Business or to replace the Administrator or any Supervisory Nursing Personnel as may be required under Section 4.f. above.

c. Effect of Termination. The termination of this Addendum shall not automatically terminate the Franchise Agreement, nor any amendments or other addenda thereto. Notwithstanding the foregoing sentence, Western reserves the right to terminate the Franchise Agreement at any time on the grounds stated therein and in accordance with the provisions contained in Paragraph 8 thereof.

d. Distributions and Payments Following Termination. Unless otherwise specifically provided, following termination of this Addendum, we shall remit to you such payments as may be due to you under Sections 5 or 6 above, at the time and in the manner that such payments would have been made if this Addendum were in full force and effect; provided, however, that we may offset from such payments any amount due and owing to Western under this Addendum, the Franchise Agreement, any amendments or other addenda thereto, as well as any license agreements between you and Western.

e. Return of Materials Following Termination. All the provisions of Paragraph 8 of the Franchise Agreement shall apply equally with respect to your rights and obligations following the termination, for whatever reason, of this Addendum, whether or not the Franchise Agreement continues in full force and effect after the termination of this Addendum; except that you shall be required to turn over immediately to Western the items described therein which relate to your operation of the Home Health Agency Business.

#### 9. Miscellaneous.

a. Sale or Transfer of the Franchise. No transfers of your interest in the Home Health Agency Business may be made pursuant to Paragraph 9 of the Franchise Agreement by you, your legal heirs or representatives or, if you are a corporation, the shareholders owning fifty-one percent (51%) or more of the outstanding stock, to persons or entities who are not able to satisfactorily demonstrate to Western the ability to operate a Home Health Agency Business and meet all legal requirements related to the operation of a Medicare certified home health agency.

b. Access, Inspection and Audit. Western shall at all times be entitled

to access to the franchise office and the right to inspect, review and copy any and all of the books and records pertaining to the operation of the Home Health Agency Business, in order to ensure compliance with the terms of this Addendum.

c. Medicare Books and Records. For the purpose of implementing Section 1861(v)(1)(I) of the Social Security Act, as amended, and any written regulations thereto, during the term of this Addendum and for a period of four (4) years thereafter, you shall make available upon written request from the Secretary of HHS or the Comptroller General of the United States, or any of their duly authorized representatives, this Addendum and any of the books, documents and records that may be necessary to certify the nature and extent of the costs of providing Home Health Services to Medicare Program beneficiaries. If you carry out any of your duties pursuant to this Addendum through a subcontract with a value or cost of Ten Thousand Dollars (\$10,000) or more over a twelve (12) month period, you shall insert the required statutory clause in such subcontract, obligating the subcontractor to provide the same access and make available necessary documents.

d. Covenant Not to Compete.

1) For the term of this Addendum and for a period of two (2) years from and after its termination, you, individually; all your partners, if any; your spouse, if any; and the corporation which is to operate the Home Health Agency Business, as well as all officers, directors and shareholders of such corporation, shall be jointly and severally obligated to comply with the noncompetition, confidentiality and nondisclosure provisions of Paragraph 6 of the Franchise Agreement as regards the Home Health Agency Business, and Western shall be entitled to the injunctive relief, other remedies and damages more particularly described therein in the event of a breach of this Section 9.d.

2) To the extent that you, individually; your partners, if any; your spouse, if any; the corporation which is to operate the Home Health Agency Business, as well as all officers, directors and shareholders of such corporation;

and third parties have executed noncompetition, confidentiality and nondisclosure covenants as required by Paragraph 6 of the Franchise Agreement, those covenants shall be binding with respect to the Home Health Agency Business.

e. Proprietary Information, Confidential Data and Trade Secrets. Any proprietary information relating to the Home Health Agency Business, including its policies, procedures, practices, techniques, forms, manuals and methods of operations, are and shall remain the property of Western. "Proprietary Information" specifically includes all information, data, ideas, operating manuals, forms, supplies and materials provided to you in furtherance of this Addendum and more fully described in Paragraph 6.d. of the Franchise Agreement, reference to which is made for further particulars.

f. Survival of Covenants, Representations and Warranties. The covenants, representations and warranties made under this Addendum shall survive its termination as more fully provided in Paragraph 14 of the Franchise Agreement.

g. Entire Agreement. This Addendum (including its exhibits and schedules), the Franchise Agreement to which it is appended, and any amendments or other addenda thereto, together constitute the entire agreement between the parties concerning the operation of the Home Health Agency Business, and together supersede all other agreements, representations or communications, whether oral or written, between the parties relating to the transactions contemplated herein, or the subject matter hereof.



IN WITNESS WHEREOF, the undersigned have executed this Addendum on the dates below their signatures.

Western:

MEDICAL  
WESTERN MEDICAL SERVICES OF FLATHEAD COUNTY, INC.

By: [Signature]  
Signature

MICHAEL J. NICHOLSON  
Type or Print Name

President  
Type or Print Title

Dated: June 17, 1998

Franchisee:

WESTERN MEDICAL SERVICES OF FLATHEAD COUNTY, MT, INC  
Type or Print Name of Legal Entity, if any

[Signature] 4-20-98  
Signature

KRISTINE H. CARLSON  
Type or Print Name

[Signature]  
Type or Print Name

JANET HAWLEY  
Dated: April 20, 1998

**SHAREHOLDER RATIFICATION AND GUARANTY**

In consideration of the above and foregoing Addendum to Franchise Agreement for Home Health Agency Business, each of the undersigned on even date herewith, individually and as all the shareholders of WESTERN MEDICAL SERVICES OF FLATHEAD COUNTY, MT, INC, jointly and severally, hereby ratify, adopt and affirm the Agreement contained herein and as the same may hereafter be amended or reconstituted, and personally guarantee the performance of any and all present and future obligations hereunder.

Witness:

[Signature]  
[Signature]

Shareholders:

[Signature]  
KRISTINE H. CARLSON  
[Signature]  
JANET HAWLEY

## ADDENDUM TO FRANCHISE AGREEMENT FOR HOME HEALTH AGENCY BUSINESS

INITIAL  
HERE

### SCHEDULE C

### METHODS AND PROCEDURES FOR CALCULATING PERIODIC REIMBURSEMENT OF FRANCHISEE'S MEDICARE REIMBURSABLE COSTS

#### (Section 5.e.)

#### A. Reporting Costs

1. For purposes of calculating Franchisee's Periodic Medicare Reimbursement under Section 5.e. of the foregoing Addendum to the Franchise Agreement ("this Addendum"), the following information shall be required, on a per period basis:
  - a. All costs incurred by Franchisee directly for the benefit of the Home Health Agency Business whether Medicare or non-Medicare, including, but not limited to, those costs identified at Section 1.g. of this Addendum;
  - b. All operating costs incurred by Franchisee for the mutual benefit of the Home Health Agency Business and the other lines of Western Medical Services supplemental staffing and private duty business operated by Franchisee; and
  - c. Documentation as requested by Western or otherwise required by law.
2. This information must be provided to Western within seven (7) days after the end of each period.

#### B. Cost Allocation

Under current Medicare cost reporting requirements, operating costs generally are allocated using either the direct allocation or the indirect allocation method.

1. **Direct Allocation.** Under the direct allocation method, operating costs shall be allocated between the Home Health Agency Business and the other lines of Western Medical Services business, based upon actual records of the costs, or on approved direct allocations supported by adequate documentation. For example, under the direct allocation method, rent and the costs of office utilities may be allocated between the Home Health Agency Business and the other lines of Western Medical Services business based upon square footage or another appropriate and approved method. Staff salaries may be allocated based on actual and regular time studies for each staff.
2. **Indirect Allocation.** Western shall use the indirect allocation method to allocate operating costs between the Home Health Agency Business and the other lines of Western Medical Services business, unless the Franchisee requests and Western is able to obtain specific approval from the Medicare Fiscal Intermediary for direct allocation. Approval requires a substantial amount of documentation by Franchisee for costs.

Under the indirect method, operating costs are accumulated into a pool and allocated between the businesses based upon the ratio of direct costs for each business to total direct costs.

#### C. Calculation of Periodic Medicare Reimbursement

1. For purposes of the calculation of the Franchisee's Periodic Medicare Reimbursement under Section 6.5 of this Addendum, costs that are incurred solely and directly for the Medicare Program shall be allocated directly to the Franchisee's Periodic Medicare Reimbursement. Such costs may include medical supplies, salaries of the Supervising RN incurred for billable visits, etc. For all other operating costs which are shared between the lines of Western Medical Services businesses, the indirect allocation method shall be used. However, if Franchisee elects and is approved to use the direct allocation method for specific categories of operating costs (such as staff salaries), the direct allocation method shall be used for those cost categories.
2. For the purpose of applying the indirect allocation method to the operating costs, the following definitions apply. "Combined Operating Costs" refers to those operating costs, excluding direct costs, that are applicable to all lines of Western Medical Services business operated by Franchisee under the Franchise Agreement and this Addendum, including supplemental staffing, private duty and the Home Health Agency Business. "Total Direct Costs" are the aggregate of direct costs for all lines of Western Medical Services business, using the definition of direct costs in Paragraph 5.e. of the Franchise Agreement.
3. In applying the indirect allocation method, Western shall calculate the ratio of direct costs for the Medicare billings to Total Direct Costs. This ratio is the "Medicare Direct Cost Ratio". Note that this ratio is for direct costs associated with Medicare business only and not with other Home Health Agency Business (non-Medicare Home Health Agency business). Western shall use the period end franchise statements as the basis for determining the Total Direct Costs.

The Combined Operating Costs reported by the Franchisee shall be multiplied by the Medicare Direct Cost Ratio, with the result being the "Gross Medicare Indirect Costs" to be reimbursed to the Franchisee. The Gross Medicare Indirect Costs shall be added to Franchisee's direct Medicare costs, if any, with the sum being the "Gross Medicare Reimbursable Costs."

The Gross Medicare Reimbursable Costs shall be reduced by the standard twenty percent (20%) reserve pursuant to Section 6.g. of this Addendum. The difference is the "Net Medicare Reimbursable Costs," and shall constitute the Franchisee's Periodic Medicare Reimbursement under Section 5.a. of this Addendum for the period in question.

#### SUMMARY OF CALCULATION OF FRANCHISEE'S MEDICARE REIMBURSEMENT

$$\begin{aligned} \text{Medicare Direct Cost Ratio} &= \text{Medicare direct costs} \div \text{Total Direct Costs} \\ \text{Gross Medicare Indirect Costs} &= \text{Combined Operating Costs} \times \text{Medicare Direct Cost Ratio} \\ \text{Gross Medicare Reimbursable Costs} &= \text{Franchisee's Medicare direct costs} + \text{Gross Medicare Indirect Costs} \end{aligned}$$

Registered Nurses

Licensed Practical Nurses

Home Health Aides

Home Companions or Sitters (not Medicare reimbursable)

Physical Therapists

Physical Therapist Assistants

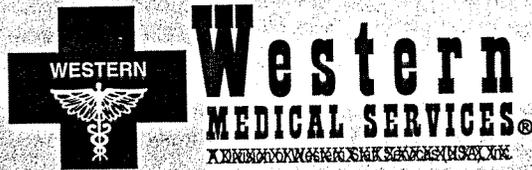
Speech Therapists

Occupational Therapists

Occupational Therapy Assistants

Licensed Social Workers

Enterostomal Therapists



INITIAL  
RE  
[Handwritten initials]

## CRITERIA FOR APPROVAL OF FRANCHISEE TO ENGAGE IN HOME HEALTH AGENCY BUSINESS

### Schedule A

Franchisee must successfully complete an evaluation process by the Medicare/Accreditation Certification Committee of the Governing Body ("the Certification Committee") in order to be approved to engage in Home Health Agency Business (as defined in the Addendum to Franchise Agreement for Home Health Agency Business). Franchisee will be assessed on his understanding of the Home Health Agency Business, as well as clinical, legal, accounting and operational issues related to Medicare and part-time and intermittent care and must meet the following requirements:

#### Financial Prerequisites

1. Be financially solvent, with no history of bankruptcies (unless special circumstances exist which may be considered by the Certification Committee) and have no outstanding indebtedness to Western (unless an exception is made on a case to case basis for accounts receivable bad debts being financed by Western). Provide Western with any required authorization to receive confidential credit data or other relevant background information requested by Western.
2. Submit personal and/or business financial statements for review at the time the Franchise Agreement is signed and annually thereafter.
3. Be and remain current with all taxing authorities and have no state or federal tax liens against the franchisee personally or any existing business(es).
4. In the case of a corporation or partnership, submit proof of qualification to do business and good standing in the state where the home health agency is to be operated.
5. Provide documentation of available working capital of not less than \$100,000.
6. In a state requiring a Certificate of Need (CON) (after a determination by the Certification Committee is made that it is feasible to proceed with a CON), sign an agreement to share 68% of the costs of preparing and pursuing a CON application, including, but not limited to accounting, outside legal and consultant fees.

#### Operational and Experience Prerequisites

1. Demonstrate ability to successfully operate a home health agency or health care business. If Franchisee plans to delegate the operation of the agency to someone other than the key personnel as defined in the Franchise Agreement such person(s) must be approved by Western.
2. Establish 24 hour on-call R.N. service.
3. Establish an office location which complies with ADA (Americans with Disabilities Act) and Office of Civil Rights requirements, i.e., be handicap accessible.
4. Hire a full-time Supervising R.N., and/or Administrator or other Supervisory Nursing Personnel approved in advance by Western who meet Medicare and any applicable state law licensure and accreditation requirements and have the employee(s) sign a written contract on a form provided by Western.
5. If operating existing business(es), be in compliance with all state and federal laws (such as immigration, wage and hour, OSHA and workers' compensation laws), and, if deemed necessary, cooperate in a pre-selection audit of the existing business(es) for compliance with these requirements.
6. Submit an initial business plan for marketing or community education in the territory or service area.
7. Sign any required authorization for Western to obtain criminal and civil court records. Represent and warrant that Franchisee and any operating personnel have no prior criminal convictions, and no citations or sanctions relating to home health agency licensing, Medicare laws or regulations, or state or federal patient abuse laws.

Western shall have the right to establish such reserves as may be reasonably necessary to provide against the contingencies of participation in such programs, similar to the Franchisee's Medicare Reserve established pursuant to Section 5.g. below, and after consultation with you.

d. Operating Manuals; Policies and Procedures. We shall provide you with operating manuals and written policies, procedures, directives and standards for the operation of the Home Health Agency Business, and any amendments to them that may be made from time to time. Upon termination of this Addendum or the Franchise Agreement, you immediately shall return all such materials, in good condition, to Western or forfeit any deposit(s).

e. Engagement and Employment of Caregivers. Western shall employ or, alternatively, independently contract with individuals responsible for patient care in the job categories listed in Schedule B to this Addendum. Individuals so employed shall be on the temporary or regular payroll, at Western's discretion, and Western as their employer shall meet all payroll obligations, including the payment of wages and salaries, payroll taxes, workers' compensation, liability and fidelity bond insurance with respect to such employees. Independent contractors shall be paid by Western in the manner of other trade accounts.

f. Billing and Collections. Western shall have the sole right to bill and collect from all clients and customers of the Home Health Agency Business, including patients and third party payors (whether government or private payors). Western shall supervise all collections, make all settlements, finance the temporary and regular payrolls and related payroll costs of Western employees, pay contractors, and otherwise handle all accounting and other details incident to the collection of the trade accounts receivable owned by Western.

g. Community Education. We shall assist you with community education, sales, promotions and marketing of the Home Health Agency Business as described in Paragraph 3 of the Franchise Agreement. All such sales, promotions or marketing activities, whether conducted by Western or you, shall conform with applicable federal, state and local laws, rules and regulations.

h. Office Supplies and Forms. We shall supply you, at Western's expense, with those office supplies and forms relating to the Home Health Agency Business listed in the supply catalog.

i. Patient Records. Any and all patient records and charts prepared or maintained in connection with the Home Health Agency Business shall be and remain the property of Western.

#### 4. Responsibilities of Franchisee.

a. Management Responsibilities. You shall have the responsibility and authority to conduct, manage and supervise the day-to-day operations of the Home Health Agency Business, in accordance with Western's procedures, programs, policies, standards, directives, ethics, and business practices and this Addendum; provided, however, that you shall have no authority to enter into any contract on behalf of Western, nor otherwise act as an agent of Western, except as specifically provided in the Franchise Agreement and this Addendum. You acknowledge and agree that the clients and customers of the Home Health Agency Business are Western's and that the employees of the Home Health Agency Business on Western's temporary and regular payrolls are Western's employees.

##### b. Name of Business; Signage and Telephones.

1) You shall operate the Home Health Agency Business under the name "Western Medical Services Home Health Agency." You shall operate the medical temporary help business under the name "Western Medical Services," except as provided in the Franchise Agreement.

2) You shall obtain, with Western's prior approval and at Western's expense, signage for the Home Health Agency Business. If the medical temporary help business and the Home Health Agency Business are conducted on the same premises, the signage must include both Western business names described in Section 4.b.1) above.

3) You shall fully cooperate with Western to obtain for Western a telephone number for the Home Health Agency Business listed in the name of "Western Medical Services Home Health Agency," which shall be distinct from the number used for the other "Western Medical Services" business you conduct pursuant to the Franchise Agreement. Such separately listed number shall be a number with the suffix acronym of "C-A-R-E," or other such acronym associated with Western, if available in your area. The terms and conditions of Paragraph 3.g. of the Franchise Agreement, with respect to payment of the installation and the basic monthly charges, Western's ownership of the telephone numbers, and the execution of telephone company contract forms, shall apply to the telephone line required under this Section 4.b.3). You shall place at least a trademark listing ad ("Yellow Pages" ad) in your local telephone directory for the Home Health Agency Business at the first available publication date, subject to our preap-

proval, and you shall renew the ad annually.

c. Office Space. You shall, at your own cost and expense, provide an appropriate office for the operation of the Home Health Agency Business. If permitted by law, you may operate the Home Health Agency Business in the office you establish pursuant to Paragraph 4.g. of the Franchise Agreement, so long as the Home Health Agency Business is properly identified pursuant to Section 4.b.1) above.

d. Scope of Business. The Home Health Agency Business you operate initially shall provide the following services; however, the subsequent addition or elimination of any therapeutic services shall be at Western's sole discretion:

- 1) Part-time or intermittent skilled nursing care;
- 2) Part-time or intermittent services of home health aides; and
- 3) Therapeutic services (check applicable services):

- physical therapy
- occupational therapy
- speech therapy
- medical social services
- other (specify):

e. Western Personnel. On Western's behalf, you shall be responsible for recruiting, selecting, training, promoting, supervising, directing and terminating the personnel employed or contracted by Western, pursuant to Section 3.e. above, to provide Home Health Services. You shall comply with all applicable laws, whether federal, state or local, and you shall conform with Western's procedures, policies, directives and business practices in carrying out your responsibilities under this Section 4.e. You shall exercise your business judgment reasonably and in good faith in these matters to the extent that they may be discretionary.

##### f. Employment of Administrator and Supervisory Nursing Personnel.

1) Subject to the approval of Western and the Governing Body, you shall employ, at your own cost and expense, an Administrator, a Director of Nursing and/or a Supervising Registered Nurse, or similarly qualified and titled personnel, (collectively, the "Supervisory Nursing Personnel") to the extent required by federal, state and local laws and regulations governing licensed and certified home health agencies. If directed by Western or the Governing Body for good cause, you shall replace the Administrator, and any Supervisory Nursing Personnel, with others who are acceptable to Western and the Governing Body. For purposes of this Section, "good cause" shall exist if the Administrator or any of the Supervisory Nursing Personnel: (a) violates applicable laws, rules, regulations or standards; (b) commits any material act of dishonesty, gross carelessness or misconduct; (c) unjustifiably neglects his or her duties; (d) acts in any way that has a materially adverse effect on the business or reputation of Western; or (e) otherwise conducts himself or herself in a manner inconsistent with generally recognized standards for the conduct of Administrators or Supervisory Nursing Personnel in the community in which the Home Health Agency Business is operated, after being given notice and an opportunity to correct such conduct.

2) You shall enter into written employment agreements with the Administrator and all Supervisory Nursing Personnel, on a form approved by Western and the Governing Body. Such agreements shall include, at minimum, the following provisions:

- a) A description of duties, including those duties required under federal, state and local law, rules and regulations;
- b) The minimum hours of work, or full-time equivalent, required of each such employee;
- c) The compensation (including salary, bonuses, travel expenses, benefits, etc.) to be paid;
- d) A statement of qualifications including the federal, state and local legal requirements for the position, and a representation that such employees meet and shall continue to meet all such requirements;
- e) A covenant to comply with all Western policies and procedures and all legal requirements imposed on licensed and certified home health agencies;
- f) A representation that each such employee has not been excluded from the Medicare or Medicaid Programs, and has not been convicted of a criminal offense, under any federal or state law, related to neglect or abuse of a patient, or to the delivery of goods and services under the Medicare or Medicaid Programs;

- g) The grounds for termination of each such employee; and
  - h) A requirement that each such employee execute written covenants to Western to maintain the confidentiality of the proprietary information of Western and not to compete with Western, on forms provided by Western.
- 3) With respect to the Administrator or any Supervisory Nursing

Personnel, Franchisee shall: (a) notify Western immediately upon the termination of employment of any of them; (b) inform Western immediately of any breach or potential breach of the confidentiality and non-competition covenants of their employment agreements; (c) consult with Western as to the need to litigate to enforce such confidentiality or non-competition covenants; and (d) fully cooperate with Western in filing and litigating actions to enforce the confidentiality or non-competition covenants. The cost of the litigation pursued under this Section 4.f., shall be shared by you paying sixty eight percent (68%) of the costs and Western paying thirty two percent (32%) of the costs.

4) Upon the approval of the Governing Body, a shareholder of Franchisee may act as Administrator or as Supervisory Nursing Personnel, provided each such person conforms with and is subject to all the provisions of this Section 4.f. and provided further that he or she meets the legal requirements therefor, is paid a reasonable salary commensurate with his or her responsibilities as an Administrator or Supervisory Nursing Personnel, and he or she otherwise conforms with and is subject to the provisions of this Section 4.f., whether or not a written agreement is executed.

g. Other Employees of the Franchisee. In addition to employing the management or supervisory employees set forth in Section 4.f. above, you may employ, at your own cost and expense, such employees as you may require to assist in the performance of your obligations under this Addendum, including employees for the following job categories:

- On-Call R.N.(s)
- On-Call Coordinator(s)
- Medical Coordinator(s)
- Team Secretary(ies)
- Other (specify):

Additional job categories shall be subject to the prior approval of Western, which shall not be unreasonably withheld. This Section 4.g. shall not apply to persons you may employ solely for the purpose of operating the Western franchise under the Franchise Agreement.

h. Medical and Other Supplies. You shall be responsible for providing, at your own cost and expense, such medical and other supplies that are required for the operation of the Home Health Agency Business, excluding the supplies provided by Western to you under Section 3.h. above.

i. Billing Information and Documentation. You shall submit to Western or its designee, for processing, all bills for the provision of Home Health Services by the Home Health Agency Business, under the office number established by Western for that purpose and in accordance with Western's accounting procedures, policies and business practices. You shall timely submit to Western or its designee accurate documentation with each bill as may be required by patients or third-party payors, including Medicare or Medicaid. You shall assist Western in its collection of the trade accounts receivable when requested.

j. Professional Liability Insurance. In addition to the insurance required under Paragraph 3.n. of the Franchise Agreement, you shall obtain at your own expense and maintain, at all times during the term of this Addendum as well as all renewal terms and for two (2) years after termination hereof, a policy or policies of professional liability insurance of no less than One Million Dollars (\$1,000,000.00) per claim and Three Million Dollars (\$3,000,000.00) aggregate per calendar year which insures you, your agents, employees and contractors, for any act, error or omission for which you or they may be liable in connection with the practice of his or her profession. Such policy or policies shall name Western and its parent company as additional insureds. All such policies shall contain an endorsement stating that they cannot be canceled or materially changed without thirty (30) days' prior written notice to Western. Before you commence doing business pursuant to this Addendum, you shall furnish Western's Legal Department with certificates of insurance confirming that such policy or policies are in full force and effect and that Western and its parent company are additional insureds. You likewise shall furnish renewal or replacement certificates annually or promptly upon obtaining such insurance from a different carrier.

k. Commencement Date. You shall cooperate fully and do all things reasonably necessary and convenient for Western to obtain and maintain the license, certification and/or accreditation of the Home Health Agency Business. You shall commence operations of the Home Health Agency Business at our instruction and as soon as practicable, provided all legal requirements for the operation of the Home Health Agency Business have been satisfied.

#### 5. Medicare Reimbursement.

a. Medicare Cost-Based Reimbursement Principle. With respect to the provision of Home Health Services to beneficiaries of the Medicare Program,

each party shall only be entitled to reimbursement or payment of those Medicare Reimbursable Costs incurred by each in the operation of the Home Health Agency Business. Such Costs are determined on an annual basis upon Final Settlement of the Medicare Cost Report for any fiscal year. The parties therefore shall do such things and make such adjustments between themselves that may be required in order to conform with the foregoing cost-based reimbursement principle, and as more fully set forth below.

b. Responsibility for Medicare Accounting. Western shall have sole responsibility to communicate with the Medicare Fiscal Intermediary on, and to make decisions with respect to, all matters related to Medicare accounting and reimbursement, including, but not limited to, the establishment of the Medicare Interim Rate, the filing of the Medicare Cost Report, and the exercise of any rights of reconsideration or appeal of reimbursement determinations. We shall consult with you and keep you informed of Western's actions on such matters, as is reasonably necessary for the proper operation of the Home Health Agency Business.

c. Preparation of the Medicare Cost Report. Western shall timely prepare, or cause to be prepared, the Medicare Cost Report, audited and unaudited financial statements, and any other reports that are required to be filed by governmental agencies or payors with respect to the Home Health Agency Business. Western may engage legal, accounting and other consultants and professionals, as necessary in Western's sole discretion and of our choice, to prepare such reports, and the costs associated with engagement of such professionals shall be considered a Medicare Reportable Cost.

d. Franchisee's Reporting of Medicare Reportable Costs. You shall timely report all Medicare Reportable Costs, with such documentation as Western deems necessary each period, for the purpose of reimbursement under Section 5.e., below, and for inclusion in the Medicare Cost Report. We shall assist you in identifying Medicare Reportable Costs that must be reported by you and in determining the manner and form for such reports; however, you shall be solely responsible for: (1) any disallowance of costs that results from your failure to comply with this Section 5.d.; (2) any Medicare Reportable Cost not included in the Medicare Cost Report and not reimbursed because of your failure to comply with this Section; and (3) any Medicare Reportable Cost not reimbursed under Section 5.e. below because of your failure to comply with this Section 5.d.

e. Periodic Medicare Reimbursement. Within four (4) weeks after the end of each period, Western shall reimburse you, based upon information submitted by you under Section 5.d. above, for the Medicare Reimbursable Costs incurred by you for the period, subject to the provisions of Sections 5.f. and 5.g. below, and in accordance with the methods and procedures set forth in Schedule C to this Addendum and illustrated on Schedule D hereto.

f. Annual Reconciliation of Medicare Reimbursement. Following Final Settlement of the Medicare Cost Report for any fiscal year, Western shall provide you a written statement showing whether payments made to you under Section 5.e. above resulted in overpayment or underpayment of your actual Medicare Reimbursable Costs. Western shall refund promptly to you the amounts of any such underpayment. You shall remit promptly to Western the amounts of any such overpayment.

#### g. Reserve for Medicare Contingencies.

1) Establishment of Franchisee's Medicare Reserve. For each and every fiscal year in which you operate a Home Health Agency Business pursuant to this Addendum, Western shall establish a fund on your behalf (the "Franchisee's Medicare Reserve") for the purpose of creating a reserve against contingencies that arise from your participation in the Medicare Program, including, but not limited to, the risks of overpayment and underpayment following Final Settlement of the Medicare Cost Report, and disallowances based on alleged fraud, lack of documentation, unreasonableness of costs, lack of medical necessity, or any other reason asserted under applicable rules and regulations. The Franchisee's Medicare Reserve shall be established for each fiscal year by setting aside twenty percent (20%) of the periodic Medicare reimbursement under Section 5.e. above. The monies that are set aside shall be held in an interest-bearing account until such time as a Notice of Amount of Program Reimbursement (NPR) or other Final Settlement of the Medicare Cost Report is issued by the Medicare Fiscal Intermediary and accepted by Western for the fiscal year that is the subject of the Franchisee's Medicare Reserve. The establishment of the Franchisee's Medicare Reserve shall in no way limit Western from establishing reserves for its own risks of participation in the Medicare Program.

2) Medicare Adjustments. When the Final Settlement of the Medicare Cost Report is issued by the Medicare Fiscal Intermediary and accepted by Western, Western shall issue an accounting of the Franchisee's Medicare Reserve to the Franchisee. In this accounting, Western shall recover from the Reserve all

of its Medicare Reimbursable Costs incurred by the Home Health Agency Business before any of the Reserve shall be returned to the Franchisee. All risks of underpayment by Medicare (except those attributable to Medicare disallowance of allotted Western Home Office Costs), whether due to any other disallowed costs or costs in excess of applicable limits on Home Health Agency costs per visit ("Medicare caps"), shall be borne by the franchisee. The remaining balance (whether positive or negative) in the Reserve after this adjustment is made shall be considered the Franchisee's Allocation of Medicare Overpayment.

3) Use of Franchisee's Medicare Reserve. Western shall use funds in the Franchisee's Medicare Reserve to pay the Franchisee's Allocation of Medicare Overpayment. In the event that such funds are insufficient to repay the Franchisee's Allocation of Medicare Overpayment, you shall provide funds to Western within ten (10) days of notice to remedy the insufficiency. If the Franchise Agreement and/or this Addendum are still in effect at the time of the notice to you of the insufficiency, Western may, at your request and at our sole discretion, advance funds to remedy the insufficiency and offset such advance from your current share of the gross profit under either the Franchise Agreement or this Addendum, until such advance is fully reimbursed.

4) Distribution of Franchisee's Medicare Reserve Following Final Settlement. Any portion of the Franchisee's Medicare Reserve remaining after payment of the Franchisee's Allocation of Medicare Overpayment or, where no overpayment exists, after Final Settlement of the Medicare Cost Report, shall be distributed to you, with accrued interest on balances due you at the then current annual rate of interest payable on business savings accounts by Bank of America NT&SA, no later than thirty (30) days from the date of Final Settlement of the Medicare Cost Report for the fiscal year in question.

5) Additional Reserves. Notwithstanding any other provision of this Addendum, Western may withhold from the periodic Medicare reimbursement under Section 5.e above any additional amounts that we deem reasonably necessary to reduce the risks of disallowance, overpayment, or recoupment, provided that: (a) Western provides you with a written notice at least fifteen (15) days before taking such action; and (b) the notice specifies: (1) the risks of disallowance, overpayment and recoupment likely to be asserted by the Fiscal Intermediary or the Medicare Program; (2) the extent to which the then current level of the Franchisee's Medicare Reserve is inadequate to meet such risks; (3) the amount to be additionally withheld and the manner and method of such withholding; (4) any limitations on the dollar amount or the duration of the period of additional withholding; and (5) your consultation rights with respect to the additional withholding.

Western shall consult with you in the event it is necessary to withhold such additional amounts, provided, however, that you shall respond to Western in writing within five (5) days after delivery of the required notice. Any additional amounts withheld pursuant to this Section 5.g. shall be added to the Franchisee's Medicare Reserve and be treated thereafter as part of such Reserve. In addition, Western may, at our sole discretion, seek adjustment of the Medicare Interim Rate by the Fiscal Intermediary as may be required to minimize the risk of Medicare overpayment.

h. Division of Medicare Underpayments. Any monies paid by the Medicare Program to Western because of underpayments identified in the NPR or on Final Settlement of the Medicare Cost Report for any fiscal year shall be allocated between the parties in proportion to each party's share of Medicare Reimbursable Costs, as shown on the NPR or final Medicare Cost Report. We shall submit to you your portion within fifteen (15) working days of our receipt of the remittance from Medicare.

#### 6. Compensation to Franchisee for Non-Medicare Home Health Agency Business.

a. Compensation to Franchisee. At the end of each period, Western shall compensate you for your services under this Addendum. Your compensation shall be the gross profit derived from the operation of the Home Health Agency Business as defined in section 6.b. below, less eight percent (8%) of the Gross Sales, as defined in the Franchise Agreement.

b. Definition of Gross Profit. "Gross Profit" for the purpose of this Section 6.b. is defined as gross billings at the usual and customary rate for all Home Health Agency Business (exclusive of Medicare business), including taxes levied thereon, for any period, less contractual allowances, direct labor costs and any mutually agreed upon expenses. Costs under this Addendum which are defined as direct labor costs under Paragraph 5.e. of the Franchise Agreement are "Direct Labor Costs" for the purpose of this Section 6.b., whether or not so specified.

c. Combining of Billing. For the sole purpose of determining the Gross Sales under Section 6.a., Western shall combine for each period the dollar value

of the hours of temporary help utilized by you under the Franchise Agreement with the dollar value of the billings for the Home Health Agency Business (exclusive of Medicare business).

7. Term. The term of this Addendum is coterminal with the term of the Franchise Agreement and any extensions or renewals thereof, and this Addendum shall terminate whenever the Franchise Agreement terminates, for whatever reason, subject to the provisions for earlier termination under Section 8 below.

#### 8. Termination.

a. Termination By Franchisee. This Addendum may be terminated without cause by Franchisee on sixty (60) days' prior written notice to Western. During the sixty (60) day period, you shall continue to operate the Home Health Agency Business unless arrangements have been made for earlier transfer of operations. You shall cooperate with Western to expedite the transfer of the Home Health Agency Business, and at Western's option, we may take possession of and exclusively operate the Home Health Agency Business, at our expense, during the sixty (60) day period, provided we continue to remit to you such payments as may be due under Sections 5 and 6 of this Addendum.

b. Immediate Termination. Western may terminate this Addendum immediately, without further notice, and may take possession of and exclusively operate the Home Health Agency Business, upon any of the following events:

1) Conviction of Franchisee, or any of your principals, under federal or state law, of a criminal offense related to (a) the neglect or abuse of a patient; or (b) to the delivery of an item or service under the Medicare or Medicaid Programs, including the performance of administrative or management services;

2) Exclusion of Franchisee, or any of your principals, from participation in the Medicare or Medicaid Programs;

3) If required in order for Western to comply with any legal order issued or proposed to be issued by a federal, state or local government department, agency or commission;

4) Material breach of Paragraph 8 of the Franchise Agreement;

5) Material breach of Sections 9.b, 9.c, 9.d or 9.e below;

6) Failure to substantially comply with: (a) federal, state or local laws, rules, and regulations; or (b) Western's procedures, policies, standards, directives, ethics and business practices for the provision of clinical services, as determined by Western's Quality Assurance Department or designee;

7) Consistent failure to properly document claims or Medicare Reportable Costs, leading to substantial risk of non-reimbursement by patients and payors; or

8) Failure to maintain adequate personnel required for the Home Health Agency Business or to replace the Administrator or any Supervisory Nursing Personnel as may be required under Section 4.f. above.

c. Effect of Termination. The termination of this Addendum shall not automatically terminate the Franchise Agreement, nor any amendments or other addenda thereto. Notwithstanding the foregoing sentence, Western reserves the right to terminate the Franchise Agreement at any time on the grounds stated therein and in accordance with the provisions contained in Paragraph 8 thereof.

d. Distributions and Payments Following Termination. Unless otherwise specifically provided, following termination of this Addendum, we shall remit to you such payments as may be due to you under Sections 5 or 6 above, at the time and in the manner that such payments would have been made if this Addendum were in full force and effect; provided, however, that we may offset from such payments any amount due and owing to Western under this Addendum, the Franchise Agreement, any amendments or other addenda thereto, as well as any license agreements between you and Western.

e. Return of Materials Following Termination. All the provisions of Paragraph 8 of the Franchise Agreement shall apply equally with respect to your rights and obligations following the termination, for whatever reason, of this Addendum, whether or not the Franchise Agreement continues in full force and effect after the termination of this Addendum; except that you shall be required to turn over immediately to Western the items described therein which relate to your operation of the Home Health Agency Business.

#### 9. Miscellaneous.

a. Sale or Transfer of the Franchise. No transfers of your interest in the Home Health Agency Business may be made pursuant to Paragraph 9 of the Franchise Agreement by you, your legal heirs or representatives or, if you are a corporation, the shareholders owning fifty-one percent (51%) or more of the outstanding stock, to persons or entities who are not able to satisfactorily demonstrate to Western the ability to operate a Home Health Agency Business and to meet all legal requirements related to the operation of a Medicare certified home health agency.

b. Access, Inspection and Audit. Western shall at all times be entitled

to access to the franchise office and the right to inspect, review and copy any and all of the books and records pertaining to the operation of the Home Health Agency Business, in order to ensure compliance with the terms of this Addendum.

c. Medicare Books and Records. For the purpose of implementing Section 1861(v)(1)(I) of the Social Security Act, as amended, and any written regulations thereto, during the term of this Addendum and for a period of four (4) years thereafter, you shall make available upon written request from the Secretary of HHS or the Comptroller General of the United States, or any of their duly authorized representatives, this Addendum and any of the books, documents and records that may be necessary to certify the nature and extent of the costs of providing Home Health Services to Medicare Program beneficiaries. If you carry out any of your duties pursuant to this Addendum through a subcontract with a value or cost of Ten Thousand Dollars (\$10,000) or more over a twelve (12) month period, you shall insert the required statutory clause in such subcontract, obligating the subcontractor to provide the same access and make available necessary documents.

d. Covenant Not to Compete.

1) For the term of this Addendum and for a period of two (2) years from and after its termination, you, individually; all your partners, if any; your spouse, if any; and the corporation which is to operate the Home Health Agency Business, as well as all officers, directors and shareholders of such corporation, shall be jointly and severally obligated to comply with the noncompetition, confidentiality and nondisclosure provisions of Paragraph 6 of the Franchise Agreement as regards the Home Health Agency Business, and Western shall be entitled to the injunctive relief, other remedies and damages more particularly described therein in the event of a breach of this Section 9.d.

2) To the extent that you, individually; your partners, if any; your spouse, if any; the corporation which is to operate the Home Health Agency Business, as well as all officers, directors and shareholders of such corporation;

and third parties have executed noncompetition, confidentiality and nondisclosure covenants as required by Paragraph 6 of the Franchise Agreement, those covenants shall be binding with respect to the Home Health Agency Business.

e. Proprietary Information, Confidential Data and Trade Secrets Any proprietary information relating to the Home Health Agency Business, including its policies, procedures, practices, techniques, forms, manuals and methods of operations, are and shall remain the property of Western. "Proprietary Information" specifically includes all information, data, ideas, operating manuals, forms, supplies and materials provided to you in furtherance of this Addendum and more fully described in Paragraph 6.d. of the Franchise Agreement, reference to which is made for further particulars.

f. Survival of Covenants, Representations and Warranties. The covenants, representations and warranties made under this Addendum shall survive its termination as more fully provided in Paragraph 14 of the Franchise Agreement.

g. Entire Agreement. This Addendum (including its exhibits and schedules), the Franchise Agreement to which it is appended, and any amendments or other addenda thereto, together constitute the entire agreement between the parties concerning the operation of the Home Health Agency Business, and together supersede all other agreements, representations or communications, whether oral or written, between the parties relating to the transactions contemplated herein, or the subject matter hereof.



IN WITNESS WHEREOF, the undersigned have executed this Addendum on the dates below their signatures.

Western:

MEDICAL  
WESTERN STAFF SERVICES, INC.

By: [Signature]  
Signature

Michael J. Nicholson

Type or Print Name

President

Type or Print Title

Dated: June 17, 1998

Franchisee:

[Signature]  
~~TYPE OR PRINT NAME~~  
ALLEN HAWLEY, Joint and Several

[Signature]  
~~SIGNATURE~~  
JANET HAWLEY, Joint and Several

Type or Print Name

Type or Print Title

Dated: April 20, 1998

**SHAREHOLDER RATIFICATION AND GUARANTY**

In consideration of the above and foregoing Addendum to Franchise Agreement for Home Health Agency Business, each of the undersigned on even date herewith, individually and as all the shareholders of \_\_\_\_\_, jointly and severally, hereby ratify, adopt and affirm the Agreement contained herein and as the same may hereafter be amended or reconstituted, and personally guarantee the performance of any and all present and future obligations hereunder.

Witness:

[Signature]  
[Signature]

Shareholders:

[Signature]  
ALLEN HAWLEY  
[Signature]  
JANET HAWLEY

# Western STAFF SERVICES®

## ADDENDUM LOCAL PAYROLL PROCESSING COMPUTER TERMINAL SYSTEM

Addendum to Franchise Agreement between \_\_\_\_\_ WESTERN MEDICAL SERVICES, INC. \_\_\_\_\_, a division of

~~Western Staff Services (USA), Inc.~~, (herein called "We" or "Western") and \_\_\_\_\_

ALLEN HAWLEY and JANET HAWLEY

(herein called "You").

It is hereby agreed by and between the parties that said Franchise Agreement as the same may have been previously amended is hereby further amended as follows:

1. Commencing on April 19, 1998, you agree to process from your local Western office the payroll(s) of Western's temporary employees at the end of each weekly period, using a computer terminal check writing system.
2. To assist you in processing the payroll locally, we agree to do the following:
  - a. We will maintain a commercial payroll bank account with our funds which you agree to use as Western's payroll bank account.
  - b. We agree to maintain a balance therein sufficient to cover payroll checks presented to the bank.
  - c. We will provide you with all the necessary payroll forms.
  - d. We will provide you with the bank check forms necessary for the payroll bank account.
  - e. We will lend you a supplement to Western's Procedure Manual containing instructions on how to operate a local payroll system.
  - f. We will continue to prepare the necessary payroll reports and returns, and pay all payroll taxes and workers' compensation, liability and fidelity bond insurance premiums.
3. You agree to do the following:
  - a. You will strictly adhere to our authorized procedures and policies for local payroll processing as outlined in this Addendum and the Procedure Manual as the same may be reasonably amended or changed in the future.
  - b. You agree not to withdraw or otherwise reduce the sums in the payroll bank account for any purpose other than to meet temporary payroll and billable expenses of temporary employees, actually incurred, and you agree to indemnify and hold us harmless for any losses we may incur as a result of the unauthorized use of these funds by you or your agents and employees.
  - c. You agree, within thirty (30) days of signing this Addendum, to secure and maintain at all times a comprehensive employee 3D fidelity bond in the amount of \$100,000 with respect to the payroll bank account, which shall meet our specifications and approval. We will reimburse you for one-half the annual cost of the bond, but in no event to exceed three hundred dollars (\$300), on receiving from you (1) a certificate of insurance and (2) a copy of the premium invoice marked by your insurance agent or broker "paid in full" within ninety (90) days of the effective date of coverage.
  - d. You agree to process in a timely manner the payrolls of temporary employees including all required bookkeeping and other details incident to the temporary payroll, and to mail or personally deliver all payroll checks. You shall have the right to designate two signatures for the payroll account. We shall have the right to designate one or more Western authorized signatures as we deem advisable in our sole discretion to carry out the purpose of this Agreement. Only one signature will be required to draw on the payroll bank account.

e. You agree to mail the following information to us as specified below:

- W-4 forms for all new employees
- Customer slips for all new customers
- Timecards approved by customers
- Any voided payroll checks

f. You will mail the above information on the day you are notified by Western your input was accepted. You will only mail the information for data which was accepted. On acceptance of reentered data as correct, you will then mail the corresponding information.

g. You agree that your local payroll records shall always be available for review and audit during reasonable hours by an authorized representative of Western.

4. This Addendum may be terminated by either party giving fifteen (15) days written notice to the other party. Until the effective date of termination, you will continue to operate the local payroll system in accordance with Western's procedures and policies, and you will cooperate with Western in any payroll processing conversion. If for any reason this Addendum is terminated, you agree to return all materials received from Western pursuant to this Addendum and convert to the payroll provisions as set forth in your Franchise Agreement, it being the intention of the parties hereto that in such event all the terms of said Agreement shall revive as if this Addendum had never been executed.

5. In the event that you are in default on any of the terms of the Addendum, we shall have the right to terminate this Addendum, immediately upon giving you written notice. In such event you agree to comply with the terms of paragraph 4 above. No waiver by us, express or implied, of any breach of this Addendum by you shall be deemed to be a continuing waiver or a consent to any subsequent breach. If you fail to obtain the bond as provided in Paragraph 3.c. above, Western may secure the bond for you and charge your franchise settlement statement for the full amount of the premium. In such event, Western will not reimburse you for a share of the premium.

6. Should suit be brought to enforce any condition, covenant or agreement herein, the prevailing party shall be entitled to reasonable attorney's fees and costs in addition to any other remedy afforded by law.

7. Each paragraph of this Addendum is distinct and severable, and if any paragraph shall be held illegal, void or unenforceable it shall not affect the validity or legality of any other portion of this Addendum.

8. All other terms, conditions and covenants of said Franchise Agreement which are not inconsistent with this Addendum shall remain the same and are hereby ratified and affirmed.

The above and foregoing is hereby approved and accepted by me this 20 day of April, 1998.

Witness: Allen Hawley  
(Franchisee) ALLEN HAWLEY, Joint and Several

Ursula Bese

Janet Hawley  
JANET HAWLEY, Joint and Several

Entered into this Addendum at Walnut Creek, CA, on this 17th day of June, 1998.

Witness: Bobbi Hugg

MEDICAL  
WESTERN STAFF SERVICES (USA), INC.  
By: Michael J. Nicholson  
Michael J. Nicholson, President

## HOME CARE AND STAFFING (continued)

### Recruiting Oriented

Welcome to Western 7839.63  
Congratulations Card 7836.52

### Office Supplies

#### Basic Office Forms

Letterhead Template 7826.61  
Envelope Template 7826.62  
Business Card Template 7826.63  
Phone Conversation Record 4012.03  
Supply Requisition 0243.68  
Temp-O-Gram 4011.03  
Adjustment Memo 4243.41  
Advertising Mailing List Addition Slip 4923.08

#### Payroll/Billing Forms

Time Card Individual 7343.16  
Authorization of Payroll Deduction 0173.41  
Indemnity Agreement: Lost Instrument 0243.64  
Proactive Approach to Workers'  
    Compensation 4830.10  
Stop Payment/Check Reissue 0243.66  
Envelopes Pre-addressed to Medical  
    Accounting 7015.07  
W-2 Request Form 0301.01  
W-4 Change Slip 4243.47  
Authorization of Occupational Tax 0173.32  
Weekly Income Tax Withholding Request 0243.63  
Employee's Withholding Allowance  
    Certificate 4343.53  
Personal Allowance Worksheet (W-5) 4343.50  
Reportable Events Document 7403.12  
Reportable Events Tracking Log 7130.07  
Personnel Action Form 7017.03

#### Applicant Processing

Professional Skills Sheet:  
    RN 7373.03  
    LP/VN 7373.04  
    Nurse Aide 7373.30  
Applications Folder 7373.00  
Confidentiality/Non-Diversion Agreement 4003.04  
Employment Eligibility Verification (I-9) 0073.22  
Hepatitis B Virus Consent/ Declination 7116.12  
Health Statements 7333.06  
Professional Liability Insurance Application 7623.08

Request for Reference 7373.32  
Schedule of Availability 7293.01  
Employee Update Notification Card 7330.03  
Performance Evaluation 7132.01

#### Safety-Related Material

Western's Safety Rules 7413.01  
Safety Orientation Log Sheet  
Accident Investigation Report  
Log of Occupational Injuries and Illness OSHA 200  
Universal Precautions for Infection Control 7828.60  
One-to-One Assisting 7826.61  
Chemical Hazcom 4838.62  
Bloodborne Infections 7829.66

#### Manuals and Catalogs

Western Medical Advertising Catalog  
Western Medical Supply Catalog  
Western Medical Safety Manual  
Western Procedure Manual  
Exposure Control Manual  
Coordinator's Orientation Manual  
Sales Training Guide Manual  
Specialty Catalog

## STAFFING ONLY

### Sales Oriented

Schedule of Rates Sheet 7929.65  
Confidential Credit Application 4343.29  
Facility Staffing Customer Assessment 7016.01  
Facility Staffing Orientation Profile 7016.02

### Inserts

Diagnostic Imaging Personnel  
Pharmacy Staffing  
Supplemental Staffing

### Recruiting Oriented

Pharmacy Recruiting Brochure 7835.53  
Facility Staffing Postcard 7837.56

### Applicant Processing

Professional Skills Sheet:  
    Radiology Technologist 7373.21  
    Pharmacist 7373.23  
    Critical Care 7373.07  
    Respiratory Care 7373.33

### Assessments & Score Keys:

RN 7373.24  
LP/VN 7373.36  
Nurse Aide 7373.37  
Medical Vocabulary 7373.11  
Respiratory Therapist 7373.34  
Critical Care 7373.31  
Radiology Technologist 7373.20  
Dental 7373.35  
Phlebotomist Competency Assessment 7023.03  
Safety-Related Material  
Pre-Job Safety Evaluation 0413.08  
Medical Facilities Emergency Preparedness 7828.59  
Pharmacy Staffing Capsule Quiz 7827.53

## OPENING ASSISTANCE

### Direct Mail Support

Composing, printing and mailing up to 500 opening office announcements upon receipt of a prospect mailing list, office address and telephone information.

## OFFICE FURNITURE

A complete Office Furniture Catalog will be made available. Western can obtain price quotations on office furnishings for you, for comparison purposes, and can purchase your items for you at a discount, if you so desire. There is no obligation to provide or use this service.

*Western Medical Services reserves the right to update any item, or substitute other items of equal value, in place of those listed on this schedule. Unless otherwise specified, the quantity furnished shall be one (1) unit pack per item listed. Not all forms listed will be received. Distribution of forms based on services provided: Home Health Agency (Medicare), Home Care, Home Care/Staffing, Staffing.*

EXHIBIT B

FRANCHISE AGREEMENT



Western MEDICAL SERVICES

A Division of Western Temporary Services (USA), Inc.

This Agreement ratifies the sale and transfer of the Western Medical Franchise Agreement dated February 27, 1990 from Terrence Radcliffe and Patrick Hermanson to Janet and Allen Hawley pursuant to the Purchase Contract and Receipt for Deposit dated June 1, 1992 by and between the parties

THIS AGREEMENT, by and between the Western Medical Services division of Western Temporary Services (USA), Inc., a California corporation, having its principal office at 301 Lennon Lane, Walnut Creek, California (hereinafter sometimes called "Western" or "We") and

ALLEN HAWLEY and JANET HAWLEY

a \_\_\_\_\_ corporation, partnership or (state)

sole proprietorship, (circle one) having its principal office at

490 No. 31st Street, Suite 205

Billings, Montana 59101

(hereinafter sometimes called "Franchisee" or "You").

1. We are granting to you an exclusive franchise to operate a Western office in the following territory:

City of Billings, Montana

This franchise authorizes you to supply medical temporary help only in your assigned territory. It is agreed that you will not directly sell and/or provide any temporary help services within any area assigned by us to another Western office.

2. It is agreed that we will do the following:

(a) We agree to give you and your Office Manager a course of methods to be used in operating a Western franchise, the time and place to be designated by Western. You agree to be responsible for your own living expenses and transportation, if any.

(b) You will be loaned a copy of our operating manual giving complete instructions on how to operate the franchise. Should this Agreement be terminated, you agree to return our manual, in good condition, or forfeit the deposit referred to in paragraph 19.

(c) In connection with the operation of a temporary help service we will meet all payrolls of the temporary employees, including the payment of all payroll taxes, workers' compensation, liability and fidelity bond insurance, the mailing of payroll checks, and the handling of all accounting and other details incident to the temporary payroll, including the preparation of the necessary payroll reports and returns.

(d) Should a special license be required to conduct a temporary help service in your city, we will reimburse you for a portion of the cost of such license(s) through the division of gross profit by adding the cost thereof to the direct labor costs which are set forth in paragraph 4.

(e) We will bill all customers of the temporary help service, supervise all collections and make settlements, finance the temporary payroll and related payroll costs, and otherwise handle all the accounting and other details incident to the collection of the trade accounts receivable.

(f) Losses from uncollectible accounts together with any contractual losses and/or all costs of collection and suit shall be shared on the same basis that gross profits are shared as defined in paragraph 4. To help you prepare for charges against your earnings when we must write off a bad debt loss, we will establish a deposit payable ("bad debt reserve") account by withholding from the amount due you one percent (1%) of each period's net billing, such withholding to commence on and from your first billing period. The maximum amount in this account will be seven hundred fifty dollars (\$750). But the parties agree that Western shall have the additional right to increase this reserve account by deducting from your share of the gross profit each four-week accounting period (1) one-half (1/2) of the amount of any invoice to a customer which remains unpaid after 112 days from the date of billing by Western to the customer, and/or (2) by any amount reasonably necessary to increase this reserve account if it develops that one-half (1/2) of a potential bad debt loss exceeds the amount of your bad debt reserve account or if the potential bad debt losses of your office are in excess of what we consider to be the normal amount. If there is a bad debt loss, we will again withhold one percent (1%) of each period's net billing until it reaches the aforementioned maximum amount. Where losses exceed the amount of the bad debt reserve you agree to pay the amount of the bad debt reserve deficit balance within ten (10) days of notice. Upon termination of this Agreement the remainder of the deposit will be remitted to you as soon as all pending financial

(g) We agree to develop sales and promotional programs to assist you in your efforts to obtain business and increase your profits thereby.

(h) We agree to pay the installation charge and the basic monthly charge for one telephone number listed in our name. It is agreed that we will own this telephone number and any other telephone number used in your franchise operation, and all telephone company contract forms for listing this number must be executed by a corporate officer of Western. All equipment and other charges in addition to the installation charge and basic monthly charge will be paid by you or, at Western's option, be paid by Western and deducted from your share of the gross profit as defined in paragraph 4.

(i) We agree to help you develop national accounts for which we may grant discounts; such discounts given to accounts in your area will be shared through the normal division of gross profit (see paragraph 4).

(j) Whenever we have booth exhibits, we will list your city in the publicity of the booth.

(k) Whenever available, we will offer group benefit insurance to you and your employees hired to assist you in the operation of your franchise.

(l) Whenever possible, we will assist you in obtaining Government contracts and business from companies having offices in more than one city. The Home Office will consult with you about appropriate local rates to use in bidding multi-office or Government contracts, and when Western is the successful bidder for such contracts you agree to furnish the necessary personnel at the rates stipulated in the bid. However, it is understood that we will not bid on any such multi-office or Government contracts, in your territory, without your prior approval. You also agree to forward all written bids, contracts or purchase orders for temporary help services to the Home Office for execution by a duly authorized officer of Western.

(m) Whenever we deem it advisable, we will publicize the business of Western through advertising or public relations efforts in national or regional magazines or newspapers.

(n) Upon receipt of your mailing list we will mail directly on your behalf, according to our mailing schedule, the following promotional advertising and sales material based on the amount of your sales volume during the preceding four (4) week accounting period:

1. Our Newsletter—  
250 copies for the first two thousand dollars (\$2,000) billing or any fraction thereof. 100 copies for each additional one thousand dollars (\$1,000) billing or any fraction thereof. This may be replaced by national or regional magazine or newspaper articles or advertising.
2. Other promotional advertising and sales material—  
500 pieces of each mailing piece for the first two thousand dollars (\$2,000) billing or any fraction thereof. 200 pieces of each mailing piece for each additional one thousand dollars (\$1,000) billing or any fraction thereof. This may be replaced by national or regional magazine or newspaper articles or advertising.

You agree to keep your mailing list updated and to follow the guidelines set forth in Western's operating manual.

(o) We agree to periodically analyze your sales based upon information submitted by you. We will make whatever suggestions are warranted by such analyses.

(p) After you open your office we agree, at our expense, to send one of our trained representatives to assist in the development and promotion of sales under this franchise and perform such other services as may be helpful to you.

(q) We will carry insurance covering the temporary employees and liabilities of Western in the temporary help service operation.

(r) We agree to furnish your office with at least the items or supplies listed on Schedule A attached. all required operating forms.

3. You agree to do the following:  
(a) To adhere to our procedures, programs, policies, standards and ethics as presently outlined in our training course, operating manual and directives, and as the same from time to time may be reasonably amended or changed in the future.

(b) You will, in good faith, develop the name and business of Western to the greatest possible extent. However, if you elect not to provide a particular service or not to service a particular account, Western reserves the right to provide such service or to service that account in your exclusive territory where we deem it important for the future development of Western and in such event Western shall receive all the gross profit (or loss) derived therefrom. You may conduct non-competitive business activities provided that the business conducted pursuant to this franchise is carried on in a responsible manner in good faith. For the proper development of your Western franchise you agree that during the first year of operation you will average ten (10) personal customer or prospect calls per week, the results of these calls to be reported to us by Wednesday of the following week on "call sheets" provided for that purpose.

(c) You agree to establish and maintain at your own expense an office properly identified as a Western office, which office will be located in a place suitable for interviewing applicants and must be approved by us. The office must be kept in a neat and clean manner and all signs in your premises must have our approval. The office shall be staffed according to our rules and regulations and shall be open during hours which are normal to this type of business in your community. We may inspect your premises at any time during normal business hours.

(d) You agree to follow the recommendations set forth in our manual concerning signs on your doors and windows. You will consult with us about the local advertising, telephone directory and promotional material as related to your Western activity, and you agree to use exclusively only the name of Western in all such advertising.

(e) You agree in the operation of your franchise office:

1. To fully comply with the 1964 Civil Rights Act, Executive Order No. 11246, Fair Labor Standards Act, Occupational Health and Safety Act, and all federal, state and local equal employment opportunity, wage and hour, and occupational health and safety laws as each may hereafter be amended, reconstituted or enacted.
2. Not to discriminate against any employee or applicant for employment because of race, color, religion, age, national origin, medical or physical impairment, or sex, and you will take whatever affirmative action is necessary to ensure that all applicants are employed and treated during employment without regard to their race, color, religion, age, national origin, medical or physical impairment, or sex. Such action shall include, but not be limited to, employment, upgrading, non-segregated facilities, recruitment advertising and rates of pay.
3. To post in your office in a conspicuous place, available to all employees and applicants for employment, any and all notices required by law including, but not limited to, those dealing with equal employment opportunities, non-discrimination in employment, wages and hours, and occupational health and safety.
4. That the trade name "Western Medical Services" is a federally-protected service mark used in commerce which enjoys the good will of the public and the trade for providing experienced, bonded and guaranteed medical temporary help, without regard to race, color, religion, age, national origin, medical or physical impairment, or sex.

(f) You shall forward to us each week the temporary employees' time cards which have been approved by the customers for the previous week's work. Prompt payment of temporary employees and the prompt remittance of your share of the gross profits depend on your sending such time cards as soon as possible.

(g) You agree to indemnify and hold us harmless in any and all claims, including reasonable attorney fees and court costs, which may arise or be asserted against you or us, and which are not expressly assumed by us under this Agreement, by reason of your business activities. Our obligation is limited to meeting the temporary help service payroll and related taxes, basic telephone service for the one Western phone, and license and insurance covering the temporary employees.

(h) You agree at your own cost to purchase and maintain at all times during the term of this Agreement the following policy or policies of insurance on your operation, but excluding the temporary employees, in the minimum amounts specified, naming Western as an additional insured: (i) Public Liability for Bodily Injury — \$100,000 each person and \$300,000 each accident, and Property Damage — \$50,000 each accident; (ii) Workers' Compensation and Employer's Liability — as required by state law; (iii) Comprehensive Auto (owned and non-owned) Liability for Bodily Injury — \$100,000 each person and \$300,000 each accident, and Property Damage — \$50,000 each accident; and (iv) Fidelity Bond — \$10,000. All such policies of insurance shall contain an endorsement stating that they cannot be cancelled or materially changed without thirty (30) days prior written notice to Western. You further agree to provide Western with a certificate of insurance confirming that the policy or policies referred to above are in full force and effect.

(i) You agree that all sales which you make directly or indirectly of temporary help service shall be in the name of Western and that the telephone provided as part of this Agreement will always be answered in such a way as to identify it exclusively as the Western telephone.

(j) If a customer desires to hire one of our temporary employees, he will be required to pay liquidated damages in one of the following two (2) ways:

1. Where permitted by law, through a cash settlement (we will mutually establish the dollar amount which this should be for your community) which Western will invoice to the customer as liquidated damages. Such amount will be divided two thirds (2/3) to you as Franchisee and one third (1/3) to Western. We will begin with (circle one) \$200 - \$300 - \$400 - \$500 - \_\_\_\_\_
2. By keeping the employee on Western's payroll for an additional number of weeks (which we will establish as the number appropriate for your community). Hours worked under this procedure will be included as part of your regular Western billing and compensated as specified in paragraph 4. We will begin with (circle one) 6 weeks - 8 weeks - 12 weeks - \_\_\_\_\_ weeks.

(k) You shall act as an independent contractor in the operation of your franchise agency, and nothing contained herein shall be construed to create the relationship of employer and employee between us and you, or between us and any of the employees you hire to assist you in the operation of the franchise agency. Your authority to represent us is limited solely to assisting in the collection of the trade accounts receivable when requested by Western and to procuring temporary help employees and arranging for their assignment with customers, in accordance with gross profit margin schedules acceptable to Western and at billing rates which will be mutually established from time to time. In granting this franchise, Western does not authorize you to use Western's name in any capacity other than what is provided herein, nor to sign Western's name to any bid, purchase order, contract or other written instrument or to use Western's name on any bank account which is owned by you.

(l) You agree that the records of operation of this Western activity shall always be available for review and audit at reasonable hours by an officer or designated agent of Western.

4. (a) At the end of each of our four-week accounting periods (hereinafter sometimes called billing periods) we will compensate you for your services in operating the franchise office by remitting to you the following percentages of the gross profit derived from the operation of the temporary help service:

On the first 1000 hours of temporary payroll time:	40%
On the next 2000 hours of temporary payroll time:	50%
On all over 3000 hours of temporary payroll time:	60%

Gross profit is defined as gross billings for temporary help service including any taxes levied thereon, for any four-week period, less discounts, payroll and other direct labor costs (which include payroll taxes and workers' compensation, liability, fidelity bond, and bid surety and performance bond insurance, and taxes levied on gross billings) and any mutually agreed upon special expenses required by customers in connection with the temporary employees. The applicable division of gross profit for payroll service (sometimes referred to as "transfer of personnel plan") is set forth in Western's operating manual or directives. We will remit as soon as practicable after accounting for the period that has been completed and you agree that we may deduct from your share of the gross profit any amounts which may be owing by you to Western. You agree our accounting to you every four-week period is correct unless you take exception thereto in writing within sixty (60) days of receipt.

(b) In addition, you will be reimbursed an amount equal to eight percent (8%) of the gross profit as defined above but in no event to exceed seven hundred dollars (\$700) per billing period. This amount is for the purpose of reimbursing you, wholly or in part, for advertising expenses which you have incurred, such as classified newspaper and telephone directory, to promote the name of Western and attract suitable applicants. We require that you place at least a trademark listing ad in your telephone directory. Before payment is made we may require that a report be submitted stating the number of inches of classified newspaper space placed during the preceding four-week period. An annual audit of such reimbursements will be made.

5. This Agreement shall continue for a period of five (5) years, subject to the option of renewal as set forth hereafter. We shall have the option to terminate this Agreement at the end of any six (6) billing periods by mailing written notice to you if your sales of temporary help, expressed in hours, during the said preceding six (6) billing periods should fall below the hourly minimums set forth below; provided, however, that you may keep this Agreement in effect by paying to Western twelve percent (12%) of the difference between the actual amount of hours billed and the guaranteed billing minimums during the preceding six (6) billing periods multiplied by the average hourly billing rate for the previous six (6) billing periods. Such sums must be paid to Western within ten (10) days of receipt of such notice or this Agreement will terminate forthwith.

First 6 billing periods .....	24,000	hours
Second 6 billing periods .....	24,000	hours
Third 6 billing periods .....	24,000	hours
Fourth 6 billing periods .....	24,000	hours

Fifth 6 billing periods ..... 24,000 hours  
Sixth 6 billing periods and for each 6  
billing periods thereafter, either during  
the original term of this Agreement or  
any renewal period. .... 24,000 hours

If, at the end of five (5) years, you are not in violation of any of the terms of this Agreement, you will have the option of renewing it for an additional period of five (5) years on the same basis and for each consecutive five (5) year period thereafter by mutual agreement of the parties hereto.

6. (a) As long as you are a Franchisee, and for two (2) years after the termination of this Agreement, you agree that:

1. You will not be connected directly or indirectly as employee, proprietor, stockholder, director, equity holder, officer, partner, or otherwise, with the operation of any business competitive to Western or its affiliated divisions or companies. For the purpose of this subparagraph, such ancillary services as a survey service, telephone answering service, phone-in typing service, duplicating service of any kind, direct mail service and similar in-office services shall be included, but not limited to, as operations deemed to be competitive, unless expressly provided otherwise in writing by Western. However, the operation of a medical permanent placement agency including a licensed nurses' registry shall not be considered as competitive. This restriction applies to operations either (1) within your exclusive territory, or (2) within any city in which Western or its affiliated divisions or companies operate. The two foregoing restrictions (1) and (2) are distinct and severable.
2. You consent to the issuance of an injunction enjoining you from the operation of a competitive practice in violation of any of the terms of this Agreement, and as damages would be extremely difficult to determine, in the event of such violation, you also agree to pay us liquidated damages in the amount of twelve percent (12%) of all your sales made in violation of paragraph 6 plus attorney fees and costs.
3. You will not divulge, as a franchise holder and for a period of two (2) years after termination of this franchise, any confidential data or trade secrets including, but not limited to, customer or employee names and addresses, techniques, methods, advertising materials, forms, operating manuals, or other information of whatever kind used in connection with the Western office in your area.

(b) If you are a partnership, each partner will sign a written covenant, on a form which we will provide, similar to 6(a) and its subsections. These restrictions shall be applicable to such partners only during the time that they are associated with the franchised business and for a period of two (2) years thereafter.

7. If you are not a corporation, you may, at your option, form a corporation for the purpose of holding this Agreement. However, it is understood that the name of the corporation must be approved by us in advance. Also, it is agreed that you and such corporation would be jointly and severally liable under this Agreement and would each be responsible for full compliance with all the terms of this Agreement. It is understood and agreed that in assigning this contract to a corporation you will remain personally liable for all obligations set forth in the Agreement.

The following provisions shall apply in the event you are presently a corporation, or if you form a corporation as provided above:

(a) You hereby represent and covenant that no stock has been issued or sold to any person who is in any way connected with a competitive business as mentioned in paragraph 6(a)1, and that you will obtain from all stockholders and prospective stockholders and all officers and directors of the corporation a written covenant (on a form which we will provide) containing restrictions similar to those imposed in said paragraph 6(a) and its subsections. If the relationship of such persons with the corporation is terminated prior to the termination of this Agreement, the covenant shall apply only during such time that such persons are associated with the corporation, in whatever capacity, and two (2) years thereafter. An executed copy of such covenant shall be mailed to our Home Office.

(b) You, and the principal officers executing this Agreement, and any shareholders signing this Agreement as individuals, will not, at any time, together own less than fifty-one percent (51%) of the outstanding stock of the corporation, voting or otherwise. Any violation of the above provision shall be deemed a sale of the franchise in accordance with paragraph 12, except where any stockholder owning more than fifty percent (50%) of the outstanding stock dies, in which event this franchise shall be subject to the special sales minimums set forth in paragraph 13.

(c) You will send a statement to us setting forth the names, addresses and occupations of all stockholders, directors and officers of the corporation, and the number of shares of stock issued to each stockholder. You agree that you will immediately report to us any proposed change in stock holdings or capital structure prior to the time that such change becomes effective and follow the procedure set forth in paragraph 12 if applicable.

(d) All stock certificates issued by the corporation shall bear an endorsement similar to the following:

"This certificate is subject to the terms and provisions of a n Agreement between Western Temporary Services, Inc , and this corporation

dated June 22, 1992

It is understood and agreed that all of the requirements of subparagraphs 7(a), (b), (c), and (d) are among the material conditions of this Agreement, and that any refusal to comply therewith within ten (10) days after we notify you to do so shall be deemed as cause for termination pursuant to paragraph 9.

8. If for any reason this Agreement is terminated, all of your rights as Franchisee shall cease, and you agree that you will turn over to us within ten (10) days a complete list of all employees, both permanent and temporary, employed by or through you during the year immediately preceding termination, including the temporary employee application cards, and a complete list of the names, addresses and telephone numbers of all customers, and you agree to cooperate in transferring the telephone listing and number referred to in paragraph 2(h) to such person and location as directed by Western. In addition, you will turn over to us all advertising material, stationery, printed forms, operating manual(s), and all other materials relating to the operation of this franchise.

You also agree upon termination of this Agreement not to advertise or hold yourself out in connection with the operation of any competitive business as having been formerly connected with or formerly operated an office under a franchise for Western, and to cease using the name Western, or any similar name, in any manner whatsoever.

9. For just and reasonable cause such as a material misrepresentation relating to your acquisition of the franchise, adverse moral conduct, dishonesty, conviction of a felony, irresponsible business actions, abandonment of the franchise or other adverse personal action which can reasonably be construed as damaging to the business, we may, at our option, terminate this Agreement forthwith by mailing to you written notice of such termination, stating therein our reasons for such action.

10. The Western operating manual sets forth circumstances under which the Franchisee may use temporary service help or payroll service as a customer of Western. Unauthorized use of such services by the Franchisee or any business or entity owned in whole or in part, directly or indirectly, by the Franchisee, or any corporation affiliated through stock ownership, shall be grounds for immediate termination of this Agreement.

11. In the event that you wish to terminate this Agreement you agree to give Western at least thirty (30) days notice in writing. During the said thirty (30) day period you shall continue to maintain complete operations unless arrangements are made between us for an earlier termination. You will cooperate with Western to expedite the transfer of said business and at Western's option, we may take possession of and exclusively operate your franchise, at our expense, provided we continue to remit to you your share of the gross profit as set forth in paragraph 4 until the effective date of termination.

12. In the event you find it necessary to terminate this Agreement pursuant to paragraph 11 or in the event more than fifty percent (50%) of your outstanding stock is proposed to be sold if you are a corporation, or in the event of your death, you, the shareholder(s) owning more than fifty percent (50%) of the outstanding stock of the corporation, or your legal heirs or legal representatives may sell the franchise or shares of stock of the corporation to a person or persons receiving our approval, who will execute the then current form of this Agreement. We will not unreasonably withhold such approval provided that the prospective purchaser submits to us a legally binding offer or agreement in writing accompanied by a cashier's or certified check for twenty-five percent (25%) of the proposed purchase price. A separate purchase price must be established for the Western franchise created under this Agreement, as distinct from your other business interests, if any.

However, we shall have a period of fifteen (15) days after we receive a signed copy of the above-mentioned offer or agreement in which to purchase the franchise or such shares of stock at the same price as would be paid to you, your estate or legal heirs, or your shareholder(s) by the prospective purchaser. It is agreed that since we have jointly built the business with you and since we will incur expenses in the transfer of the franchise to a new owner or controlling shareholder or shareholders, twenty-five percent (25%) of the purchase price, whether purchased by us or by an outsider, shall be paid to Western out of the proceeds of sale. It is understood and agreed that the entire purchase price will be paid by the purchaser directly to Western, which we will then remit to you after deducting our share thereof and any amounts which you then owe us. In the event you or your purchaser rescinds or revokes the proposed sale for any reason whatsoever during said period, Western shall have the option to retain said twenty-five percent (25%) of the purchase price to defer Western's legal and administrative expenses or to exercise our option to purchase the franchise or such shares of stock, at the same price as would have been paid to you, your estate or legal heirs, or your shareholder(s) by the prospective purchaser, had the proposed sale not been rescinded or revoked.

13. In the event of your death, your corporation, heirs or other successors may continue to operate this franchise provided that the billing hours of temporary help for each billing period during the six (6) billing periods following the date of death do not fall below sixty percent (60%) of the average billing period for the twelve (12) full billing periods immediately preceding the date of death. The billing period in which death occurs shall be included, but the average shall be prorated according to the number of days remaining in the period. If those billing hours do fall below the stated sixty percent (60%) limit we may terminate this Agreement forthwith; a waiver of our right to so terminate for any one billing period shall not be deemed to be a waiver for any other period. After the six (6) billing periods have expired the normal billing minimums provided for in paragraph 5 of this Agreement shall again apply.

14. Upon giving to you thirty (30) days advance notice in writing, we reserve the right to purchase the non-physical assets of this franchise. These non-physical assets will include all records developed in establishing this franchise. The selling price will be the sum total of your share of the gross profit as defined in paragraph 4 for the last fifteen (15) periods. If you have been in business less than fifteen (15) periods, this formula will be used on a pro rata basis for the actual periods involved. The sale price of this franchise shall be distributed according to the provisions of paragraph 12 of this Agreement, but in no event shall the sales price be less than one and one-half (1 1/2) times the amount paid by you under paragraph 19.

However, if the billing hours of temporary help for the said thirty (30) day period should fall below eighty-five percent (85%) of the average billing period hours for the six (6) billing periods immediately preceding our giving of such notice, we may, at our discretion, rescind our Agreement to purchase the franchise without affecting the right to exercise again this option in the future.

15. In the event of your bankruptcy, or insolvency, or a bill in equity or other proceeding for the appointment of a receiver for the agency is filed, or in the event you make an assignment for the benefit of creditors, this Agreement and any interest therein shall forthwith terminate and come to an end.

16. In the event that continuance of the business contemplated by this Agreement in a normal profitable manner is impaired due to circumstances beyond our control, including, but not limited to, labor union activity, enactment of any law or regulation, acts of God, war or civil disorders, or any similar circumstances, Western shall have the right to terminate this Agreement upon ten (10) days written notice, without liability to you or to Western, except for the payment to you of your share of the gross profit as set forth in paragraph 4 until the effective date of termination.

17. You agree to commence the operation of this franchise on or before June 14, 1992

18. In the event that you are in default on any of the terms of this Agreement, we will notify you in writing of such violation and you will have ten (10) days or the number of days provided by law, whichever is greater, after receipt of such notice in which to correct the violation. If such correction is not made within the time so allowed, or if you have repeated a previous breach, we shall have the right to

terminate this Agreement forthwith and you agree that we will not be responsible for losses on investments, if any, incurred by you in doing business under this Franchise Agreement.

19. As evidence of your intention to actively develop the name of Western you agree to pay a franchise fee of Waived dollars (\$ -0-) which shall include the posting of a \$500.00 security deposit for the operating manual we will entrust to you. If this Agreement is terminated, the \$500.00 security deposit will be refunded to you upon return of our operating manual in good condition. ~~As part of the consideration for such payment Western agrees to provide the supplies listed on Schedule A.~~

20. Any notices required to be given hereunder shall be deemed to have been properly given and served by one party upon the other when deposited postage prepaid registered or certified in the proper mail and directed to said party at his respective address listed below, or to the last address designated in writing by either party.

1. Western Temporary Services (USA), Inc.  
Western Medical Services Division  
P.O. Box 9280  
Walnut Creek, CA 94596  
Attention: Legal Department
2. Allen Hawley or Janet Hawley  
Name Western Medical Services (Franchisee)  
490 No. 31st Street, Suite 205  
Address  
Billings, Montana 59101

21. This Agreement, along with any material representation made to you through any applicable disclosure document, constitutes the entire contract between us, and its provisions shall be binding upon you, your executors, your administrators, successors and assigns. We reserve the right to assign this Agreement to any affiliated corporation upon serving written notice to you. You agree not to assign or sublicense this Agreement, in whole or in part, to any person other than the corporation, as provided above, and any assignment or sublicense, conveyance or transfer in violation of this Agreement, whether by operation of law or otherwise, shall be null and void. No waiver by Western, express or implied, of any breach of this Agreement by you shall be deemed to be a continuing waiver or a consent to any subsequent breach. Every provision of this Agreement is distinct and severable and if any provision is held to be illegal, void or unenforceable it shall not affect the validity or legality of any other provision.

22. You acknowledge that you have fully read and understood this Agreement and your signature at the bottom hereof shall constitute your acceptance of the terms and conditions hereof. This Agreement or any changes or modifications thereto shall have no force and effect, unless accepted in writing by a duly authorized officer of Western.

The above and foregoing is hereby approved and accepted by me this 12 day of June, 1992

Witness: Debbie Kocou

Allen Hawley  
ALLEN HAWLEY, Joint and Several  
Janet Hawley  
JANET HAWLEY, Joint and Several

Entered into this Agreement in Walnut Creek, California (City and State), on this 22nd day of June, 1992

Witness: Debbie Plimney

By: Bonnie A. McDonald  
WESTERN TEMPORARY SERVICES (USA), INC.  
Bonnie A. McDonald (Title) Vice President

SHAREHOLDER RATIFICATION AND GUARANTY

In consideration of the above and foregoing, each of the undersigned on even date herewith, individually and as sole share holders of \_\_\_\_\_

jointly and severally, hereby ratify, adopt, and affirm the herein Agreement and as the same may hereafter be amended or reconstituted, and personally guarantee the performance of any and all present and future obligations hereunder.

Witness: \_\_\_\_\_ Shareholders: \_\_\_\_\_

1 UNITED STATES BANKRUPTCY COURT  
2 DISTRICT OF MINNESOTA

3 In re:

4 Intrepid USA, Inc.,

Debtor.

Case No. 04-40416  
(Jointly Administered)

Chapter 11 Case

---

**AFFIDAVIT OF**

**JANET HAWLEY AND ALLEN HAWLEY**

---

Janet Hawley and Allen Hawley, being first sworn and upon oath, state and depose as follows:

1. We are the owners of an Intrepid franchise located in Billings, Montana, and have personal knowledge of the facts set forth in this Affidavit and the accompanying Motion relating to the franchises with the Montana Franchisees.

2. The Montana Franchisees are currently franchisees with seven offices in Montana servicing thirty-four Montana counties, which provide personal care and/or home health care services in such counties. We ("the Hawleys") originally entered into a franchise agreement in 1991, with Western Medical Services, Inc. ("Western") to conduct business out of the Billings, Montana office servicing six counties. In 1998, we along with our daughter Kristine Carlson ("Carlson") through an entity known as Western Medical Services of Flathead County, Montana, Inc., purchased another franchise from Western located in Kalispell, Montana, servicing five counties. The Kalispell franchise was subsequently assigned to a corporation wholly owned by Carlson known as TKO Stat, Inc.

3. During late 1999 and early 2000, Western, the franchisor under the Franchise Agreements, sold its business to Intrepid U.S.A., Inc., one of the Debtors in this consolidated case. The Debtor thereafter assigned all of the franchises to Intrepid Affiliates, Inc. During the year 2002,

1 the Debtors made available to the Montana franchisees six other Montana franchise locations.  
2 Carlson, utilizing an entity known as InWest, Inc., purchased personal care service and/or home  
3 health care service franchises in Butte, Montana, servicing five counties; Bozeman, Montana,  
4 servicing four counties; Sidney, Montana; Helena, Montana, servicing four counties; Great Falls,  
5 Montana, servicing six counties; and Havre, Montana, servicing four counties. No written purchase  
6 agreement or franchise agreement was entered into with Debtors with respect to these six locations.  
7 The Sidney, Montana location was closed approximately three months ago.

8 4. The eight Montana locations have been operated as franchises of the Debtors. The  
9 Montana Franchisees provide management and care services through local staff, and the Debtors  
10 own all of the licenses (Medicare and Medicaid) and any certificates of need. The Debtors bill for  
11 the services which the Montana Franchisees provide, collect all of the revenues, pay certain  
12 expenses, including payroll for field staff, and retain 8% of the revenues as a franchise fee. Under  
13 the Franchise Agreements, the balance of the revenues is required to be paid to the Montana  
14 Franchisees on a four-week basis.

15 5. Immediately upon acquiring the franchise business, the Debtors began dismantling  
16 such business. In 2000, they offered all franchisees the option to buy each of their respective  
17 franchises at a 75% discount off the formula price set forth in the standard franchise agreement. On  
18 information and belief, all but three franchisees accepted the offer, and bought their franchise at the  
19 discounted price. The Montana Franchisees did not accept the buy out offer and elected to retain the  
20 franchises.

21 6. At about the same time the Debtors began offering the above-described buy out

1 program, it also began reducing the services that it provided under the Franchise Agreements. The  
2 Montana Franchisees allege that the reduction of services constitutes a substantial, material and  
3 continuing default under the Franchise Agreements.

4 7. In early April 2004, the Montana Franchisees were anticipating the receipt of net  
5 revenues under the Franchise Agreements for their eight franchises from the Debtors; however, the  
6 Debtors failed to pay such revenues to the Montana Franchisees. The Debtors issued checks that  
7 were subsequently dishonored because they had been written on closed accounts. These checks  
8 totaled \$134,649.64. It was at or about this time that the Montana Franchisees discovered that  
9 Intrepid USA had filed a petition under Chapter 11 in the District of Minnesota. The Montana  
10 Franchisees further discovered that on April 12, 2004, Intrepid Affiliates, Inc. filed a petition under  
11 Chapter 11.

12 8. The Debtors are also in default under the Franchise Agreements for failure to pay  
13 additional pre-petition revenues due to the Montana Franchisees. The Montana Franchisees cannot  
14 identify exactly how much money Debtors owe them for pre-petition periods because they have been  
15 unable to receive complete financials from the Debtors. However, the Montana Franchisees believe  
16 that such amount is not less than \$229,235.01, which the Debtors have failed and refuse to pay to  
17 the Montana Franchisees.

18 9. The Debtors have failed to pay pre-petition revenues due in an amount not less than  
19 \$229,235.01 to the Montana Franchisees. In addition, the Debtors are in default under the Franchise  
20 Agreements as follows:

21 A. Workers Compensation Coverage: As part of its payroll obligations found at paragraph 3.d.

1 of the Franchise Agreements, the Debtors are responsible to fund workers compensation insurance.  
2 The Debtors represented to the Montana Franchisees that it will provide coverage at a rate  
3 comparable to that available in the state where the franchisee does business. The Montana  
4 Franchisees are of the opinion that the Debtors are seriously overcharging them for the workers  
5 compensation premiums. In Montana, the estimated rate for this type of industry, as quoted by the  
6 Montana State Fund, is \$7.56 per \$1,000 of payroll. For approximately two and a quarter years, the  
7 Debtors have been charging \$14.30 per \$1,000 of payroll. The Montana Franchisees have  
8 continuously asked for an invoice or some other evidence of the cost of the workers compensation  
9 premium, but the Debtors have refused to provide it. The Montana Franchisees have acquired  
10 information that the workers compensation premium rate for the Debtors' corporate-owned locations  
11 is only \$6.00 per \$1,000 of payroll, and for the Debtors' administrative offices it is only \$7.60 per  
12 \$1,000 of payroll. The Montana Franchisees have calculated the difference between the State quoted  
13 rate and what the Debtors have charged them the last two and a quarter years and amongst all eight  
14 Montana locations it totals \$664,512. The Montana Franchisees are aware that a former franchise  
15 owner by the name of Tom Ruppert sued Western and the Debtors shortly after the Debtors bought  
16 Western, claiming that his franchise was overcharged workers' compensation premiums. The  
17 information acquired by the Montana Franchisees indicates that he was ultimately successful in that  
18 litigation. The Montana Franchisees are seeking repayment of this overcharge of the workers'  
19 compensation premium.

20 B. Liability Insurance: Paragraph 3.d. of the Franchise Agreements requires the Debtors to pay  
21 general commercial liability insurance for the franchisees. The Debtors have historically charged

1 1.5 percent of total payroll costs as a premium for this coverage. The Montana Franchisees believe  
2 this amount to be far too high comparable to other rates available in Montana. The Montana  
3 Franchisees have repeatedly requested invoices or other evidence of the cost of these premiums from  
4 the Debtors, but the Debtors have not provided any evidence of the same. The Montana Franchisees  
5 have also attempted to file claims against the insurance policy, but those claims are always denied  
6 by the Debtors as not being covered by the policy. The Montana Franchisees do not even know what  
7 coverage exists. The Montana Franchisees have researched comparable premium costs available in  
8 the state of Montana for comprehensive liability coverage and have found the rates charged them by  
9 Debtors to be far too high. The Montana Franchisees are seeking the difference between the rates  
10 available in Montana and what the Debtors have charged for four years.

11 C. Billing Problems: Paragraph 3.e. and paragraph 3.f. of the Home Health Care Addendum  
12 to the Franchise Agreements require that the Debtors bill for all services rendered by the Montana  
13 Franchisees. At the beginning of 2002, it became evident that the Debtors' billing package was  
14 inadequate. The Montana Franchisees have found that some bills were billed inaccurately, others  
15 were not billed at all. Some bills were billed accurately and collected but the billing software did  
16 not account for the payment. Any bill that is not paid is classified as bad debt after a period of time  
17 and the principal plus interest that the Debtors charges against that bad debt is deducted from the  
18 profits otherwise payable to the Montana Franchisees. The collection issues are the Debtors'  
19 problem, not the Montana Franchisees' problem. The Debtors are aware of the problem but it cannot  
20 afford to fix it at this time. Instead, the Montana Franchisees are obviously paying for the problem.  
21 They seek a refund on all accounts placed in bad debt that are not bad debt, plus any interest

1 deducted from their profits for the years 2002, 2003, and 2004.

2 D. Payment to Franchisees: Pursuant to paragraph 5.h. of the Franchise Agreements, the  
3 Debtors are obligated to pay to the franchisees the "remaining gross profits as soon as practicable  
4 after each period ends". Western, and until about one year ago, the Debtors, made direct deposits  
5 of this remittance on the Monday following the end of each period. Approximately one year ago,  
6 the Debtors unilaterally changed these procedures and began mailing the franchisees checks, which  
7 arrive any time between Monday through Friday of the week following the end of the period. The  
8 Montana Franchisees believe this is a breach of the Franchise Agreement because Western and the  
9 Debtors had already established by their actions what amounted to "as soon as practicable after each  
10 period ends" by direct depositing this remittance on the Monday after the end of the period. The  
11 Montana Franchisees are seeking interest on all monies paid any later than that date over the last  
12 year.

13 E. Forms: Paragraph 3.o. of the Franchise Agreements and paragraph 3.h. of the Home Health  
14 Addendum to the Franchise Agreements all require that the Debtors provide the franchisees with  
15 operating forms. The Montana Franchisees have been unable to obtain the necessary operating forms  
16 for some time now. For example, the Montana Franchisees have had to copy thousands of time  
17 sheets to enable all of the employees to correctly keep track of their time. The Debtors have always  
18 required that its own forms be used, but it has failed to provide them. Essentially, all forms relating  
19 to payroll have not been provided. In addition, hospice forms have not been provided for two and  
20 a half years. Debtors are now demanding that the Montana Franchisees pay separately for the  
21 operating forms, even though the Franchise Agreements do not set forth a separate charge. The

1 franchise fee was to cover these costs. The Montana Franchisees are seeking payment for all copying  
2 costs, envelopes, mailings, etc., which they have been required to provide since the problem started.

3 F. Sales and Promotional Programs: Paragraph 3.l. of the Franchise Agreement requires that  
4 the Debtors develop sales and promotional programs to assist the franchisees in their efforts to  
5 generate more business and increase the sales of the franchise, but the Debtors have never done so  
6 since they purchased the business from Western. The Montana Franchisees are seeking payment for  
7 potential lost sales as a result of this breach.

8 G. Publicity and Direct Mail: Paragraph 3.m. of the Franchise Agreements requires that the  
9 Debtors publicize their trade name and conduct direct mailings of promotional advertising and sales  
10 materials. However, since purchasing the business from Western, Debtors have not done so. The  
11 Montana Franchisees are seeking payment for potential lost sales as a result of this breach.

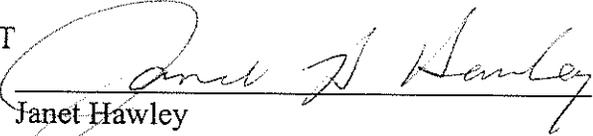
12 H. Community Education: Paragraph 3.g. of the Home Health Addendum to the Franchise  
13 Agreements requires that the Debtors assist the franchisees with community education, sales,  
14 promotions and marketing. However, the Debtors have not done so since purchasing the business  
15 from Western. The Montana Franchisees are seeking payment for potential lost sales as a result of  
16 this breach.

17 I. Branch Manager Training: Western and the Debtors had historically conducted classes for  
18 new branch managers. Since February, 2003, the Debtors have not held a class for these new branch  
19 managers. They indicated at that time that these classes would be rescheduled but that has not been  
20 done. The Montana Franchisees are seeking payment for lost productivity and training time as a  
21 result of this breach.

1 J. Consulting: Western provided consulting to the franchisees prior to all Medicare surveys.  
2 However, the Debtors failed to do so ever since they purchased the business from Western. The  
3 Montana Franchisees are seeking payment for the value of this lost expertise.

4 K. Post-Petition Payments to Franchisees: The Debtors have failed to make timely payment to  
5 the Montana Franchisees for amounts which are due the Montana Franchisees post-petition. These  
6 revenues are the Montana Franchisees revenues from which the Debtors are to pay certain expenses  
7 and retain its 8% franchise fee. Payments are to be made to the Montana Franchisees as explained  
8 in paragraph D. above. Since the filing of the case, the Debtors have paid every payment late, and  
9 then only after we or our attorneys have made repeated demands for such payments. In one case,  
10 Debtors held payment for ten (10) days. In addition, the only way we can determine if our payment  
11 is accurate is to review the detailed accounting that accompanies the payment. Since the filing of  
12 the bankruptcy, we have seen abbreviated accountings, or sometimes no accounting at all. We  
13 received our last payment late, with only a summary accounting. Debtors' home office explained  
14 they did not have the time to "work on the details". It has been impossible to determine the accuracy  
15 of the payments. We continue to operate, but are in constant fear that Debtors will fail to make their  
16 next payment to us. The Debtors' failure to timely pay these amounts is causing great harm to the  
17 ongoing operations of the Montana Franchisees. We estimate that the cost of post-petition defaults  
18 of the Debtors to the Montana Franchisees total approximately \$25,000 per month.

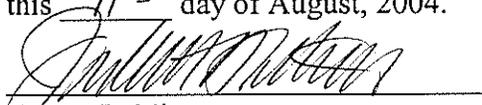
19 FURTHER AFFIANTS SAITH NOT

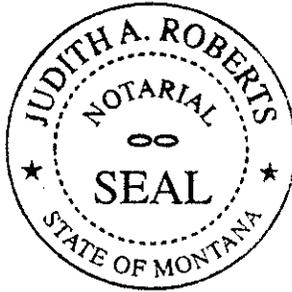
  
Janet Hawley

  
Allen Hawley

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

Subscribed and sworn to before me  
this 11<sup>th</sup> day of August, 2004.

  
\_\_\_\_\_  
Notary Public



UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In re:

Intrepid USA, Inc.,

Debtor.

Case No. 04-40416  
(Jointly Administered)

Chapter 11 Case

---

**MEMORANDUM IN SUPPORT OF MOTION (1) TO REQUIRE ASSUMPTION  
OR REJECTION OF EXECUTORY CONTRACT, (2) TO COMPEL  
TIMELY PERFORMANCE UNDER FRANCHISE AGREEMENT AND (3) TO  
GRANT ADMINISTRATIVE EXPENSE PRIORITY FOR POST-PETITION  
AMOUNTS DUE UNDER FRANCHISE AGREEMENTS**

---

Janet and Allen Hawley, TKO Stat, Inc., and InWest, Inc., by their undersigned counsel, respectfully submit this Memorandum in Support of their Motion (1) to Require Assumption or Rejection of Executory Contract, (2) to Compel Timely Performance Under Franchise Agreement and (3) to Grant Administrative Expense Priority for Post-Petition Amounts Due Under Franchise Agreement.

The facts underlying the relief requested in the Motion are set forth in the verified Motion, Affidavit of Janet and Allen Hawley (the “Hawley Affidavit”), and are not repeated herein. Capitalized terms used, but not defined, in this Memorandum have the meanings specified in the Motion.

**DISCUSSION**

The Franchise Agreements are executory contracts within the meaning of 11 U.S.C. § 365. 11 U.S.C. § 365(a) provides that the Trustee (which includes the debtor in possession) “may assume or reject any executory contract or unexpired lease of the debtor.” The Bankruptcy Code does not define “executory contract”. Most courts, recognizing the legislative history of

this section, have found executory contract to mean a contract on which performance is due to some extent on both sides. Matter of Newcomb, 744 F.2nd 621 (8th Cir. 1984).

Section 365(d)(2) of the Bankruptcy Code provides that in a case under Chapter 9, 11, 12 or 13, the Trustee or debtor in possession “may assume or reject an executory contract ... at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.” 11 U.S.C. § 365(d)(2) (emphasis supplied). It has been held that the relevant considerations for the Bankruptcy Court in determining what is a reasonable time for requiring the debtor to determine whether to assume or reject an executory contract includes the following:

1. Damage that the non-debtor party will suffer beyond compensation available under the Bankruptcy Code;
2. Contracts important to the debtor’s business and reorganization;
3. Whether the debtor has had sufficient time to appraise its financial situation and the potential value of the assets in formulating a plan; and
4. Whether exclusivity has terminated.

In re Teligent, Inc., (Bankr. S.D.N.Y. 2001) 268 B.R. 723. See also In re Enron, (Bankr. S.D.N.Y. 2002) 279 B.R. 695; In re Adelphia Communications Corp., (Bankr. S.D.N.Y. 2003) 291 B.R. 283. In reviewing the facts and circumstances of this case, it is clear that balancing the applicable factors compels the conclusion that the Debtors should be required to make a determination as to assumption or rejection of the contract.

First, as set forth in the Hawley Affidavit, the Montana Franchisees and their businesses are suffering continuing and ongoing damage for which they are unlikely to be compensated as

part of the bankruptcy proceeding. Aside from the cash flow interruption caused by the bankruptcy filing, and the failure of the Debtors to pay to the franchisees the revenues which represent the pre-petition defaults, the failure of the Debtors to timely pay to the Montana Franchisees the post-petition obligations is causing significant damage to the Montana Franchisees. The Debtors are not rendering performance required under the Franchise Agreements at even a minimal level. They are being overcharged for workmens compensation and other insurance; are not being provided with billing information; are not being supplied with forms, publicity and community education materials and opportunities or other matters required to be provided by the Debtors under the Franchise Agreements. In both action and word, the Debtors have indicated that they do not intend to assume the Franchise Agreements. Indeed, to do so would require them to cure both pre-petition and post-petition defaults, and give adequate assurance of future performance under the Franchise Agreement. Under the circumstances, it seems clear that the Debtors are choosing to delay the decision to reject the Franchise Agreements solely to extract some financial accommodation from the Montana Franchisees. The use of § 365 in this manner violates at least the spirit and purposes of § 365. The Montana Franchisees are being threatened with the shut down of their business operations in an effort to extract a financial benefit.

For these same reasons, the second factor weights in favor of requiring immediate assumption or rejection of the contract. The Franchise Agreements are not important to the Debtors' business or reorganization efforts. In fact, the Debtors for all intents and purposes dismantled their franchise operation and is not servicing the remaining franchisees. It is highly unlikely that the Debtors will attempt to resurrect the franchise operation as part of their reorganization plan. In order to do so, it would be required to cure past defaults, and put in place

the employees and structure to service the franchisees in order to provide adequate assurance of future performance. The expense of curing defaults and hiring staff to operate the franchise operation would be prohibitive. Any “benefits” of assuming the Franchise Agreements would be far outweighed by the costs.

Thirdly, the Debtors have had more than sufficient time to appraise their financial situation and the potential value of Franchise Agreements in formulating their plan. The case has been pending since February. The Montana Franchisees have been engaged in discussions since the case was filed. The Debtors have shown no indication of an intention to maintain the franchise operation as an ongoing part of the Debtors’ business. The Debtors exclusive period within which to file a Plan of Reorganization has been extended once from June 6 to August 10, 2004, pursuant to Order of the Bankruptcy Court dated June 2, 2004. The Debtors have not filed a plan as of August 10, 2004.

For the foregoing reasons, the Montana Franchisees are entitled to the entry of an order directing the Debtors to determine whether to assume or reject the contracts not later than September 30, 2004. In the interim, the Montana Franchisees request that the Court direct that the Debtors timely perform their obligations under the Franchise Agreements.

Finally, the Montana Franchisees request that the Court allow the unpaid post-petition amounts due the Montana Franchisees under the Franchise Agreements as an administrative expense under 11 U.S.C. § 503(b)(1) and direct that such payments be made to the Montana Franchisees according to the terms of the Franchise Agreements. As set forth in the Hawley Affidavit, the amounts due the Montana Franchisees are revenues generated solely through the efforts of the Montana Franchisees. The Debtors are collecting a franchise fee in exchange for which the Montana Franchisees are receiving no benefit. If these revenues are not the Montana

Franchisees' property, then they are certainly entitled to payment of the same as an actual, necessary cost and expense of preserving the estate.

### **CONCLUSION**

For the reasons set forth herein, the Court should direct the Debtors to assume or reject the Franchise Agreements not later than September 30, 2004, and if such determination is not made, that the Franchise Agreements be deemed rejected as of that date. Additionally, Movant requests that the Debtors be required to timely perform under the terms of the Franchise Agreements pending such determination, and that all post-petition amounts due be ordered paid to the Montana Franchisees on a timely basis.

Dated this 11th day of August, 2004.

/e/ Larry B. Ricke

Steven D. DeRuyter (#0022287 )

Larry B. Ricke (#0121800)

LEONARD, STREET AND DEINARD

Professional Association

150 South Fifth Street, Suite 2300

Minneapolis, Minnesota 55402

Telephone: 612-335-1500

Facsimile: 612-335-1657

ATTORNEYS FOR JANET AND ALLEN  
HAWLEY, TKO STAT, INC., AND  
INWEST, INC.

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In re:

Intrepid USA, Inc.,

Debtor.

Case No. 04-40416  
(Jointly Administered)

Chapter 11 Case

---

**ORDER GRANTING MOTION (1) TO COMPEL ASSUMPTION AND  
REJECTION OF EXECUTORY CONTRACTS AND (2) TO COMPEL TIMELY  
PERFORMANCE UNDER FRANCHISE AGREEMENT AND  
(3) TO GRANT ADMINISTRATIVE EXPENSE PRIORITY FOR  
POST-PETITION AMOUNTS DUE UNDER FRANCHISE AGREEMENTS**

---

The above-entitled matter came on for hearing before the Court on September 22, 2004, upon the Motion (1) to Require Assumption or Rejection of Executory Contracts (2) to Compel Timely Performance Under Franchise Agreement and (3) to Grant Administrative Expense Priority for Post-petition Amounts Due Under Franchise Agreements. Appearances were noted on the record. Based on the verified Motion, all of the files and records in this case, and the argument of counsel, it appearing that notice of the hearing on the motion was adequate, and the Court being fully advised in the premises,

IT IS ORDERED:

1. The Debtors are hereby required to assume or reject the Franchise Agreements not later than September 30, 2004. If the Debtors have not served the Montana Franchisees with written notice of intention to assume or reject the contract and filed a motion requesting approval of such assumption or rejection by that date, then the Franchise Agreements shall be deemed rejected.

2. The Debtors are ordered to timely perform all of their obligations to the Montana Franchisees under the Franchise Agreements, including payment obligations until such agreements are assumed or rejected.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of Bankruptcy Court

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In re:

Intrepid USA, Inc.,

Debtor.

Case No. 04-40416  
(Jointly Administered)

Chapter 11 Case

---

**UNSWORN CERTIFICATE OF SERVICE**

---

I, Susan Patterson, declare under penalty of perjury that on August 16, 2004, I served the attached Motion (1) to Require Assumption or Rejection of Executory Contract, (2) to Compel Timely Performance under Franchise Agreement and (3) to Grant Administrative Expense Priority for Post-Petition Amounts Due under Franchise Agreements by United States Mail on the following parties:

Intrepid USA, Inc.  
6600 France Avenue South, Suite 510  
Edina, Minnesota 55425

Faye Knowles  
Clinton E. Cutler  
Fredrikson & Byron  
200 South Sixth Street, Suite 4000  
Minneapolis, Minnesota 55402

Michael P. Massad  
Steven T. Holmes  
Hunton & Williams LLP  
30th Floor, Energy Plaza  
1601 Bryan Street  
Dallas, Texas 75201

QBF  
c/o Tom Hoerr  
5097 Nathan Lane  
Minneapolis, Minnesota 55442

DVI Financial Services Inc.  
c/o Clark T. Whitmore  
90 South Seventh Street, Suite 3300  
Minneapolis, Minnesota 55402

The Hays Group, Inc.  
c/o Stephen Lerum  
80 South Eighth Street, Suite 700  
Minneapolis, Minnesota 55402

DVI Business Credit Corp.  
c/o Richard M. Beck  
260 South Broad Street  
Philadelphia, Pennsylvania 19102-3163

McKesson Information Solutions  
c/o Brenda Lile  
1550 East Republic Road  
Springfield, Missouri 65804

U.S. Bank National Association  
c/o Michael R. Stewart  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402-3901

IOS Capital Inc.  
Bankruptcy Administration  
1738 Bass Road  
PO Box 13708  
Macon, Georgia 31208-3708

Todd J. Garamella  
Garamella Family Limited Partnership  
c/o John McDonald  
2800 LaSalle Plaza  
800 LaSalle Avenue  
Minneapolis, Minnesota 55402

Handi Medical Supply Inc.  
c/o Mary Benhardus  
2405 University Avenue West  
St. Paul, Minnesota 55114

Genesis Home Care Inc.  
c/o Michael Kashevatsky  
3445 Washington Drive  
Eagan, Minnesota 55122

Minnesota Department of Revenue  
Collection Enforcement  
551 Bankruptcy Section  
PO Box 64447  
St. Paul, Minnesota 55164

Internal Revenue Service  
Special Procedures Branch  
316 North Robert Street, Stop 5700  
St. Paul, Minnesota 55101

MVR Homecare Inc.  
c/o Vladimir Storchaf  
3435 Washington Drive  
Eagan, Minnesota 55122

Nationwide Advertising Service  
c/o Susan Bowers  
1 Infinity Corporate Centre Court  
Cleveland, Ohio 44125

U.S. Trustee  
1015 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, Minnesota 55415

U.S. Department of Justice  
c/o Roylene Champeaux  
600 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, Minnesota 55415

McKesson Information Solutions LLC  
c/o Jeffrey K. Garfinkle  
18400 Von Karman Avenue, Suite 800  
Irvine, California 92612

Lang-Nelson Associates  
c/o William I. Kampf  
Henson & Efron PA  
220 South Sixth Street, Suite 1800  
Minneapolis, Minnesota 55402

Committee of Unsecured Creditors  
c/o George H. Singer  
80 South Eighth Street, Suite 4200  
Minneapolis, Minnesota 55402

IRS Office of Chief Counsel  
650 Galtier Plaza  
380 Jackson Street  
St. Paul, Minnesota 55101

Whitten & Young  
c/o Gary L. Hacker  
PO Box 208  
Abilene, Texas 79604

Committee of Unsecured Creditors  
c/o Jeffrey K. Garfinkle  
895 Dove Street, Suite 400  
Irvine, California 92660-2917

Securities and Exchange Commission  
Bankruptcy Section  
175 West Jackson Boulevard Suite 900  
Chicago, Illinois 60604

Aberfeldy II Limited Partnership  
c/o J. David Leamon  
4000 Fountain Place  
1445 Ross Avenue  
Dallas, Texas 75202-2790

Riverside Contracting LLC  
c/o Neil Herskowitz  
PO Box 626  
Planetarium Station  
New York, New York 10024-0540

New Options Founders  
c/o Adam M. Spence  
105 West Chesapeake Avenue, Suite 400  
Towson, Maryland 21204

G-Fore Associates LLC  
c/o Bradford A. Steiner  
2320 Second Avenue, Suite 2000  
Seattle, Washington 98121

IBM Corporation  
c/o Beverly H. Shideler  
Two Lincoln Centre  
Oakbrook Terrace, Illinois 60181

Heller Financial Inc.  
c/o Thomas Lallier  
250 Marquette Avenue, Suite 1200  
Minneapolis, Minnesota 55401

Oracle Corporation  
c/o Debra Solle Healy  
18400 Von Karman Avenue, Suite 800  
Irvine, California 92612

MVR Home Healthcare Inc.  
c/o Matthew R. Burton  
100 South Fifth Street, Suite 2500  
Minneapolis, Minnesota 55402

Centurytel Inc.  
c/o Rex D. Rainach  
3622 Government Street  
Baton Rouge, Louisiana 70806-5720

Trowbridge Marketing Inc.  
c/o Michael T. Kallas  
4930 West 77th Street, Suite 210  
Edina, Minnesota 55435

ARA Recovery LLC  
c/o John R. McDonald  
2800 LaSalle Avenue  
800 LaSalle Avenue  
Minneapolis, Minnesota 55402

Les Nelson Investments  
c/o Mark E. Fosse  
206 South Broadway, Suite 505  
PO Box 549  
Rochester, Minnesota 55903

Nueces County  
c/o Diane W. Sanders  
1949 South IH 35  
PO Box 17428  
Austin, Texas 78760-7428

Bexar County  
c/o David G. Aelvoet  
711 Navarro, Suite 300  
San Antonio, Texas 78205

Healthcare Associates of Walterboro LLC  
c/o H. Flynn Griffin III  
PO Box 76  
Columbia, South Carolina 29202

Bizrocket.com Inc.  
c/o Downs and Associates  
255 University Drive  
Coral Gables, Florida 33134

Hays Group Inc.  
c/o Steven Scott  
3300 Edinborough Way, Suite 400  
Edina, Minnesota 55435

Dated: August 16, 2004

AMS Group LLC  
c/o John R. McDonald  
2800 LaSalle Plaza  
800 LaSalle Avenue  
Minneapolis, Minnesota 55402

Healthcare Business Credit Corp.  
c/o Steven W. Meyer  
45 South Seventh Street, Suite 3300  
Minneapolis, Minnesota 55402

TBJG LLC  
c/o John R. McDonald  
2800 LaSalle Plaza  
800 LaSalle Avenue  
Minneapolis, Minnesota 55402

CapitalSource Finance LLC  
c/o Steven Kluz, Sr.  
333 South Seventh Street, Suite 2000  
Minneapolis, Minnesota 55402

/e/ Susan Patterson