



## **TERMS AND CONDITIONS ABSORB SOFTWARE AUSTRALIA PTY LTD.**

THE ORDER FORM OF THESE SERVICE TERMS AND CONDITIONS (COLLECTIVELY, THE "AGREEMENT") SHALL CONSTITUTE THE ENTIRE AGREEMENT BETWEEN **YOU** ("CLIENT") AND ABSORB SOFTWARE AUSTRALIA PTY LTD. ("COMPANY"), CONCERNING USE OF THE COMPANY LEARNING MANAGEMENT SYSTEM (THE "SERVICE"). BY ORDERING OR OTHERWISE USING THE SERVICE, CLIENT AGREE TO AND ACCEPT THIS AGREEMENT IN ITS ENTIRETY, INCLUDING BUT NOT LIMITED TO THE SPECIFIC LIMITATIONS SET FORTH IN SECTIONS 6, 7, 8, 12, 14 AND 15. THE SERVICE MAY BE USED ONLY IN ACCORDANCE WITH THIS AGREEMENT. NO OTHER CONTRACT OR TERMS CONCERNING USE OF THE SERVICE MAY BE CREATED IN ANY OTHER MANNER, INCLUDING BY MEANS OF PURCHASE ORDERS OR SIMILAR DOCUMENTS, SAVE FOR AMENDMENTS AS SET FORTH IN SECTION 15.14 AND MUTUALLY AGREED ADENDUMS.

**DEFINITIONS:** In this AGREEMENT, the following terms shall have the following definitions:

**"Admin"** means a CLIENT User who is also a system Administrator

**"Affiliate"** means, with respect to any entity, any other entity directly or indirectly controlling or controlled by, or under common control with, such entity or one or more of the other Affiliates of that entity (or a combination thereof). For purposes of this definition, an entity shall control another entity if the first entity: (i) owns, beneficially or of record, more than fifty percent (50%) of the voting securities/shares of the other entity; or (ii) has the ability to elect a majority of the directors of the other entity.

**"Client Content"** means courses, programs, materials, and other collateral uploaded by CLIENT or on CLIENT's behalf to the SERVICE.

**"Client Data"** means any and all data and information of any kind or nature submitted by CLIENT, or received on behalf of CLIENT, in connection with the SERVICE.

**"Fees"** means all amounts payable by CLIENT to COMPANY for the provision of the SERVICE.

**"Onboarding Fees"** means the fees payable for initial implementation and onboarding. These Fees occur only once at the beginning of the provision of the SERVICE.

**"One-time Fees"** means Fees that occur and are payable only once for the provision of the SERVICE.



**"Order Form"** means the form whereby CLIENT agrees to purchase the SERVICE from COMPANY as outlined therein, including any amendments or exhibits thereto, and Client Check List. The Order Form must be executed by both parties, and stands in addition to the AGREEMENT, but does not supersede rights and responsibilities as outlined in the AGREEMENT.

**"SERVICE"** means the COMPANY Learning Management System (LMS), a wholly Company owned proprietary Internet-based software application for the administration, documentation, tracking, and reporting of training programs, classroom and online events, e-learning programs, and training content. The "SERVICE" includes all related SERVICES, software, associated offline components, and other designated websites, but excluding Third Party Applications, as provided by the COMPANY, and which are agreed to purchase by CLIENT as set forth in an Order Form.

**"Third-Party Applications"** refers to online, Internet-based applications and offline software products, if any, that are provided by third parties and interoperate with the SERVICE, such as web browsers.

**"Users"** means individuals who are authorized by CLIENT to use the SERVICE, for whom subscriptions to the SERVICE have been purchased, and to whom CLIENT has supplied user identifications and/or passwords. Users may include but are not limited to CLIENT's employees, consultants, contractors, agents, or third parties approved by CLIENT.

Terms not otherwise defined above have the meaning given to them elsewhere in this AGREEMENT

## **1. USE OF THE SERVICE**

1.1 COMPANY reserves the right to provide emergency updates for the purpose of security updates and emergent functionality patches from time to time without notice. Any new features that augment or enhance the SERVICE, including the release of new tools and resources, shall be subject to this AGREEMENT.

1.2 The SERVICE is provided to CLIENT and CLIENT Users on a subscription basis as provided in Order Form, and as otherwise provided in this AGREEMENT. CLIENT's right to use the SERVICE is limited therein.

## **2. THE SERVICE**

2.1 COMPANY will provide the following SERVICE to CLIENT as provided in the Order Form. Unless otherwise noted, SERVICE Fees are provided in the Order Form.



## 2.2 SETUP SERVICES

2.2.1 **Branding.** Initial branding services include incorporating CLIENT corporate trademarks, logos, and colors into the landing page, dashboard, and certificates. Initial branding services include up to eight (8) hours of design, including changes and approval, and up to two (2) custom certificates. Additional branding requests, and any changes requested by CLIENT after initial branding approval are subject to a design fee of A\$200/hour.

2.2.2 **Administrative Setup.** Initial administrative setup services include those setup services selected by CLIENT and indicated on the Order Form. Any additional administrative setup services, or changes requested after initial administrative setup, are subject to a fee of A\$200/hour.

2.2.3 **Systems Integration.** If required, integration of the SERVICE with custom or specialized Third-Party Applications and/or external data sources, are subject to a programming fee of A\$200/hour applies.

2.2.4 **Storage.** The SERVICE includes unlimited storage for Client Content

## 2.3 TRAINING SERVICES

2.3.1 **Training Program.** Up to six (6) hours of scheduled telephone/webinar training, including the following: (a) Session 1: On-boarding, to review branding, administrative setup and operation, and new client orientation; (b) Session 2: Pre-live training, to teach administrative and user-side software operations to the system administrator; and (c) Session 3: Post-live training, to ensure all systems are working properly, answering specific questions, and trouble-shooting as required. Any additional training services are subject to a fee of A\$200/hour. Additional training services include any training of replacement system administrators.

## 2.4 OPERATIONS

2.4.1 **Access to SERVICE.** COMPANY shall use all commercially reasonable efforts to make the SERVICE available twenty-four (24) hours a day, seven (7) days a week, except for: (a) planned downtime, which may include but is not limited to software updates and hardware maintenance, or (b) any unavailability caused by circumstances beyond COMPANY's reasonable control, including without limitation, acts of God, acts of government, flood, fire, earthquakes, civil unrest, acts of terror, strikes or other labour problems (other than those involving COMPANY employees), or Internet Service Provider failures or delays. In the case of planned downtime, COMPANY will strive to provide seven (7) days advance notice and shall schedule to the extent practicable all planned downtime during weekend hours (18:00 MST/MDT Friday to 03:00 MST/MDT Monday). CLIENT access to the SERVICE includes (a) full



and unlimited use of Client Content, and (b) all updates, upgrades and enhancements that COMPANY makes publicly available. COMPANY also maintains regular (hourly, daily, weekly) backups that are hosted offsite for up to 30 days. In the event that CLIENT requires an independent backup to restore its own systems, CLIENT may request use of backups for User and administrative data, subject to a fee of A\$200/hour.

## 2.5 ADDITIONAL SERVICES

2.5.1 **Consultation.** On receiving a request for SERVICE customization or management consultation, COMPANY will arrange a needs assessment separate from the primary SERVICE, and provide a quote prior to any development. COMPANY reserves the right to refuse specific customization requests if, in its own estimation, the customization will negatively affect the SERVICE and/or other client operations. Customization projects often take several weeks or months to implement. Customization work is billed at A\$275/hour. Consultation work is billed at A\$200/hour.

2.5.2 **Add-on Services.** In the event that CLIENT purchases any of the add-on services listed hereunder, that service is limited to:

- I. Single Sign-on: Up to 3 hours of consulting on setup and troubleshooting
- II. RESTful API: Up to 3 hours of consulting on setup and troubleshooting
- III. Historical Data Import: Up to 10 hours of support for scoping, configuration, and import work
- IV. Scheduled Data Import: Up to 10 hours of support for scoping, configuration, and import work
- V. Scheduled Data Export: Up to 6 hours of support for scoping, configuration, and import work

## 2.6 TECHNICAL SUPPORT

2.6.1 **Technical and Support Services.** COMPANY will provide Premium support at no cost. Support will be provided in the English language and includes: (i) troubleshooting, error correction, bug fixes, and assistance with LMS functionality; (ii) Access to technical support is provided by web or by phone as outlined herein; (iii) Access to comprehensive Knowledge Base, (iv) Dedicated onboarding assistance and training, and (v) Access to the Absorb Academy. Technical support is provided directly to CLIENT Admins. COMPANY does not provide technical support for Third-Party Applications.

2.6.2 **Support Availability.** Technical support is available 24/7 via web, e-mail, and by phone.



2.6.3 **Support Levels.** Once a technical support request has been received, and all required information has been gathered, the request will be assigned a severity level as defined below:

- **Level 1:** The SERVICE is not functioning or is materially unavailable. The SERVICE is not available to a majority of Users, or the production system is down, or all features/functions are unavailable. For example: No course content is available, no Users can login, or the administrative interface is unavailable.
  - **Target Response Time: 2 hours**
- **Level 2:** The SERVICE is functioning, but with significant impairment. The SERVICE is not available to a significant proportion of Users or a major area of the SERVICE is not functioning. For example: A department of Users cannot access the SERVICE, the Courses section of the administrative interface is unavailable, or new enrollments cannot be made.
  - **Target Response Time: 4 hours**
- **Level 3:** The SERVICE is functioning but with minor impairment. The SERVICE is not available to a small proportion of CLIENT Users or a specific area of the SERVICE is not functioning. For example: Certificates are not displaying, an individual report is not accessible, or enrollment emails are not sending out.
  - **Target Response Time: 8 hours**
- **Level 4:** Any request that is not level 1, 2, or 3 is a severity level 4.
  - **Target Response Time: 24 hours**

Response time applies to both the initial response as well as any subsequent responses.

In the event that CLIENT upgrades to Elite Support, in addition to the aforementioned, CLIENT shall also receive (i) Strategic client support, (ii) business reviews, and (iii) SSL certificate for custom URL

### 3. **FEES AND PAYMENT FOR SERVICE.**

3.1 **User Fees.** CLIENT shall promptly pay all Fees specified in all Order Forms. Except as otherwise specified herein or in an Order Form, (a) Fees are quoted and payable in Australian Dollars, (b) Fees are based on the SERVICE User subscription Fees as defined in the Order Form, (c) payment obligations are non-cancellable and Fees paid are non-refundable, and (d) the number of User subscriptions purchased cannot be decreased during the relevant subscription term stated on the Order Form.



3.1.1 **Hosted Fees.** Hosted User subscription Fees are based on monthly periods that begin on the subscription start date and each monthly anniversary thereof. Fees for User subscriptions added in the middle of a monthly period will be charged for that full monthly period and the monthly periods remaining in the subscription term.

3.1.2 **External Fees.** External User Fees are comprised of either a monthly or annual hosting fee, plus a one-time per user charge as defined in the Order Form. External User licenses may not be transferred from one user to another.

### 3.2 **Invoicing and Payment.**

3.2.1 **Payment by Credit Card.** If paying by credit card, CLIENT shall provide COMPANY with valid and updated credit card information. CLIENT authorizes COMPANY to charge such credit for all Fees listed in the Order Form for the initial subscription term and any subsequent renewal subscription term(s) as set forth in the AGREEMENT.

3.2.2 **Payment by Other Method.** If payment will be by a method other than a credit card, CLIENT shall provide COMPANY with a valid purchase order or alternative purchase documentation reasonably acceptable to COMPANY.

3.2.3 **Invoicing.** If required by CLIENT, COMPANY shall provide invoice in advance and otherwise in accordance with the relevant Order Form. Unless otherwise stated in the Order Form, invoiced charges are due net thirty (30) days from the invoice date. CLIENT is responsible for maintaining complete and accurate billing and contact information.

3.2.4 **Timing.** At the date of signature, COMPANY will invoice the Onboarding Fees and One-time Fees. Within thirty (30) days of signature of the Order Form, COMPANY will invoice subscription and any other remaining Fees. Thereafter, subscription Fees shall be billed in advance annually, or as otherwise stipulated by the Order Form.

3.3 **Overdue Charges.** If complete payment is not received by the due date, and unless otherwise provided in the Order Form, then at COMPANY's discretion (a) such charges may accrue late interest at the rate of 1.5% of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower, from the date such payment was due until the date paid, and/or (b) future subscription renewals and Order Forms may be conditioned on payment terms shorter than those specified in Section 3.2 (Invoicing and Payment).



3.4 **Suspension of SERVICE and Acceleration.** If any amount owing under this or any other AGREEMENT for the SERVICE or other SERVICES is thirty (30) or more days overdue, COMPANY may, without limiting its other rights and remedies, accelerate unpaid fee obligations under such AGREEMENTs so that all such obligations become immediately due and payable, and suspend SERVICE and other SERVICES until such amounts are paid in full.

3.5 **Payment Disputes.** COMPANY shall not exercise its rights under Section 3.3 (Overdue Charges) or 3.4 (Suspension of SERVICE and Acceleration) if the applicable charges are under reasonable and good-faith dispute and both parties are cooperating diligently to resolve the dispute.

3.6 **Taxes.** Unless otherwise stated in writing, SERVICE Fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including but not limited to value-added, sales, use or withholding taxes, assessable by any local, state, provincial, federal or foreign jurisdiction (collectively referred to as "Taxes"). CLIENT shall be responsible for paying all Taxes associated with any and all purchases hereunder. Should COMPANY obtain the legal obligation to pay or collect Taxes for which CLIENT is responsible under this paragraph, the appropriate amount shall be invoiced to and paid by CLIENT.

#### 4. **TERM AND TERMINATION**

4.1 **Term of AGREEMENT.** This AGREEMENT commences on the start date specified in the applicable Order Form and continues for the subscription term specified therein. Except as otherwise specified in the applicable Order Form, this AGREEMENT shall automatically renew for additional periods equal to twelve (12) months, unless CLIENT provides COMPANY written notice of non-renewal at least thirty (30) days before the end of the applicable subscription term. The per-unit pricing during any such renewal term shall be the same as that during the prior term unless COMPANY has provided written notice of a pricing increase at least thirty (30) days before the end of such prior term, in which case the pricing increase shall be effective upon renewal and thereafter.

4.2 **Termination for Cause.** Either party may terminate this AGREEMENT for cause (a) upon thirty (30) days written notice to the other party of a material breach if such breach remains uncured at the expiration of such period, or (b) if the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, examinership, liquidation or assignment for the benefit of creditors.

4.3 **Refund or Payment upon Termination.** Upon any termination for cause by CLIENT, COMPANY shall refund any prepaid Fees covering the remainder of the term of all subscriptions after the effective date



of termination. Upon termination for cause by COMPANY, CLIENT shall pay any unpaid Fees covering the remainder of the term of all Order Forms after the effective date of termination. In no event shall any termination relieve CLIENT of the obligation to pay any Fees payable for the period prior to the effective date of termination. Notwithstanding the foregoing, External User Fees are non-refundable.

**4.4 Destruction/Return of Client Data.** On termination of the provision of the SERVICE, COMPANY at written CLIENT request shall return or destroy Client Data, and shall delete any existing copies of such Client Data unless required by law to refrain from same, whereupon CLIENT will receive written notification of same.

**4.5 Surviving Provisions.** Section 3 (Fees and Payment for SERVICE), Section 4.4 (Destruction/Return of Client Data), Section 5 (Proprietary Rights), Section 12 (Confidentiality), Section 13 (Warranties and Disclaimer), Section 14 (Mutual Indemnification), Section 15 (Limitation of Liability), and Section 16 (General Terms) of this AGREEMENT shall survive any termination or expiration of this AGREEMENT.

## **5. PROPRIETARY RIGHTS**

**5.1 Reservation of Rights.** Subject to the limited rights expressly granted hereunder, COMPANY reserves all right, title and interest in and to the SERVICE, including all related intellectual property rights. No rights are granted to CLIENT hereunder other than as expressly set forth herein. The SERVICE is protected by copyright and other intellectual property laws and treaties. COMPANY grants a time limited, non-exclusive, and non-transferable license (as provided in the Order Form) to CLIENT to use the SERVICE. COMPANY or its licensors own the title, copyright, and all other intellectual property rights in the SERVICE. The SERVICE is licensed, not sold, and this AGREEMENT only gives CLIENT limited rights of use. COMPANY reserves all other rights. Unless applicable law gives CLIENT more rights despite this limitation, CLIENT may use the SERVICE only as expressly permitted in this AGREEMENT. CLIENT may not, unless CLIENT have received prior written consent of COMPANY (which may be arbitrarily withheld), do any of the following: (a) work around any technical limitations in the SERVICE; (b) reverse engineer, decompile or disassemble the SERVICE; (c) publish the SERVICE for others to copy; (d) permit any third party to access the SERVICE except as permitted herein; (e) rent, lease, sell, or lend the SERVICE; (f) create derivate works based on the SERVICE; (g) use the SERVICE for commercial software hosting SERVICES; (h) access the SERVICE in order to build a competitive product or SERVICE, or copy any features, functions or graphics of the SERVICE; or (i) use the SERVICE in any way that is against the law.

**5.2 Ownership of Client Content and Data.** CLIENT exclusively owns all right, title and interest in and to all of CLIENT content and data. CLIENT grant COMPANY a personal, non-exclusive, royalty-free,





non- transferrable (except as permitted under Section 16.10), irrevocable license to use Client Data for internal reference, research, and analysis for the purpose of providing technical support and benchmarking system usage or performance.

5.3 **Suggestions and Custom Enhancements.** COMPANY shall have a royalty-free, worldwide, transferable, sub-licensable, irrevocable, perpetual license to use or incorporate into the SERVICE any suggestions, enhancement requests, recommendations or other feedback provided by CLIENT, including Users, relating to the operation of the SERVICE.

6. **ACCEPTANCE.** Upon execution of an Order Form by both parties, the parties acknowledge and agree to the terms of this AGREEMENT and each party represents that they have the legal right, capacity, and authority to enter into this AGREEMENT.

7. **UNAUTHORIZED USE.** CLIENT may not access the SERVICE if CLIENT is a direct competitor of COMPANY, except with prior written consent of COMPANY. In addition, CLIENT may not access the SERVICE for purposes of monitoring its availability, performance or functionality, or for any other benchmarking or competitive purposes without COMPANY's express written permission.

8. **PURCHASED SERVICE.** COMPANY shall make the SERVICE available to CLIENT pursuant to this AGREEMENT and the applicable Order Form during a subscription term. CLIENT agrees that CLIENT use hereunder is neither contingent on the delivery of any future functionality or features nor dependent on any oral or written public comments made by COMPANY regarding future functionality or features, save and except as mutually agreed upon in writing by the parties. Unless otherwise specified in the applicable Order Form, (a) the SERVICE is purchased as User subscriptions and may be accessed by no more than the specified number of Users; (b) additional User subscriptions may be added during the subscription term at the same pricing as that for the pre-existing subscriptions, prorated for the remainder of the subscription term in effect at the time the additional User subscriptions are added; (c) the added User subscriptions shall terminate on the same date as the pre-existing subscriptions; and (d) User subscriptions are for designated Users and cannot be shared or used by more than one User but may be reassigned to new Users replacing former Users who no longer require ongoing use of the SERVICE and have been deleted from the User Database.

9. **CLIENT RESPONSIBILITIES.**

9.1 CLIENT will ensure that:



9.1.1 CLIENT shall, except as otherwise provided in an Order Form, (a) be responsible for all Users' compliance with this AGREEMENT; (b) be solely responsible for the accuracy, quality, integrity and legality of CLIENT content and of the means by which CLIENT acquired CLIENT content; (c) use commercially reasonable efforts to prevent unauthorized access to or use of the SERVICE, and notify COMPANY promptly of any such unauthorized access or use, and (d) use the SERVICE only in accordance with applicable laws and government regulations and any instruction manuals which COMPANY may provide.

9.1.2 CLIENT shall not (a) make the SERVICE available to anyone other than Users, (b) sell, resell, rent or lease the SERVICE, use the SERVICE to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third party privacy rights, (d) use the SERVICE to store or transmit malicious code, (e) interfere with or disrupt the integrity or performance of the SERVICE or third party content contained therein, or (f) attempt to gain unauthorized access to the SERVICE or its related systems or networks.

9.2 It shall be the responsibility of CLIENT to be familiar with and abide by all applicable local, national and international laws and regulations (including but not limited to policies and laws related to the privacy of personal information of Users) in relation to the use of the SERVICE. CLIENT is solely responsible for all acts or omissions that occur under CLIENT's account for use of the SERVICE. COMPANY does not and will not interpret any laws, rules, or regulations for CLIENT, and CLIENT is ultimately responsible for making informed decisions regarding the data collection of Users and the legalities of such collection, use or disclosure. CLIENT herein represents, covenants, and warrants that CLIENT shall use the SERVICE only in compliance with this AGREEMENT, any applicable Order Form(s), and all applicable Addenda and/or Appendices.

## 10. DATA PRIVACY REGULATION

10.1 **GDPR.** If CLIENT uploads any Personally Identifiable Information belonging to any citizen of the European Union, then the terms of the Data Processing Addendum shall also apply.

10.2 It shall be the responsibility of the CLIENT to notify COMPANY if at any time CLIENT uploads Sensitive, Protected Health Information, or any other similar data. Unless expressly agreed herein, COMPANY does not warrant compliance with specific data privacy regulations.

## 11. THIRD PARTY PROVIDERS

11.1 **Acquisition of Third-Party Products and Services.** Any other acquisition by CLIENT of third party products or services (for example web browsers), including but not limited to Third-Party Applications



and implementation, customization and other consulting services, is solely between CLIENT and the applicable third party provider. COMPANY does not warrant or support third party products or services.

**11.2 Third-Party Applications and Client Content and Data.** If CLIENT installs or enables Third-Party Applications for use with the SERVICE, CLIENT acknowledge that COMPANY may allow providers of those Third-Party Applications to access CLIENT content and data as required for the inter-operation of such Third-Party Applications with the SERVICE. COMPANY shall not be responsible for any disclosure, modification or deletion of CLIENT content or data resulting from any such access by Third-Party Application providers.

## 12. CONFIDENTIALITY

**12.1 Definition of Confidential Information.** As used herein, "Confidential Information" means all confidential information disclosed by a party ("Disclosing Party") to the other party ("Receiving Party"), whether orally, or in writing, or in electronic form, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure. CLIENT Confidential Information shall include Client Content and Data, including personal information. Confidential Information of each party shall include CLIENT pricing for the SERVICE, as well as confidential business and marketing plans, technology and technical information, product plans and designs, and business processes disclosed by such party. However, Confidential Information shall not include any information that (a) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party, (b) was known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party, (c) is received from a third party without breach of any obligation owed to the Disclosing Party, or (d) was independently developed by the Receiving Party.

**12.2 Protection of Confidential Information.** Except as otherwise permitted in writing by the Disclosing Party, (a) the Receiving Party shall use the same degree of care that it uses to protect the confidentiality of its own confidential information of like kind (but in no event less than reasonable care) and shall not disclose or use any Confidential Information of the Disclosing Party for any purpose outside the scope of this AGREEMENT, and (b) the Receiving Party shall limit access to Confidential Information of the Disclosing Party to those of the Receiving Party's employees, contractors and agents who need such access for purposes consistent with this AGREEMENT and who have signed confidentiality Agreements with the Receiving Party containing protections no less stringent than those herein.

**12.3 Protection of Client Content and Data.** Without limiting the above, COMPANY shall maintain appropriate administrative, physical, and technical safeguards for the protection of the security,



confidentiality and integrity of Client Content and Data and shall only use such data as set out in this AGREEMENT and in accordance with CLIENT instructions. Except as authorized by CLIENT, COMPANY shall not: (i) modify Client Content and Data, (ii) disclose Client Content and Data, except as compelled by law or in accordance with Section 12.4 (Compelled Disclosure), or (iii) access Client Content and Data except to provide the SERVICE or prevent or address SERVICE or technical problems, or at CLIENT request in connection with customer support matters. COMPANY shall ensure that all staff who have access to CLIENT personal data have committed to appropriate obligations of confidentiality. In addition, COMPANY shall, as soon as reasonably practicable, notify CLIENT of any Reportable Breach and provide CLIENT with reasonable assistance to respond and mitigate that Reportable Breach.

**12.4 Compelled Disclosure.** The Receiving Party may disclose Confidential Information of the Disclosing Party if it is compelled by law to do so, provided the Receiving Party gives the Disclosing Party prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at the Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure. If the Receiving Party is compelled by law to disclose the Disclosing Party's Confidential Information as part of a civil proceeding to which the Disclosing Party is a party, and the Disclosing Party is not contesting the disclosure, the Disclosing Party will reimburse the Receiving Party for its reasonable cost of compiling and providing secure access to such Confidential Information.

**13. WARRANTIES AND DISCLAIMERS.** THE SERVICE IS DISTRIBUTED "AS IS" WITHOUT ANY WARRANTIES, WHETHER WRITTEN, ORAL, STATUTORY, EXPRESS OR IMPLIED. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, COMPANY SPECIFICALLY DISCLAIMS ANY WARRANTIES OF NON-INFRINGEMENT, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. This waiver of warranty affects CLIENT specific legal rights, but is without prejudice to any rights to which CLIENT are entitled (to the extent that they cannot be waived) under applicable law. For example, CLIENT may have rights which may vary depending upon where CLIENT is located. Some jurisdictions do not allow limitations on implied warranties, so the limitations above may not apply to CLIENT.

**14. MUTUAL INDEMNIFICATION.**

**14.1 Indemnification by COMPANY.** COMPANY shall defend CLIENT against any claim, demand, suit, or civil proceeding, of any kind whatsoever ("Claim") made or brought against CLIENT by a third party alleging that the use of the SERVICE as permitted hereunder infringes or misappropriates the intellectual property rights of a third party, and shall indemnify CLIENT for any damages finally awarded against, and for reasonable legal Fees incurred by, CLIENT in connection with any such Claim; provided, that CLIENT (i) promptly give COMPANY written notice of the Claim; (ii) give COMPANY sole control of the defense and



settlement of the Claim (provided that COMPANY may not settle any Claim unless the settlement unconditionally releases CLIENT of all liability); and (iii) provide to COMPANY all reasonable assistance at CLIENT expense.

**14.2 Indemnification by CLIENT.** CLIENT shall defend COMPANY against any Claim made or brought against COMPANY by a third party alleging that CLIENT content, or CLIENT use of the SERVICE in violation of this AGREEMENT, infringes or misappropriates the intellectual property rights of a third party or violates applicable law (including privacy laws), and CLIENT shall indemnify COMPANY for any damages finally awarded against, and for reasonable legal fees incurred by, COMPANY in connection with any such Claim; provided, that COMPANY (i) promptly gives CLIENT written notice of the Claim; (ii) gives CLIENT sole control of the defense and settlement of the Claim (provided that CLIENT may not settle any Claim unless the settlement unconditionally releases COMPANY of all liability); and (iii) provides to CLIENT all reasonable assistance at COMPANY's expense.

**14.3 Exclusive Remedy.** This Section 13 (Mutual Indemnification) states the indemnifying party's sole liability to, and the indemnified party's exclusive remedy against, the other party for any type of Claim described in this Section.

## **15. LIMITATION OF LIABILITY.**

**15.1 Limitation of Liability.** In no event shall COMPANY's aggregate liability arising out of or related to this AGREEMENT, whether in contract, tort, or under any other theory of liability, exceed an amount equal to one-twelfth (1/12) of the total amount paid by CLIENT hereunder to COMPANY in the twelve (12) consecutive months preceding the incident causing the claim. The foregoing shall not limit the payment obligations under Section 3 (Fees and Payment for SERVICE).

**15.2 Exclusion of Certain Damages.** In no event shall COMPANY have any liability to CLIENT for any lost profits or revenues or for any indirect, special, incidental, consequential, or punitive damages however caused, whether in contract, tort or under any other theory of liability, and whether or not COMPANY has been advised of the possibility of such damages. The foregoing disclaimer shall not apply to the extent prohibited by applicable law.

## **16. GENERAL TERMS.**

**16.1 Notice.** All notices which may be given under this AGREEMENT shall be delivered in person, by email, courier, or sent by regular mail (a) to Absorb Software Inc., #275 - 1011 9th Ave SE, Calgary, Alberta,



Canada T2G 0H7, email: legal@absorblms.com, or (b) to CLIENT at the contact information contained in CLIENT Order Form.

**16.2 Manner of Giving Notice.** Except as otherwise specified in this AGREEMENT, all notices, permissions and approvals hereunder shall be in writing and shall be deemed to have been given upon: (i) personal delivery, (ii) the second business day after mailing, or (iii) the first business day after sending by email (provided email shall not be sufficient for notices of termination or an indemnifiable claim). Notices to CLIENT shall be addressed to the system administrator designated by CLIENT, and in the case of billing-related notices, to the relevant billing contact designated by CLIENT. Either party shall give notice of a change of address or contact person to the other party.

**16.3 Governing Law and Jurisdiction.** This AGREEMENT shall be governed by, and be construed in accordance with, the laws of the state of New South Wales. The parties consent to the exclusive venue and jurisdiction of the District Court of New South Wales for any action commenced relating to this AGREEMENT or the transactions contemplated hereby.

**16.4 Waiver of Jury Trial.** Each party hereby waives any right to jury trial in connection with any action or litigation in any way arising out of or related to this AGREEMENT.

**16.5 Relationship of the Parties.** The parties are independent contractors. This AGREEMENT does not create a partnership, franchise, joint venture, agency, fiduciary or employment relationship between the parties.

**16.6 No Third-Party Beneficiaries.** There are no third-party beneficiaries to this AGREEMENT.

**16.7 Waiver and Cumulative Remedies.** No failure or delay by either party in exercising any right under this AGREEMENT shall constitute a waiver of that right. Other than as expressly stated herein, the remedies provided herein are in addition to, and not exclusive of, any other remedies of a party at law or in equity.

**16.8 Severability.** If any provision of this AGREEMENT is held by a court of competent jurisdiction to be contrary to law, the provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this AGREEMENT shall remain in effect.

**16.9 Legal Fees.** CLIENT shall pay on demand all of COMPANY's reasonable legal fees and other costs incurred by COMPANY to collect any fees or charges due to COMPANY under this AGREEMENT following any breach by CLIENT of this AGREEMENT.



16.10 **Assignment.** Neither party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the prior written consent of the other party (not to be unreasonably withheld). Notwithstanding the foregoing, either party may assign this AGREEMENT in its entirety (provided all Order Forms are also assigned), without consent of the other party, to its Affiliate or in connection with a merger, acquisition, corporate reorganization, or sale, of all or substantially all of its assets not involving a direct competitor of the other party. A party's sole remedy for any purported assignment by the other party in breach of this paragraph shall be, at the non-assigning party's election, termination of this AGREEMENT upon written notice to the assigning party. In the event of such a termination due to a breach by CLIENT, COMPANY shall be entitled to retain any prepaid Fees paid by CLIENT. Subject to the foregoing, this AGREEMENT shall bind and inure to the benefit of the parties, their respective successors and permitted assigns.

16.11 **Entire AGREEMENT.** These SERVICE Terms and Conditions together with all applicable Order Forms, and any exhibits or amendments thereto, constitutes the entire AGREEMENT between the parties and supersedes all prior and contemporaneous Agreements, proposals or representations, written or oral, concerning its subject matter. To the extent of any conflict or inconsistency between the provisions in the body of these SERVICE Terms and Conditions and any applicable Order Form, the terms of such Order Form shall prevail.

16.12 **Conflict.** If there is any inconsistency between the terms of the AGREEMENT, Order Form, and Data Processing Agreement (if applicable), a term contained in a document higher in the list shall have priority over one contained in a document lower in the list below:

1. Data Processing Agreement (if applicable);
2. Order Form; and
3. AGREEMENT.

16.13 **Modification:** COMPANY reserves the right to amend this AGREEMENT from time to time, in which case the new AGREEMENT will supersede prior versions. COMPANY will notify CLIENT of material changes not less than ten (10) days prior to the effective date of any such amendment, and CLIENT continued use of the SERVICE following the effective date of any such amendment will constitute consent to any such amendment.

