

Terms & Conditions

1. **DEFINITIONS.** The following terms have the following meanings:

1.1 **"Brainier LMS"** means the cloud-based Learning Management System and all included hosted software modules and included content, as applicable, made available by for access by Customer through the Subscription Service, whether owned by or licensed to Licensor.

1.2 **"Confidential Information"** means any non-public information disclosed by one party to the other party that is: (a) at the time of disclosure identified or marked as confidential or proprietary information; or (b) by its nature and the circumstances should be considered, or is reasonably obvious to be confidential information, in all cases including, but not limited to, information regarding either party's technology, strategy, operations, finances, sales, supply chain, transactions and customers.

1.3 **"Content"** means any and all courseware licensed for use to Customer, the ownership of which is retained by Brainier or its licensors.

1.4 **"Courseware"** means only the specific subject matter created by Licensor or its licensors that is the subject of a mutually agreed upon Statement of Work, proposal or investment summary. (Collectively **"Course(s)"**)

1.5 **"Customer Supplied Content"** means any information, data, user information, training materials and all other customer supplied information processed through, uploaded, or submitted by Customer to the LMS. Any Intellectual Property Rights in connection with Content provided by Customer shall be and remain the exclusive property of Customer.

1.6 **"Active User"** means any user authorized by the terms of the Subscription to use the LMS and eligible for log-in during the quarter or other term specified in this agreement. The number of authorized Active users is set forth in the Subscription Inclusions and will be billed according to the payment schedule.

1.7 **"Intellectual Property Rights"** means common law or statutory: (a) patents, patent applications, and patent rights; (b) rights associated with original works, authorship, moral rights, copyrights and all their exclusive rights; (c) rights relating to the protection of trade secrets and Confidential Information; and (d) now existing or hereafter filed, issued or acquired intellectual property rights.

1.8 **"Proposal"** means a document including a Statement of Work and investment summary mutually executed by the parties that by its terms is incorporated into this Agreement and describes the Services to be provided by Licensor.

1.9 **"Proprietary Tools"** means technology that Licensor makes, creates, conceives, invents or develops at any time for any reason including Licensor's or its licensor's products, services, technologies, original works, documents, information, designs, designations, discoveries, inventions, data whether in computer readable form or otherwise, methods, formulae, tools, computer programs (including source code) and other items that are possessed, used, made, created, authored, conceived, invented, disclosed or developed by Licensor.

1.10 **"Services"** means the services including the Subscription Service provided pursuant to this Agreement and, if applicable, a Statement of Work.

1.11 **"Subscription" or "Subscription Service"** means the Learning Management System or LMS and all online or web-based services included with the LMS that is hosted, served, or managed by Licensor or a third-party service provider on behalf of Licensor and provided to Customer.

2. **SCOPE OF SUBSCRIPTION; TERM LICENSE; RESTRICTIONS.** Licensor grants Customer a non-exclusive, non-transferable, worldwide, term license on a hosted basis to use and access the LMS, all included functionality of the LMS, and any purchased Optional Courses for Customer's Active Users; all of which is subject to the terms of this Subscription Agreement.

This license grant does not grant Customer (a) the right to allow third party vendors, outsourcers or any other third party use or access the LMS, except for Active Users or with Licensor's written consent, (b) to modify or reverse engineer the LMS; or (c) any right, title, or interest in the LMS, any functionality or any Courses except for the license grant for the Subscription Service and any updates, upgrades or modifications that are included in this Agreement and which shall remain Licensor Proprietary Tools. Customer will not lease, loan, resell, distribute, transfer or otherwise grant any rights in the Subscription Service or Licensor's Proprietary Tools in any form to any other party who is not an authorized Active user.

3. **CONTENT.** Customer retains all right and title in all content provided to Licensor by or on behalf of Customer for Course(s) including but not limited to text and media files, all Customer Supplied Content including text and media files, and all Content specifically and solely created solely for Customer except that if Content includes stock images or Content licensed from third parties then third party licensing rights to use such Content will be transferred to Customer but only to the extent applicable.

4. **HOSTING.** During the term of the Subscription Service, Licensor shall host, operate, and maintain the Subscription Service in the AWS S3 Global Cloud Hosting. The Subscription Service will be made available to Customer twenty-four (24) hours a day, seven (7) days a week excluding: (a) down time for scheduled network, hardware or service maintenance and/or upgrades, or (b) down time caused by internet failures or delays involving hardware or software not within Licensor's reasonable control. In no event will scheduled maintenance or upgrades occur Monday through Friday, between the hours of 8:00 am and 7:00 pm Central Standard Time.

5. **DATA SECURITY.** Licensor will maintain, implement and enforce safety and security procedures in operating the Subscription Service that are equal to or better than industry standards for such networks but in any case in accordance with a reasonable standard of care. Licensor must continually implement and keep current such security and safety procedures for the Subscription Service.

6. **BACK-UP.** Licensor shall perform routine backups of the Subscription Service, including Customer Supplied Content. In the event any Customer Supplied Content is corrupted, lost, or deleted from the Subscription Service, Licensor shall use all reasonable efforts to restore any Customer Supplied Content from backup media as soon as commercially practicable.

7. **BUSINESS CONTINUITY PLAN.** Licensor warrants that it has developed and will at all times during the term of this Agreement maintain a Business Continuity Plan. Such BCP plan ensures that the Subscription Service continues unaffected and in accordance with the Agreement.

8. **SUPPORT.** Licensor will furnish Customer with standard Active User and technical telephone and e-mail support from Monday thru Friday, 7:00am to 6:00pm CST except generally recognized holidays unless otherwise agreed upon in writing.

9. **PAYMENT TERMS.** Licensor shall invoice Customer and Customer agrees to pay Licensor based on the fees and expenses set forth in this Agreement within thirty (30) days of the date of each invoice. Active Users in excess of the number specified in this agreement as specified in the Subscription Terms shall be billed at the rate of \$ per Active user per month.

10. **CUSTOMER CONFIDENTIAL INFORMATION.** Customer's Content shall be and remain the confidential information of Customer. Licensor shall keep all Customer Content in strict confidence and shall not without Customer's prior written consent, disclose, publish, or disseminate any Customer confidential information except for purposes relating to Licensor's operation and maintenance of the Subscription and except for Content accessed by Active Users.

11. **TERM: TERMINATION & RENEWAL.** The Term of this Agreement shall commence on the Effective Date and shall continue in effect for twenty-seven (27) months from the Effective Date ("**Initial Term**"). After the expiration of the Initial Term (or a Renewal Term), this Agreement and the Subscription Service shall automatically renew for additional one (1) year terms ("**Renewal Term(s)**") unless terminated by either party on written notice three (3) months prior to the end of the Initial Term or Renewal Term, as applicable.

Unless Customer enters into a new Subscription Service Agreement with Licensor, the Subscription Service fee may, at Licensor's option, increase by three percent (3%) for Renewal Term(s). After the expiration of the Initial

Term, either party may terminate this Agreement for any reason upon ninety (90) day's written notice. Either party may terminate this Agreement for cause upon thirty (30) day's written notice specifying the basis for the termination if the other party breaches any provision of this Agreement.

12. **LIMITATION OF LIABILITY.** NEITHER PARTY BE LIABLE FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT, OR INCIDENTAL DAMAGES OF ANY KIND. IN NO EVENT SHALL EITHER PARTY'S LIABILITY FOR ANY OTHER REASON WHATSOEVER EXCEED IN THE AGGREGATE THE SUM OF ONE MILLION DOLLARS (\$1,000,000.00).

13. **FORCE MAJEURE.** The duties and obligations of the parties hereto shall be excused upon, and neither party shall be liable to the other for, any failure to fully or partially perform resulting from the occurrence of an "Event of Force Majeure". An "Event of Force Majeure" shall mean any act, cause, contingency or circumstance beyond the reasonable control of the party invoking this clause, including, without limitation, acts of God, labor strike, labor dispute, lockout, civil disorder, terrorism or perceived terrorist threat, disaster, interruption of communication services, governmental actions or regulation, or other emergency making it inadvisable, unsafe, impossible, or illegal to perform under the Agreement.

14. **GOVERNING LAW.** This Agreement and the rights and obligations of the parties hereunder shall be governed by and construed under the laws of the State of Minnesota without reference to its principles of choice of law. Licensor and Customer hereby irrevocably submit to the exclusive personal jurisdiction and venue of the District Court for the County of Hennepin, State of Minnesota over any such action, suit, or proceeding unless such matter is removed to Federal Court in the State of Minnesota; and then in such event, Licensor and Customer hereby irrevocably submit to the exclusive personal jurisdiction and venue of the United States District Court for the District of Minnesota.

15. **OFF-THE-SHELF CONTENT USAGE.** If at any time during this agreement, the Customer chooses to purchase off-the-shelf content, the Customer agrees to restrict access to said content for use by Customer and its affiliates only, for the users specified above or in subsequent amendments to the agreement for the agreed upon term. Customer will use reasonable efforts to monitor usage and report usage over the specified number to Brainier on a quarterly basis through the term of this agreement. At the end of the term, Customer will remove access to content or the content agreement will automatically renew for an additional year from the date courses are available.