

SUBSCRIPTION AGREEMENT – VIA TOTARA PARTNER

PLEASE READ THIS AGREEMENT CAREFULLY BEFORE PURCHASING OR USING SUBSCRIPTION SERVICES. BY USING OR PURCHASING SUBSCRIPTION SERVICES, CUSTOMER AGREES TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS AGREEMENT. IF YOU ARE ACTING ON BEHALF OF AN ENTITY, THEN YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO ENTER INTO THIS AGREEMENT ON BEHALF OF THAT ENTITY. IF CUSTOMER DOES NOT ACCEPT THE TERMS OF THIS AGREEMENT, THEN IT MUST NOT PURCHASE OR USE SUBSCRIPTION SERVICES.

This Subscription Agreement, including all schedules and appendices attached (“**Agreement**”) is between Totara Learning Solutions Limited (“**Totara**”, “**we**” or “**us**”) and the purchaser or user of Subscription Services (defined below) that accepts the terms of this Agreement (“**Customer**”, “**you**” or “**your**”). The commencement date of this Agreement (“**Commencement Date**”) is the date that Customer signs or accepts this Agreement.

Totara sells subscriptions that entitle you to receive the Subscription Services during the Subscription Term. This Agreement applies to a Customer who has purchased Subscription Services through an authorized Totara Partner.

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement, unless the context otherwise requires:

Business Day means any day other than a Saturday or Sunday or a statutory public holiday in the United States.

Designated Totara Partner means the authorized Totara Partner designated by you during the purchase process and agreed to by us who is authorised to contact our customer support staff.

Documentation means all documentation that Totara typically provides to Customers in conjunction with the Totara Product, which may include, but is not limited to:

- the source code form of the Totara Product;
- manuals, guides and other written material in print or electronic book format;
- videos;
- training slides and material; and
- public or private online documentation in the form of wikis, forums or blogs.

Error means a reproducible defect in the Totara Product when operated on a Supported Environment, which causes the Totara Product not to operate substantially in accordance with our Documentation or as we otherwise intended it to operate.

Error Correction means a modification or patch that brings the Totara Product into substantial conformance with our Documentation or the intended operation of the Totara Product, or a procedure, routine or other information that enables you to avoid the practical adverse effect of an Error.

Force Majeure Event means an event or occurrence which a party could not have reasonably foreseen and taken reasonable measures to prevent, but does not include strikes, lock-outs or any other form of labour dispute or delay caused by contractual or labour relations between the parties and any of their employees, agents, sub-contractors or suppliers, or inability to perform due to lack of available funds.

Intellectual Property means all inventions and/or works and any and all rights under United States and/or foreign patents, trademarks, trade secrets, know-how, copyrights, and other industrial or intangible property rights of a similar nature; all rights pursuant to grants and/or registrations worldwide in connection with the foregoing and all other rights with respect thereto; all rights under applications for any such grant or registration, all rights of priority under international conventions to make such applications and the right to control their prosecution, and all rights under amendments, continuations, divisions and continuations-in-part of such applications; and all rights under corrections, reissues, patents of addition, extensions and renewals of any such grant, registration and/or right.

Insolvency Event in relation to a party means circumstances that reasonably indicate that there is a significant risk that a party is or will become unable to pay its debts as they fall due, including but not limited to the appointment of a receiver, administrator, liquidator or similar

officer, the entering into an arrangement or scheme with creditors, entry into a voluntary or involuntary bankruptcy proceeding, or like event.

Instance means a Production Instance or a Non-Production Instance, as the case may be.

Non-Production Instance means an instance of the Totara Product which is implemented to support the development, test or deployment of a business process of the Customer, in connection with a Production Instance.

Maintenance Release means an update to an existing version of the Totara Product containing Error Corrections or minor functionality enhancements. A Maintenance Release is designated as a numbered service pack for the current version, with no change in the version number.

New Version Release means a new version of the Totara Product containing new features or enhancements to functionality. A New Version Release is designated by an increase in the version number. e.g., from 1.5 to 1.6 or 1.0 to 2.0.

Person means an individual, firm, company, corporation or unincorporated body of persons, or any state or government or any agency thereof (in each case, whether or not having separate legal personality), and a reference to a “company” includes a person.

Production Instance means an instance of the Totara Product which is deployed to support an operational business process of the Customer.

Subscriber Portal means online user community located at <http://community.totarams.com>.

Subscription Fee means the fees specified in Schedule 1.

Subscription Services means the services described in Section 4.1.

Subscription Term means Initial Subscription Term together with any Renewal Terms of this Agreement.

Supported Environment means a hardware, operating system and database platform meeting the minimum system configuration requirements for the proper use and operation of the Totara Product as set out in our Documentation.

Taxes means any means any sales, use, excise, value-added, withholding taxes or other taxes based upon this Agreement, excluding taxes based on Totara’s net income.

Totara Partner means a reseller and provider of Subscription Services authorised by us.

Totara Product means a single Instance of the Totara Learning Management System.

Totara Product Core Components means:

- those core code components of the Totara Product attributable to, and the Intellectual Property of, Totara; and
- excludes any code components attributable to the Moodle product, available from a standard release of Moodle from <http://download.moodle.org/> (or other such successor website).

Third-level Support means the support provided by us to resolve problems with the application that require changes to the code.

Updates means any releases (including any preproduction releases) of the Totara Product made available by us, including bug fixes, improvements, enhancements, translations, localisations, new versions or releases, releases on additional operating environments, and other changes to the Totara Product.

1.2 In this Agreement, unless the context otherwise requires:

1.2.1 reference to “dollars” and “\$” refers to United States dollars (US\$) exclusive of Taxes unless specifically stated otherwise;

1.2.2 the singular includes the plural and vice versa, where the context requires; and

1.2.3 in the event of any conflict between the provisions of the main body of this Agreement and any of the Schedules, then the main body of the Agreement will prevail.

2. TERM

2.1 **Initial Subscription Term:** The initial subscription term will begin on the Commencement Date and will run for a period of twelve (12) months (“Initial Subscription Term”).

2.2 **Automatic Renewal:** The Agreement shall automatically renew for an unlimited number of one year periods (each, a “Renewal Term,” and, together with the Initial Subscription Term, the “Subscription Term”) unless you or your Totara Partner give us notice that you do not wish

to renew the Subscription Term for an additional 12 months at least 30 days before the expiry of the Initial Subscription Term or any Renewal Term.

2.3 **Failure to renew:** The failure to renew this Agreement will not affect your usage of your currently installed Totara Product but will cease any updates, maintenance or support services provided pursuant to this Agreement.

2.4 **Reinstatement of Support:** If you have terminated or elected not to renew this Agreement, you can elect to reinstate support for an existing installation if we still offer support for the Totara Product and if you pay:

2.4.1 the Subscription Fees for the period when you did not receive maintenance; and

2.4.2 the Subscription Fee for the current Subscription Term.

3. **SUBSCRIPTION FEES**

3.1 **Subscription Fees:** Subscription Fees are payable annually in advance on the Commencement Date and annually thereafter in accordance with Section 3.2.

3.2 **Payment to a Totara Partner:** You have entered into this Agreement via a Totara Partner. The Totara Partner will request that you make payment of the Subscription Fees to the Totara Partner and not to us. Provided the Totara Partner supplies you with an invoice for the Subscription Fees then we agree to you making payment to the Totara Partner. For renewals, if you do not receive an invoice from the Totara Partner prior to the relevant anniversary of the Commencement Date, then you should make payment direct to us by the due date as set out in Section 3.1.

3.3 **Costs:** If requested by us, you will reimburse us for all costs (including reasonable legal fees) associated with collecting overdue or dishonoured payments by you that are more than 30 days overdue.

3.4 **Termination:** If payment of fees is more than 30 days overdue, we shall have the option to terminate this Agreement in accordance with Section 9 upon notice in writing to you.

3.5 **Taxes:** Subscription Fees are exclusive of any Taxes. Customer will pay to Totara or Totara Partner (as applicable) an amount equal to any Taxes arising from or relating to this Agreement which are paid by or are payable by Totara. If Customer is required under any applicable law or regulation to withhold or deduct any portion of the payments due to Totara or Totara Partner (as applicable), then the sum payable will be increased by the amount necessary so that Totara receives an amount equal to the sum it would have received had Customer made no withholdings or deductions.

4. **SUBSCRIPTION SERVICES**

4.1 **Services Provided:** During each Subscription Term, we will, via your Totara Partner, provide the following support, subject to the terms and conditions of this Agreement:

4.1.1 assisting in the operation of the features and functions of the Totara Product;

4.1.2 assisting in your usage of our Documentation;

4.1.3 assisting in identifying and verifying the causes of suspected Errors;

4.1.4 providing Error Corrections for verifiable Errors; and

4.1.5 allowing you access to the Subscriber Portal (where you can access new code releases, latest documentation etc)

4.2 **Totara Product Instances:** Except with the prior written consent of Totara, the subscription services set out in Section 4.1 (and any other services under this Agreement) are provided to you in respect of a single Production Instance of the Totara Product. Where you wish to deploy multiple Production Instances of the Totara Product, you will need to sign a separate Totara Subscription Agreement or a Hosting and Support Agreement (as applicable). For the avoidance of doubt, multiple Non-Production Instances may be deployed in connection with a single Production Instance of the Totara Product.

4.3 **Customer as end-user acknowledgment:** You acknowledge and agree that we, via your Totara Partner, are providing the subscription services set out in Section 4.1 (and any other services under this Agreement) to you as an end-user and you will not provide any third party with those services, or the benefit (whether direct or indirect) of those services, and whether by way of resupply, resale or otherwise.

- 4.4 **Self Help Support Resources:** You agree that the users of the Totara Product under your control must first attempt to answer any questions or resolve any issues in relation to the operation of the Totara Product by using the following self-help resources:
 - 4.4.1 the Help function of the Totara Product;
 - 4.4.2 the knowledgebase website located at <http://help.totarams.com>; and
 - 4.4.3 community forums and resources located at <http://community.totarams.com>.
- 4.5 **Referral to Totara Partner:** You agree to use extended support services from a Totara Partner, and:
 - 4.5.1 if you are unable to resolve an issue or question in relation to the Totara Product using the self-help resources described in Section 4.4, you agree to contact your Totara Partner for assistance;
 - 4.5.2 the Totara Partner will be responsible for contacting us as required under Sections 4.6 and 4.7.
- 4.6 **Notification of Error:** When you report an Error to a Totara Partner you must include a detailed description of the Error in order for us to be able to replicate the Error.
- 4.7 **Error Correction:** We will use commercially reasonable efforts to provide an Error Correction. The Error Correction may:
 - 4.7.1 require that you install the latest Maintenance Release for the supported version of the Totara Product on which you reported the Error;
 - 4.7.2 require multiple contacts and off- line research;
 - 4.7.3 when completed, be provided in the form of a Totara Product patch consisting of sufficient programming and operating instructions to implement the Error Correction, which will be provided to you via your Totara Partner.
- 4.8 **Exclusions from Support Program:** We are not responsible or liable for providing support in connection with causes external to the Totara Product, including:
 - 4.8.1 your failure to incorporate Maintenance Releases or New Version Releases, or follow instructions in the Documentation;
 - 4.8.2 installation of the Totara Product or any New Version Releases by any party other than us or one of our Totara Partners;
 - 4.8.3 your use of the Totara Product with any software or hardware other than within the Supported Environment;
 - 4.8.4 modifications, alterations, or additions to the Totara Product by parties other than us (including modifications, alterations, or additions to the Totara Product made by you);
 - 4.8.5 damage from any source other than us including water, humidity, fire, power surges, computer viruses, and accidents; and
 - 4.8.6 errors arising out of or related to a database management server or a web server or any other third party component that is used in conjunction with the Totara Product (unless we are hosting the Totara Product at our data centre).
- 4.9 **Services due to excluded clauses:** If we agree to undertake any maintenance or services required to fix an Error caused by (in our sole opinion) one or more of the causes specified in Section 4.8 these will be billed to you on a time-and-materials basis in accordance with our then current rates. We are under no obligation to agree to undertake such services at any time.
- 4.10 **Further exclusions:** Support provided under this Agreement excludes:
 - 4.10.1 Totara Product installation, configuration or services provided on-site at your location;
 - 4.10.2 problems or errors in modifications to the Totara Product provided by third parties (including modifications provided by Totara Partners).
- 4.11 **Data protection:** Totara will:
 - 4.11.1 only process your personal information:
 - 4.13.1.1 for the purpose of carrying out its obligations under this Agreement and no other purpose;
 - 4.13.1.2 in accordance with any instructions issued by you, or your Totara Partner on your behalf, from time to time; and
 - 4.13.1.3 otherwise in accordance with relevant privacy laws; and
 - 4.11.2 promptly comply with any request from you, or your Totara Partner on your behalf, requiring it to amend, transfer or delete the personal information.

5. YOUR RESPONSIBILITIES

- 5.1 **Supported Environment and Operations:** You or your Totara Partner, on your behalf, are responsible for undertaking the proper supervision, control and management of your use of the Totara Product including:
- 5.1.1 providing, maintaining and assuring proper configuration of the Supported Environment;
 - 5.1.2 following industry standard procedures and applicable laws for the security of data, accuracy of input and output, and back-up plans, including restart and recovery in the event of hardware or software error or malfunction; and
 - 5.1.3 maintaining a procedure external to the Totara Product for reconstruction of lost or altered files, data and programs. This sub-clause will not apply to you if we are hosting the Totara Product at our data centre.
- 5.2 **Assistance in Providing Support:** Your Totara Partner must provide reasonable assistance to us in determining and resolving Errors you report to them. This assistance may include:
- 5.2.1 determination activities such as performing network traces, capturing error messages, collecting configuration information and other similar activities to allow us to reproduce the Error; and
 - 5.2.2 resolution activities such as access to your personnel and/or remote access to the Supported Environment.
- 5.3 **Implementation of Error Corrections:** Your Totara Partner is responsible for performing activities to implement Error Corrections we provide and for responding in a timely manner to requests for information by our customer support staff. Error Corrections may include changing, installing or reinstalling new or existing versions of web browser software or new components, or modifying processes.

6. NEW RELEASES OF THE SOFTWARE

- 6.1 **Maintenance Releases Provided with Support:** Via your Totara Partner, we will provide to you any Maintenance Releases and New Version Releases that we make generally available to end users during the Subscription Term at no additional charge. Any Maintenance Releases or New Version Releases are part of the Totara Product and subject to the terms and conditions of this Agreement. The designation of a Totara Product release as a Maintenance Release or a New Version Release will be made by us in our reasonable discretion.
- 6.2 **Maintenance Release Installation:**
- 6.2.1 We may designate a Maintenance Release as mandatory and may require a mandatory Maintenance Release to be applied as a pre-requisite for problem verification, diagnosis and/or resolution.
 - 6.2.2 Once a mandatory Maintenance Release is made generally available, it must be applied to the environment within six (6) months or within such shorter time period as may be designated by us. After such period, all subsequent Maintenance Releases will be built on a codeline that assumes the mandatory Maintenance Release has been applied.
- 6.3 **Support of Prior Releases:** We will provide support for the most current Maintenance Releases made in relation to the current New Version Release and the last two New Version Releases immediately preceding that release.
- 6.4 **Installation of New Releases:**
- 6.4.1 Unless we are hosting the Totara Product at our data centre, support excludes the installation or configuration of any Maintenance Releases or New Version Releases.
 - 6.4.2 New Version Releases may have significant changes from current versions. Your Totara Partner will assist you with the installation of New Version Releases to ensure our ability to continue to provide support and Error Corrections.
 - 6.4.3 We will not correct Errors arising out of or related to installation or configuration of the Totara Product or any New Version Releases by any party other than you or us or a Totara Partner.
- 6.5 **Migration of Customisations and/or Modifications:** For customisations and/or modifications:
- 6.5.1 We provide support only for the out-of-the-box, unmodified Totara Product (including any standard configuration changes);

- 6.5.2 All errors must be reproduced by us on such Totara Product before a patch or other fix will be considered;
- 6.5.3 If you have customised and/or modified Totara Product, support does not include migrating your customisations and/or modifications to any Maintenance Release or New Version Release..

7. LICENSE AND INTELLECTUAL PROPERTY OWNERSHIP

- 7.1 **License:** Subject to the following terms, Totara grants you a license to use the Totara Product software under the terms of the GNU General Public License v3 as published by the Free Software License. The end user license agreement for each component of the software is located in the component's source code which permits you to copy, modify and redistribute the component, in both source code and binary code forms. This Agreement does not limit your rights under, or grant you rights that supersede, the license terms of any particular component.
- 7.2 **Totara Intellectual Property:** No right or license, express or implied, is granted to the Customer under this Agreement for the use of any Totara trade mark, logo, service mark or other Intellectual Property whether or not derived from the Totara Product including, without limitation, the distribution of any Totara Product Core Components or other Totara Intellectual Property.
- 7.3 **Pre Existing Intellectual Property:** All Intellectual Property that is owned by, or is proprietary to, a party to this Agreement at the Commencement Date of this Agreement, shall at all times remain owned by that party exclusively. Any modifications of, or additions to that pre-existing Intellectual Property shall automatically become the property of the owner of the pre-existing intellectual Property.
- 7.4 **Open Source Assurance Programme:** If any portion of the Totara Product Core Components is found to infringe any third party intellectual property rights and Customer has complied with all of the terms of this Agreement, then for each Production Instance that includes any of the infringing Totara Product Core Components for which Customer is current in its Subscription Fees, Totara will, at its expense and option: (i) obtain the rights necessary for Customer to continue to use the Totara Product Core Components consistent with this Agreement; (ii) modify the Totara Product Core Components so that they are non-infringing; or (iii) replace the infringing portion of the Totara Product Core Components with non-infringing code. The foregoing will not apply to claims arising from: the combination of the Totara Product Core Components with products or services not provided by Totara; the modification of the Totara Product Core Components pursuant to specifications of Customer; the modification of the Totara Product Core Components other than as directed by Totara; or use of the Totara Product Core Components in a manner not permitted or contemplated hereunder.

8. WARRANTY AND DISCLAIMERS

- 8.1 We, via your Totara Partner, will provide the services under this Agreement with the level of due care and diligence that might be expected from a provider of product maintenance and support services in respect of open source software.
- 8.2 AS THE TOTARA PRODUCT CONTAINS OPEN SOURCE SOFTWARE, THE ONLY WARRANTIES IN RESPECT OF THE TOTARA PRODUCT, THE DOCUMENTATION AND ANY COVERED WORKS ARE AS SET OUT IN THE GNU GENERAL PUBLIC LICENSE V3. NO REPRESENTATIONS OR WARRANTIES ARE MADE BY US IN RESPECT OF THE TOTARA PRODUCT, DOCUMENTATION OR ANY COVERED WORKS IN THIS AGREEMENT. TO THE EXTENT THAT ANY MAINTENANCE RELEASE OR ERROR CORRECTION WHICH WE CREATE OURSELVES AND PROVIDE TO YOU PURSUANT TO THIS AGREEMENT IS NOT A COVERED WORK PURSUANT TO THE GNU GENERAL PUBLIC LICENSE V3, WE WARRANT THAT TO THE BEST OF OUR KNOWLEDGE IT DOES NOT INFRINGE THE INTELLECTUAL PROPERTY RIGHTS OF A THIRD PARTY.
- 8.3 **Disclaimers:** EXCEPT AS EXPRESSLY SET FORTH IN SECTION 8.2, THE TOTARA PRODUCT IS PROVIDED "AS IS" AND "AS AVAILABLE." WE MAKE NO WARRANTIES WITH RESPECT TO TOTARA PRODUCT, SUBSCRIPTION SERVICES, OR OTHERWISE IN CONNECTION WITH THIS AGREEMENT AND HEREBY DISCLAIM ANY AND ALL

EXPRESS, IMPLIED, OR STATUTORY WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF TITLE, MERCHANTABILITY, NON-INFRINGEMENT, FITNESS FOR A PARTICULAR PURPOSE, AVAILABILITY, ERROR-FREE OR UNINTERRUPTED OPERATION, AND ANY WARRANTIES ARISING FROM A COURSE OF DEALING, COURSE OF PERFORMANCE, OR USAGE OF TRADE. WE CANNOT GUARANTEE THAT THE TOTARA PRODUCT AND THE SERVICES PROVIDED UNDER THIS AGREEMENT, OR VIA YOUR TOTARA PARTNER, WILL BE TIMELY, SECURE, UNINTERRUPTED OR ERROR FREE, OR THAT DEFECTS WILL BE CORRECTED.

9. TERMINATION

- 9.1 **Termination for breach:** A party shall be in default of this Agreement where:
- 9.1.1 it breaches, or fails to properly or promptly perform, any of its obligations (other than payment obligations) under this Agreement, and fails to remedy that failure within 30 Business Days after receiving written notice (inclusive of the date of receipt) from the other party requiring the failure to be remedied;
 - 9.1.2 it breaches a material obligation under this Agreement which is incapable of remedy;
 - 9.1.3 it assigns, transfers or otherwise disposes of any right, interest, obligation or liability in contravention of this Agreement;
 - 9.1.4 it is subject to an Insolvency Event; or
 - 9.1.5 any monies due to be paid by the party pursuant to this Agreement are more than 30 days overdue.
- 9.2 **Right to terminate on default:** The non-defaulting party may terminate this Agreement immediately by written notice to the other if the other is in default as specified in Section 9.1.
- 9.3 **Termination or limitation of services for abuse of support:** At our sole discretion, we may terminate this Agreement, or limit the availability of product maintenance services, upon written notice to you (either directly or via your Totara Partner) if, in our reasonable judgment, you are abusing the product support system. By way of example, and not by way of limitation, such abuse may include excessive requests (either directly or via your Totara Partner) for assistance unrelated to errors in the Totara Product or lack of cooperation with the reasonable requests of our personnel for error documentation
- 9.4 **Force Majeure:** If a Force Majeure Event under Section 12 continues for more than 60 consecutive Business Days, or for an aggregate of 60 Business Days in any six month period, then the party not claiming the benefit of the Force Majeure Event will be entitled to terminate this Agreement.

10. EFFECT OF TERMINATION:

- 10.1 **Effect of Termination by Us:** If we terminate this Agreement because you are in default, we will retain any Subscription Fees paid.
- 10.2 **Effect of Termination by You:** If you terminate this Agreement because we are in default, our sole and exclusive obligation to you, and your sole and exclusive remedy, will be to promptly refund that portion of the Subscription Fee actually paid by you that is proportional to the percentage of the Subscription Term remaining at the time termination is effective.
- 10.3 **Effect of Termination on use of Totara Product:** The termination of this Agreement will not affect your usage of your currently installed Totara Product but will cease any updates, maintenance or support services provided under this Agreement.
- 10.4 **Obligations shall cease:** Subject to Sections 10.1 and 10.2, upon termination of this Agreement all further obligations of both of us under this Agreement will immediately cease.

11. INDEMNITY

- 11.1 **Your Indemnity:** You shall indemnify, defend and hold us and our officers, directors, agents and employees harmless from and against all claims, suits, demands, actions, proceedings, judgments, penalties, damages, losses, liabilities, costs and expenses (including, without limitation, reasonable legal and expert witness fees) resulting from any and all third-party claims against us arising from or relating to:
- 11.1.1 any breach of a representation, warranty, acts or omission made by you; and

- 11.1.2 any action or inaction by you or any of your contractors, agents or employees which caused or is alleged to have caused damage to the person or tangible property of a third-party, including without limitation, third-party computer equipment.
- 11.2 **Our Indemnity:**
- 11.2.1 We shall defend you from and against third party claims, actions and proceedings based upon or arising from (i) any action or inaction by us or any of our Totara Partners, contractors, agents or employees which caused or is alleged to have caused damage to the person or tangible property of a third-party, including without limitation, third-party computer equipment, or (ii) an allegation that the Totara Product Core Components infringe the Intellectual Property rights of a third party (each, a "Claim").
- 11.2.2 For Claims arising under Section 11.2.1(ii), we will also abide by our Open Source Assurance Program set forth in Section 7.4.
- 11.2.3 You must, via your Totara Partner, or directly to us if a Totara Partner is not currently providing Totara Services, immediately give written notice of any Claim or threatened Claim (and in any event within 14 days of becoming aware of the Claim); give us sole and complete control of the defense and settlement of the Claim; provide us with all reasonable information and assistance; and not negotiate, settle or otherwise compromise the Claim without our prior written agreement.
- 11.3 **Mitigation:** Each of the parties must take reasonable steps to mitigate any claim for loss or damage it may take against the other under or arising out of this Agreement.
- 11.4 **Cap:** In no event shall either party be liable to the other party for direct damages, on any theory, arising under this Agreement or relating thereto, in an amount exceeding the greater of:
- 11.4.1 one thousand dollars (\$1,000US\$); or
- 11.4.2 the fees or commission, if any, received by such party from, or on behalf of, the other party for the twelve (12) month period preceding the occurrence of such liability.
- 11.5 **Exclusion of indirect losses:** In no event shall either party be liable to the other for any indirect, incidental, punitive, exemplary, consequential or special losses or damages arising out of or in connection with this Agreement, even if the potentially liable party has been informed of the possibility of such damages.
12. **FORCE MAJEURE**
- 12.1 **Obligations suspended:** Where either of us are unable, wholly or in part, by reason of a Force Majeure Event, to carry out any obligation (except for payment) under this Agreement and:
- 12.1.1 that party gives the other party immediate written notice of the nature and expected duration of, and the obligation affected by, the Force Majeure Event; and
- 12.1.2 that party uses all reasonable endeavours to:
- 12.1.2.1 mitigate the effects of the Force Majeure Event on that party's obligations under this Agreement; and
- 12.1.2.2 perform that party's obligations under this Agreement despite the Force Majeure Event, then that obligation is suspended so far as it is affected by the Force Majeure Event during its continuance.
13. **DISPUTE RESOLUTION AND ESCALATION PROCESS**
- 13.1.1 In the event of any controversy, claim or dispute between the parties arising under this Agreement, including, but not limited to, a material breach (each, a "Dispute"), and prior to serving notice of any material breach pursuant to Section 9.1, the parties are

required first to attempt resolution of such Dispute in accordance with the escalation procedures set forth in this Section 13.

- 13.1.2 A Dispute may be referred by either party to the senior executive level of each party by written notice delivered in accordance with this Agreement. Each party shall appoint and authorize a senior executive to resolve the Dispute on behalf of his or her respective company ("Senior Executives"). The Senior Executives will meet for negotiations within fifteen (15) calendar days after receipt of such written notice at a time and place mutually acceptable to both Senior Executives (the "Initial Negotiation Period"). If the Dispute has not been resolved within fifteen (15) calendar days after the end of the Initial Negotiation Period, then the aggrieved party may proceed to serve a notice of material breach pursuant to Section 9.1.
- 13.1.3 Notwithstanding the foregoing, either party shall have the right to seek injunctive relief without completion of this escalation process for Disputes regarding a breach of confidentiality or intellectual property infringement matters.
- 13.1.4 All offers, promises, conduct and statements, whether written or oral, made in the course of conducting the negotiations pursuant to this Section 13 by any of the parties, their agents, affiliates, employees, experts and attorneys, are confidential, privileged and inadmissible for any purpose, including impeachment, in any proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the negotiation.

14. NOTICES

- 14.1.1 **Service:** All notices and other communication required or permitted to be given to a party pursuant to this Agreement shall be in writing, and shall be deemed duly given (i) on the date delivered if personally delivered, or (ii) on the day after being sent by Federal Express or another recognized overnight courier service which utilizes a written form of receipt for next day or next business day delivery, in each case addressed to the party's address; provided that a party hereto may change its address for receiving notice by the proper giving of notice hereunder. In the case of the Customer, that shall be the address advised to the Totara Partner at the time Customer subscribed for the Totara Product (or such other address as may be notified to us in writing from time to time). Any notice to us shall be addressed to Totara Learning Inc, 19477 Fishhawk Loop, Bend, Oregon 97702 USA or via email to subscriptions@totalms.com.

15. GENERAL

- 15.1 **Assignment:** We may assign our rights or obligations under this Agreement, upon giving notice to you via your Totara Partner. You may only assign your rights or obligations under this Agreement, with our prior written consent (which may be given in our absolute discretion). Any change in control or of more than 50% of the ownership interest in you (if you are a company) shall be deemed an assignment.
- 15.2 **Compliance with laws:** Each of us will, in performing our respective obligations under and in connection with this Agreement, comply with all relevant statutes and other laws.
- 15.3 **Entire Agreement:** Subject to any amendment in accordance with Section 15.4, this Agreement constitutes the entire agreement, understanding and arrangement (express and implied) between both of us relating to the subject matter of this Agreement and supersedes and cancels any previous agreement, understanding and arrangement relating thereto, whether written or oral. Any provision in any statute or other law that is inconsistent with this Agreement will not apply, to the extent that contracting out of that provision is permitted.
- 15.4 **Variations:** We may amend this Agreement at any time by giving you 30 days notice of any proposed change and posting an amended version at <http://subscribe.totarams.com>. If you do not accept the proposed amendments, you may terminate this Agreement by notice in writing

- at any time within the 30 days prior to the change coming into effect. If we do not receive notice of termination from you prior to the change coming into effect, you will be deemed to have accepted the amended Agreement.
- 15.5 **Pay own costs:** Except as otherwise provided in this Agreement, each of us will pay our own costs of, and incidental to, the negotiation, preparation, execution and enforcing, or attempting to enforce, this Agreement.
- 15.6 **Non-solicitation:** You agree that you will not during the term of this Agreement or for a period of one (1) year from the termination or end of this Agreement, whether for yourself or for any other person, solicit or approach and entice or endeavour to entice away any of our staff or Totara Partners.
- 15.7 **No waiver by action:** Any delay, failure or forbearance by a party to exercise (in whole or in part) any right, power or remedy under, or in connection with, this Agreement will not operate as a waiver of such right, power or remedy.
- 15.8 **Waiver to be in writing:** The waiver of any breach of any provision of this Agreement will not be effective unless that waiver is in writing and is signed by the party against whom that waiver is claimed. A waiver of any breach shall not be, or be deemed to be, a waiver of any other or subsequent breach.
- 15.9 **Governing Law and Jurisdiction:** This Agreement and all matters arising out of or relating to this Agreement, will be governed by the laws of Delaware, USA and the parties irrevocably submit to the exclusive jurisdiction of the courts of Delaware, USA with respect to any legal action, suit or proceeding or any other matter arising out of or in connection with this Agreement.

SCHEDULE 1

Support Plans and Fees

During each Subscription Term, we will provide the following support and services via your Totara Partner, subject to the terms and conditions of this Agreement:

- clarifying and assisting in the operation of the features and functions of the Totara Product;
- clarifying our Documentation;
- assisting in identifying and verifying the causes of suspected Errors;
- providing Error Corrections;
- access to the Subscriber Portal; and
- new releases of the Software.

Plan	Professional 500	Enterprise 3K	Enterprise 10K	Enterprise 50K	Enterprise 250K
Number of active users	< 500	< 3,000	< 10,000	< 50,000	< 250,000
Issue reporting	Via Totara Partner	Via Totara Partner	Via Totara Partner	Via Totara Partner	Via Totara Partner
Annual Subscription Fee (All prices in \$USD)	\$2,950	\$4,950	\$9,950	\$19,950	\$29,950

Note: “Active users” in the table above refers to those users who are registered and have logged into the Totara Learning Management System (the **System**) during the Subscription Term, and do not include those users who have previously registered and/or hold training records but have not logged into the System during the Subscription Term or users who have never logged in.

Common Features of all Subscription levels

- TotaraLMS – full access to all features
- Open Source – License is GNU GPL v3
- Service Packs / Patch Updates
- Issue Reporting
- Subscriber Discussion Forums
- Documentation and Knowledge Base
- Web-based Administrator / Configuration Training (self-paced)
- Web-based Course Creator Training (self-paced)