MZD

MZ Development, Inc.

Terms of Service

These Terms of Service are between Company, as defined in the SOW, and MZ Development Inc. (MZD), as defined in the SOW. By agreeing to the SOW, the Company is agreeing to these Terms of Service. Company also agrees that its employees, agents, and end users will be bound by these Terms of Service. Employees and agents of Company shall be required to agree to an End User License Agreement before being permitted to access and use the Software.

1.   Definitions

1.1   "Data File" means one or more files which contain data that is input (including scoring data) by the Users while accessing the Software.

1.2   "Implementation Fee" means the amount of money listed in the SOW for implementation of the Software.

1.3   "License Fee" means the amount of money listed in the SOW for the Software license and incorporates a price per Response.

1.4   "License Period" means the time period listed in the SOW.

1.5   "Customization" shall mean those changes, requested by the Company and implemented by MZD, that are listed in the SOW.

1.6   "Generated Data" means any report created by a User from data in the Data File.

1.7   "Patches" means minor modifications to the Software that correct an existing problem and do not add any additional functionality. Patches are provided by MZD at its discretion.

1.8   "Response" means a student answer to a single examination question that has been entered into the Software and can be scored.

1.9   "Software" means the software and documentation listed in the SOW.

1.10   "SOW" means the covering statement of work, and any exhibits thereto, for these Terms of Service and includes information on the Software, License Fee, License Period, and the number of licensed Responses, as well as other services provided by MZD, and other fees.

1.11   "Support" means services provided by MZD under these Terms of Service.

1.12   "Support Fee" means the amount of money listed in the SOW for Support of the Software.

1.13   "System Data" means data generated by the Software including data regarding user interaction with the Software, the underlying operating system, or other software though the accessing and use of the Software by Users. need to be able to evaluate data on a per project basis and across multiple projects.

1.14   "Technical Issue" means: a) a problem with Software; or b) a problem with accessing Software that is hosted on a computer or virtual machine that is owned or controlled by MZD, where the problem affects a User's ability to make use of a major functionality of the Software and includes lack of access, reduced communications speed, functions not performing to specifications, corrupt data, errors appearing within the Software, or missing data on reports generated by the Software.

1.15   "User" means a person authorized by the Company to use the Software.

1.16   "Updates" means minor version changes to the Software provided by MZD at its discretion. Updates do not include new modules or new software products.

1.17   "Upgrades" means major version changes to the Software provided by MZD at its discretion. Upgrades do not include new modules or new software products.

2.   Grant of License

2.1   MZD grants Company the non-exclusive, non-sub-licensable, limited right a) to access and use the Software

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installed on a computer or virtual machine owned or controlled by MZD; and b) to permit an unlimited number of Users to access and/or use the Software for which the License Fee has been paid for the License Period; and c) to permit the User to enter up to the number of Responses into the Software for which the License Fee has been paid, but only during the License Period.

2.2   MZD grants Company the non-exclusive, non-sub-licensable, limited right to use the Software to make, reproduce, publicly display, distribute or otherwise use Generated Data, but only for Company's internal business purposes.

2.3   All rights not specifically granted under these Terms of Service are reserved by MZD.

3.   Restrictions

3.1   Company agrees, except as expressly permitted in the License, the Software may not be used, copied, translated, redistributed, retransmitted, published, sold, leased, marketed, sublicensed, assigned, disposed of, encumbered, transferred, altered, modified or enhanced, whether in whole or in part. Company may not remove any proprietary notices, marks or labels from the Software.

3.2   No license is granted to System Data or the source code for the Software. Company agrees not to reverse-engineer, de-compile or disassemble the Software, or make any attempt to discover the source code to the Software, except and only to the extent that such activity is expressly permitted by applicable law notwithstanding this limitation.

3.3   Company agrees to not attempt to break or evade any access controls, copy-control protections, or encryption utilized in the Software.

3.4   Company agrees not to assist others in doing what the Company is prohibited from doing.

4.   Implementation Upon payment of the Implementation Fee, MZD shall undertake the services set forth in the SOW related to installation of the Software.

5.   Training Company may use MZD's web-based training resources at Company's discretion and may utilize other MZD training resources as set forth in the SOW.

6.   Customization Any Customization carried out by MZD is covered under these Terms of Service.

7.   Maintenance MZD shall be responsible for maintaining the computer or virtual machine on which the Software is installed. MZD shall not be responsible for maintaining the computers or virtual machines which are used to access the Software.

8.   Back-ups MZD, MZD shall be responsible for performing back-ups the Software, the Data File, and System Data. Back-ups of the Data File shall be done nightly by MZD and kept until sixty (60) days after the end of the Agreement. If Company desires to maintain its backed-up the Data File for linger periods , it must arrange separate storage for itself. After sixty (60) days after the end of the Agreement, MZD may delete all back-ups.

9.   Support

9.1   Company may make unlimited number of Support Requests. MZD will thoroughly investigate all problems reported by Company. If the problem is a Technical Issue with the Software, MZD will make commercially reasonable efforts to correct the Technical Issue and MZD will provide: a) a solution; b) confirmation that the Software works per design specifications; or c) confirmation that the problem will not be fixed.

9.2   MZD shall provide Support via telephone, email, and remote diagnosis and access tools during regular business hours (8:00 am - 5:00 pm Central Time) Monday through Friday except holidays. MZD support staff may provide Support for Technical Issues outside of regular business hours at its discretion or as otherwise agreed to by the Company. MZD shall not be required to provide in-person Support and shall use remote diagnosis tools to deliver Support. To receive Support, Company shall authorize MZD's use of remote diagnosis tools and access to Company's computers and networks.

9.3   MZD has no obligation to support: a) Software that has been altered by Company or a third party; b) any problem that is not a Technical Issue; c) third-party software; 4) Company's backup procedures; d) hardware, or e) interconnectivity of the Software with third party software.

9.4   Support Requests will be prioritized by severity and handled in the order of most severe to least severe, with Technical issues ahead of other problems and questions. Priority is assigned in descending severity: the Software

unavailable for processing; a portion of the Software is unavailable; operational questions that are holding up processing; operational questions that do not interfere with normal processing; enhancement suggestions/requests and requests for custom applications.

10.   Patches, Updates, Upgrades and Customizations Company shall have the right to receive Patches, Updates, Upgrades and/or Customizations as set forth in the SOW. Patches, Updates, Upgrades and Customizations shall be considered part of the Software.

11.   Availability of the Software

11.1   The Software will be available for use and access by Users 24 hours a day, 7 days a week, except a) for scheduled and noticed maintenance to take place at commercially reasonable times, and b) for violations of MZD's acceptable use policy.

11.2   Credits for unavailability of the Software will not be given except as set forth in the SOW.

12.   Responsibilities of the Company

12.1   Company shall designate one primary contact and one backup contact, who will interact with the MZD. MZD need not respond to or interact with any Company employee or agent except the primary and backup contacts. The primary and backup contacts shall have sufficient technical skill and knowledge of Company's computer systems and the Software to be able to assist MZD in resolving Technical Issues.

12.2   Company shall implement industry standard policies covering: a) data security, b) compliance with data security rules and regulations, c) data breach notification rules and regulations, and d) acceptably use of Company's computing resources by Users.

12.3   Company is responsible for the misuse of User authentication credentials.

12.4   When reporting a Technical Issue, Company shall provide as accurate and complete description as possible and shall assist in Technical Issue resolution by providing MZD with reasonably requested information.

12.5   Company shall not enter any personally identifiable information (PII) into the Software. If Company does enter PII into the Software, Company shall defend, indemnify, and hold MZD harmless from and against any loss, liability, cost, or expense, including reasonable attorney's fees, which may be incurred by MZD against any claims, actions, or demands by a third party alleging improper use of PII by Company..

13.   Ownership

13.1   Title, ownership rights and intellectual property rights in and to the Software and System Data shall remain with MZD. The Software is licensed, not sold.

13.2   Title, ownership rights and intellectual property rights in the data stored in the Data File shall remain with Company. Company grants MZD a license to use the Data File, and the data in the Data File, for: a) internal business purposes to evaluate the use and operation of the Software; and b) other purposes provided that any information shared with third parties is anonymized and/or aggregated so that Company or any individual cannot be reasonably identified from the shared information.

14.   **Transfer of Software** Company shall not transfer its rights under these Terms of Service without prior written consent from MZD, where such consent shall not be unreasonably withheld.

15.   **Termination of License** These Terms of Service is in effect until terminated or the end of the License Period. Company may terminate it at any time by notifying MZD of Company's intent to terminate. MZD may terminate these Terms of Service if Company fails to comply with these Terms of Service. MZD is not obligated to provide an opportunity to cure. Upon termination or the end of the License Period, Company agrees that MZD may terminate access to the Software and the Data File without warning.

16.   **Reports and Audit Rights** Company shall institute reasonable measures to ensure compliance with the terms and conditions of these Terms of Service. Company acknowledges that MZD may monitor the Data File and collect System Data in real time and produce reports relating to Company's and Users' access and use of the Software. Upon reasonable request, Company agrees to provide reports, and access to Company's facilities and records, relating to Company's use of the Software as necessary to demonstrate Company's compliance with these Terms of Service. Interference with an audit

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by Company is grounds for termination of these Terms of Service.

17. **Software Limited Warranty** To the original customer only, MZD provides the following warranties:

17.1 **Limited Warranty** MZD WARRANTS THAT FOR AS LONG AS THESE TERMS OF SERVICE ARE IN PLACE BETWEEN MZD AND COMPANY ("WARRANTY PERIOD") AS EVIDENCED BY COMPANY'S RECEIPT OR OTHER PROOF OF PURCHASE a) THE SOFTWARE, UNLESS MODIFIED OR OTHERWISE ALTERED BY COMPANY, WILL PERFORM SUBSTANTIALLY IN ACCORDANCE WITH THE PUBLISHED SPECIFICATIONS FOR THE SOFTWARE, AND b) THE MEDIA ON WHICH THE SOFTWARE IS FURNISHED, IF ANY, WILL BE FREE FROM DEFECTS IN MATERIALS AND WORKMANSHIP UNDER NORMAL USE. MZD does not warrant that the Software will meet Company's requirements, or that Use of the Software will be uninterrupted or error-free. MZD is not responsible for problems caused by changes in the operating characteristics of computer hardware or computer operating systems which are made after the release of the Software, nor for problems in the interaction of the Software with non-MZD software. Some jurisdictions do not allow limitations on duration of an implied warranty, so the above limitation may not apply to Company. The Limited Warranty gives Company specific legal rights. Company may have others.

17.2 Exclusive Remedy MZD's entire liability, and Company's exclusive remedy, shall be, at MZD's option, either a) replacement of the defective media, b) repair or replacement of the Software that does not meet MZD's Limited Warranty, or c) return of the License Fee paid and termination of these Terms of Service. This remedy is subject to return of the Software to MZD with a copy of Company's receipt within the Warranty Period or, solely for Software that was obtained electronically via "electronic software distribution", to delivery to MZD of a MZD -approved "certification of destruction" together with proof of purchase within the Warranty Period. This Limited Warranty is void if failure of the Software has resulted from accident, abuse, or misapplication. Any replacement Software will be warranted for the remainder of the original warranty period or thirty days, whichever is longer.

17.3 **Further Warranties**

17.3.1 MZD warrants that it owns the Software or otherwise has sufficient rights to grant Company the license in these Terms of Service.

17.3.2 MZD warrants that it owns or otherwise has sufficient rights to grant Company access to the Software on those computers or virtual machines.

17.3.3 MZD warrants that, at the time of these Terms of Service, it is not aware of claims that the Software infringes any right of a third party.

17.3.4 After notice by Company of such requirements, MZD warrants that it shall abide by any data usage requirements imposed by law or regulation that govern use of the data in the Data File.

17.4 **No Other Warranties** THE ABOVE WARRANTIES ARE EXCLUSIVE. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, MZD AND ITS SUPPLIERS DISCLAIM ALL OTHER WARRANTIES AND CONDITIONS, EITHER EXPRESSED OR IMPLIED, INCLUDING, WITHOUT LIMITATION, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT, AND THOSE ARISING OUT OF USAGE OF TRADE OR COURSE OF DEALING, CONCERNING THE SOFTWARE, AND THE PROVISION OF OR FAILURE TO PROVIDE SUPPORT. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY MZD, ITS AGENTS, DEALERS, DISTRIBUTORS OR EMPLOYEES SHALL INCREASE THE SCOPE OF THE ABOVE WARRANTIES OR CREATE ANY OTHER WARRANTIES.

17.5 No Liability for Damages EXCEPT FOR THE EXPRESS REMEDIES AND INDEMNITIES PROVIDED TO THE COMPANY UNDER THESE TERMS OF SERVICE, REGARDLESS OF WHETHER ANY REMEDY SET FORTH HEREIN FAILS OF ITS ESSENTIAL PURPOSE, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL MZD OR ITS SUPPLIERS (OR THEIR RESPECTIVE AGENTS, DIRECTORS, EMPLOYEES OR REPRESENTATIVES) BE LIABLE FOR ANY DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION TO: CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL, ECONOMIC, PUNITIVE OR SIMILAR DAMAGES, OR DAMAGES FOR LOSS OF BUSINESS PROFITS, LOSS OF GOODWILL, BUSINESS INTERRUPTION, COMPUTER FAILURE OR MALFUNCTION, LOSS OF BUSINESS INFORMATION OR ANY AND ALL OTHER COMMERCIAL OR PECUNIARY DAMAGES OR LOSSES) ARISING OUT OF THE USE OF OR INABILITY TO USE THE SOFTWARE OR THE PROVISION OF OR FAILURE TO PROVIDE SUPPORT , HOWEVER CAUSED AND ON ANY LEGAL THEORY OF LIABILITY (WHETHER IN TORT, CONTRACT OR OTHERWISE), EVEN IF MZD HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR FOR ANY CLAIM BY ANY OTHER PARTY. COMPANY ACKNOWLEDGES THAT THE LICENSE FEE REFLECTS THIS ALLOCATION OF RISK. In any event, if any statute implies warranties or conditions not stated in these Terms of Service, MZD's entire liability under

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any provision of these Terms of Service shall be limited to the greater of the amount actually paid by Company to license the Software and Five United States Dollars (US$5.00), or, in the case of Support, providing such Support again or refunding the cost thereof. Because some jurisdictions do not allow the exclusion or limitation of liability for consequential or incidental damages, the above limitation may not apply to Company.

17.6 **Infringement Indemnity** MZD shall defend, indemnify, and hold Company harmless from and against any loss, liability, cost, or expense, including reasonable attorney's fees, which may be incurred by Company against any claims, actions, or demands by a third party alleging that the Software infringes a U.S. copyright or trademark, provided: a) Company promptly notify MZD in writing of the claim; b) Company provide documents clearly describing the allegations of infringement; c) MZD has sole control of the defense of any actions and negotiations related to the defense or settlement of any claim; and d) Company cooperates fully in the defense of the claim.

17.6.1 If the Software is found to infringe a U.S. copyright or trademark, MZD shall, in its sole discretion, take commercially reasonable steps to obtain the necessary rights or modify the Software. In the alternative, MZD may terminate these Terms of Service and Company shall uninstall the Software. MZD's liability shall then be to indemnify Company as above and refund a pro-rata portion of any License Fee paid by Company for the Software. No refund shall be paid for any price paid by Company for Support.

17.6.2 MZD shall have no obligation to defend Company or to pay any resulting costs, damages, or attorneys' fees for any claims alleging direct or contributory infringement of the Software by a) combination of or integration with a product, process, or system not supplied by MZD; b) material alteration by anyone other than MZD; c) use after Company have been notified of possible infringement; or d) use after modifications are provided or after these Terms of Service are terminated.

18. Confidentiality

18.1 Each party agrees to keep confidential the terms and provisions of these Terms of Service and any other information with respect to the relationship among the parties; provided, however, that a party may reveal such information as required a) by law, regulation or court order, or b) in connection with such party's performance of its obligations under these Terms of Service.

18.2 Each party acknowledges that it will be provided with, or have access to, Proprietary Information belonging to the receiving party. The receiving party agrees to not: a) disclose Proprietary Information to any third party, except to the extent necessary to carry out the purpose of these Terms of Service; b) use or copy any Proprietary Information for any purpose other than for carrying out the purpose of these Terms of Service; or c) use Proprietary Information in any way adverse to the disclosing party's interests.

18.3 Proprietary Information is defined as any and all information not generally available to the public, and includes without limitation, all information related support, service level agreement, pricing, payment terms, customer lists, vendor lists, the Data File, data in the Data File, System Data, the Software and any other information that is a trade secret.

18.4 Proprietary Information shall not include information: a) already in the possession of the receiving party at the time of disclosure; b) already in the public domain at the time of disclosure; c) that becomes part of the public domain through no fault of the receiving party; or d) that was obtained in good faith by the receiving party from a third party on a non-confidential basis.

18.5 The receiving party agrees to destroy all Proprietary Information, including from backup archives, upon request from the disclosing party or upon expiration or termination of these Terms of Service. The receiving party shall not retain any copies of Proprietary Information and shall certify the destruction of same.

18.6 The receiving party agrees that its duties regarding use of Proprietary Information under these Terms of Service: a) do not cease with the expiration or termination of these Terms of Service; and b) cease only if the information no longer meets the definition of Proprietary Information.

19. **Entire Agreement** The SOW and these Terms of Service constitutes the entire agreement between MZD and Company with regard to the Software and supersedes any and all prior agreements on this topic. To the extent that these Terms of Service conflict with the SOW, these Terms of Service shall control. These Terms of Service shall not be modified except by a written agreement between authorized representatives of MZD and Company.

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20. **Severability** If a court of competent jurisdiction determines that a provision of these Terms of Service is unenforceable in any jurisdiction, then such provision shall be deemed modified to the minimum extent necessary to make it comply with the applicable law of such jurisdiction.

21.   **Governing Law** These Terms of Service is governed by the laws of the State of Iowa and applicable U.S. federal law and the state and federal courts located in Cedar Rapids, Iowa, USA shall have exclusive jurisdiction and venue over any claim arising from these Terms of Service.