



## **WATERSHED ESSENTIALS**

### **SUBSCRIPTION SERVICES AGREEMENT**

This Watershed Subscription Services Agreement is entered into by and between Watershed Systems, Inc., (“**Watershed**”) and the entity named in the Subscription Order (as defined below) that wishes to use the Watershed Essentials application (“**Customer**”), and describes the terms and conditions pursuant to which Watershed will provide access to the Subscription Services to the Customer. By usage of the Subscription Services, the Customer agrees to be bound by the terms and conditions of this agreement.

#### **1. Definitions**

When used in this Agreement or in any Subscription Order, now or hereafter, the following terms shall have the following meanings.

“**Affiliate(s)**” means any entity, including and without limitation, any individual, corporation, company, partnership, limited liability company, or group that directly or indirectly, through one of more intermediaries, controls, is controlled by, or is under common control with such party.

“**Agreement**” means this Watershed Subscription Services Agreement and any Subscription Order.

“**Authorized Users**” means collectively, Learners and Administrators of Customer that are using the Subscription Services in accordance with the terms and conditions set forth in this agreement. Where applicable, the number of Authorized Users shall not exceed the number Customer agreed with Watershed from time to time.

“**Customer Data**” means any permitted documents, files, information or data stored or processed through use of the Subscription Services that concerns, but is not limited to, Customer’s employees, training materials, learning record stores, scoring methods, results, and Statements.

“**Documentation**” means the user and administrator documentation as may be made available by Watershed to the Customer from time to time.

“**Effective Date**” means the date as indicated in the Subscription Order, or the first date on which the Customer is given access to the Subscription Services, whichever is earlier.

“**Intellectual Property Rights**” means rights in know-how, unpatented inventions, patent applications, patents, registered and unregistered trademarks or service marks, names or logos (and in each case applications thereof), trade names, licenses, domain name rights, know-how and other trade secret rights, copyrights and all other intellectual or industrial property rights, in the broadest meaning of the term, derivatives thereof, and forms of protection of a similar nature anywhere in the world.



“**Learner**” means an individual employee or independent contractor of Customer (or Customer’s Affiliates) who is (i) either a) the subject of a xAPI Statement or b) actively engaged with or accessing the learning tools that are reported on utilizing the Watershed Technology or for which the Customer uses the Watershed Technology to run reports against (collectively, “Active Learner”), or (ii) learners that are not Active Learners, but for which their data, reporting, or other metrics have not been disengaged or removed from the system (collectively, “Inactive Learner”).

“**Prohibited Information**” means credit or debit card numbers, passwords, protected health information as defined in HIPAA (45 C.F.R. § 160.103), information relating to a customer or consumer of a financial institution under GLBA (15 U.S.C. §§ 6801–6809) or other highly sensitive personal information.

“**Statements**” shall be defined in Section 2.1 below.

“**Subscription Order**”, as applicable, means a document referencing this Watershed Subscription Services Agreement, evidencing the agreed-upon initial subscription or any subsequent subscription, specifying, among other things, the quantities contracted for, the applicable fees, the billing period, and any other terms as agreed to between the parties. Each such Subscription Order is subject to the terms and conditions of the Agreement (in the event of any conflict between the terms of this Watershed Subscription Services Agreement and the terms of any such Subscription Order, the terms of this Watershed Subscription Services Agreement shall prevail). For the sake of clarity, a Subscription Order is not required except as determined by Watershed, in its sole discretion.

“**Subscription Services**” means the Watershed Essentials application made available to Customer on a Software-as-a-Service (SaaS) subscription basis and the Support.

“**Support**” means the Watershed standard support services as outlined in Section 8 of this Watershed Subscription Services Agreement.

“**Watershed Technology**” means all of Watershed's proprietary technology (including the the Subscription Services and all other proprietary software, hardware, products, processes, algorithms, user interfaces, reports, know-how, techniques, designs and other tangible or intangible technical material or information) made available to Customer by Watershed in connection with the Agreement.

## **2. Grant of access and use right; Restrictions**

2.1. For the duration specified in the Subscription Services Order Watershed grants Customer the right to access and use the Subscription Services to receive, store and share experiential data in the form of statement objects (“**Statements**”) on behalf of a limited number of unique Learners solely for Customer’s own internal business purposes, subject to the terms and conditions of the Agreement and the agreed quantities and/or scope as set forth in the applicable Subscription Order. All rights not expressly granted in the Agreement are reserved by Watershed.



2.2. Customer's use of the Subscription Services does not require the entry or collection of Prohibited Information. Customer agrees not to use the Subscription Services to collect or manage Prohibited Information. NOTWITHSTANDING ANY OTHER PROVISION OF THE AGREEMENT, WATERSHED DISCLAIMS ANY AND ALL LIABILITY THAT MAY ARISE FROM CUSTOMER'S USE OF THE SUBSCRIPTION SERVICES TO COLLECT OR MANAGE PROHIBITED INFORMATION.

2.3 Watershed shall provide Customer with unique usernames and access passwords based on the Subscription Order. Customer shall ensure that each individual Authorized User has a unique ID and will not allow any Authorized User ID to be used by more than one individual Authorized User unless the Unique ID has been permanently reassigned in its entirety to another individual Authorized User, in which case the prior Authorized User shall no longer have any right to access or use the Subscription Services.

2.4. With respect to the Subscription Services, Customer shall not: (i) permit unauthorized use of the Subscription Services; (ii) infringe or violate the intellectual property rights, privacy, or any other rights of any third party or any applicable law; (iii) submit information that is defamatory, obscene, threatening, abusive or hateful, as determined by Watershed; (iv) sell, resell, transfer, assign, distribute or otherwise commercially exploit or make it available to any third party in any way (except that Customer may allow Customer's contractors access to the Subscription Services as required in order to perform their obligations towards Customer); (v) transmit or store material containing software viruses, worms, Trojan horses or other harmful computer code, files, scripts, agents or programs or upload, post, or transmit any unlawful, harassing, libelous, or abusive material on the Subscription Services; (vi) interfere with or disrupt the integrity or performance of the Subscription Services or the data contained therein; (vii) attempt to gain unauthorized access to the Subscription Services or its related systems or networks; (viii) reverse engineer, decompile, recompile, alter, copy, rent, disassemble or modify the Subscription Services or any Watershed Technology.

### **3. Customer Data**

3.1 Customer acknowledges that to use the Subscription Services, Customer may be required to provide Watershed with Customer Data. Watershed acknowledges that Customer Data shall be Customer Confidential Information and that Watershed does not own any Customer Data. Customer grants Watershed a royalty-free license to store, process and access the Customer Data to the extent required for Watershed to provide the Subscription Services.

3.2 Watershed may aggregate, anonymize and de-identify Customer Data (collectively, "**Anonymous Data**") with other data in its possession and may use such Anonymous Data for the purpose of improving the Subscription Services.

### **4. IP Ownership and Confidentiality**

4.1 Watershed alone (and/or its licensors, where applicable) shall own all right, title and interest, including all related Intellectual Property Rights, in and to the Subscription Services, the



Watershed Technology, and any suggestions, ideas, enhancement requests, feedback, recommendations or other information provided by Customer or any other party relating to the Subscription Services or the Watershed Technology. Watershed's name, Watershed's logo, and the product names associated with the Subscription Services are trademarks of Watershed or third parties, and no right or license is granted to use them except as expressly authorized herein.

4.2 **“Confidential Information”** means all information and materials obtained by a party (the “Recipient”) from the other party (the “Disclosing Party”), whether in tangible form, written or oral, that is identified as confidential or would reasonably be understood to be confidential given the nature of the information and circumstances of disclosure, including without limitation Customer Data, the Subscription Services, and the terms and pricing set out in the Agreement. Each party shall preserve as confidential and not copy, adapt, alter or communicate to any party (other than employees with a ‘need to know’ or independent contractors bound by a written agreement of confidentiality no less restrictive than this section), or use for any reason other than performance under the Agreement, all Confidential Information. The confidentiality obligations of this section shall not apply to: (i) information that is publicly known prior to the disclosure or becomes publicly known through no wrongful act of the Recipient; (ii) information that was in lawful possession of the Recipient prior to the disclosure without any agreement of confidentiality restricting its use or disclosure, and was not received as a result of any breach of confidentiality with respect to the other party (iii) is independently developed by the Recipient without use of or reference to the Disclosing Party’s Confidential Information; or (iv) becomes known by the Recipient from a third party and, to the Recipient’s knowledge, is not subject to an obligation of confidentiality to the Disclosing Party. The Recipient may disclose Confidential Information to the extent that it is required to be disclosed pursuant to a statutory or regulatory provision or court order, provided that the Recipient provides prior notice of such disclosure to the Disclosing Party, unless such notice is prohibited by law, rule, regulation or court order. Watershed and Customer acknowledge that monetary remedies may be inadequate to protect their rights with respect to a breach of this section and agree that, in addition to legal remedies otherwise available, injunctive relief is an appropriate judicial remedy to protect such rights, and each party hereby waives its right to assert that monetary remedies are adequate.

4.3 Watershed and Customer agree that both companies have the right to express publicly their business relationship. This includes the right to republish logos, company names, and software names of the other party. Either company may request that a specific reference to them by the other party be removed, and it is agreed that publications by either Watershed or Customer will be generally positive in tone.

## 5. Privacy & Security

5.1 Watershed will maintain and enforce commercially reasonable physical and logical security methods and procedures to protect Customer Data. Notwithstanding any other provision, this section sets forth Watershed’s entire obligation to protect Customer Data on the Subscription Services. Customer will maintain and enforce commercially reasonable security



methods and procedures to prevent misuse of the Subscription Services log-in information of its employees and other users. Watershed shall not be liable for any damages incurred by Customer or any third party in connection with any unauthorized access resulting from the actions of Customer or its representatives.

## **6. Charges and Payment of Fees (If applicable)**

6.1. In consideration for the Subscription Services to be performed by Watershed, Customer agrees to pay to Watershed the agreed fees in the timeframe as specified in the Subscription Order, or, lacking such specification, within thirty (30) days of the date of Watershed's invoice. All payments shall be made in U.S. currency, without credit, set-off or reduction. For any fees not paid within thirty (30) days of its due date, Customer shall be liable for late charges at the rate equal to the lesser of 1.5% per month, or, if lower, the highest rate allowed by law, calculated from the due date until the amounts are paid, together with all costs and expenses incurred in collection, including reasonable attorney's fees. Watershed may also suspend (any part of) the Subscription Services on giving the Customer no less than five (5) business days' notice in writing if any fees are due and outstanding, until such payment is received, provided that Customer will remain obligated to make all payments due under the Agreement and/or the relevant Subscription Order. All fees committed by Customer in a Subscription Order will be fixed for the term specified in such Subscription Order and thereafter may be increased by Watershed beginning with each annual term upon providing Customer no less than sixty (60) days prior written notice. Watershed's fees are exclusive of all taxes, levies, or duties imposed by taxing authorities, and Customer shall be responsible for payment of all such taxes, levies, or duties, excluding only taxes based solely on Watershed's net income.

6.2 Customer may add additional Authorized Users by executing additional written Subscription Orders and paying the additional fees. Except as may be otherwise specifically agreed on in the additional Subscription Orders, added Authorized Users will be subject to the following: (i) added Authorized Users will be coterminous with the then preexisting billing period with respect to then-existing Subscription Services; and (ii) the fee for the added Authorized Users will be the then-current generally applicable Subscription Services fee.

6.3 The Subscription Services have usage limitations based on the number of Learners, Administrators, Data Sources and/or other agreed metrics as set forth in the Subscription Order ("Quantity"). Customer shall maintain accurate records regarding Customer's actual use based on the number of its Learners, Administrators, Data Sources and/or other agreed metrics ("Actual Use"). Watershed shall monitor Customer's Actual Use of the Subscription Services. Unless otherwise set forth in an Order Form, when Customer's Actual Use exceeds the applicable Quantity, Customer shall, upon receipt of Watershed's invoice, pay additional fees on a proportionate basis for the excess use in minimum blocks of 10% of the applicable Quantity, for prior excess use and for the remainder of the then current term.

6.4. If Customer believes the Watershed invoice is incorrect, Customer must contact Watershed in writing within thirty (30) days of the invoice date stating the amount in question



and the reason for non-payment of that amount to be eligible to receive an adjustment or credit. In any event, Customer must pay the undisputed amount based on the payment terms that were agreed on with Watershed.

## **7. Term and Termination**

7.1 Unless terminated earlier pursuant to the Agreement, the initial term (“**Initial Term**”) of the Agreement shall be for a period of twelve (12) months from the Effective Date. Subsequent renewal of the Agreement, including the access grant, shall require the mutual agreement of the parties.

7.2 The Agreement can be terminated by either party for any reason upon thirty (30) days’ written notice.

7.3 Upon request of the other party, each party will return to the other any proprietary materials and data which have been delivered by the other party, which contain, embody, reflect or reference all or any part of any Confidential Information of the other party or will provide a letter signed by an authorized representative of the receiving party that such Confidential Information and data have been destroyed. Customer shall have thirty (30) days from the termination of the Agreement to request a copy of the Customer Data from Watershed, and if requested, at Customer’s cost and expense and pursuant to a mutually agreed change request, Watershed shall use commercially reasonable efforts to provide a copy of that data within forty-five (45) days. After such thirty (30) day period, Watershed shall have no obligation to maintain or provide any Customer Data and shall thereafter, unless legally prohibited, delete all Customer Data in its systems or otherwise in its possession or under its control.

## **8. Support**

Watershed will, as part of the Subscription Services, and at no additional cost to Customer, provide Customer with Watershed’s self-service customer support documentation found at [support.watershedlrs.com](http://support.watershedlrs.com) (“Support”).

## **9. Warranties and Disclaimer of Warranties**

9.1 **AUTHORITY.** EACH PARTY WARRANTS AND REPRESENTS THAT IT HAS ALL REQUISITE LEGAL AUTHORITY TO ENTER INTO AND PERFORM ITS RESPECTIVE OBLIGATIONS UNDER THE AGREEMENT AND THAT IT SHALL COMPLY WITH ALL LAWS APPLICABLE TO ITS PERFORMANCE HEREUNDER.

9.2 **THE USE OF THE WATERSHED ESSENTIALS APPLICATION IS PROVIDED ON AN AS-IS BASIS.**

9.3 **EXCEPT AS OTHERWISE STATED IN THIS SECTION, ALL CONDITIONS, REPRESENTATIONS AND WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE, ARE HEREBY**



DISCLAIMED. WATERSHED (INCLUDING ITS AFFILIATES, DIRECTORS, OFFICERS, EMPLOYEES, AGENTS, CONTRACTORS, SUCCESSORS OR ASSIGNEES) AND ITS LICENSORS DO NOT REPRESENT OR WARRANT THAT (A) THE USE OF THE SUBSCRIPTION SERVICES WILL BE UNINTERRUPTED, ERROR-FREE, SECURE, OR OPERATE IN COMBINATION WITH ANY OTHER HARDWARE, SOFTWARE, SYSTEM OR DATA, AND/OR (B) THE SUBSCRIPTION SERVICES AND/OR THEIR QUALITY WILL MEET CUSTOMER'S REQUIREMENTS OR EXPECTATIONS.

## **10. Indemnification**

10.1. Customer shall defend, indemnify, and hold harmless Watershed and its Affiliates and their respective officers, shareholders, employees, agents, successors and assigns (each a "Watershed Indemnified Party") from and against any and all damages, losses, costs and expenses (including any reasonable attorney's fees and expenses) in connection with any third party claim, suit, action, or proceeding (each a "Claim") brought against a Watershed Indemnified Party to the extent arising out of or in connection with:

10.1.1 Customer's use of the Subscription Services;

10.1.2 Any gross negligent act or willful misconduct by Authorized Users and any agents, employees, or subcontractors of Customer; or

10.1.3 An allegation that the Customer Data or any other content, data or information supplied by Customer, or the use thereof, infringes the Intellectual Property Rights of a third party.

## **11. Limitation of Liability**

EXCEPT FOR DAMAGES RESULTING FROM GROSS NEGLIGENCE, FRAUD OR WILFUL MISCONDUCT, AND LIABILITY FOR DEATH OR BODILY INJURY OF ANY PERSON CAUSED BY THE NEGLIGENT ACTS OR OMISSIONS OF A PARTY, IN NO EVENT SHALL THE TOTAL LIABILITY OF WATERSHED, ITS AFFILIATES, SERVICE PROVIDERS, LICENSORS, CONTRACTORS, OR SUPPLIERS, UNDER OR IN CONNECTION WITH THE AGREEMENT, WHETHER IN TORT (INCLUDING NEGLIGENCE AND BREACH OF STATUTORY DUTY), CONTRACT, OR ON ANY OTHER THEORY OF LIABILITY, EXCEED THE AMOUNTS PAID BY CUSTOMER SOLELY FOR THE WATERSHED ESSENTIALS SUBSCRIPTION SERVICES IN THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE DATE UPON WHICH THE EVENT GIVING RISE TO THE CLAIM FIRST AROSE. IN NO EVENT WILL EITHER PARTY, THEIR AFFILIATES, SERVICE PROVIDERS, LICENSORS, CONTRACTORS, OR SUPPLIERS, BE LIABLE FOR LOST REVENUE, PROFITS, BUSINESS OR DATA, OR FOR ANY COSTS OF COVER, INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, EXEMPLARY OR SPECIAL DAMAGES, HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY ARISING OUT OF OR RELATING



TO THE AGREEMENT, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY PROVIDED IN THE AGREEMENT.

## **12. Customer's Responsibilities**

Customer shall provide Watershed with all necessary cooperation in relation to any Subscription Order and all necessary access to such information as may be required by Watershed to provide the Subscription Services. Customer shall carry out their responsibilities set out in the Agreement in a timely and efficient manner. Customer shall ensure that the Authorized Users use the Subscription Services in accordance with the terms and conditions of the Agreement. Customer shall: (i) notify Watershed immediately of any unauthorized use of any password or account or any other known or suspected breach of security; (ii) suspend all user accounts for individuals who are no longer authorized to access those accounts, and (iii) comply with any lawful instructions concerning access to and/or use of the Subscription Services that Watershed may give from time to time.

## **13. General.**

13.1 Employees. Each party agrees that during, and for one year after, the term of the Agreement, it will not directly or indirectly solicit for hire any of the other party's employees who were actively engaged in the provision or use of the Subscription Services without the other party's express written consent. This restriction shall not apply to offers extended solely as a result of and in response to public advertising or similar general solicitations not specifically targeted at the other party's employees.

13.2. Independent Contractors. The parties are independent contractors and not agents or partners of, or joint venturers with, the other party for any purpose. Neither party shall have any right, power, or authority to act or create any obligation, express or implied, on behalf of the other party.

13.3. Assignment; Subcontracting. Neither party may assign the Agreement, in whole or in part, without the prior written consent of the other, which shall not be unreasonably withheld. However, either party may assign the Agreement to any Affiliate, or to a person or entity into which it has merged or which has otherwise succeeded to all or substantially all of its business or assets to which the Agreement pertains, by purchase of stock, assets, merger, reorganization or otherwise, and which has assumed in writing or by operation of law its obligations under the Agreement, provided that Customer shall not assign the Agreement to a direct competitor of Watershed. Any assignment or attempted assignment in breach of this section shall be void. The Agreement shall be binding upon and shall inure to the benefit of the parties' respective successors and assigns. Watershed may subcontract any part of the Agreement to any Affiliate or third party, provided that it shall remain responsible for the actions and omissions of the relevant Affiliate or third party in accordance with, and subject to the provisions of the Agreement.





13.4. **Governing Law; Dispute Resolution.** The Agreement shall be exclusively governed by the laws of the State of Tennessee, without regard to the conflict of law provisions thereof. Except for the right of either party to apply to a court of competent jurisdiction for an injunction or other equitable relief or for the collection of an account stated, any controversy, claim or dispute related to the Agreement will be settled by binding arbitration before a single arbitrator, who is an attorney with experience in the software industry. The arbitration will be conducted under the then current Commercial Arbitration Rules of the American Arbitration Association. The decision and award of the arbitrator will be final and binding, and the award rendered may be entered in any court having jurisdiction thereof. The arbitration will be held in Williamson County, Tennessee. The arbitrator will enforce the terms of the Agreement and will have no authority to award punitive damages, non-compensatory damages or any damages other than direct damages, or to award direct damages in excess of the limitations and exclusions set forth in the Agreement. In the event that Customer initiates an arbitration for alleged breach of the Agreement, and Customer does not prevail in the arbitration, Customer agrees that Watershed shall be paid its reasonable attorneys' fees and costs. The existence of the arbitration, the arbitration proceedings and the outcome of such arbitration will be treated as Confidential Information under the Agreement and will not be disclosed by either party.

13.4 **No Third Party Beneficiaries.** Unless otherwise expressly provided, no provisions of the Agreement are intended or shall be construed to confer upon or give to any person or entity other than Customer and Watershed any rights, remedies or other benefits under or by reason of the Agreement.

13.5 **Actions Permitted.** Except for actions for nonpayment or breach of a party's proprietary rights, no action, regardless of form, arising out of or relating to the Agreement may be brought by either party more than one year after the cause of action has accrued.

13.6. **No Waiver; Severability.** The waiver by either party of a breach of any provision of the Agreement or the failure by either party to exercise any right hereunder shall not operate or be construed as a waiver of any subsequent breach of that right or as a waiver of any other right. If any one or more of the provisions in the Agreement are determined invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability will not affect the other provisions of the Agreement, and the Agreement will be construed as if such invalid, illegal or unenforceable provisions had never been contained in the Agreement.

13.7. **Force Majeure.** Neither party will be responsible to the other for any delay, failure in performance, loss or damage, unless through the exercise of reasonable diligence, the non-performing party was able to prevent interference with and/or interruption of its performance of the Agreement, due to fire, explosion, power blackout, earthquake, volcanic action, cable cuts by third parties, flood, severe weather elements, strike, embargo, labor disputes, civil or military authority, war, acts of God, acts or omissions of carriers or suppliers, acts of regulatory or governmental agencies, or other causes beyond their reasonable control ("Force Majeure"), except that Customer must pay for any Subscription Services used. Any such delay or failure shall suspend the Agreement until the Force Majeure event ceases, provided that such party



gives the other party prompt written notice of the failure to perform, the reason for the failure to perform, its expected duration, and its anticipated effect on the ability to perform the obligations, and uses its reasonable efforts to limit the resulting delay in its performance.

13.8 Miscellaneous. No text or information set forth on any other purchase order, preprinted form or document (other than a Subscription Order, if applicable and where expressly stated that it amends or deviates from the terms of this Agreement) shall add to or vary the terms and conditions of the Agreement. The Agreement comprises the entire Agreement between the parties and supersedes all prior or contemporaneous negotiations, discussions or agreements, whether written or oral, between the parties regarding the subject matter contained therein. All terms and provisions of the Agreement which should by their nature survive the termination of the Agreement shall so survive, including without limitation those terms regarding payment of fees, ownership and confidentiality, disclaimer of warranties and limitations of liability. No joint venture, partnership, employment, or agency relationship exists between the parties as a result of this Agreement or use of the Subscription Services. Section headings contained in the Agreement are for convenient reference only and shall not in any way affect the meaning or interpretation of the Agreement.