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University of the Incarnate Word

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

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11 LEARNING TECHNOLOGY PARTNERS,)
a California limited liability company,)

12 Plaintiff,)

13 vs.)

14 UNIVERSITY OF THE INCARNATE)
15 WORD, a Texas nonprofit corporation, and)
16 DOES 1 through 10, inclusive,)

17 Defendants.)

18 UNIVERSITY OF THE INCARNATE)
19 WORD, a Texas nonprofit corporation,)

20 Counter-Claimant)

21 vs.)

22 LEARNING TECHNOLOGY PARTNERS,)
a California limited liability company,)

23 Counter-Defendant)
24
25
26
27
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Case No. 4:14-cv-04322 PJH

**UNIVERSITY OF THE INCARNATE
WORD'S COUNTERCLAIM**

JURY TRIAL DEMANDED

Date Filed: August 19, 2014

Trial Date: TBD

1 Defendant and Counter-Claimant University of the Incarnate Word (“UIW”) asserts its
2 counterclaim against Plaintiff and Counter-Defendant Learning Technology Partners (“LTP”)
3 and alleges as follows:

4 **Jurisdiction**

5 1. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §
6 1331 (diversity jurisdiction), 28 U.S.C. § 1367 (supplemental jurisdiction), 28 U.S.C. § 2201
7 (Declaratory Judgment Act) and the doctrine of pendent jurisdiction set forth in *United Mine*
8 *Workers v. Gibbs*, 383 U.S. 715 (1996). This is a civil action between citizens of different states
9 and the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs.

10 **Venue**

11 2. Pursuant to the Services Agreement among the parties, venue is appropriate in the
12 Northern District of California. (Exh. A at § 13.4.) Moreover, LTP’s complaint has been
13 removed to the Northern District of California.

14 **The Parties**

15 3. LTP is a California limited liability company with its principal place of business
16 in Walnut Creek, California. Plaintiff’s managing member is a citizen of California residing in
17 Alamo, California. Plaintiff’s other members are all California or non-Texas citizens.

18 4. UIW is a Texas nonprofit corporation with its principal place of business in San
19 Antonio, Texas. It is a private, Catholic liberal arts university that has both a campus in San
20 Antonio, Texas and online courses. It was founded in 1881 by the Sisters of Charity of the
21 Incarnate Word. In 1995, the university created the Adult Degree Completion Program
22 (“ADCaP”) to offer post-secondary education in the evenings to working adults. In 2000, the
23 university expanded to offer online courses through “Universe Online.”

24 **General Allegations**

25 5. In December 2004, LTP and UIW entered into the “Services Agreement” whereby
26 LTP would provide online resources, including the “Learning Platform (IZIO),” for use by UIW
27 students enrolled in certain online courses. A true and correct copy of the Services Agreement is
28 attached as Exhibit A.

1 6. The Services Agreement has been modified both orally and in writing since its
2 inception, including between 2009 and 2011 to include services provided for UIW students
3 enrolled in ADCaP and related “blended” programs.

4 7. The term of the Services Agreement has been extended multiple times since its
5 inception. However, in 2013, UIW determined to terminate the agreement. Thus, pursuant to the
6 terms of the Services Agreement, on September 26, 2013, UIW provided LTP with notice of
7 termination effective at the end of 2013.

8 8. Rather than terminate the Services Agreement, in December 2013, LTP and UIW
9 entered into an “Addendum to Contract Agreement” whereby the term of the Services Agreement
10 would be extended to December 31, 2014. The Addendum also included agreement as to
11 increased fees for UIW students using LTP’s services, which was requested by LTP in response
12 to alleged increased and improper usage by UIW students. A true and correct copy of the
13 Addendum is attached as Exhibit B.

14 9. After UIW notified LTP of its intention to terminate the Services Agreement, the
15 relationship of the parties changed. LTP began demanding retroactive fees for UIW students’
16 allegedly improper uses of LTP’s system. Despite disputing such retroactive fees, on June 3,
17 2014, UIW requested that LTP provide an invoice for such alleged retroactive fees as required by
18 Section 5.2 of the Services Agreement.

19 10. On June 19, 2014, LTP transmitted an “invoice” for \$1,056,434 in retroactive
20 fees, which also included a threat to litigate if UIW did not pay the exorbitant fees. A true and
21 correct copy of LTP’s June 19, 2014 letter is attached as Exhibit C.

22 11. LTP’s “invoice” included retroactive fees from August 27, 2011 through July 13,
23 2014. This invoice was sent despite the fact that on June 25, 2013, LTP conducted a “full audit,”
24 “discover[ed] that usage of ADCaP students had multiplied[,]” and notified UIW that “no retro
25 charges [would be] assessed.” The letter also requested that UIW agree to an increase in fees due
26 to the increase in usage, to which LTP agreed six months later in the Addendum.

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SECOND CAUSE OF ACTION

(Breach of Implied Covenant of Good Faith and Fair Dealing)

20. UIW restates and realleges the allegations set forth in paragraphs 1 through 19 above, as though fully set forth herein.

21. The Services Agreement was a valid contract between UIW and LTP.

22. LTP performed all of its obligations under the Services Agreement, or was excused from performance by LTP's actions or omissions.

23. LTP breached the implied covenant of good faith and fair dealing, including by failing to fix its defective product upon notice by UIW, by issuing unreasonable and excessive "invoices" despite having agreed as part of an accord that no retroactive fees would be assessed against UIW, and threatening to file suit unless such improper fees were paid by UIW.

24. UIW was damaged by LTP's breach in an amount in excess of the jurisdictional minimum of this court. UIW will set forth the full amount of said damages when they have been more fully ascertained or proven.

THIRD CAUSE OF ACTION

(Declaratory Relief)

25. UIW restates and realleges the allegations set forth in paragraphs 1 through 24 above, as though fully set forth herein.

26. An actual controversy exists between UIW and LTP in that UIW contends, and LTP denies, that:

a. UIW was entitled to invoke early termination of the Services Agreement and has no further obligations to LTP as a result of LTP's failure to perform under the Services Agreement.

b. UIW was entitled to invoke early termination of the Services Agreement and has no further obligations to LTP as a result of LTP's issuance of an unreasonable and excessive "invoice" for retroactive fees despite having agreed as part of an accord that no retroactive fees would be assessed against UIW.

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1 c. Because the early termination of the contract was justified, UIW was not obligated
2 to pay the \$120,144 previously tendered, and LTP is obligated to restore said
3 payment to UIW.

4 27. UIW desires a judicial determination of its rights and duties with respect to the
5 Services Agreement. Such a declaration is necessary and appropriate at this time in order that
6 UIW and LTP may ascertain their rights and responsibilities under the Services Agreement.

7 WHEREFORE, UIW prays for judgment against LTP as follows:

- 8 1. That judgment be entered in favor of UIW on its counterclaim;
9 2. General and special damages in an amount to be proven at trial, including interest;
10 3. That UIW be awarded reasonable attorneys' fees and costs of suit, as provided in
11 the Services Agreement;
12 4. That UIW be awarded costs of suit to the full extent permitted by law;
13 5. For declarations that:

- 14 a. UIW was entitled to terminate the Services Agreement as a
15 result of LTP's failure to perform under the Services
16 Agreement.
17 b. UIW was entitled to terminate the Services Agreement as a
18 result of LTP's issuance of an unreasonable and excessive
19 "invoice" for retroactive fees in violation of the parties'
20 agreement despite having agreed as part of an accord that no
21 retroactive fees would be assessed against UIW.
22 c. LTP is obligated to reimburse UIW the full amount of
23 \$120,144 tendered in August 2014, together with interest
24 thereon at the legal rate.

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JURY TRIAL DEMANDED

UIW demands a jury on all claims so triable.

Dated: October 2, 2014

GLYNN & FINLEY, LLP
CLEMENT L. GLYNN
JONATHAN A. ELDREDGE
One Walnut Creek Center
100 Pringle Avenue, Suite 500
Walnut Creek, CA 94596

By /s/Jonathan A. Eldredge
Attorneys for Defendant
University of the Incarnate Word

Exhibit A



Universe1220

SERVICES AGREEMENT

This SERVICES AGREEMENT ("Agreement") is made and entered into as of the Effective Date, by and between **University of the Incarnate World, Universe Online**, having offices at 4300 Broadway, San Antonio, TX 78209 ("Client") and Learning Technology Partners, having offices at 595 Market Street, Suite 1340, San Francisco, California, 94105 ("LTP").

WHEREAS, LTP is engaged in the business of developing and providing a hosted Web-Based Collaboration application for education, knowledge sharing and performance support consisting of certain LTP Software, and associated services described herein (collectively, the "Services"); and

WHEREAS, LTP desires to enter into an agreement with Client, and Client desires to enter into an agreement with LTP, whereby LTP will host the application for the Client and provide Services to facilitate Client's collaboration, performance support and knowledge sharing program(s).

NOW, THEREFORE, in consideration of the foregoing premises and the mutual covenants contained herein, the parties hereby agree as follows:

1. DEFINITIONS

1.1 **Effective Date:** the Effective Date shall be the date that the Client signs the Agreement.

1.2 **Software:** the term Software shall mean LTP's Learning Platform ("IZIO")

2. SERVICES

LTP agrees to provide to Client the Core Services described in **Exhibit A** (the "Services"), subject to the terms and conditions set forth herein. LTP shall be under no obligation to provide the Services on terms and conditions other than as set forth herein.

3. GRANT OF LICENSES

3.1 License by LTP to Client.

Subject to the terms and conditions of this Agreement (including Client's obligation to pay the Fees), LTP grants to Client a non-exclusive, worldwide license to use the Software in executable code form and in accordance with applicable documentation for the sole purpose of accessing and using the Services.

3.2 License by Client to LTP.

Client hereby grants to LTP a non-exclusive, non-transferable, royalty-free license to reproduce, distribute, perform and display any course materials or other content provided by Client to LTP for the purposes of providing the Services to Client.

3.3 Limited Trademark License.

Each party grants the other party hereunder a limited, non-exclusive, non-transferable, royalty-free license to use such party's trade name, logo, or trademarks for the purpose of marketing the Services. The content of any marketing materials making use of a party's tradename, logo, or trademarks will be subject to that party's prior written approval which shall not be unreasonably withheld. Each party will comply with the other party's trademark usage guidelines in using any trademark, trade name, or logo of the other party. Except as expressly authorized by this Agreement, neither party will make any use of the other party's trademarks, trade names, or logo.

4. PROPRIETARY RIGHTS

4.1 Proprietary Rights of LTP.

As between LTP and Client, the Software shall remain the sole and exclusive property of LTP. Nothing in this Agreement shall be construed to grant Client any ownership right in, or license to the Software, except as provided in Section 3 of this Agreement. All materials, including, any computer software (in object code and source code form), script, programming code, data, information or HTML script developed by LTP or its suppliers, including any trade secrets, know how, methodologies and processes, shall be the sole and exclusive property of LTP, including without limitation all copyrights, trademarks, patents, trade secrets, and any other proprietary rights inherent therein and appurtenant thereto.

4.2 Proprietary Rights of Client.

All content provided by Client to LTP pursuant to this Agreement, including any course materials, computer software (in object code and source code form), script, programming code, data, information or HTML script, shall remain the sole and exclusive property of Client or its suppliers, including, without limitation, all copyrights, trademarks, patents, trade secrets, and any other proprietary rights inherent therein and appurtenant thereto.

4.3 Restrictions.

Client acknowledges that the Software and its structure, organization and source code constitute valuable trade secrets of LTP. Accordingly, Client agrees not to (a) modify, adapt, alter, translate, or create derivative works from the Software; (b) merge the Software with other software; (c) sublicense, lease, rent, loan, or otherwise transfer (except as explicitly provided in Section 3) the Software to any third party; (d) reverse engineer, decompile, disassemble, or otherwise attempt to derive the source code for the Software; or (e) otherwise use or copy the Software except as expressly allowed under Section 3.

5. FEES, TAXES AND EXPENSES

5.1 Services Fees.

Client shall pay LTP all fees for the Core Services in accordance with the applicable fee schedule set forth in Exhibit A. All such fees shall be referred to collectively as the "Fees."

5.2 Payment.

(a) Unless otherwise provided by LTP, Client shall pay all Fees upon receipt of invoice. All payments must be made in U.S. dollars and shall be due upon Client's receipt of invoice from LTP. Failure to pay LTP for said fees by invoice terms will result in temporary deactivation of Software until payment is received. The Fees exclude all applicable sales, use and other taxes and all applicable export and import fees, customs duties and similar charges, and Client will be responsible for payment of all such taxes (other than taxes based on LTP's income), fees, duties and charges, and any related penalties and interest, arising from the payment of the Fees or the delivery or license of the Software or Services to Client. Client will make all payments of the Fees to LTP free and clear of, and without reduction for, any withholding taxes; any such taxes imposed on payments of the Fees to LTP will be Client's sole responsibility, and Client will provide LTP with official receipts issued by the appropriate taxing authority, or such other evidence as LTP may reasonably request, to establish that such taxes have been paid. LTP reserves the right to charge interest in the amount of eighteen percent (18%) per annum or the maximum rate permitted by applicable law, whichever is less, from the due date until paid with the exception of disputed fees.

(b) In its sole discretion LTP may establish any lawful credit policies, payment terms, late payment charges and other such mechanisms for the facilitation of LTP's business. LTP is not obligated to extend credit terms to any individual, group, or organization.

5.3 Taxes.

The Fees exclude all applicable sales, use and other taxes, and Client will be responsible for payment of all such taxes (other than taxes based on LTP's income), and any fees, duties, charges, penalties, or interest, arising from the payment of the Fees, the provision of the Services, or the license to the Software.

6. MARKETING.

6.1 **Publicity.** Client agrees that LTP may use Client's name and logo to identify Client as a customer of LTP on LTP's Web Site, and as a part of a general list of LTP customers for use and reference in LTP corporate, promotional and marketing literature. Additionally, Client agrees that LTP may issue a press release identifying Client as a LTP customer. The content of any press release identifying Client as a customer of LTP will be subject to Client's prior approval which shall not be unreasonably withheld. Similarly, Client may issue a press release identifying LTP as a provider of Services subject to LTP's prior approval.

6.2 Web sites. The parties shall discuss in good faith appropriate statements and links in and to each party's Web Sites.

6.3 Non-Exclusivity. Nothing in this Agreement will prevent LTP from entering into joint or cooperative marketing arrangements with, or offering similar marketing assistance to, any other third parties at any time.

7. CONFIDENTIALITY

7.1 Confidential Information. Each party (the "Disclosing Party") may from time to time during the term of this Agreement disclose to the other party (the "Receiving Party") certain information regarding the Disclosing Party's business, including technical, marketing, financial, employee, planning, and other confidential or proprietary information ("Confidential Information"). The Disclosing Party will mark all Confidential Information in tangible form as "confidential" or "proprietary" or with a similar legend. The Disclosing Party will identify all Confidential Information disclosed orally as confidential at the time of disclosure. Regardless of whether so marked or identified, however, any information that the Receiving Party knew or should have known, under the circumstances, was considered confidential or proprietary by the Disclosing Party, will be considered Confidential Information of the Disclosing Party.

7.2 Protection of Confidential Information. The Receiving Party will not use any Confidential Information of the Disclosing Party for any purpose not expressly permitted by this Agreement, and will disclose the Confidential Information of the Disclosing Party only to the employees or contractors of the Receiving Party who have a need to know such Confidential Information for purposes of this Agreement and who are under a duty of confidentiality no less restrictive than the Receiving Party's duty hereunder. The Receiving Party will protect the Disclosing Party's Confidential Information from unauthorized use, access, or disclosure in the same manner as the Receiving Party protects its own confidential or proprietary information of a similar nature and with no less than reasonable care.

7.3 Exceptions. The Receiving Party's obligations under this Section 7 with respect to any Confidential Information of the Disclosing Party will terminate if such information: (a) was already lawfully known to the Receiving Party at the time of disclosure by the Disclosing Party; (b) is disclosed to the Receiving Party by a third party who had the right to make such disclosure without any confidentiality restrictions; (c) is, or through no fault of the Receiving Party has become, generally available to the public; or (d) is independently developed by the Receiving Party without access to, or use of, the Disclosing Party's Confidential Information. In addition, the Receiving Party will be allowed to disclose Confidential Information of the Disclosing Party to the extent that such disclosure is (i) approved in writing by the Disclosing Party, (ii) necessary for the Receiving Party to enforce its rights under this Agreement in connection with a legal proceeding; or (iii) required by law or by the order of a court of similar judicial or administrative body, provided that the Receiving Party notifies the Disclosing Party of such required disclosure promptly and in writing and cooperates with the Disclosing Party, at the Disclosing Party's request and expense, in any lawful action to contest or limit the scope of such required disclosure.

7.4 Return of Confidential Information. The Receiving Party will return to the Disclosing Party or destroy all Confidential Information of the Disclosing Party in the Receiving Party's possession or control and permanently erase all electronic copies of such Confidential Information promptly upon the written request of the Disclosing Party or the expiration or termination of this Agreement, whichever comes first. At the Disclosing Party's request, the Receiving Party will certify in writing signed by an officer of the Receiving Party that it has fully complied with its obligations under this Section 7.4.

7.5 Confidentiality of Agreement. Neither party will disclose any terms of this Agreement to anyone other than its attorneys, accountants, and other professional advisors under a duty of confidentiality except (a) as required by law or (b) pursuant to a mutually agreeable press release or (c) in connection with a proposed merger, financing, or sale of such party's business (provided that any third party to whom the terms of this Agreement are to be disclosed signs a confidentiality agreement with terms no less restrictive than the confidentiality terms herein).

7.6 LTP Exclusivity. Client acknowledges and agrees that LTP will incur significant costs in initializing the relationship with Client, including initial setup fees and custom work charges. In addition, LTP is providing a discount exceeding sixty percent (60%) of its standard fees. As a consideration for LTP agreeing to waive its setup fees and custom work charges, and providing such discount, Client agrees that for the term of this Agreement LTP shall be Client's sole and exclusive provider for all distance education Content Management Systems or Learning Management Systems.

8. REPRESENTATIONS AND WARRANTIES

8.1 Client Representations and Warranties.

Client represents and warrants to LTP that Client will use diligent efforts to ensure that its network and systems do not compromise the security or functionality of the systems used to provide the Services, whether by transfer of viruses or other harmful code, requests for service, or otherwise. Client agrees that, in the event its network and systems compromise the security or functionality of the systems used to provide the Services, Client shall use its best efforts to assist LTP to mitigate and restore any losses that may be incurred.

8.2 LTP Representations and Warranties

LTP represents and warrants to Client that the Software and the Services provided to Client by LTP will not violate, plagiarize, or infringe upon the rights of any third party, including copyrights, trade secrets, privacy, or other personal or proprietary rights. LTP further represents and warrants to Client that LTP will use diligent efforts to ensure that its network and systems used to provide the Services do not compromise the security or functionality of Client's network and systems, whether by transfer of viruses or other harmful code, or otherwise. LTP agrees that, in the event its network and systems used to provide the Services compromise the security or functionality of

Client's network and systems, LTP shall use its best efforts to assist Client to mitigate and restore any losses that may be incurred.

DISCLAIMER

EXCEPT FOR THE EXPRESS WARRANTIES IN THIS SECTION 8, LTP DISCLAIMS ALL OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, REGARDING THE SERVICES, INCLUDING ANY WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. CLIENT ACKNOWLEDGES THAT IT HAS RELIED ON NO WARRANTIES OTHER THAN THE EXPRESS WARRANTIES IN THIS AGREEMENT.

9. INDEMNIFICATION

LTP will defend at its own expense any action against Client brought by a third party to the extent that the action is based upon a claim that the Software infringes any U.S. copyrights or misappropriates any trade secrets recognized as such under the Uniform Trade Secret law, and LTP will pay those costs and damages finally awarded against Client in any such action that are specifically attributable to such claim or those costs and damages agreed to in a monetary settlement of such action. The foregoing obligations are conditioned on Client notifying LTP promptly in writing of such action, Client giving LTP sole control of the defense thereof and any related settlement negotiations, and Client cooperating and, at LTP's request and expense, assisting in such defense. If the Software becomes, or in LTP's opinion is likely to become, the subject of an infringement claim, LTP may, at its option and expense, either (a) procure for Client the right to continue using the Software, (b) replace or modify the Software so that it becomes non-infringing, or (c) accept return of the Software and give Client a refund for the Fees paid by Client less a reasonable allowance for the period of time Client has used the Software. Notwithstanding the foregoing, LTP will have no obligation under this Section 9 or otherwise with respect to any infringement claim based upon (i) any use of the Software not in accordance with this Agreement or for purposes not intended by LTP, (ii) any use of the Software in combination with other products, equipment, software, or data not supplied by LTP, (iii) any use of any release of the Software other than the most current release made available to Client, or (iv) any modification of the Software by any person other than LTP. **EXCEPT AS PROVIDED IN SECTION 10 AND SECTION 11, THIS SECTION 9 STATES LTP'S ENTIRE LIABILITY AND CLIENT'S SOLE AND EXCLUSIVE REMEDY FOR INFRINGEMENT CLAIMS AND ACTIONS.**

10. LIMITATION OF LIABILITY

IN NO EVENT WILL LTP BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, EXEMPLARY, SPECIAL OR INCIDENTAL DAMAGES, INCLUDING ANY LOST DATA AND LOST PROFITS, ARISING FROM OR RELATING TO THIS AGREEMENT. EXCEPT AS PROVIDED IN SECTION 9 AND SECTION 11, LTP'S TOTAL CUMULATIVE LIABILITY IN CONNECTION WITH THIS AGREEMENT, WHETHER IN CONTRACT OR TORT OR OTHERWISE, WILL NOT EXCEED THE AMOUNT OF FEES PAID TO LTP DURING THE 12-MONTH PERIOD PRECEDING THE DATE SUCH CLAIM IS MADE. CLIENT ACKNOWLEDGES THAT THE FEES REFLECT THE ALLOCATION OF RISK SET FORTH IN THIS AGREEMENT AND THAT LTP WOULD NOT ENTER INTO THIS AGREEMENT WITHOUT THESE LIMITATIONS ON ITS LIABILITY.

11. RELIEF

11.1 Injunctive Relief.

Each party acknowledges that a breach of this Agreement, including any breach of Section 7, would result in irreparable harm to the non-breaching party. Accordingly the parties agree that in the event of a breach of this Agreement, the non-breaching party shall be entitled to apply to a court of appropriate jurisdiction for injunctive relief to prevent or stop harm to the non-breaching party, including harm relating to any Intellectual Property Rights of the non-breaching party.

11.2 Recovery of Litigation Costs.

In the event of any action brought to enforce this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees and other costs incurred in that action or proceeding from the other party in addition to any other relief to which it may be entitled.

12. TERM; TERMINATION

12.1 Initial Term.

This Agreement shall be effective from the Effective Date and thereafter remain in effect for Three years (the "Term"), unless earlier terminated in accordance with the terms of this Agreement.

12.2 Automatic Renewal.

Agreement will automatically renew for like term unless either party notifies the other with their desire not to renew sixty (60) days in advance of termination date.

12.3 Termination without Cause.

This Agreement may be terminated by either party on the last day of the Term by providing written notice to the other party not less than sixty (60) days prior to the expiration of the Term.

12.4 Termination for Cause.

In addition to any other rights LTP may have under this Agreement or applicable law, LTP may, at LTP's option, immediately terminate this Agreement, upon (i) a material breach by Client of Client's obligations under this Agreement which breach is not cured within thirty (30) days after written notice thereof is received by Client; (ii) Client ceasing to do business in the normal course, becoming or being declared insolvent or bankrupt, being the subject of any proceeding relating to liquidation or insolvency which is not dismissed within ninety (90) days or making an assignment for the benefit of its creditors; or (iii) Client building or attempting to build any learning platform or productivity center based on the Software or intellectual property of LTP.

This Agreement can be terminated by Client immediately, if (i) the Software or Services are not available to Client's users at least 90% of the time for any two of any three consecutive weeks or (ii) upon failure of LTP to address problems within 24 hours of Client reporting said issues.

12.5 Post Termination Obligations

In addition to any other rights Client may have under this Agreement or applicable law, if LTP ceases to do business in the normal course, becoming or being declared insolvent or bankrupt, being the subject of any proceeding relating to liquidation or insolvency which is not dismissed within ninety (90) days or making an assignment for the benefit of its creditors, Client is entitled to the platform (Izio) source code, which will be preserved in escrow for the duration of this Agreement.

12.6 Deactivation; Withholding of Fees

LTP reserves the right to temporarily deactivate Client's hosted software application for non-payment in accordance with the "Services Fees," outlined in Section 5.1, until payment is received.

12.7 Survival.

Sections 4 (Proprietary Rights), 5 (Fees, Taxes, and Expenses), 7 (Confidentiality), 8 (Representations and Warranties), 9 (Indemnification), 10 (Limitation of Liability), 11 (Relief), 12 (Term; Termination), and 13 (Miscellaneous) shall survive any expiration or termination of this Agreement.

13. MISCELLANEOUS

13.1 Entire Agreement.

This Agreement and the Exhibits attached hereto constitute the entire agreement between LTP and Client with respect to the subject matter hereof and supersedes all prior oral negotiations and prior written agreements with respect thereto.

13.2 Independent Contractors

Nothing in this Agreement or in the course of dealing between Client and LTP pursuant hereto shall be deemed to create between Client and LTP (including their respective directors, officers, employees and agents) a partnership, joint venture, association, employment relationship or any other relationship, other than that of independent contractors with respect to each other. LTP shall not have the authority to commit or legally bind Client in any manner whatsoever, including the acceptance or making of any agreement, representation or warranty.

13.3 Waiver; Non-Waiver; Amendment.

Failure by either party to enforce any of the provisions of this Agreement or any rights with respect hereto or the failure to exercise any option provided

hereunder shall in no way be considered to be a waiver of such provision, right or option, or to in any way affect the validity of this Agreement. No waiver of any rights under this Agreement, or any modification or amendment of this Agreement shall be effective or enforceable, unless in writing and signed by both parties.

13.4 Governing Law and Venue.

This Agreement is governed by the laws of the State of California as such laws apply to contracts between California residents performed entirely within California. The United Nations Convention on Contracts for the International Sale of Goods does not apply to this Agreement. Any action or proceeding arising from or relating to this Agreement may be brought in a federal court in the Northern District of California or in state court in San Francisco County, California, and each party irrevocably submits to the jurisdiction and venue of any such court in any such action or proceeding.

13.5 Assignment.

Client may not assign or transfer, by operation of law or otherwise, any of its rights under this Agreement (including its licenses with respect to the Licensed Software) to any third party without LTP's prior written consent, except pursuant to a transfer of all or substantially all of Client's business and assets, whether by merger, sale of assets, sale of stock or otherwise. Any attempted assignment or transfer in violation of the foregoing will be void.

13.6 Notice.

All notices or other communications under this Agreement must be in writing and will be deemed to have been duly given when (a) delivered by hand (with written confirmation of receipt), (b) sent by facsimile or electronic mail (with written confirmation of receipt), or (c) two (2) days after being deposited for delivery with a nationally recognized overnight delivery service, such as Federal Express, and addressed or sent, as the case may be, to the appropriate addresses or facsimile numbers set forth below (or to such other addresses or facsimile numbers as a party may designate by notice to the other party):

In the case of Client:

University of the Incarnate Word
Dr. Cyndi Porter, Dean Universe Online
4300 Broadway,
San Antonio, TX 78209

In the case of LTP:

Mr. Reda Athanasios
595 Market Street, Suite 1340
San Francisco, CA 94105
Tel: (415) 495-8555
Facsimile No.: (415) 495-8570

13.7 Severability.

If any provision of this Agreement is held invalid or unenforceable, such provision shall thereupon be deemed modified only to the extent necessary to render the same valid or eliminated from this Agreement, as the situation may require, and this Agreement shall be enforced and construed as if such provision had been included herein as so modified in scope or applicability or not been included herein, as the case may be.

13.8 Responsibility for Account Number/Passwords.

Client is responsible for all uses of Software whether or not authorized by Client. Client is responsible for maintaining the confidentiality of Client's account numbers and passwords. Client agrees to immediately notify LTP of any unauthorized use of Client's account of which Client becomes aware.

13.9 Responsibility for Content of Communication.

Client agrees that Client is solely responsible for the content of all visual, written or audible communications using Client's account. Client agrees that Client will not use Services to send unsolicited mass mailings outside Client's company or organization. Client further agrees not to use Services to communicate any message or material that is harassing, libelous, threatening, and obscene, would violate the intellectual property rights of any party or is otherwise unlawful, that would give rise to civil liability, or that constitutes or encourages conduct that could constitute a criminal offense, under any applicable law or regulation. Although LTP is not responsible for any such communications, LTP may delete any such communications of which LTP becomes aware, at any time without notice.

13.10 Counterparts.

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which taken together shall constitute but one agreement.

13.11 Construction.

The headings preceding the text of the paragraphs of this Agreement have been inserted solely for convenience of reference and neither constitutes a part of this Agreement nor affects its meaning, interpretation or effect. Where used in this Agreement, the word "including" means "including but not limited to".

13.12 Force Majeure.

If performance hereunder is interfered with by any condition beyond a party's reasonable control, the affected party shall be excused from performance to the extent of such condition. The operation of LTP's servers and the provision of the Services may be interfered with by numerous factors outside of LTP's control. LTP does not guarantee continuous, uninterrupted or secure Services, and Client acknowledges that the Services may be unavailable for sustained periods of time.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives.

LTP, LLC.**(CLIENT)**By: By: Reda Athanasios
(Print Name):Douglas B Endsley
(Print Name):

Title: President

Title: V-P. for Business & Finance

Date: _____

Date: December 22, 2004

EXHIBIT A

SERVICES AND FEES

I. SERVICES

Services as described herein may only be amended or expanded with an amendment to the Agreement in writing and signed by both parties.

- **A license** for the LTP Learning Platform (IZIO). This software license includes unlimited access rights to the LTP Learning Platform for the 36-month period beginning with the Effective Date. It also includes access to updated versions of the LTP Learning Platform, increased functionality of the core application and added features and enhancements as they become available during the license period.
- **Hosting of all offerings** developed by Client on the LTP Learning Platform. LTP will provide technical support, hosted servers, network administration, software and system maintenance, mirror servers and backup services.

II. FEES

User Fees (IZIO "named users") will be determined according to the total user account population on the IZIO for the 30 days prior to the date of billing, usually the 15th of every month, beginning on the first month of the contract. "Named Users" are anyone enrolled on the IZIO including (but not limited to): administrators, instructors, staff, and enrolled students. Client is responsible for maintaining the accuracy of the user accounts.

All discounts shall be in accordance with Table 1 and are valid until March 5, 2005. If client fails to sign this contract by the aforementioned date, the fees are subject to change.

USERS CHARGES	
UIW UNIVERSE WILL PAY LTP \$15 PER A STUDENT PER (5- 8 WEEKS) SEMESTER PER COURSE FOR UP TO 1800 STUDENTS IN ANY GIVEN SEMESTER	
UIW UNIVERSE WILL PAY LTP \$12 PER A STUDENT PER (5- 8 WEEKS) SEMESTER PER COURSE FOR ALL STUDENTS ABOVE 1800 AND UP TO 2500 IN ANY GIVEN SEMESTER	
UIW UNIVERSE WILL PAY LTP \$11 PER A STUDENT PER (5- 8 WEEKS) SEMESTER PER COURSE FOR ALL STUDENTS ABOVE 2500 IN ANY GIVEN SEMESTER	

- III. OPTIONAL GRAPHIC WORK CLIENT WILL PAY LTP A \$100/HOUR FOR ANY WORK DONE SUBJECT TO CLIENT PRE-APPROVAL.**
- IV. PAYMENT SCHEDULE PAYMENT WILL BE DUE IN FULL UPON THE FIRST DAY OF THE MONTH FOLLOWING SEMESTER START DATE.**

Exhibit B

Addendum to Contract Agreement

In reference to the Services agreement by and between the undersigned, said agreement being dated December 22nd, 2004 (Contract).

BE IT KNOWN that for good consideration the parties made the following changes a part of said contract as if contained therein.

AMENDMENT TO AGREEMENT Term

ARTICLE 12 clauses 12.1 Initial Term;

The Agreement ending date will be extended to December 31, 2014

AMENDMENT TO Exhibit A SERVES and FEES

Exhibit A Services and Fees, the fee per student per course in the USERS CHARGES schedule; will change to \$24 for all online VU students.

Exhibit A Services and Fees, the fee per student per course in the USERS CHARGES schedule; will change to \$14 for all ADCaP Blended Learning students.

Exhibit A Services and Fees, the fee per student per course in the USERS CHARGES schedule; will change to \$4 for all ADCaP students other than Blended Learning.

All other services and charges remain the same as agreed upon by both parties.

Except as provided herein, all other terms and conditions set forth of said Contract Agreement shall remain in full force and effect.

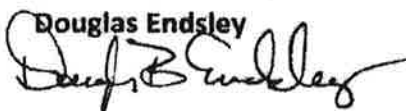
Reda Athanasios



For: Learning Technology Partners

Date: 12 - 16 - 2013

Douglas Endsley



For: University of the Incarnate Word

Date: 12/10/2013

Exhibit C



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Walnut Creek CA 94596

June 19, 2014

Douglas B. Endsley
V.P. for Business & Finance
University of the Incarnate Word
4301 Broadway CPO #319
San Antonio, TX 78209

Confidential Settlement Communication

Re: Monies Owed for Past Services

Dear Mr. Endsley:

This letter is written in response to your email dated June 3, 2014, in which you correctly ascertained that the University of the Incarnate Word ("UIW") owes money to Learning Technology Partners ("LTP") for past services utilized by UIW for its Adult Degree Completion Program ("ADCaP"). You have asked us to issue an invoice in which we "detail the enrollments and level of service and billing that applies to the enrollments." We will do all of the foregoing in this letter.

Throughout the course of LTP's relationship with UIW, we have interacted mainly with Dr. Cyndi Porter. As you know, however, she is no longer engaged in resolving the current dispute. Since you have not been involved it might be helpful to give you a little more background information. This information accompanies what we have already presented to you in my email to you dated June 2, 2014.

On December 22, 2004, UIW and LTP entered into a Services Agreement (the "Agreement") pursuant to which LTP has been providing UIW with access to LTP's "IZIO" online learning platform. The original term of the Agreement was for three years, and UIW and LTP have renewed the agreement three times, the first two times for additional 3-year terms and most recently for one final 1-year term that will conclude on December 31 of this year. Under the original agreement, UIW was to pay LTP \$15 for each student who was granted access to IZIO for one 5-8 week semester (see Exhibit A, Section II of the Agreement), with certain volume discounts applying. Over the past 10 years, LTP and UIW have agreed to various increases in this fee; for most of the past three to four years, the fee has been \$22 per student for a 5-8 week semester.

At the end of 2009, UIW asked LTP to make e-books available to ADCaP students who did not use IZIO, and LTP agreed to do so, charging UIW \$2 for each student who was enrolled in a course through LTP's web portal and who used it to download an e-book. In LTP's invoices to



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UIW, this is referred to as “Click Through Usage.” At one point UIW began extending their usage of the web portal to include a full electronic registration system. When we became aware of this, we proposed increasing the “Click-Through” fee to \$4, but that change was never implemented. In any event, a student’s access to LTP’s web portal (whether to download an e-book or to perform other functions) was always completely separate from that student’s access of IZIO, and the two were never meant to be conflated.

In July 2011, at UIW’s request, LTP agreed to provide IZIO to students in the new ADCaP “Blended” program at a discounted rate, which was usually around \$12 per student for the 5-8 week term over the past few years.

The price-per-student for enrollment in an IZIO course is a fixed fee and applies regardless of the student’s usage of IZIO; this has been the practice of LTP and UIW for the past 10 years and is what is stated in the Agreement. That is, if any UIW (non-blended program) student *enrolls* in a course on IZIO, UIW owes LTP \$22 regardless of whether the student uses IZIO every single day during the semester or decides never to actually access the platform. This is a significantly discounted price. As you can see from Section 7.6 of the Agreement, LTP has been giving UIW a 60% discount since the contract was signed. If LTP had charged UIW its standard prices, UIW would have been required to pay \$55 for each standard ADCaP student enrolled on IZIO and \$30 for each blended student (instead of \$22 and \$12, respectively).

Late in 2011, LTP began experiencing severe usage and capacity issues, as I noted in my last email to you. It took nearly 3 years to diagnose and address these issues. During that time LTP incurred significant costs upgrading its servers and systems and lost significant business opportunities because of the amount of time required to tend to UIW’s problems and the unavailability of resources required to service new customers. During this time, on several occasions (both in writing and in person) LTP inquired whether UIW was putting extra burden on LTP’s systems, and in each case UIW denied knowledge of this. It turns out this was not true. It is now clear to both LTP and UIW that there were two reasons for the continuing strain on LTP’s network and systems, both attributable to UIW.

The first reason was enrollment into IZIO of ADCaP students for whom UIW had only paid the \$2 “Click Through Usage” fee. That is, UIW had been enrolling all “Click Through” students in classes UIW structured in IZIO, even though LTP’s systems were only allocated to handle the IZIO students of whom we were aware. Only UIW had the capability to build these IZIO classes and to grant students access to IZIO: the “Click Through Usage” students would not have been able to know how to access IZIO, and these IZIO classes would have never existed, without the aid of UIW’s IZIO administrators.

The second reason was UIW’s allowing all ADCaP students to remain enrolled in IZIO for twice the amount of time as was stipulated in the Agreement. From the second “Fall” semester of 2011 through the second “Spring” semester of this year, although UIW was representing that only



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Blended students were accessing IZIO, and that they were only accessing it for one 5-8 week term, in reality all ADCaP students (Blended and Click-Through) were granted access to IZIO for 10-16 weeks.

As I mention in my June 2 email, dealing with this issue has taken a grave toll on the professional and personal lives of my business partners and me. We would like to resolve this quickly so we can put this unpleasant chapter behind us. To that end, we have calculated the amounts that UIW owes for students for whom (a) UIW paid only a \$2 "Click Through Usage" fee, but then allowed to enroll in an IZIO course, and (b) UIW paid for a 5-8 week course, but then allowed to access IZIO for 10-16 weeks. Here are two examples to illustrate this:

(a) UIW paid \$2 for a standard ADCaP student to have "Click Through Access," but the student was actually granted access to IZIO. Further, that student was granted access for 14 weeks. UIW owes LTP \$22 x 2 terms for a total of an additional \$44 for that student.

(b) UIW paid \$12 for a "blended" ADCaP student to have access to IZIO for 5-8 weeks, but that student was granted access for 14 weeks. UIW owes LTP an additional \$12 for that student.

Please find below a semester-by-semester breakdown of the amount UIW owes LTP for unauthorized usage of IZIO over the past three years, taking into account the slight shifts in pricing that have occurred during that time.



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ADCaP Terms	Start Date	End Date	Number of weeks	Total Extension Students	Total Blended Students	5-8 week courses	10-16 week courses
Fall 1 2011	8/27/2011	10/20/2011	8 weeks	0	75	x	
Fall 2 2011	9/26/2011	12/15/2011	11 weeks	1352	75		x
Spring 1 2012	12/21/2011	3/1/2012	10 weeks	1389	157		x
Spring 2 2012	1/23/2012	4/26/2012	12 weeks	1374	54		x
Summer 1 2012	3/19/2012	6/21/2012	13 weeks	1142	143		x
Summer 2 2012	5/14/2012	8/16/2012	13 weeks	1138	166		x
Fall 1 2012	7/9/2012	10/18/2012	14 weeks	1502	188		x
Fall 2 2012	9/10/2012	12/13/2012	13 weeks	1390	208		x
Spring 1 2013	11/12/2012	3/7/2013	16 weeks	1741	263		x
Spring 2 2013	1/28/2013	5/3/2013	14 weeks	1527	216		x
Summer 1 2013	3/27/2013	6/28/2013	13 weeks	1273	263		x
Summer 2 2013	5/22/2013	8/23/2013	13 weeks	1341	143		x
Fall 1 2013	7/22/2013	10/25/2013	13 weeks	1800	196		x
Fall 2 2013	9/16/2013	12/20/2013	13 weeks	1652	215		x
Spring 1 2014	11/18/2013	3/7/2014	15 weeks	1786	216		x
Spring 2 2014	1/27/2014	5/2/2014	14 weeks	1739	239		x
Summer 1 2014	4/23/2014	6/27/2014	8 weeks	1337	140	x	
Summer 2 2014	5/26/2014	7/13/2014	8 weeks	862*	102**	x	
Extension Students 5-8 week courses		1337	Due \$	29,414.00	1337 enrollments x \$22.00		
Extension Student 10-16 week courses		22146	Due \$	974,424.00	22,146 enrollments x \$44.00		
Blended Students 5-8 week courses		140	Balance Due \$	1,960.00	140 enrollments x \$14.00		
Blended Students 10-16 week courses		2742	Balance Due \$	32,904.00	2742 enrollments x \$12.00		
January 2014 Click Throughs		819	Balance Due \$	3,276.00	819 Click Throughs x \$4.00		
February 2014 Click Throughs		1204	Balance Due \$	4,816.00	1204 Click Throughs x \$4.00		
March 2014 Click Throughs		561	Balance Due \$	2,244.00	561 Click Throughs x \$4.00		
April 2014 Click Throughs		1150	Balance Due \$	4,600.00	1150 Click Throughs x \$4.00		
May 2014 Click Throughs		699	Balance Due \$	2,976.00	699 Click Throughs x \$4.00		
			Total Due \$	1,056,434.00			

Legend

Courses between 5-8 weeks

Courses between 10-16 weeks

* number of extension students as of June 18, 2014

** number of blended students as of June 18

Please note that, subject to the immediately following paragraph, we also believe that LTP is entitled to the following additional costs and other amounts:

- Late Fees. Under Section 5.2(a) of the Agreement, LTP reserves the right to charge interest of 18% per annum or the maximum rate permitted by applicable law (whichever is less) for fees paid late.
- Damages for Breach of Warranty. Under Section 8.1 of the Agreement, UIW represents and warrants to LTP that it will "use diligent efforts to ensure that its network and



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systems do not compromise the security or functionality the systems used to provide [IZIO]..." Further, in this provision UIW agrees to use its best efforts to mitigate and restore losses that may be incurred in relation to any such compromise. By allowing all of the "Click Through Usage" students to access IZIO, and allowing students to use the system for an extra semester, UIW flooded the network and compromised the network's functionality. LTP was forced to devote significant extra resources (financial and otherwise) to address this, not knowing that it was UIW all the while that was causing this problem.

- Full Fees. The charges allocated above are based on the discounted rate offered to UIW under the contract. They would be considerably greater if LTP charged UIW its full prices.
- Pain and Suffering. My business partner and I suffered greatly while dealing with the damage to our network caused by UIW's actions. I was personally under incredible stress, to the point that I developed ulcers.
- Other Fees. The charges above do not include other legal and administrative fees incurred in the course of dealing with this issue.

In the spirit of resolving this issue efficiently and painlessly, we are willing to disregard all of these additional Costs if UIW pays to LTP the entire amount of **\$1,056,434.00** calculated above. We require your written confirmation by 5:00 PM (California time) on **July 3, 2014** that such payment will be made. Upon receiving your confirmation, we are available to discuss a payment schedule with UIW (with appropriate interest) if UIW would prefer this. Also, we note that we are currently servicing, and will continue to service, all students regardless of UIW's response to this letter.

While we are hopeful that this matter can be resolved without the need for litigation, if we do not receive confirmation by July 3 that UIW will pay the amounts owed under the Agreement, then LTP will seek all appropriate legal and equitable remedies, including with respect to recovery of all of the additional costs listed above.

Sincerely,

A handwritten signature in black ink, appearing to read "Reda Athanasios", written in a cursive style.

Reda Athanasios
President, Learning Technology Partners