TEST TRACK LEARNING MANAGEMENT SYSTEM (www.ttlms.com)
Terms and Conditions

The following Terms of Use apply to the TestTrack web site (the "Web Site") owned by KMS Learning, LLC, and to the software, services, products, resources, information, content, materials and results or output derived from such services or products on the Web Site ("Site Content"). By using the Web Site or Site Contents you accept and agree to comply with the following Terms of Use. We reserve the right to modify, alter, update, or remove portions of these Terms of Use at any time. Your continued use of the Web Site signifies your acceptance of any changed items. If you do not agree with our Terms of Use, your sole remedy is to discontinue your use of the Web Site. The failure to enforce these Terms of Use, for whatever reason, shall not be construed as a waiver of any right to do so at any time.

1. **License and Specific Functionality**

    1.1 **License.** KMS hereby grants to Client a personal, non-transferable, non-exclusive license to use and access the LMS System solely for the Client's own use and provide access to the LMS System for use by users designated by Client. Client shall not copy or permit any party to copy the LMS Software or any part of the LMS System.

        1.1.1 Client shall not transfer in any manner or otherwise make the LMS System available to any third party, unless such third party is a student, employee or agent of Client and agrees to be bound by the terms of this Agreement.. Client shall not, nor allow third parities to, modify, decompile, disassemble or otherwise reverse engineer the LMS software. Client agrees that any and all retrieval, copying, or misappropriation of content, including product data, from the online environment by any means including, but not limited to web crawling, web spidering, offline browsing, and screen scraping is a violation of KMS' intellectual property rights and may result in civil and criminal penalties. Violators will be prosecuted to the maximum extent available by law.

        1.1.2 Any modifications to the LMS System or any part thereof shall be considered derivative works owned by KMS and/or its suppliers which are licensed to Client as part of the LMS System under this Agreement.

        1.1.3 Title, ownership, and all other rights in patents, copyrights, and trade secrets in the LMS System, any copy, portion, or modification thereof, including all derivative works, shall remain in KMS and shall not transfer to Client.

        1.1.4 Client shall not merge or combine the LMS System with any other software unless its separate identity is maintained.

        1.1.5 Except as permitted by this Agreement the License provided hereunder shall automatically terminate if Client copies, provides, attempts to provide, or makes available the LMS System to any unauthorized third party or violates the terms and conditions of this Agreement.

    1.2 **Specific Functionality.** In order to access the LMS Software, a Client Login Name and Password shall be provided to Client by KMS. Client is responsible for safekeeping of such Login Name and Password, and any use of such Login Name and Password shall be deemed authorized use by Client. Any time KMS updates or modifies the LMS System, particularly the LMS Software, KMS shall not be liable for any customizations Client has made that cease functioning as a result of the update or modification.

2. **Proprietary Rights**

    2.1 **Proprietary Rights of Client**. As between Client and KMS, Client Content shall remain the sole and exclusive property of Client, including, without limitation, all Client data, information, graphics, html, and all copyrights, trademarks, patents, trade secrets, and any other proprietary rights (collectively, "Client Content"). Except as provided in Section 2.1, nothing in this Agreement shall be construed

to grant KMS any ownership right in, or license to, the Client Content provided by Client to the LMS System or to KMS.

2.2 **Proprietary Rights of KMS**. All materials, including but not limited to any computer software (in objective code and source code form), data or information developed or provided by KMS or its suppliers under this Agreement, and any know-how, methodologies, equipment, or processes used by KMS to provide services to Client, including, without limitation, all copyrights, trademarks, patents, trade secrets, and any other proprietary rights inherent therein and appurtenant thereto (collectively, "KMS Materials") shall remain the sole and exclusive property of KMS or its suppliers.

2.3 **Confidentiality**. Each Party agrees that during the course of this Agreement, information that is confidential or proprietary may be disclosed to the other Party, including, but not limited to, software, technical processes, formulas and know-how, source codes, product designs, personnel information, student information, customer information, unpublished financial information, product and business plans, usage rates, advertising relationships, projections, and marketing data ("Confidential Information"). Confidential Information shall include any information designated as such or that ought in good faith to be treated as confidential due to its nature or the circumstances surrounding its disclosure. Confidential Information shall not include information that the receiving Party can demonstrate (a) is, as of the time of its disclosure, or thereafter becomes part of the public domain through a source other than the receiving Party, (b) was known to the receiving Party as of the time of its disclosure, (c) is independently developed by the receiving Party, or (d) is subsequently learned from a third party not under a confidentiality obligation to the providing Party. Except as provided for in this Agreement, each Party shall not make any disclosure of the Confidential Information to anyone other than its employees and agents who have a need to know in connection with this Agreement. Each Party undertakes to retain in confidence any Confidential Information received, shall take precautions at least as great as those taken to protect its own confidential information of a similar nature, shall notify its employees of their confidentiality obligations with respect to the Confidential Information and shall require its employees to comply with these obligations. The confidentiality obligations of each Party and its employees shall survive the expiration or termination of this Agreement. Upon request of the providing party, the receiving party agrees to remove from service and where applicable, return materials, in any medium, which contain, embody, reflect or reference all or any part of any of the providing party's Confidential Information. Additionally, any and all passwords shall be considered confidential.

3. **User System Requirements**. The system is accessible through common modern desktop computers using most mainstream browsers. It is the responsibility of the client to test system performance on specifically configured systems based on their user population. A sustained internet connection with 0% packet loss is required for access to the system.

4. **Fees**

.1 **Base Yeary Fee**. A Base Monthly Fee for access to the LMS System shall charged and billed on a yearly basis.
.2 **Payment Terms.** Client shall pay all fees for the LMS System to KMS including, but not limited to, the Base Yearly Fee, in accordance with the applicable fee and payment schedule set forth in Schedule A, or as otherwise agreed between the parties. Client shall pay these fees in order for Client to access the LMS System. Client agrees to pay its fees using a major credit card, check or wire transfer.

4.2 **Failure of Payment**. Failure of Client to pay any fees due hereunder within thirty (30) days of receipt of KMS' written notice of non-payment shall be deemed a material breach of this Agreement and shall be subject to Section 8.2 of this Agreement.

5. **Warranties**

5.1 **KMS's Warranties**. KMS represents and warrants that (a) KMS has the power and authority to enter into and perform its obligations under this Agreement, (b) KMS' services under this Agreement shall be performed in a good and workmanlike manner, (c) KMS has the full power and ability to grant the rights and to undertake the obligations set forth in this Agreement, (d) the LMS System and the services provided by KMS hereunder do not knowingly infringe on or violate any applicable law, regulation or

any patent, copyright or other proprietary rights of third parties, (e) the LMS System is not known to contain any "back door", "time bomb", "Trojan Horse", "worm", "drop dead device", "virus" (as these terms are commonly used in the computer software field), or other software routines designed to permit unauthorized access to client hardware or software or to disable or erase software, hardware, or data, or to perform any other similar type of function. No warranties extend from KMS to media uploaded to the server by the client.

5.2 **Client's Warranties**. Client represents and warrants that (a) Client has the power and authority to enter into and perform its obligations under this Agreement, (b) Client Content does not and shall not contain any content, materials, advertising or services that are inaccurate or that infringe on or violate any applicable law, regulation or right of a third party, including, without limitation, export laws, or any proprietary, contract, moral, or privacy right or any other third party right, and that Client owns the Client Content or otherwise has the right to place the Client Content on the LMS System, and (c) Client has obtained any authorization(s) necessary for hypertext links from the LMS System to other third party web sites or web applications. Should Client receive notice of a claim regarding the Client Content or Client's use of the LMS System, Client shall promptly provide KMS with written notice of such claim.

5.3 **Disclaimer of Warranty**. EXCEPT AS OTHERWISE PROVIDED HEREIN, THIS LMS SYSTEM, ANY CONTENT, AND/OR AND ANY RELATED SERVICES ARE PROVIDED "AS-IS," AND TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, KMS AND ITS MEMBERS AND MANAGERS, PARTICIPATING FINANCIAL INSTITUTIONS, THIRD-PARTY CONTENT OR SERVICE PROVIDERS, DISTRIBUTORS, DEALERS OR SUPPLIERS ("REPRESENTATIVES") DISCLAIMS ALL OTHER REPRESENTATIONS AND WARRANTIES, EXPRESS OR IMPLIED, REGARDING THIS LMS SYSTEM, THE LMS SOFTWARE, RELATED MATERIALS AND ANY SERVICES, INCLUDING THEIR FITNESS FOR A PARTICULAR PURPOSE, THEIR QUALITY, THEIR MERCHANTABILITY, EXCEPT AS OTHERWISE PROVIDED HEREIN. EXCEPT AS OTHERWISE SET FORTH HEREIN, KMS DOES NOT WARRANT THAT THE LMS SYSTEM IS FREE FROM BUGS, VIRUSES, ERRORS, OR OTHER PROGRAM LIMITATIONS, INCLUDING BUT NOT LIMITED TO ACCURATE OR UPDATED THIRD-PARTY CONTENT, NOR DOES KMS WARRANT ACCESS TO THE CLIENT'S CONTENT, THE INTERNET OR ANY OTHER SERVICE THROUGH THE LMS SYSTEM. CLIENT ACKNOWLEDGES AND AGREES THAT IT MUST: (A) PROVIDE ITS OWN ACCESS TO THE WORLD WIDE WEB AND PAY ANY SERVICE FEES ASSOCIATED WITH SUCH ACCESS, AND (B) PROVIDE ALL EQUIPMENT NECESSARY FOR IT TO MAKE SUCH CONNECTION TO THE WORLD WIDE WEB, INCLUDING A COMPUTER, AND AN ANALOG OR DIGITAL CONNECTION. SPECIFICALLY, KMS SHALL HAVE NO LIABILITY FOR THE ACCURACY OF DATA RECEIVED BY OR PROVIDED BY CLIENT.

6. **Indemnification**

6.1 **Client**. Client agrees to indemnify, defend, and hold harmless KMS, its members, managers, employees and agents, and defend any action brought against same with respect to any claim, demand, cause of action, debt or liability, including reasonable attorneys' fees, to the extent that such action is based upon a claim that: (i) if true, would constitute a breach of any of Client's representations, warranties, or agreements hereunder; (ii) arises out of the negligence or willful misconduct of Client; or (iii) any of the Client Content to be provided by Client hereunder or other material on the LMS System infringes or violates any rights of third parties, including without limitation, rights of publicity, rights of privacy, patents, copyrights, trademarks, trade secrets, licenses, and/or other contractual or property interests.

6.2 **KMS**.

6.2.1 **General Indemnification**. KMS agrees to indemnify, defend, and hold harmless Client, its directors, officers, employees and agents, and defend any action brought against same with respect to any claim, demand, cause of action, debt or liability, including reasonable attorneys' fees, to the extent that such action is based upon a claim that: (i) if true, would constitute a breach of any of KMS' representations, warranties, or agreements hereunder; (ii) arises out of the negligence or willful misconduct of KMS.

6.2.2 **Patent Indemnification**. KMS agrees to indemnify, defend, and hold harmless Client, its directors, officers, employees and agents from and against any loss, expense (including reasonable attorney's fees), damages, claims, or liabilities arising from any claim, suit or action that (i) the LMS System and Client's exercise of its license rights under this Agreement (including without limitation the use, reproduction and distribution of the Software) infringes or violate any patent, copyright, trademark, trade secret, or other proprietary rights of any third party. Should the LMS system become unusable due to litigation, client has the right to terminate the agreement and will be provided recent copies client information from the system, where applicable.

6.3 **Notice**. The party claiming any indemnification hereunder shall promptly provide the indemnifying party with written notice of any claim which it believes falls within the scope of the foregoing paragraphs. The indemnified party may, at its own expense, assist in the defense if it so chooses. Any settlement intended to bind the indemnified party shall not be final without the indemnified party's written consent, which shall not be unreasonably withheld or delayed.

7. **Limitation of Liability**. NEITHER KMS, NOR ANY OF ITS MEMBERS, MANAGERS, EMPLOYEES, REPRESENTATIVES, OR AGENTS SHALL BE LIABLE FOR UNAUTHORIZED ACCESS TO, OR ALTERATION, THEFT OR DESTRUCTION OF, THE SYSTEM, SOFTWARE APPLICATION OR CLIENT'S DATA FILES, PROGRAMS OR INFORMATION THROUGH ACCIDENT, FRAUDULENT MEANS OR DEVICES. NEITHER PARTY SHALL HAVE ANY LIABILITY TO THE OTHER PARTY FOR CONSEQUENTIAL, EXEMPLARY, SPECIAL, INCIDENTAL, INDIRECT, OR PUNITIVE DAMAGES WHETHER FORESEEABLE OR UNFORESEEABLE (WHETHER OR NOT A PARTY OR ANYONE ELSE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES) WHETHER BASED UPON LOST GOOD WILL OR LOST PROFITS. IN ANY EVENT, KMS' LIABILITY TO CLIENT FOR ANY REASON AND UPON ANY CAUSE OF ACTION SHALL BE LIMITED TO THE AMOUNT ACTUALLY PAID TO KMS BY CLIENT UNDER THIS AGREEMENT DURING THE THREE (3) MONTHS IMMEDIATELY PRECEDING THE DATE ON WHICH SUCH CLAIM ACCRUED. THIS LIMITATION APPLIES TO ALL CAUSES OF ACTION IN THE AGGREGATE, INCLUDING WITHOUT LIMITATION TO BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, MISREPRESENTATIONS, AND OTHER TORTS.

8. **Term, Termination and Renewal**

8.1 **Term**. This Agreement is for the subscription to the LMS System that shall begin when Client is provided a Login Name and password to access the LMS System (the "Term"), which shall only be upon KMS receiving complete payment for initial services. The subscription may be cancelled by either party at any time as provided in the Termination policies below (see 8.2 and 8.3).

8.2 **Termination by KMS**. This Agreement may be terminated by KMS if KMS believes, within its sole discretion, that Client has violated or acted inconsistently with this Agreement, KMS's Acceptable Use Policy or violated KMS's rights or those of a related party, or KMS is ordered to remove the Client Content by a third-party service provider of KMS, law enforcement or any other governmental agency. KMS will notify Client if it terminates the Agreement, either before or after the termination, unless giving notice would cause a risk of further violation or damages, and any fees paid by Siemens for any pro-rated period of time after termination shall be promptly returned to Siemens. Any such termination may include termination of any and all Login Names, passwords, and add-on products licensed by Client. Upon termination of this Agreement, Client may no longer have access to the LMS System.

8.3 **Termination by Client**. Client may terminate its subscription at any time by notifying KMS in writing via first class mail, facsimile or e-mail at support@TTLMS.com. Any and all fees already paid to KMS by the Client for any period of time after termination shall be promptly retuned to Client.

8.4 **Renewal**. Upon the expiration of the current Term, this Agreement will automatically renew for successive one (1) year term, unless KMS or Client give notice of their desire not to renew within ten (10) days prior to the end of the current Term. If either party gives notice of their desire not to renew, the LMS System will no longer functional for client upon expiration of the Term.

9. **Effect of Termination**. Prior to the end of the current Term, if the Term is not renewed pursuant to paragraph 8.4, it is the Client's responsibility to remove all Client information contained within the LMS System. If this Agreement is terminated without notice to Client, or Client Content is removed from the LMS System, Client may contact KMS, and KMS shall provide Client with limited access to the LMS System for the sole purpose of removing the Client Content at a standard rate, pro-rated for the length of time needed to remove said materials..

10. **Miscellaneous**

10.1 **Entire Agreement**. The KMS Acceptable Use Policy and this Agreement set forth the entire agreement and understanding of the Parties with respect to the subject matter herein and there are no representations, understandings or agreements that are not fully expressed in this Agreement.

10.2 **Survival**. Sections 2, 5, 6, 7, 9 and 10 shall survive any termination of this Agreement.

10.3 **Assignment**. Neither party may assign, delegate, pledge or otherwise transfer (including by way of a sale of assets, merger or other change of control) any right, title or interest of any type in or to this Agreement to any other party without the prior consent of the other party, which will not be unreasonably withheld.

10.4 **Force Majeure**. Neither Party to this Agreement shall be liable to the other party for any delay or failure by that Party to perform its obligations under this Agreement or otherwise, if such delay or failure arises from any cause or causes beyond the reasonable control of such party, including but not limited to labor disputes, strikes or other labor or industrial disturbances, acts of God, floods, earthquakes, lightning, material shortages, utility or communications failures, war or acts of the public enemy, riots, insurrections, embargoes, blockages, restrictions, regulations or orders of any governmental agency. A party whose performance is suspended, delayed or interrupted due to a force majeure event shall resume the performance hereunder as soon as reasonable after the force majeure event has ended.

10.5 **Governing Law**. This Agreement shall be governed by the laws of the Commonwealth of Pennsylvania without regard to conflict of law principles.

10.6 **Waiver**. The waiver or failure of either Party to exercise any right in any respect provided for herein shall not be deemed a waiver of any further right hereunder.

10.7 **Severability**. If any provision of this Agreement is determined to be invalid under any applicable statute or rule of law, it is to that extent to be deemed omitted, and the balance of the Agreement shall remain enforceable.

.8 **Modifications**. KMS may modify the information and functionality of the LMS System at any time. KMS shall announce any such modifications (in module "New Features"), and continued use of the LMS System after such notice constitutes Client's full agreement and acceptance of such modifications.

.9 **Notices**. All notices required to be given under the terms of this Agreement or which any of the parties desire to give hereunder shall be in writing and delivered either personally, by Certified Mail return receipt requested, or facsimile transmission and shall be deemed received when personally delivered, three days after mailing, or when sent with electronic confirmation of transmission. Such Notices shall be addressed as follows:

TO KMS: **Fax 610-430-1607**

KMS Learning, LLC.
PO Box 3271
West Chester, PA 19381

With a Required Copy To:

Harry J. DiDonato, Esquire
MacElree Harvey, Ltd.
17 West Miner Street
P.O. Box 660
West Chester, PA 19381-0660

TO THE CLIENT:

At current billing address

Client LMS Administrator Responsibilities (Added January 1, 2013)

To maximize the efficiency of the LMS for your particular use, every client account requires an LMS Administrator. This role is central to optimizing performance within the organization, and for coordinating and communicating with the LMS provider.

Responsibilities include:

- Importing users
- Assigning administrator rights
- Training new administrators
- Coordinating with content developers
- Managing courses and assignments
- Planning instructor-led classes
- Running reports or training others to run reports
- Monitoring any payment gateways attached to the LMS
- Maintaining a list of browsers on which the LMS and client content has been tested
- Planning for updates and new features
- Escalating bugs and issues reports after they have been internally verified
- Maintaining a list of outstanding issues related to the LMS
- Requesting and coordinating any new features or customizations needed
- Coordinating as needed with accounts payable
- Designating a backup client LMS administrator, if required

Escalating Bugs and Issues

We make great efforts to assure the system functions as designed. When the LMS does not perform correctly and a bug or issue is discovered, the first line of defense is the Client LMS Administrator, who is responsible for determining if the issue is resolvable internally or if it needs to be escalated. Bug reports or issues should not be sent directly from end-users to TTLMS without being verified by the Client LMS Administrator.

When forwarding issues, please include the following:

- Client Account
- Current LMS Administrator contact information
- User Account where issue occurred
- Description of issue including what was being done at the time, what was expected, and what actually happened
- Date and Time issue occurred
- Who verified issue and how it was verified
- Any screen-caps that illustrate the issue, if available

TTLMS will attempt to resolve the bug or issue in a timely manner and will report our findings to the Client LMS Administrator. In order to avoid charges related to resolving bugs or issues, please remember the following:

- Only the Client LMS Administrator should report bugs or issues to TTLMS

- Only verified bugs or issues should be reported
- Only issues related to the function of the LMS will be resolved without charge, not issues related to content uploaded by or developed by clients
- Issues related to customizations, integrations with others systems, and importing of TTLMS-generated content into other LMS's may generate charges regardless of how the issue is resolved

Custom Features and Course Development

When TTLMS is hired to perform course development or to create custom features on the site for client use, we will prepare a document containing the scope, budget, and timeline of the project. Upon approval, we will continue with the project along the project plan, assuming timely client reviews and approvals. Unless otherwise defined, the feedback phase of custom course development of custom features is one week. Feedback received after one week may cause a delay in the project or additional charges.