

# Hughes Learning Management Portal Month-to-Month Software Hosting Agreement

PLEASE FAX TO 1-801-764-9022

Online Store Order ID: \_\_\_\_\_

This Software Hosting Agreement (the "Agreement") is entered into and effective as of

\_\_\_\_\_ (the "Effective Date") between Hughes Network Systems LLC. ("HUGHES"), a Delaware Limited Liability Company, with its principal offices at 11717 Exploration Lane, Germantown, MD 20876, and

\_\_\_\_\_ ("CUSTOMER"), a

\_\_\_\_\_, with reference to the facts set forth in the Recitals below.

## Recitals

A. HUGHES develops and markets computer software products and services for the creation, management, delivery and tracking of web-based training content, courses and participants.

B. Pursuant to that certain Service Order between the parties executed as of the Effective Date (the "Service Order"), HUGHES is providing a Hosting training domain service for CUSTOMER.

C. As part of this service, HUGHES will host and maintain the training domain on servers owned and/or operated by HUGHES, and HUGHES desires to provide such hosting and maintenance services, on the terms and conditions contained herein.

### 1. DEFINITIONS

1.1. "CUSTOMER Data" means all information entered into the Hosting System by CUSTOMER in the course of its authorized use of the Hosting System and stored on the Host Server for access by the Hosting System and retrieval by CUSTOMER.

1.2. "Host Server" means the server provided by HUGHES or its agent through which CUSTOMER accesses the Hosting System, identified by a URL and one or more accounts and passwords to be established by CUSTOMER.

1.3. "Hosting System" means the computer software in object code form owned or provided by HUGHES for which CUSTOMER has License Rights granted pursuant to this Agreement, updates and upgrades to the Hosting System, and online documentation.

1.4. "Intellectual Property Rights" means inventions, patent applications, patents, design rights, utility models, copyrights, trademarks, service marks, trade names, domain name rights, mask work rights, know-how and other trade secret rights, and all other intellectual property rights, derivatives thereof, and forms of protection of a similar nature anywhere in the world.

1.5. "Service Order(s)" means the documentation, including telephonic and online transactions, by which CUSTOMER orders Hosting System license subscriptions and Services, as may be agreed to by the parties from time to time.

1.6. "Services" means the Hosting System services consisting of non-exclusive electronic access to the Host Server to store CUSTOMER data and make Host Server available on demand by CUSTOMER via the Internet as more specifically identified herein.

## **2. USE OF HOSTING SYSTEM**

### **2.1 License Subscription Rights Granted**

A. HUGHES hereby grants CUSTOMER a non-exclusive, non-transferable, worldwide right to use the Hosting System, subject to the terms and conditions of this Agreement for the creation, management and tracking of CUSTOMER content for internal use and for use by third-party customers. CUSTOMER shall have no right to (i) act as a reseller or distributor of the Hosting System or Services, or as a service bureau for the Hosting System or Services; (ii) use the Hosting System to create, manage or track any third-party content on behalf of third parties; or (iii) use the Hosting System in any other way that is in competition with HUGHES. All rights not expressly granted to CUSTOMER are reserved by HUGHES.

B. CUSTOMER agrees not to cause or permit the reverse engineering, disassembly, or decompilation of the Hosting System.

C. HUGHES retains all title, copyright, Intellectual Property Rights and other proprietary rights in the Hosting System. CUSTOMER does not acquire any rights, express or implied, in the Hosting System, other than those specified in the Agreement. CUSTOMER agrees that it will not use the Hosting System for sharing inappropriate materials, including without limitation materials containing viruses or other harmful code; unsolicited mail (spam); copyrighted materials to which CUSTOMER does not have appropriate rights; pornography or other adult materials offensive to community standards; harassing, tortious, or defamatory materials; or other materials prohibited by applicable international, federal, state, or local laws and regulations. CUSTOMER agrees to fully comply with all federal, state, and local privacy laws in connection with use of the Hosting System and Services.

2.2 Intellectual Property Ownership. HUGHES (and its licensors, where applicable) shall own all right, title and interest, including all related Intellectual Property Rights, in and to the HUGHES technology, the content (excluding CUSTOMER Data) and the Services. In the event CUSTOMER provides any suggestions, ideas, enhancement requests, or feedback ("Feedback") to HUGHES with respect to the Services, CUSTOMER agrees that HUGHES may freely use, disclose, reproduce, license, distribute, and otherwise commercialize the Feedback in any HUGHES product or service. This Agreement is not a sale and does not convey any rights of ownership in or related to the Services, the HUGHES technology or the Intellectual Property Rights owned by HUGHES. The HUGHES name, the HUGHES logo, and the product names associated with the Services are trademarks of HUGHES or third parties, and no right or license is granted to use them. The CUSTOMER's name, CUSTOMER's logo, and the product names associated with the CUSTOMER data are owned by CUSTOMER, including, without limitation, any copyrights and/or trademarks associated therewith.

2.3. Verification. HUGHES shall have the right to audit use of the Hosting System by CUSTOMER electronically at any time.

## **3. SERVICES**

3.1. Hosting Services. HUGHES will provide CUSTOMER with access to the online Hosting System selected in the Service Order(s) and will provide for the storage and retrieval of CUSTOMER Data in connection with use of the Hosting System. CUSTOMER is responsible for obtaining access to the Internet using software and hardware that meet CUSTOMER's minimum requirements, including security requirements.

3.2. Access. CUSTOMER users may include CUSTOMER employees and customers. CUSTOMER is responsible for the confidentiality and use of account names and passwords. HUGHES will deem any communication, data transfer, or use of the Hosting System received under CUSTOMER account names and passwords to be for CUSTOMER's benefit and use. CUSTOMER agrees to notify HUGHES if account names or passwords are lost, stolen, or being used in an unauthorized manner. CUSTOMER represents and warrants that it has the rights to all CUSTOMER Data, including the right to upload CUSTOMER Data to the Host Server in connection with its authorized use of the Hosting System. CUSTOMER agrees that the CUSTOMER Data and its use do not infringe the rights of any third party and agrees to indemnify and hold HUGHES harmless from any third-party claims of infringement as provided herein.

3.3. Data Security. When required, CUSTOMER agrees to access the Hosting System and to store and retrieve data using third-party programs, including specifically Internet "browser" programs, that support data security protocols compatible with those specified by HUGHES. HUGHES agrees to back up and maintain the security of CUSTOMER Data using industry-standard backup tools and data security protocols, and other methods reasonably deemed to be adequate for secure business data and to notify CUSTOMER in the event of a breach of security involving CUSTOMER Data.

3.4. Ownership of Data and License. CUSTOMER shall retain ownership of all CUSTOMER Data stored or retrieved in connection with use of the Hosting System, which data shall be subject to the confidentiality provisions set forth below. CUSTOMER agrees that backup or archival of CUSTOMER Data is not an infringement of any intellectual property rights of CUSTOMER or any third party. CUSTOMER agrees that it will not store data on the Host Server that is subject to the rights of any third parties without first obtaining all required authorizations and rights in writing from such third parties.

#### **4. TERM AND TERMINATION**

4.1. Term. CUSTOMER's rights to use the Hosting System and Services shall remain in effect for an initial one (1) month ("Initial Term"). Thereafter, the term shall automatically renew for additional one (1) month terms ("Renewal Terms") unless either party gives thirty (30) days' advance written notice prior to the end of the Initial Term or any Renewal Term of its intention to terminate the Agreement as described in section 4.2.

4.2. Termination. After the Initial Term, either party may terminate this Agreement for or without reason by providing thirty (30) days' written notice to the other. HUGHES may suspend all services if CUSTOMER commits a material breach that remains uncured after five (5) days' written notice specifying the nature of the breach and identifying the measures required to correct the breach. Non-payment of fees due from CUSTOMER shall be a material breach and, upon such uncured material breach, in addition to other remedies, fees for the current term shall be due and payable in full. CUSTOMER may terminate this Agreement if HUGHES commits a material breach that remains uncured after five (5) days' written notice.

4.3. Effect of Termination. Termination of this Agreement shall not preclude either party from pursuing other remedies available to it, including injunctive relief, nor shall such termination relieve CUSTOMER's obligation to pay all fees that have accrued or are otherwise owed by CUSTOMER under any Service Order or under this Agreement. Upon termination of this Agreement, and so long as CUSTOMER has paid all fees then owing under the Agreement, HUGHES shall allow CUSTOMER limited access to the Hosting System for thirty (30) days to allow CUSTOMER to retrieve any CUSTOMER Data stored on the Host Server, following which access to the Hosting System and all Services shall be terminated. Limited access during this period shall allow CUSTOMER only to (i) view and retrieve CUSTOMER Data; and (ii) complete pending transactions; but shall not include Support Services for the Hosting System or access to their functionality. Upon termination, other than for breach on the part of HUGHES under Section 4.2 above, all unpaid fees related to the initial term or any renewal term shall be due and payable in full immediately. Upon termination, HUGHES shall refund to CUSTOMER any and all fees paid in advance as such fees relate to any unused periods (based on a monthly pro-rata basis).

#### **5. NDEMNITY, WARRANTIES, REMEDIES**

5.1 Disclaimer of Warranties. EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, HUGHES DOES NOT MAKE ANY REPRESENTATION, WARRANTY, OR GUARANTY AS TO THE RELIABILITY, TIMELINESS, QUALITY, SUITABILITY, TRUTH, AVAILABILITY, ACCURACY OR COMPLETENESS OF THE SERVICES OR ANY CONTENT OR INFORMATION. EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, HUGHES DOES NOT REPRESENT OR WARRANT THAT (A) THE USE OF THE SERVICES WILL BE SECURE, TIMELY, UNINTERRUPTED OR ERROR-FREE OR OPERATE IN COMBINATION WITH ANY OTHER HARDWARE, SOFTWARE, SYSTEM OR DATA, (B) THE SERVICES WILL MEET CUSTOMER'S REQUIREMENTS OR EXPECTATIONS, (C) ANY STORED DATA WILL BE ACCURATE OR RELIABLE, (D) THE QUALITY OF ANY PRODUCTS, SERVICES, INFORMATION, OR OTHER MATERIAL PURCHASED OR OBTAINED BY CUSTOMER THROUGH THE SERVICES WILL MEET CUSTOMER'S REQUIREMENTS OR EXPECTATIONS, (E) ERRORS OR DEFECTS WILL BE CORRECTED, OR (F) THE SERVICES OR THE HOST SERVER(S) THAT MAKE THE SERVICES AVAILABLE ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. THE SERVICES AND ALL CONTENT AND INFORMATION IS PROVIDED STRICTLY ON AN "AS IS" BASIS. ALL CONDITIONS, REPRESENTATIONS AND WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NONINFRINGEMENT OF THIRD-PARTY RIGHTS, ARE HEREBY DISCLAIMED TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW.

5.2. Internet Delays. THE SERVICES MAY BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS. HUGHES IS NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES, OR OTHER DAMAGE RESULTING FROM SUCH PROBLEMS.

5.3 Representations and Warranties. HUGHES represents and warrants that: (a) Hosting System and Services will perform in conformity with its documentation, manuals, and specifications, (b) to its knowledge, there are no suits or proceedings pending or threatened which allege any infringement of any third-party intellectual property rights, and (c) it has the valid right to grant to CUSTOMER all rights to the Hosting System and Services as granted herein.

5.4. Limitation of Liability. IN NO EVENT SHALL HUGHES'S AGGREGATE LIABILITY EXCEED THE AMOUNTS ACTUALLY PAID BY AND/OR DUE FROM CUSTOMER IN THE ONE (1) YEAR PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO SUCH CLAIM EXCEPT AS EXPRESSLY PROVIDED HEREIN. IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, PUNITIVE, SPECIAL, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL OR OTHER DAMAGES OF ANY TYPE OR KIND (INCLUDING LOSS OF DATA, REVENUE, PROFITS, USE OR OTHER ECONOMIC ADVANTAGE) ARISING OUT OF, OR IN ANY WAY CONNECTED WITH THE SERVICES, INCLUDING BUT NOT LIMITED TO THE USE OR INABILITY TO USE THE SERVICES, OR FOR ANY CONTENT OBTAINED FROM OR THROUGH THE SERVICES, ANY INTERRUPTION, INACCURACY, ERROR OR OMISSION, REGARDLESS OF CAUSE IN THE CONTENT, EVEN IF THE PARTY FROM WHICH DAMAGES ARE BEING SOUGHT OR SUCH PARTY'S LICENSORS HAVE BEEN PREVIOUSLY ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

#### 5.5. Indemnity.

Subject to limitations set forth in Sections 5.1, 5.2, 5.3, and 5.4, HUGHES shall indemnify CUSTOMER (and its officers, directors and partners) from and against any and all liability, damage, loss or expense arising from any claim, demand, action or proceeding based upon or arising out of the breach or alleged breach of any of the representations or warranties set forth in this Agreement or incurred in the settlement or avoidance of any such claim, provided, however, that CUSTOMER shall give prompt legal notice to HUGHES of the assertion of any such claim and provided further that CUSTOMER shall have the right to participate in the defense thereof at its own expense. This agreement to indemnify shall survive any termination or expiration of this License Agreement. The limitations of liability set forth in Section 5.4 shall not apply an alleged infringement by HUGHES of a third party's intellectual property right(s).

1. CUSTOMER shall indemnify and defend HUGHES against all costs, including but not limited to reasonable attorney's fees, and losses arising out of any action by a third party against HUGHES arising directly or indirectly out of or incidental to (i) the breach by CUSTOMER of any of its obligations or covenants hereunder; (ii) the content, disclosure and distribution of any CUSTOMER Data; or (iii) an alleged infringement by CUSTOMER Data of a third party's intellectual property right(s), provided, however, that HUGHES shall give prompt legal notice to CUSTOMER of the assertion of any such claim and provided further that HUGHES shall have the right to participate in the defense thereof at its own expense. This agreement to indemnify shall survive any termination or expiration of this License Agreement.

5.6. Exclusive Remedies. For any breach of the warranties contained in Section 5, CUSTOMER's exclusive remedy, and HUGHES's entire liability, shall be:

A. For Hosting System: The correction of Hosting Program errors that caused breach of the warranty. Any error not reported to HUGHES by CUSTOMER within sixty (60) days of its discovery will be deemed waived and accepted by CUSTOMER.

B. For all other Services: The reperformance of the Services, provided that CUSTOMER notifies HUGHES in writing of any defects in the Services within ninety (90) days of their performance.

## 6. PAYMENT PROVISIONS

6.1. Payment. The subscription fee for the License and Services for the Initial Term shall be payable in advance in a lump sum prior to commencement of the Services. Payment of the monthly subscription fee shall be in accordance with the applicable Service Order(s).

6.2. Additional Users. Monthly users above that specified in the Service Order(s) are billed in 250 user increments. Each 250 user increment is an additional \$250/month.

6.3. Billing Additional Users above those specified in the Service Order(s) during the Initial Term will be billed monthly. Monthly billing after the Initial Term will include the recurring monthly base subscription fee specified in the Service Order(s), any recurring fees for optional services specified in the Service Order(s) and any Additional Users as per 6.2. HUGHES reserves the right to alter pricing for any and all services at the conclusion of eleven (11) consecutive Renewal Terms following the Initial Term, or at the conclusion of any subsequent twelve (12) month period, with thirty (30) days advance written notice to CUSTOMER prior to making the change.

6.4. Credit Card Authorization. CUSTOMER hereby authorizes HUGHES to charge any and all amounts due under the Agreement and applicable Service Order(s) to the credit card provided in the initial Service Order(s) or another credit card if provided by CUSTOMER to HUGHES. This includes both one time and periodic fees as they become due. In the event HUGHES is unable to collect from this credit card any sums due, CUSTOMER agrees to pay such sums, together with any costs incurred by HUGHES in collecting such sums, including reasonable attorneys' fees, and interest at the lower of 1.5% per month or the highest rate permitted by law. In any fee dispute or other dispute, prior to exercising any dispute resolution process associated with a credit card, CUSTOMER and HUGHES shall follow the steps of dispute resolution set forth in Section 7.2 below.

6.5. Taxes. The fees listed in this Agreement do not include taxes; if HUGHES is required to pay sales, use, property, value-added, withholding, excise or other taxes, duties, or governmental charges or Services provided under the Agreement or on CUSTOMER's use of Hosting System or Services, then such taxes, duties, or governmental charges shall be billed to and paid by CUSTOMER. If HUGHES is found to be responsible for the withholding and payment of taxes on behalf of CUSTOMER, CUSTOMER agrees to indemnify HUGHES with respect to the full amount of taxes due together with applicable interest and penalties. If CUSTOMER is required to withhold any tax from any payment, then the amount of the payment will be automatically increased to totally offset such tax so that the amount remitted to HUGHES, net of all taxes, equals the amount invoiced or otherwise due. This Section shall not apply to taxes based on HUGHES's net income.

6.6. Marketing and Branding. During the term of this Agreement, HUGHES may refer to CUSTOMER as a HUGHES customer, orally and in writing.

## **7. GENERAL TERMS**

7.1. Nondisclosure. By virtue of the Agreement, the parties may have access to information that is confidential to one another ("Confidential Information"). Confidential Information shall be limited to the Hosting System, the terms and pricing under this Agreement, and all information clearly identified as confidential (either orally or in writing).

A party's Confidential Information shall not include information that: (a) is or becomes a part of the public domain through no act or omission of the other party; (b) was in the other party's lawful possession prior to the disclosure and had not been obtained by the other party either directly or indirectly from the disclosing party; (c) is lawfully disclosed to the other party by a third party without restriction on disclosure; or (d) is independently developed by the other party.

The parties agree to hold each other's Confidential Information in confidence during the term of the Agreement and for a period of two years after termination of the Agreement. In addition, the receiving party will not use, or permit others to use, Confidential Information for any purpose other than as set forth in this Agreement.

In the event that either party is requested or required for the purposes of legal, administrative, or arbitration to disclose any Confidential Information, the party receiving such disclosure request will provide the other party with immediate written notice of any such request or requirement so that such party may seek an appropriate protective order or other relief.

7.2. Governing Law and Dispute Resolution. The Agreement, and all matters arising out of or relating to the Agreement, shall be governed by the laws of the State of Utah, without giving effect to principles regarding conflicts of laws. Any controversy or claim arising out of or relating to the Agreement, or breach thereof, shall be submitted to the following procedure: (a) direct negotiation in a settlement conference to be scheduled as soon as possible after the dispute arises; (b) if no resolution is reached within sixty (60) days of the settlement conference, the parties will submit the dispute to non-binding mediation in Utah County, Utah under the mediation rules of the American Arbitration Association; (c) if no settlement is reached within sixty (60) days of the start of mediation, either party may

seek legal redress in the state or federal courts of Utah County, Utah.

7.3. Notice. CUSTOMER agrees to make reasonable efforts to notify HUGHES of any changes to CUSTOMER's business address, business contact, and support contact within ten (10) days of any change thereto. All notices required or permitted hereunder shall be given in writing or as specifically set forth in the applicable section of this Agreement. To expedite order processing, CUSTOMER agrees that HUGHES may treat documents emailed or faxed by CUSTOMER to HUGHES, including documents generated by online transactions, as original documents; nevertheless, either party may require the other to exchange original signed documents to evidence an order for Hosting System or for Services.

7.4. Other Terms. In the event any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of the Agreement will remain in full force. The waiver by either party of any default or breach of the Agreement shall not constitute a waiver of any other or subsequent default or breach. All rights and licenses granted to CUSTOMER in this Agreement shall apply to CUSTOMER's subsidiaries provided CUSTOMER remains fully liable for the acts and any omissions of its subsidiaries under this Agreement. This Agreement constitutes the complete agreement between the parties and supersedes all prior or contemporaneous agreements or representations, written or oral, concerning the subject matter of this Agreement. CUSTOMER may not assign this Agreement or any rights or obligations hereunder without the prior written consent of HUGHES, which consent shall not be unreasonably withheld or delayed; any such assignment without prior consent shall be null and void. Notwithstanding the foregoing, CUSTOMER may assign this Agreement to any entity who acquires (by merger, acquisition, or otherwise) all or substantially all of the business assets of CUSTOMER applicable to the subject matter of this Agreement. It is expressly agreed that the terms of this Agreement shall supersede the terms in any CUSTOMER Service Order or other ordering document.

Executed as of the Effective Date set forth above.

CUSTOMER:

HUGHES:

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_