

**ADDENDUM TO INSTRUTURE STANDARD TERMS AND CONDITIONS**

**FOR MAKING WAVES ACADEMY**

IN CONSIDERATION of the mutual promises by Instructure, Inc. (“Instructure”) and Making Waves Academy (“Making Waves Academy” or “Charter School”) in this Addendum, Instructure and Making Waves Academy agree to the following changes to the Instructure Standard Terms and Conditions (“Agreement”).

No modification of this Addendum shall be binding unless in writing and expressing an intent to modify the Addendum and signed by an authorized representative from each party. No unilateral revision to the Instructure Standard Terms and Conditions by Instructure shall nullify or modify the terms of this Addendum.

Section 10 (“Limitation of Liability”) of the Instructure Standard Terms and Conditions is amended to read:

EXCEPT AS EXPRESSLY PROVIDED IN SECTIONS 6 & 7, INSTRUTURE DISCLAIMS ALL WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, NON-INFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE. INSTRUTURE DOES NOT WARRANT THAT THE SERVICE WILL BE UNINTERRUPTED OR BE ERROR-FREE. EACH PARTY AND ITS SUPPLIERS SHALL NOT BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, SPECIAL, EXEMPLARY, PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE USE OR INABILITY TO USE THE SERVICES (INCLUDING, WITHOUT LIMITATION, COSTS OF DELAY, LOSS OF DATA, RECORDS OR INFORMATION, AND ANY FAILURE OF DELIVERY OF THE SERVICE), EVEN IF THE OTHER PARTY HAS BEEN NOTIFIED OF THE LIKELIHOOD OF SUCH DAMAGES. EXCEPT FOR A PARTY’S THIRDPARTY INDEMNITY OBLIGATIONS IN SECTION 18 a. and b., EACH PARTY’S CUMULATIVE MAXIMUM LIABILITY FOR DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT (WHETHER IN CONTRACT, TORT OR OTHERWISE) SHALL NOT EXCEED THE AMOUNT PAID BY CUSTOMER WITHIN THE PRECEDING 12 MONTHS UNDER THIS AGREEMENT. CUSTOMER ACKNOWLEDGES THAT INSTRUTURE IS NOT RESPONSIBLE FOR THIRD-PARTY SERVICES MADE AVAILABLE THROUGH THE SERVICE.

**The following shall be added to the end of Section 18 (“Infringement”) of the Instructure Standard Terms and Conditions is amended to read:**

Notwithstanding any other provision of the Agreement, Instructure shall indemnify, defend and hold harmless Making Waves Academy, its authorizers, Board members, officers, employees, authorized volunteers and agents from and against all liabilities, obligations, losses, damages, judgments, claims, penalties, fines, costs and expenses (including legal fees, attorney’s fees and costs and costs of investigation) (collectively “Losses”) and threatened Losses arising out of, relating to, incurred in connection with, or based in whole or in part upon any third-party claim, threatened claim, suit, action or proceeding (“Claim”) made against Making Waves Academy for:

- a. Injury or death of any individual, or the loss, damage or destruction of any real or personal property caused, directly or indirectly, by any act or omission of Instructure or any of its employees, directors, officers, agents, representatives, or subcontractors; or
- b. Any infringement of patent, copyright, trademark, trade secret or other proprietary right caused, directly or indirectly by Instructure or any of its employees, directors, officers, agents, representatives, or subcontractors (“Infringement Claim”); or
- c. Any violation of this Agreement or the AUP by Instructure or its employees, directors, officers, agents, representatives, or subcontractors.

Notwithstanding the foregoing, Instructure shall have no obligation under this Section with respect to any Loss that is caused solely by the active negligence or willful misconduct of Making Waves Academy and is not contributed to by any act or omission (including any failure to perform any duty imposed by law) by Instructure, or any of its subcontractors, agents, or employees.

Notwithstanding any other provision of the Agreement, Making Waves Academy shall indemnify, defend and hold harmless Instructure, its Board members, officers, employees, authorized volunteers and agents from and against all Losses and threatened Losses arising out of, relating to, incurred in connection with, or based in whole or in part upon any third-party Claim made against Instructure for:

- a. Injury or death of any individual, or the loss, damage or destruction of any real or personal property caused, directly or indirectly, by any act or omission of Making Waves Academy or any of its employees, directors, officers, agents, representatives, or subcontractors;
- b. Any infringement of patent, copyright, trademark, trade secret or other proprietary right caused, directly or indirectly, by Making Waves Academy or any of its employees, directors, officers, agents, representatives, or subcontractors (“Infringement Claim”); or
- c. Use of the Service by Customer or any of Customer’s Users in violation of this Agreement or the AUP.

Notwithstanding the foregoing, Making Waves Academy shall have no obligation under this Section with respect to any Loss that is caused solely by the active negligence or willful misconduct of Instructure and is not contributed to by any act or omission (including any failure to perform any duty imposed by law) by Making Waves Academy or any of its subcontractors, agents or employees.

The obligations set forth in this Section are conditioned upon the party entitled to a defense of a third party claim (“Indemnified Party”) notifying the other party (“Indemnifying Party”) promptly in writing of any covered action, giving the

Indemnifying Party sole control over the defense thereof and any related settlement negotiations, and cooperating and, at the Indemnifying Party's request and expense, assisting in such defense and any related settlement negotiations. The Indemnified Party may also participate in the defense at its own expense.

If an Infringement Claim is made relating to the Services, Instructure may continue to enable Making Waves Academy to use the Service or to modify it such that it becomes non-infringing. If Instructure determines that these alternatives are not reasonably available, Instructure may terminate the Service without any liability to Making Waves Academy upon notice to Making Waves Academy and with the return of any prepaid and unused fees. Instructure's indemnity obligations for Infringement Claims in this Section do not apply if the Infringement Claim solely arises from (a) any technology not provided by Instructure or otherwise identified by Instructure in writing as interoperable, (b) use of the Service by Making Waves Academy in violation of this Agreement or the applicable Services documentation, (c) the Making Waves Academy Content, and/or (d) modification or alteration to the Services by Making Waves Academy or any of its subcontractors, agents or employees without the written consent of Instructure.

The indemnification obligations set forth above shall survive termination of the Agreement between the parties.

**Section 19 ("General") of the Instructure Standard Terms and Conditions is amended to read:**

Any notice by a party under this Agreement shall be in writing and either personally delivered, delivered by facsimile or sent via reputable overnight courier (such as Federal Express) or certified mail, postage prepaid and return receipt requested, addressed to the other party at the address specified in the Order Form or such other address of which either party may from time to time notify the other in accordance with this Section 19. A copy of all notices to Instructure shall be sent to: Instructure, Inc., 6330 South 3000 East, Ste. 700 Salt Lake City, UT 84121, Attention: General Counsel. For purposes of service messages and notices about the Service, Instructure may place a banner notice or send an email to an email address associated with an account. It is the User's responsibility to ensure that a current email address is associated with their account. All notices shall be in English and shall be deemed effective upon receipt. If Instructure is unable to perform its obligations under this Agreement due to circumstances beyond its reasonable control, including, but not limited to, acts of God, earthquakes, hacker attacks, actions or decrees of governmental bodies, changes in applicable laws, or communication or power failures, such obligations will be suspended so long as those circumstances persist. This Agreement shall be interpreted, governed and construed by the laws of the State of California. Instructure is acting in performance of this Agreement as an independent contractor to Customer. If any term of this agreement is invalid or unenforceable, the other terms remain in effect and the invalid or unenforceable provision will be deemed modified so that it is valid and enforceable to the maximum extent permitted by law. Amendments to this Agreement must be made in writing and signed by both parties unless otherwise specified in the Agreement. This Agreement constitute the entire agreement between the parties with respect to the subject matter of

this Agreement, and any prior representations, statements, and agreements relating thereto are superseded by the terms of this Agreement. Instructure rejects additional or conflicting terms of any Customer form-purchasing document. Customer shall not assign this Agreement, in whole or in part, to any entity without Instructure's prior written consent. Any attempt to assign this Agreement, in whole or part, in contravention of this Section, shall be void. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their successors and permitted assigns. Any failure by either party to enforce the other party's strict performance of any provision of this Agreement will not constitute a waiver of its right to subsequently enforce such provision or any other provision of this Agreement. Customer agrees to allow Instructure to use its name, logo and non-competitive use details in both text and pictures in its various marketing communications and materials, in accordance with Customer's trademark guidelines and policies. Any terms that by their nature survive termination or expiration of this agreement, will survive (including, but not limited to, Sections 10, 12, 15, 16 and 19).

**Section 20 ("Insurance") is hereby added to the Instructure Standard Terms and Conditions and reads:**

- a. Without in anyway limiting Instructure's liability pursuant to the "Indemnification" section of the Agreement, and notwithstanding any other provision in the Agreement, Instructure shall maintain during the full term of this Agreement the following insurance amounts and coverage:

Coverage:

A. Coverage for Professional Liability/ Errors and Omissions appropriate for Instructure's profession including Network and Privacy Security covering Instructure's wrongful acts, grossly negligent actions, errors or omissions in the performance of the Services under this Agreement and for claims and losses with respect to network or data risks to cover security, privacy, business interruption, cyber extortion, denial of service, data breaches, release of confidential information, unauthorized access/use of information, and identity theft. Such coverage shall cover breach notification and credit notification monitoring expenses as required by the applicable law. The retroactive date (if any) is to be no later than the effective date of this Agreement.

B. Automobile Liability, covering Symbols 8 and 9 (non-owned and hired autos) if services will be performed on Charter School premises.

C. Workers' Compensation and Employer's Liability.

D. Insurance Services Office Commercial General Liability Coverage (Occurrence Form CG 0001).

Limits: Instructure shall maintain limits no less than the following -

E. Professional Liability / Errors and Omissions including Network and Privacy Security as described above- Two million dollars (\$2,000,000) per claim.

F. General Liability - One million dollars (\$1,000,000) per occurrence for bodily injury, personal injury and property damage and \$2,000,000 annual aggregate.

G. Automobile Liability - One million dollars (\$1,000,000) for bodily injury and property damage each accident limit.

H. Workers' Compensation as required by law. Employer's liability insurance in the amount \$500,000 per accident for bodily injury and disease.

b. Commercial General Liability and Business Automobile Liability policies must provide the following:

i. Name as Additional Insured the Charter School and its Board, officers, volunteers, agents and employees and the Contra Costa County Office of Education.

ii. That such policies are primary insurance to any other insurance available to the Additional Insured, with respect to any claims arising out of this Agreement and that such policies apply separately to each insured against who claim is made or suit is brought.

c. Insurance is to be placed with insurers having a current A.M. Best rating of no less than A:VII or equivalent or as otherwise approved by the Charter School in writing.

d. Instructure shall endeavor to provide thirty (30) days advance written notice to the Charter School of cancellation, non-renewal or reduction in coverage. Instructure will make best efforts to notify the Charter School within 30 days of any of the policies that are cancelled, non-renewed or reduced in coverage below the requirements required under this agreement.

e. If any policies are written on a claims-made form, Instructure agrees to maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of at least one year beyond the expiration of this Agreement, such that should occurrences during the Agreement term give rise to claims made after expiration of the Agreement, such claims shall be covered.

f. Should any required insurance lapse during the term of this Agreement, requests for payments originating after such lapse shall not be processed until the Charter School receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not reinstated, the Charter School may, at its sole

option, terminate this Agreement effective on the date of such lapse of insurance.

g. Before commencing any operations under this Agreement, Instructure must provide the Charter School with the certificates of insurance (Accord Form 25-S or equivalent) signed by the insurer's representative with the **additional insured policy endorsements as applicable**, evidencing all coverages set forth above, and shall furnish complete copies of policies promptly upon the Charter School's request. Instructure also understands and agrees that the Charter School may withhold payment for services performed for any violations of the insurance provisions of this Agreement.

h. Approval of the insurance by the Charter School shall not relieve or decrease the liability of Instructure hereunder.

**Section 21 ("Compliance") is hereby added to the Instructure Standard Terms and Conditions and reads:**

Notwithstanding any other provision in the Agreement, Making Waves Academy and Instructure agree to comply with all applicable California and federal laws, regulations and ordinances including but not limited to the Children's Online Privacy Protection Act (COPPA), the Student Online Personal Information Protection Act (SOPIPA), the Family Educational Rights And Privacy (FERPA), and California Education Code section 49073.1.

For compliance with California Education Code Section 49073.1, Making Waves Academy and Instructure agree that:

1. Pupil records obtained by Instructure from Making Waves Academy continue to be the property of and under the control of the Making Waves Academy. Pupil records include any information directly related to a pupil that is maintained by the Making Waves Academy or acquired directly from the pupil through the use of instructional software or applications assigned to the pupil by a teacher or other Making Waves Academy employees or contractors. Pupil records does not include de-identified information (information that cannot be used to identify an individual pupil) used by the third party: (1) to improve educational products for adaptive learning purposes and for customized pupil learning; (2) to demonstrate the effectiveness of the Instructure's products in the marketing of those products; or (3) for the development and improvement of educational sites, services, or applications.
2. Pupils may retain possession and control of their own pupil-generated content and transfer pupil-generated content to a personal account, consistent with the functionality of the Services, by: Submitting a written request to Making Waves Academy. After receiving written authorization from Making Waves Academy, Instructure will provide the option to transfer student account data into a family account (to be paid for by the pupil or parent/guardian separately).

5. Parents, legal guardians, or eligible pupils may review personally identifiable information in the pupil's records and correct erroneous information by: Submitting a written request to Making Waves Academy. Making Waves Academy and Instructure will consider what personally identifiable information is available.
6. Instructure shall take actions to ensure the security and confidentiality of pupil records, including but not limited to designating and training responsible individuals on ensuring the security and confidentiality of pupil records. Instructure uses various measures to maintain the security and confidentiality of pupil records including but not limited to strict access controls, auditing and logging, and encryption.
7. In the event of an unauthorized disclosure of a pupil's records, Instructure will notify the Making Waves Academy in writing. To the extent that further notification is required by law, Instructure will coordinate with Making Waves Academy in good faith on a mutually acceptable notification procedure.
8. Instructure shall not use any information in a pupil record for any purpose other than those required or specifically permitted by the Agreement.
9. Instructure certifies that a pupil's records shall not be retained or available to Instructure more than thirty (30) days after written request from Making Waves Academy, or ninety (90) days after termination of the Agreement or upon completion of the terms of the Agreement, except for a case where a pupil chooses to establish or maintain an account with Instructure for the purpose of storing pupil-generated content, either by retaining possession and control of their own pupil-generated content, or by transferring pupil-generated content to a personal account. Such certification will be enforced by: Instructure will, within thirty (30) days of receipt of a written request from Making Waves Academy, provide written notice that pupil records have been destroyed and/or deidentified. This provision shall survive termination of the Agreement.
10. Making Waves Academy agrees to work with Instructure to ensure compliance with FERPA and the Parties will ensure compliance by: Instructure will treat pupil records as confidential information and will not disseminate pupil records to third parties unless needed to fulfill Instructure's rights and obligations under this Addendum or Agreement; in which case disclosure will be subject to an obligation of confidentiality. Instructure may also disseminate pupil records if required by law or court order.
11. Instructure shall not use personally identifiable information in pupil records to engage in targeted advertising.

**IN WITNESS WHEREOF**, the parties hereto have caused this Addendum to be executed by their authorized representatives, effective as of the date first set forth above.

**Making Waves Academy**  
**4123 Lakeside Drive**  
**Richmond, CA 94806**

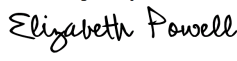
By: \_\_\_\_\_

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

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

Date: \_\_\_\_\_

**Instructure, Inc.**  
**6330 South 3000 East, Ste. 700**  
**Salt Lake City, UT 84121**

By:  \_\_\_\_\_  
DocuSigned by:  
3415CBF9A62B404

Name: Elizabeth Powell \_\_\_\_\_

Title: Senior Manager, Deal Desk \_\_\_\_\_

Date: 6/8/2020 \_\_\_\_\_