

CREATABILITY LLC - STANDARD TERMS AND CONDITIONS FOR WEBSITE DESIGN AND INTERNET MARKETING SERVICES

Unless otherwise agreed the following terms and conditions will apply:

1. INTERPRETATION

1.1 In this agreement, the following terms shall have the following meanings:

Acceptance - the acceptance or deemed acceptance of the Site / Services by the Customer pursuant to clause 4;

Business Day - any day (other than a Saturday or Sunday) when banks are generally open for business in San Francisco;

Business Hours - the hours of 9am to 5pm;

Change Control Procedures - as set out in clause 15;

Charges - the charges in respect of the Services, Support Services, Supplied Hardware and Supplied Software set out in the Proposal together with any charges arising from the Change Control Procedures;

Effective Date - the date Creatability receives instructions from the Customer to provide the Services;

Fault - any fault with a Creatability Product / Service identified by the Customer in the Fault Report;

Force Majeure Event - as set out in clause 16;

Hosting Services - the hosting of the Site on the Server as described in the Proposal and/or Specification including any charges pursuant to clause 6;

Intellectual Property Rights - all intellectual property rights wherever in the world arising, whether registered or unregistered (and including any application), including copyright, know-how, confidential information, trade secrets, business names and domain names, trade marks, service marks, trade names, patents, petty patents, utility models, design rights, semiconductor topography rights, database rights and all rights in the nature of unfair competition rights or rights to sue for passing off;

Materials - the content provided to Creatability by the Customer from time to time for incorporation in the Site / Services;

Proposal - the high level description of the Services to be provided by Creatability;

Creatability Products / Services - products / services designed by Creatability;

Server - a computer server administered by Creatability as more particularly defined in the Proposal and/or Specification;

Severity One Error - a failure where the Creatability Products / Services is hindered by a severe loss of functionality or performance which renders it non-operational

Severity Two Error - a failure where the Creatability Products / Services can function but it is not functioning properly, thus materially impairing functionality and/or reducing performance and/or operating efficiency

Severity Three Error - a failure where the Creatability Products / Services can function subject to only minor impairment, reduction in functionality or performance which does not materially impact upon operating efficiency

Services - the design and development services to be provided pursuant to clause 2 and any other service requested by the Customer (excluding the Support Services) as detailed in the Proposal and the Specification;

Site - the website to be hosted by Creatability;

Specification - the technical and functional specification for the Site / Service produced by Creatability and the timetable for the development and delivery of the Site / Service;

Support Services - the support services for the Creatability Products / Services and the Hosting Services;

Third Party Products - any third party software products and/or hardware products and/or third party supplier's services procured on behalf of the Customer by Creatability

Visitor - a visitor to the Site.

1.2 Clause headings are included in this agreement for ease of reference only and shall not affect the interpretation or construction of this agreement.

1.3 References to clauses and schedules are (unless otherwise provided) references to the clauses and schedules of this agreement.

1.4 In the event and to the extent only of any conflict between the clauses and the schedules, the clauses shall prevail.

1.5 Where the context so admits or requires, words denoting the singular include the plural and vice versa.

1.6 References to statutory provisions shall be construed as references to those provisions as replaced, amended or re-enacted from time to time (whether before or after the date of this agreement) and shall include any provisions of which they are re-enactments (whether

with or without modification) and any subordinate legislation made under such provisions.

1.7 References to “including” and “include(s)” shall be deemed to mean respectively “including without limitation” and “include(s) without limitation”.

1.8 References to “content” mean any kind of text, information, images, or audio or video material which can be incorporated in a website for access by a Visitor to that website, and/or other services with public access.

2. SCOPE OF THE PROJECT

2.1 Creatability shall:

2.1.1 liaise with the Customer in developing the look and feel of the Site and/or other marketing services / product; and

2.1.2 design, develop and deliver the Site/Marketing Services in accordance with the Proposal; and

2.1.3 provide the Services; and

2.1.4 provide at the request of the Customer the Support Services.

3. CUSTOMER RESPONSIBILITIES

3.1 The Customer acknowledges that Creatability’s ability to provide the Services is dependent upon the full and timely co-operation of the Customer (which the Customer agrees to provide) as well as the accuracy and completeness of any information and data the Customer provides to Creatability. Accordingly, the Customer shall provide Creatability with access to, and use of, all information, data and documentation reasonably required by Creatability for the performance by Creatability of its obligations under this agreement.

3.2 The Customer shall be responsible for the accuracy and completeness of the Materials on the Site in accordance with clause 11.2.

4. DEVELOPMENT AND ACCEPTANCE OF SITE / SERVICES

4.1 Once Creatability has completed the consultation with the Customer pursuant to clause 2.1.1, Creatability shall provide the Customer with a Proposal. The Customer shall indicate its approval of the Proposal and submit a deposit payment relating to the Services as indicated in the Proposal. For the avoidance of doubt, such deposit is non refundable.

4.2 Once the Customer has approved the Proposal Creatability shall develop and produce the Specification for the approval of the Customer.

4.3 The Customer shall have a period of ten (10) Business Days in which to consider the

Specification and to submit written comments to Creatability. The parties shall discuss any proposed amendments and shall use their reasonable endeavours to agree the form of the Specification within five (5) Business Days. For the avoidance of doubt if the proposed changes are material changes and affect the cost of development Creatability shall provide the Customer with revised Charges.

4.4 If the Customer fails to provide comments pursuant to clause 4.3, Creatability shall in its complete discretion invoice the work done to date to the Customer. Such invoices shall be payable pursuant to clause 8.

4.5 Once Creatability has completed the design and development of the Site / Services in accordance with the Proposal and the Specification it shall run the Acceptance Tests.

4.6 The Acceptance Tests shall test compliance of the Site / Services with the Site / Services Specification.

4.7 Acceptance of the Site shall occur when the Site has passed the Acceptance Tests. Creatability shall notify the customer when the tests have been passed and provide the results of the Acceptance Tests to the Customer in writing.

4.8 If any failure to pass the Acceptance Tests results from a defect which is caused by an act or omission of the Customer or by one of the Customer's sub-contractors or agents for which Creatability has no responsibility ("**Non-Creatability Defects**"), the Site shall be deemed to have passed the Acceptance Tests notwithstanding such Non-Creatability Defect. Creatability shall provide assistance reasonably requested by the Customer in remedying any Non-Creatability Defects by supplying additional services or products. If so requested, the Customer shall pay Creatability in full for all such additional services and products at Creatability's then current fees and prices.

4.9 Acceptance of the Site / Services shall be deemed to have taken place upon the happening of any of the following events:

4.9.1 the Customer uses any part of the Site / Services "live" (that is for any revenue-earning purposes or to provide any services to third parties other than for test purposes); or

4.9.2 the Customer unreasonably delays the start of relevant Acceptance Tests or any retest for a period of 7 (seven) Business Days from the date when Creatability is ready to commence running the Acceptance Tests or retests; or

4.9.3 the Customer fails to inspect the Site / Service, deemed Acceptance shall occur ten (10) Business Days from delivery of Site / Service to Customer.

5. THIRD PARTY PRODUCTS

5.1 The third party Products shall be supplied in accordance with the relevant third party suppliers standard terms and Creatability shall use its reasonable endeavours to pass on to Creatability LLC

the Customer any such manufacturers guarantees.

5.2 Any third party Charges are included in the Charges payable pursuant to clause 8.

6. HOSTING SERVICES

6.1 At the Customer's request and upon payment of the annual charges for the Hosting Services, Creatability shall provide the Hosting Services in accordance with the provisions of this clause 6.

6.2 Creatability shall exercise such reasonable skill, care and diligence as expected of an experienced provider of website hosting services.

6.3 From Acceptance of the Site, if requested by the Customer, Creatability shall store the Site on the Server and make available the Site for access by users of the Internet. Creatability agrees to perform maintenance and other actions as are reasonably required to maintain the Site in working order such maintenance may incur charges at Creatability's published rates from time to time. Where such charges are levied the invoices shall be payable pursuant to clause 8.

7. SUPPORT – FAULT REPORTING

7.1 In the event that the Customer shall become aware of a Fault, the Customer shall submit a Fault Report to Creatability.

7.2 The Customer shall ensure that the Fault Report comprises details of:

7.2.1 the identity and contact details of the author of the Fault Report;

7.2.2 the nature of the Fault; and

7.2.3 classification of the Fault as

7.2.3.1 a Severity One Error;

7.2.3.2 a Severity Two Error; or

7.2.3.3 a Severity Three Error.

Creatability will thereupon promptly investigate the reported Fault to identify whether it is due to an error of Creatability. Where the error and defect is due to the equipment or software not provided by Creatability, Creatability shall notify the Customer who shall then obtain the necessary support from an alternative provider. Where the Fault is due to an error in the Creatability Product Creatability will provide the Support Services.

Creatability shall provide the following Support Services to the Customer during Business Hours in respect of the Creatability. If Support Services are provided outside of Business

Hours Creatability has the option to charge at its current rates;

7.4.1 reasonable assistance in the resolution of queries via a telephone call originated by the Customer;

7.4.2 recommendations relevant to the course of action necessary to recover from a fault, error or failure emanating from the Site / Service or its use;

7.4.3 the remote rectification of Faults by the issue of fixes in respect of the Creatability Products / Services; and

7.4.4 the creation and dispatch to the Customer from time to time at Creatability's sole discretion of Maintenance Releases.

7.5 The Support Services shall not include the diagnosis and rectification of a fault arising from:

7.5.1 the improper use or neglect of any software or equipment;

7.5.2 the modification or alteration of or interference with the Creatability Products / Services or its merger (in whole or in part) with any other software;

7.5.3 the use of the Creatability Product / Service by an individual who has not undergone training with Creatability to the required level or is not otherwise reasonably competent in the use of the product / service;

7.5.4 the failure by the Customer to implement recommendations in respect of or solutions to Faults previously advised by Creatability;

7.5.5 a repair, adjustment, alteration or modification of the Creatability Product / Service by a third party save with the prior written authority of Creatability;

7.5.6 the use of the Creatability Product / Service for a purpose for which it was not designed.

8. CHARGES AND PAYMENT

8.1 The Customer shall pay an agreed non refundable deposit at approval of the Proposal.

8.2 The Customer shall pay any charges relating to the Hosting Services yearly in advance.

8.3 Thereafter, Creatability shall issue a monthly invoice in respect of the Charges, and the Customer shall pay to Creatability the Charges set out in Creatability's invoice within 10 (ten) days of the date of Creatability's invoice.

8.5 If the Customer fails to pay any amount payable by it under this agreement, Creatability shall be entitled but not obliged to charge the Customer interest on the overdue

amount, payable by the Customer forthwith on demand, from the due date up to the date of actual payment, after as well as before judgment, at the rate of 8% per annum above the base rate for the time being of Chase Bank. Such interest shall accrue on a daily basis and be compounded quarterly.

9. WARRANTIES

9.1 Each of the parties warrants to the other that it has full power and authority to enter into and perform this agreement.

9.2 Creatability shall perform the Services and the Support Services with reasonable care and skill.

9.3 Creatability warrants that the Site will perform substantially in accordance with the Site Specification for a period of 3 (three) months from Acceptance. If the Site does not so perform, then Creatability shall for no additional charge ensure that the Site substantially complies with the Specification.

9.4 The warranty set out in clause 9 shall not apply to the extent any failure to perform is caused by any Materials.

9.5 This agreement sets out the full extent of Creatability's obligations and liabilities in respect of the supply of the Services. All conditions, warranties or other terms concerning the Services which might otherwise be implied into this agreement or any collateral contract (whether by statute or otherwise) are hereby expressly excluded.

10. LIMITATION OF REMEDIES AND LIABILITY

10.1 Nothing in this agreement shall operate to exclude or limit Creatability's liability for death or personal injury caused by its negligence;

10.2 Creatability shall not be liable to the Customer for any damage to software, damage to or loss of data, loss of profit, anticipated profits, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage.

10.3 Subject to clause 10.1, Creatability's aggregate liability in respect of claims based on events in any calendar year arising out of or in connection with this agreement or any collateral contract, whether in contract or tort (including negligence) or otherwise, shall in no circumstances exceed one hundred percent (100%) of the total Charges payable by the Customer to Creatability under this agreement in that calendar year.

11. INTELLECTUAL PROPERTY RIGHTS

11.1 All Intellectual Property Rights in the Documentation and the Site (including in the content of the Site and the Site Software), but excluding the Materials, arising in connection with this agreement shall be the property of Creatability and Creatability hereby

grants the Customer a non-exclusive license of such Intellectual Property Rights for the purposes of operating the Site / Service.

11.2 The Customer shall indemnify Creatability against all damages, losses and expenses arising as a result of any action or claim that the Materials infringe Intellectual Property Rights of a third party.

11.3 Creatability shall indemnify the Customer against all damages, losses and expenses arising as a result of any action or claim that the Site infringes any Intellectual Property Rights of a third party in the US other than infringements referred to in clause 11.2.

11.4 The indemnities in clauses 11.2 and 11.3 are subject to the following provisos:

11.4.1 the indemnified party promptly notifies the indemnifier in writing of the claim;

11.4.2 the indemnified party makes no admissions or settlements without the indemnifier's prior written consent;

11.4.3 the indemnified party gives the indemnifier all information and assistance as the indemnifier may reasonably require; and

11.4.4 the indemnified party allows the indemnifier complete control over the litigation and settlement of any action or claim.

11.5 The indemnities in clauses 11.2, 11.3, 12.3 may not be invoked to the extent that the action or claim arises out of the indemnifier's compliance with any designs, specifications or instructions of the indemnified party.

12. SITE CONTENT

12.1 Creatability shall upon request and at the cost of the Customer, update the Site with Materials provided from time to time by the Customer. The Customer shall ensure that Materials do not infringe any applicable laws, regulations or third party rights (such as material which is obscene, indecent, pornographic, seditious, offensive, defamatory, threatening, liable to incite racial hatred, menacing, blasphemous or in breach of any third party Intellectual Property Rights) ("**Inappropriate Content**").

12.2 Creatability shall include only Materials on the Site. The Customer recognizes that Creatability has no control over any content placed on the Site by Visitors and does not purport to monitor the content of the Site. Creatability reserves the right to remove content from the Site where it reasonably suspects such content is Inappropriate Content. Creatability shall notify the Customer promptly if it becomes aware of any allegation that content on the Site may be Inappropriate Content.

12.3 The Customer shall indemnify Creatability against all damages, losses and expenses arising as a result of any action or claim that the Materials constitute Inappropriate Content.

12.4 Creatability may include the statement “Designed by Creatability LLCd” on the home page of the Site in a form to be agreed.

13. DATA PROTECTION

13.1 Creatability warrants that to the extent it processes any Personal Data on behalf of the Customer:

13.1.1 it shall act only on instructions from the Customer; and

13.1.2 it has in place appropriate technical and organizational security measures against unauthorized or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data.

14. TERM AND TERMINATION

14.1 This agreement shall commence on the Effective Date and shall continue, subject to earlier termination pursuant to this clause 14, to the first anniversary of the Hosting of the Site by the Customer.

14.2 Either party may terminate this agreement immediately at any time by written notice to the other party if:

14.2.1 that other party commits any material breach of its obligations under this agreement which (if remediable) is not remedied within 30 (thirty) days after the service of written notice specifying the breach and requiring it to be remedied; or

14.2.2 that other party ceases to trade (either in whole, or as to any part or division involved in the performance of this agreement) or becomes insolvent or unable to pay its debts within the meaning of the insolvency legislation applicable to that party; or a person (including the holder of a charge or other security interest) is appointed to manage or take control of the whole or part of the business or assets of that party; or the ability of that party’s creditors to take any action to enforce their debts is suspended, restricted or prevented or some or all of that party’s creditors accept, by agreement or pursuant to a court order, an amount of less than the sums owing to them in satisfaction of those sums; or any process is instituted which could lead to that party being dissolved and its assets being distributed to its creditors, shareholders or other contributors (other than for the purposes of solvent amalgamation or reconstruction).

14.3 On termination of this agreement by Creatability pursuant to clause 14.2, all licenses granted by Creatability for use of Creatability Products under this agreement shall terminate immediately. The Customer shall cease using the Site Service.

14.4 On expiry or termination of this agreement otherwise than on termination by Creatability pursuant to clause 14.2, Creatability shall promptly return all Materials to the Customer, and shall provide to the Customer an electronic copy of the Site (including all Creatability LLC

content on the Site). Creatability shall provide such assistance as is reasonably requested by the Customer to transfer the hosting of the Site to the Customer or another service provider, subject to the payment of Creatability's expenses reasonably incurred.

14.5 On expiry or termination of this agreement, all provisions of this agreement shall cease to have effect, save that any provision which can reasonably be inferred as continuing or is expressly stated to continue shall continue in full force and effect.

15. CHANGE CONTROL

15.1 Any request to change the scope of the Services shall be processed in accordance with the Change Control Procedure set out in this clause 15.

15.2 Creatability and the Customer shall discuss any changes proposed by the other and such discussion shall result in either:

15.2.1 a written request for a Change by the Customer;

or

15.2.2 a written recommendation for a Change by Creatability or, if neither of the Customer nor Creatability should wish to submit a request or recommendation, the proposal for the Change will not proceed.

15.3 Where a written request for a Change is received from the Customer, Creatability shall, unless otherwise agreed, submit a Change Control Note ("CCN") to the Customer within the period agreed between the parties.

15.4 A written recommendation for a Change by Creatability shall be submitted as a CCN direct to the Customer at the time of such recommendation.

15.5 Each CCN shall contain:

15.5.1 the title of the Change;

15.5.2 the originator and the date of the request or recommendation for the Change;

15.5.3 the reason for the Change;

15.5.4 the full details of the Change, including any specifications and user facilities;

15.5.5 the Charges, if any, of or associated with the Change;

15.5.6 a timetable for implementation, together with any proposals for acceptance of the Change;

15.5.7 the impact, if any, of the Change on other aspects of the agreement in question.

15.6 Once agreed by the Customer and Creatability in accordance with this clause 15, the Change shall be immediately effective and the Customer and Creatability shall perform their respective **obligations on the basis of the agreed amendment.**

16. FORCE MAJEURE

16.1 For the purposes of this agreement, "**Force Majeure Event**" shall mean any event arising which is beyond the reasonable control of the affected party (including any industrial dispute affecting any third party, governmental regulations, fire, flood, disaster, civil riot or war).

16.2 A party who becomes aware of a Force Majeure Event which gives rise to or which is likely to give rise to any failure or delay in performing its obligations under this agreement shall forthwith notify the other and shall inform the other of the period for which it is estimated that such failure or delay shall continue. The affected party shall take reasonable steps to mitigate the effect of the Force Majeure Event.

17. CONFIDENTIALITY

17.1 For the purposes of this agreement, "**Confidential Information**" shall mean all information whether technical or commercial (including all drawings, designs, ideas, graphics, Proposals and Specifications disclosed in writing, on disc, orally or by inspection of documents or pursuant to discussions between the parties), where the information is:

17.1.1 identified as confidential at the time of disclosure; or

17.1.2 ought reasonably to be considered confidential given the nature of the information or the circumstances of disclosure.

17.2 Each party shall protect the Confidential Information of the other party against unauthorized disclosure by using the same degree of care as it takes to preserve and safeguard its own confidential information of a similar nature, being at least a reasonable degree of care.

17.3 Confidential Information may be disclosed by the receiving party to its employees, affiliates and professional advisers, provided the recipient is bound to maintain the confidentiality of the Confidential Information received.

17.4 The obligations set out in this clause 17 shall not apply to Confidential Information which the receiving party can demonstrate:

17.4.1 is or has become publicly known other than through breach of this clause 17;

17.4.2 was in possession of the receiving party prior to disclosure by the other party;

17.4.3 was received by the receiving party from an independent third party who has full

right of disclosure;

17.4.4 was independently developed by the receiving party; or

17.4.5 was required to be disclosed by governmental authority, provided that the party subject to such requirement to disclose gives the other prompt written notice of the requirement.

17.5 For the avoidance of doubt, the Proposal and the Specification remain the property of Creatability and shall not be disclosed by the Customer to any third party supplier.

17.6 The obligations of confidentiality in this clause 17 shall not be affected by the expiry or termination of this agreement.

18. NOTICES

18.1 A notice given under this agreement:

18.1.1 must be in writing in the English language (or be accompanied by a properly prepared translation into English);

18.1.2 must be sent for the attention of the person, and to the address, or e-mail address given in this clause (or such other person, address, or e-mail address as the receiving party may have notified to the other, such notice to take effect 5 (five) days from the notice being received); and must be delivered personally, sent by e-mail, sent by pre-paid first-class post, recorded delivery or registered post, or (if the notice is to be served or posted outside the country from which it is sent) sent by registered airmail.

18.2 A notice is deemed to have been received:

18.2.1 if delivered personally, at the time of delivery;

18.2.2 in the case of fax or e-mail, at the time of transmission provided a confirmatory copy is sent by first-class pre-paid post or by personal delivery before the end of the next Business Day;

18.2.3 in the case of pre-paid first class post, recorded delivery or registered post, 48 hours from the date of posting;

18.2.4 in the case of registered airmail, 5 (five) days from the date of posting;

18.2.5 if deemed receipt under the previous paragraphs of this sub-clause is not within business hours (meaning 9 am to 5.30 pm Monday to Friday on a day that is not a public holiday in the place of receipt), when business next starts in the place of receipt.

18.3 To prove service it is sufficient to prove that the notice was transmitted by fax to the fax number or e-mail address of the relevant party or, in the case of post, that the envelope

containing the notice was properly addressed and posted.

19. PUBLICITY

19.1 All media releases, public announcements and public disclosures by either party relating to this agreement or its subject matter, including promotional or marketing material, shall be coordinated with the other party and approved jointly by the parties prior to release.

20. ASSIGNMENT

20.1 Neither party may assign this agreement without the prior written consent of the other party, such consent not to be unreasonably withheld or delayed.

21. ENTIRE AGREEMENT

21.1 Save as set out in this clause 21, neither party shall have any remedy in respect of any untrue statement (whether written or oral) made to it upon which it relied in entering into this agreement (“**Misrepresentation**”), and neither party shall have any liability other than pursuant to the express terms of this agreement. Nothing in this agreement shall exclude or limit either party's liability for any Misrepresentation made knowing that it was untrue. Each party's liability for Misrepresentation as to a fundamental matter, including as to a matter fundamental to that party's ability to perform its obligations under this agreement, shall be subject to the limit set out in clause 10.3.

22. THIRD PARTY RIGHTS

22.1 This agreement is made for the benefit of the parties to it and is not intended to benefit, or be enforceable by, anyone else.

23. VARIATION AND WAIVER

23.1 A variation of this agreement must be in writing and signed by or on behalf of both parties.

23.2 A waiver of any right under this agreement is only effective if it is in writing and it applies only to the party to whom the waiver is addressed and the circumstances for which it is given. No waiver shall be implied by taking or failing to take any other action.

23.3 Unless specifically provided otherwise, rights arising under this agreement are cumulative and do not exclude rights provided by law.

24. SEVERANCE

24.1 If any provision (or part of a provision) of this agreement is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the

other provisions will remain in force.

24.2 If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision will apply with whatever modification is necessary to give effect to the commercial intention of the parties.

25. GOVERNING LAW AND JURISDICTION

25.1 This agreement and any disputes or claims arising out of or in connection with its subject matter are governed by and construed in accordance with the law of California.

25.2 The parties irrevocably agree that the courts of Alameda County, California have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement. This agreement has been entered into on the date stated at the beginning of this agreement