

## **Vanilla Active Limited – Terms and Conditions**

These terms and conditions (**Terms and Conditions**) shall apply to the supply of our Services.

These Terms and Conditions are separated into two sections: **section 1** – Supply of Services and **section 2** – General Terms and Conditions.

In these Terms and Conditions “**we**” and “**our**” refers to Vanilla Active Limited, a limited liability company incorporated in England (registered number 06672476) with registered office address at c/o Stuart Vine & Co, Station House, 2 Station Road, Radlett, Hertfordshire WD7 8JX and correspondence address at Devonshire House, Borehamwood, Hertfordshire WD6 1QQ, and “**you**” and “**your**” refers to the person firm or entity on whose behalf any Proposal issued by us is acknowledged and/or signed.

### **Section 1 – Supply of Services**

Our Services are supplied strictly subject to these Terms and Conditions. Each time we agree to supply our services there will be a separate legal agreement between us (**Service Agreement**).

These Terms and Conditions shall apply to all Service Agreements to the exclusion of all other terms and conditions (including any terms or conditions which you purport to apply under any purchase order, confirmation of order, specification or other document). No terms or conditions endorsed on, delivered with or contained in any document from you shall form part of a Service Agreement simply as a result of such document being referred to in a Service Agreement. Any order or acceptance of any Proposal by you shall be deemed to be an offer from you subject to these Terms and Conditions. No order placed by you shall be deemed accepted by us until we issue a written acknowledgement.

#### **1 Our Responsibilities**

- 1.1 We shall use reasonable care and skill in the provision of the Services.
- 1.2 We shall use reasonable endeavours to meet any specified delivery dates, but any such dates shall be an estimate only and time for such delivery shall not be of the essence of any Service Agreement. We do not operate an out-of-hours service and are only contactable during our normal office hours ( on Business Days), unless agreed in advance in writing.

#### **2 Your Responsibilities**

- 2.1 Our performance of the Services is dependent on you providing us (including any of our employees, agents, consultants and subcontractors) with such information and assistance (including Client Materials) that we may reasonably require from time to time. You will use reasonable care and skill to ensure that all such information and assistance is provided on a timely basis and is accurate and complete.

- 2.2 You will appoint a project manager (**Project Manager**) who shall have the authority to bind you on all matters relating to any Service Agreement. The Project Manager shall also act as a liaison between us and shall be responsible for acting on all requests for information and guidance given by us under a Service Agreements.
- 2.3 You shall be responsible for ensuring that the terms of the Proposal and any information it provides relating to the Specification is complete and accurate. It is your exclusive responsibility to ensure that the Specification contains full details of, and adequately reflects, your business and/or functional requirements in relation to the Services and/or Deliverables.
- 2.4 You will be responsible for ensuring your computer system contains proper security and safety measures, including comprehensive virus, firewall in accordance with best computing practise.
- 2.5 It shall be your sole responsibility to obtain and maintain all necessary licences, permissions and consents in all countries which may be required in connection with the provision and use of the Services, before the date on which the Services are to start. This includes ensuring that the Services comply with all disability discrimination legislation and compliance with the W3C standards. It shall also be your responsibility to ensure that the Website carries all disclaimers, warnings and public information which any competent lawyer acting for you would advise.
- 2.6 Accordingly you agree to indemnify us and hold us harmless and our, subcontractors agents and employees from any liability, cost, loss, damages award, sum payable by way of settlement or other expense of any kind (including reasonable legal fees) arising from any claim, demand or action alleging that the Services or use of them are contrary to any law, code or regulation in any country.

### **3 Change in Services**

- 3.1 If after the commencement of a Service Agreements either of us wishes to change the scope or specification of the Services, the party desiring a change shall submit details to the other in writing.
- 3.2 We shall consider any such changes and within a reasonable amount of time supply you with any revisions to the relevant Proposal relating to any affects to timing, our charges, the proposed Specification and any other changes. We shall be under no obligation to proceed with any changes unless you agree to such necessary changes.
- 3.3 You shall be responsible for paying for all Services or other work or services provided by us to you even though not contained or stated on a Proposal, including, but not limited to any Services, work or services provided:
  - 3.3.1 on a experimental, testing or evaluative basis;
  - 3.3.2 in connection with correcting, amending or redoing any Client Materials and necessary or required in order to provide the Services in accordance with a Proposal; or

- 3.3.3 alterations, amendments or corrections made or requested to be made by you including after the receipt the Deliverables by you.
- 3.4 Where you allow us to propose, decide or use our judgment as to design, layout, type style, typeface, style etc of any material then, if you wish to make any changes, alterations or amendments, you shall pay for such changes, alterations or amendments.
- 3.5 We shall have the right to make any changes to the Services which are necessary to comply with any applicable law or safety requirement, or which do not materially affect the nature or quality of the Services, and we shall notify you in any such event.
- 3.6 If the performance of any of our obligations under a Services Agreement is prevented or delayed by any act or omission by you or failure by you to perform any relevant obligation (**Customer Default**):
  - 3.6.1 we shall without limiting our other rights or remedies have the right to suspend performance of the Services until you remedy the Customer Default, and to rely on the Customer Default to relieve us from the performance of any of our obligations to the extent the Customer Default prevents or delays our performance of any of our obligations;
  - 3.6.2 we shall not be liable for any costs or losses sustained or incurred by you arising directly or indirectly from our failure or delay to perform any of our obligations as set out in this clause 3.6; and
  - 3.6.3 you shall reimburse us on written demand for any costs or losses sustained or incurred by us arising directly or indirectly from the Customer Default.

#### **4 Service Exclusions**

- 4.1 Our Services **do not** include:
  - 4.1.1 any work that is required due to a computer virus or other malicious contamination whatsoever and howsoever caused and of any nature;
  - 4.1.2 providing any software or hardware or any training or consultancy which is not specifically stated in a Proposal;
  - 4.1.3 any amendments and modifications if there are changes to any features, policies or regulations by any third party which affects the Services; and
  - 4.1.4 any specialist IT services or training issues, including but not limited to [*insert details*]. If we consider that you require such services which are not covered by the Services, then we will, in our discretion, either cease to provide the Services in respect of the matter in issue or charge for the work on a time and material basis at our then current rates.
- 4.2 Where our Services relate to the supply of website pages, we cannot guarantee that the website pages will be optimised for every browser or user preferences. Consequently, there may be certain browsers and user preferences where Website will not display or function as desired.

## **5 Intellectual Property**

### *Bespoke Content*

- 5.1 Subject to clause 5.2, subject to you paying to us all Fees and other sums due to us under a Service Agreement we grant to you a non-exclusive, non-transferable, royalty-free licence to use the Bespoke Materials in respect of that Service Agreements.

### *Your Content*

- 5.2 You agree that you shall at your own expense provide or make available to us the Client Materials as reasonably required by us so that we can perform our obligations under any Service Agreements.
- 5.3 You agree to grant to us a non-exclusive, non-transferable, worldwide licence during a Service Agreement to use the Client Materials in accordance with your instructions for the performance of our obligations in respect of that Service Agreement.
- 5.4 We acknowledge that you (or your licensors) are the owner of all Intellectual Property Rights in the Client Materials and that nothing in these Terms and Conditions shall result in us owning any Intellectual Property Rights in the Client Materials.
- 5.5 You warrant that:
- 5.5.1 you, or your licensors, are the owner of any Intellectual Property Rights in the Client Materials; and
- 5.5.2 our use of the Client Materials in accordance with any Service Agreement shall not infringe any third party Intellectual Property Rights.
- 5.6 You shall indemnify and hold us harmless from and against all and any losses, liabilities, demands, claims, costs and expenses (including legal costs and disbursements on an indemnity basis) and damages incurred or suffered by us, and any damages awarded against us, arising directly or indirectly as a result of or in connection with any claim that the Client Materials infringe any Intellectual Property Rights of any third party or are libellous, defamatory or obscene.

### *Our Content*

- 5.7 Subject to you paying to us all Fees and other sums due to us under a Service Agreement we grant to you a non-exclusive and non-transferable licence to use the Supplier Materials (in relation to any software Deliverables, in object form only) in respect of that Service Agreements. You agree that nothing in any Service Agreement shall give you the right to obtain source codes relating to the Deliverables unless expressly agreed otherwise by us on such terms as we shall determine.
- 5.8 You shall not (except to the extent necessary to make proper use of the Deliverables):

- 5.8.1 alter, adapt, reverse engineer or decompile the Supplier Materials except as permitted by law nor attempt to do any of those things;
- 5.8.2 reproduce or deal in the Supplier Materials (in whole or in part) in any way;
- 5.8.3 make copies of the Supplier Materials except to the extent reasonably necessary for back up purposes or for other purposes permitted by any Service Agreement;
- 5.8.4 make the Deliverables available to any third party without our prior written consent and on such terms (including payment of further Fees) as we may determine;
- 5.8.5 remove, suppress or modify in any way any proprietary marking, including any trade mark or copyright notice, on or in the Deliverables and you agree to incorporate any such proprietary markings in any copies you take of the Deliverables;
- 5.8.6 at any time (whether during or after termination of any Service Agreement) use and/or exploit or allow any third party to use and/or exploit the Deliverables or any of our confidential information to design, develop or otherwise commercially exploit any product that competes, or may compete, with the Deliverables.
- 5.9 You acknowledge that we (or our licensors) are the owner of all Intellectual Property Rights in the Supplier Materials and that nothing in any Service Agreement shall result in your owning any Intellectual Property Rights in the Supplier Materials.
- 5.10 Notwithstanding clause 5.9 you hereby assign with full title guarantee any such right, title and interest in the Supplier Materials which may have been vested in you for any reason absolutely to us. Further, you will execute such further documents and undertake such further acts as we may reasonably require from time to time, at our expense, to give full effect to the assignment in this clause.
- 5.11 You agree with us not to cause or permit anything to be done which may damage or endanger our intellectual property or any title to such intellectual property or assist or allow others to do so.
- 5.12 If there are new inventions, designs or processes evolved in the provision of the Services or the design of the Deliverables, you acknowledge that these shall belong to us. Furthermore, you agree to assist us (at our reasonable cost) in the registration of any of the inventions, designs or processes as may be determined by us.

#### *Third Party Content*

- 5.13 We shall use reasonable endeavours to obtain all necessary licences to use the Third Party Materials.
- 5.14 Subject to the Third Party supplier's standard terms and conditions and subject to your payment of all Fees and other sums due to us under a Service Agreement we grant to you a non-exclusive and non-transferable sub-licence to use the Third

Party Materials (in relation to any software Deliverables, in object form only) in accordance with the Service Agreement.

- 5.15 You agree to comply with any terms and conditions of a third party supplier in relation to any Third Party Materials and shall not (except to the extent necessary to make proper use of the Deliverables):
  - 5.15.1 alter, adapt, reverse engineer or decompile the Third Party Materials except as permitted by law;
  - 5.15.2 reproduce or deal in the Third Party Materials (in whole or in part) in any way;
  - 5.15.3 make copies of the Third Party Materials except to the extent reasonably necessary for back up purposes or for other purposes permitted by this agreement;
  - 5.15.4 make the Deliverables available to any third party without our prior written consent and on such terms (including payment of further Fees) as we may determine;
  - 5.15.5 remove, suppress or modify in any way any proprietary marking, including any trade mark or copyright notice, on or in the Deliverables and you agree to incorporate any such proprietary markings in any copies you take of the Deliverables.
- 5.16 You acknowledge that the relevant third party supplier (or its licensors) is the owner of all Intellectual Property Rights in the Third Party Materials and that nothing in any Service Agreement shall result in your owning any Intellectual Property Rights in the Third Party Materials.
- 5.17 You agree that unless termination of a Service Agreement arises as a result of a material breach of the licence of Deliverables granted under a Service Agreement this clause 5 shall survive termination of a Service Agreement.

## **6 Illegal material**

- 6.1 If in our reasonable opinion, we consider that any Client Materials provided to us by or on behalf of:
  - 6.1.1 are defamatory;
  - 6.1.2 contain, express or indicate illegal racist or otherwise discriminatory opinions;
  - 6.1.3 contain any designs, images, graphics or photographs which are illegally racist or otherwise discriminatory;
  - 6.1.4 are illegal or contain illegal content;
  - 6.1.5 infringe or breach the intellectual property rights of a third party; or
  - 6.1.6 are used outside the provisions of any licence that you may have to use those Client Materials,

then we shall not be required to supply any Services in relation to such Client Materials or any Deliverables based on them.

- 6.2 The right not to provide any Services shall also apply where carrying them out would involve the creation, design, layout, production or reproduction of copy, designs, artwork or images (in any format) which fall into one of the categories set out in clauses 6.1.1 to 6.1.6.

## 7 Client Materials

- 7.1 If you provide Client Materials to us by electronic means (**Electronic Files**), we shall not be responsible for checking unless provided in a Proposal:

- 7.1.1 where the Client Materials consist of copy, the accuracy of the content, including but not limited to checking whether the copy is spelt correctly, is grammatically correct, or formatted in accordance with any specification, layout or design or otherwise; or

- 7.1.2 where the Client Materials consist of artwork or layouts, whether the artwork or layouts are positioned correctly on a page or in accordance with any instructions as to how the artwork or layout are to be reproduced or printed.

- 7.2 For Client Materials submitted as Electronic Files:

- 7.2.1 You acknowledge and agree that:

- 7.2.1.1 the devices on which Electronic Files are stored (or on which they are submitted by you shall); and/or

- 7.2.1.2 the communication methods used by you shall to transmit the Electronic Files to us,

- may be subject to interception, corruption or alteration which is not within our reasonable control or reasonable knowledge of us.

- 7.2.2 You shall keep one or more copies as backup.

- 7.2.3 You shall make available copies of the Electronic Files at dates and times that we reasonably require.

- 7.2.4 You shall submit Electronic Files in the software programme, version and format we specify to you (**Supported Format**).

- 7.3 We may reject any Client Materials or other materials selected by you which appear to be unsuitable for use, and additional charges may be made for materials which we are obliged to acquire in substitution.

- 7.4 Materials used or produced by us specifically for you shall normally be stored by us in a secure and dry environment. They will be stored for a period of 3 months following the delivery of the service for which they were used or produced.

- 7.5 Materials used or produced electronically or digitally by us specifically for you shall normally be stored by us in a secure fashion. Should they not be used or

required for 'live' web sites, they will be stored for a period of 12 months following closure of the service for which they were used or produced.

## **8 Location**

- 8.1 Unless we both agree, or a Proposal provides otherwise, we shall provide the Services in such places and locations as we consider appropriate to the type and nature of your requirements. For the avoidance of doubt, the performance of the Services shall not require attendance at your premises or face-to-face meetings with you, unless agreed in a Proposal.

## **9 Contracts with Third Party Suppliers**

- 9.1 We shall be permitted to use other persons to provide some or all of the Services.
- 9.2 We shall be responsible for the work of a sub-contractor to the same standard as stated in a Service Agreement and any Specification. However, you acknowledge and agree that the some sub-contractors have their own terms and conditions on which the sub-contractor trades and which are more restrictive than those in these Terms and Conditions. For example, without limiting the generality of the foregoing, a sub-contractor may have more restrictive wording as to the standard they will reach in work they perform (as to timing or quality, what is to happen if that standard is not reached or met, issues concerning the restriction and exclusion of liability, and so on). Where the terms and conditions of a sub-contractor are more restrictive or exclusory then the provisions of these Terms and Conditions, you agree that the work provided by any such sub-contractor will be governed by the terms and conditions of that sub-contractor rather than the provisions of these Terms and Conditions.

## **10 Branding**

- 10.1 Whilst we may provide certain branding design and development services (**Design Services**) as part of the Services we shall not have any responsibility to appoint solicitors or trade mark agents to carry out any trade mark, domain name or common law searches whether in respect of a name or visual concept or otherwise to assess the potential for conflict between any and all Intellectual Property Rights in the Design Services and any other third party rights.
- 10.2 If we reasonably believe that certain designs and/or features are unsuitable for creation or use, for example they violate standard industry practice, or they cannot be created on time or on budget, then we reserve the right not to do such work.

## **11 Domain Names**

- 11.1 Subject to your paying our Fees and any other amount agreed between us in respect of acquiring and maintaining a domain name for you if we agree to acquire any domain names on your behalf, we agree that:
- 11.1.1 such domain names shall be your property and we shall use the domain names solely in respect of a Service Agreement;

11.1.2 to provide you with all reasonable assistance as may be required to transfer the administration of the domain names to you subject to a transfer fee.

11.2 We do not guarantee the availability of any domain name (or underlying IP address).

## **12 Citation Policy**

12.1 You agree that we may include a statement on the Deliverables (including the home page of the Website) stating that the Deliverables were either (as we determine in our reasonable opinion) “powered by Vanilla Active Limited” or “designed by Vanilla Active Limited” with, in respect of the Website, an accompanying hyperlink to our website.

12.2 Protecting our branding from being associated with a Website which we in our absolute and sole discretion consider to be objectionable is paramount to us and you agree that we may remove any statement or hyperlink on the Website (as included in accordance with clause 12.1 above) without notice and, on demand, you agree to execute all such further documents and do all such further acts as we may reasonably require to protect our branding.

## **13 Electronic Storage and Passwords**

13.1 Where the Deliverables are supplied to you on computer disks or other electronic storage method, then we remain the owner of these storage media and we reserve the right to require immediate return of them. Should any artwork be supplied to you in digital form, you may not amend it or otherwise use it for purposes outside those contemplated by the Service Agreement without our express prior written permission.

13.2 If as part of the Services we are required to hold any of your passwords to access and/or edit the Website, it is your responsibility at the completion of the Services to ensure, where we are no longer instructed, that such passwords are immediately changed. For the avoidance of doubt we do not accept any responsibility for your failure to change passwords in such circumstances.

13.3 If you change any passwords which we use in order to provide the Services then you must immediately notify us of the new password.

## **14 Approval and Acceptance of Services**

14.1 Before we deliver the Deliverables (or any part of them) to you, we shall test them to satisfy ourselves that they function correctly and are otherwise in accordance with the Proposal.

14.2 Acceptance of our Services and Deliverables shall occur when we have confirmed to you in writing that our Acceptance Tests have been passed.

14.3 If any failure to pass the Acceptance Tests is caused by (i) your act or omission; or (ii) any amendment or modification to the Deliverables by you or any third party on your behalf then the Deliverables shall be deemed accepted. However, in such circumstances we shall use reasonable endeavours to remedy the cause of such failure on a time and materials basis at our then current rates.

- 14.4 It is your sole responsibility to ensure that the content of the Website is correct, accurate, in compliance with all laws and regulations and up to date at all times.
- 14.5 Acceptance of our Services and Deliverables shall also be deemed accepted if you give us notice of acceptance or if you use the Deliverables in a live environment unless such use is solely for the purposes of carrying out the Acceptance Tests.
- 14.6 Unless a rejection fee has been agreed in advance, you shall have no right to terminate a Service Agreement, allege breach of contract or seek any cancellation, reduction or repayment of the Fees on the basis of style or composition.
- 14.7 Where we supply Proofs to you, you shall be responsible for checking whether the Proofs are in accordance with the Specification set out in the Proposal or as agreed between us for the provision of the Services. You shall approve the Proofs and after approval, any remaining errors, whether in:
  - 14.7.1 the content or Client Materials provided by you,
  - 14.7.2 the design or layout created, made or carried out by us, or
  - 14.7.3 the application of the Specification for the provision of the Services (relating to such matters for example as the colours to be used, size, position, folding etc), shall be your sole responsibility.
- 14.8 We shall be entitled to use the approved Proofs as the basis for carrying out the remainder of the Services.

## **15 Evaluation Work**

- 15.1 Where you are considering, before the formation of any Service Agreement, to retain our Services, in consideration of £1.00 (receipt of which is acknowledged by you) you undertake that:
  - 15.1.1 you will not use or exploit any Evaluation Materials for any purpose other than to evaluate whether or not to retain our services, and in particular (but without limitation to the foregoing) unless you do retain our services, any designs, ideas or concepts put forward by us may not be used by you as part of any subsequent advertising campaign, on the Website or otherwise without our prior written consent;
  - 15.1.2 you will not divulge any confidential information otherwise than as provided by clause 4.1 of section 2;
  - 15.1.3 obey with any reasonable directions we may give for protecting the security of our confidential information.

## **16 Hosting**

- 16.1 Where our Services include the provision of our Hosting Services, you grant to us a non-exclusive and worldwide licence for the term of the Service Agreement to host the Website.
- 16.2 Subject to your payment of all Fees and other sums due to us under any Services Agreement, we grant to you a non-exclusive, non-transferable licence for the term of the Services Agreement to use any hosting software we make available to you.
- 16.3 You agree that you will only use our Hosting Services in accordance with the provisions of a Service Agreement and our reasonable instructions from time to time.
- 16.4 You shall keep any password we give to you to access our or our agents or sub-contractors hosting server confidential. We may reasonably change such password for the purpose of essential maintenance, enhancement, modernisation or other work deemed by us to be necessary to the operation and/or security of our Hosting Service.
- 16.5 You agree that you will at all times comply with our Acceptable Use Policy. The Acceptable Use Policy is a standard policy applicable to all users of our hosting services and is necessary to enable us to provide orderly and efficient hosting services. We may reasonably amend the Acceptable Use Policy at any time on giving notice to you.
- 16.6 We may, at our sole discretion, suspend the Hosting Services (in whole or part) if:
  - 16.6.1 We are entitled to terminate any Service Agreement for any reason; or
  - 16.6.2 the suspension is for the purposes of carrying out scheduled or emergency maintenance or to substitute, change, reconfigure, relocate or rearrange the hosting server or any other connectivity infrastructure relevant to the Hosting Services; or
  - 16.6.3 the suspension is in accordance with an order, instruction or request of government, an emergency service organisation or other competent administrative authority or is a result of our otherwise losing any authorisation we may need to provide the Hosting Services.
- 16.7 We shall notify you as soon as reasonably possible of any suspension (if practicable) and we shall use all reasonable efforts to minimise the downtime incurred in taking such actions.
- 16.8 Exercise by us of our right of suspension under clause 16.6 shall not function as a waiver of any right or termination which we may have under a Service Agreement.
- 16.9 If the Hosting Service is provided on co-located equipment, it is not intended that such co-location will constitute a lease of any real or personal property. You acknowledge and agree that you have been granted only a limited licence to occupy space and use any equipment provided by us in accordance with a Service Agreement.

16.10 You warrant that:

16.10.1 You or your licensors are, the owner of any Intellectual Property Rights in the Website; and

16.10.2 Our use of the Website in accordance with a Service Agreement to provide the Hosting Services shall not infringe any third party Intellectual Property Rights.

16.11 You shall be responsible for the costs and expenses involved in hosting the Website. If you require and we accept for the Website to be hosted on our or other third party servers then you shall be responsible for paying us for those services at our or the relevant third party supplier's then current rates and on our or the relevant third party supplier's terms. If you then no longer require the Website to be hosted, the Website may be deactivated subject to a deactivation fee.

## **17 Term of Service Agreement**

17.1 A Service Agreement shall, subject to these Terms and Conditions, continue in full force and effect until the acceptance of the Deliverables in accordance with the Acceptance Tests. Where we are providing Hosting Services, the Service Agreement shall, subject to these Terms and Conditions, continue until the later of the expiration of the Hosting Services or the acceptance of the Deliverables in accordance with the Acceptance Tests.

## **Section 2 – General Terms and Conditions**

This section 2 of the Terms and Conditions shall always apply in respect of every Service Agreements.

### **1 Price**

1.1 All Proposals are valid for 30 days (unless a lesser time is stated on the Proposal) from the issue date and are, unless otherwise stated, exclusive of VAT and other charges. We may withdraw a Proposal at any time by notice to you.

1.2 We reserve the right to revise our charges at any time in the event of any changes whatsoever to a Proposal, to reflect, for example, the costs of production and raw materials which are to be used in the provision of the Services.

1.3 We reserve the right to increase our charges by giving 30 days prior written notice at any time after the first anniversary of the commencement of a Service Agreements.

1.4 Where our fees are calculated on the amount of time spent by us the following applies:

1.4.1 'Day' shall mean a period of 7 hours. Where the work carried out in performing the Services exceeds the period of 7 hours, the period shall be charged at the pro-rated rate for a day; and

- 1.4.2 Where our fees are based on an hourly rate, any time spent which is less than an hour shall be charged on a pro-rated basis.

## **2 Payment**

- 2.1 In respect of our supply of the Services, unless otherwise provided in a Proposal, you agree to pay our fees (**Fees**). In most cases, we will issue an invoice for 50% of the total fee which is to be paid before work commences. The second 50% invoice will be issued as the project approaches completion. Once a project has been approved, final payment is due in full. In the case of web site development, final payment will need to be received before the web site is put 'live'.
- 2.2 It is at our discretion that a web site is placed live before final payment is received. In these cases, payment must be received within 7 days. For smaller projects, payment terms may vary.
- 2.3 In respect of any expenses incurred by us including, for example, the cost of hotel, subsistence and travelling in connection with the performance of a Service Agreements or otherwise at your direction, and the cost of any materials or services reasonably and properly provided by third parties required by you, unless otherwise agreed, we will require payment in advance.
- 2.4 All payments due to us from you under a Service Agreement shall be paid to us without deduction, setoff, counterclaim or any other withholding.
- 2.5 Time for all payments due to us from you shall be of the essence.
- 2.6 If you fail to pay us on the due date any amount due to us the whole of the balance of any amount then owing to us shall become immediately due and payable and without prejudice to any other right or remedy available to us we may:
  - 2.6.1 charge interest on such sum due to us for payment at the rate of 3% over Barclays Bank plc base rate accruing on a daily basis and being compounded quarterly until payment is made (before as well as after judgment); and
  - 2.6.2 suspend further performance of all or any Services (irrespective of which Service Agreement they may be ordered under) until payment together with any interest is made in full; and
  - 2.6.3 terminate any and all Service Agreement.
- 2.7 We may without prejudice to any other rights we may have, set off any liability you have to us against any liability we may have to you.
- 2.8 Without prejudice to any right or claim for interest or any other right under these Terms and Conditions all sums due to us shall become immediately due to us on termination of a Service Agreement.

## **3 Liability**

- 3.1 Our liability to you under a Service Agreement shall not be limited for:

- 3.1.1 fraud, fraudulent misrepresentation or dishonesty; and
- 3.1.2 death or personal injury caused by our negligence.
- 3.2 Subject to clause 3.1 our liability to you arising out of a failure to provide any goods or services to you or any delay in providing any goods or services to you or in connection with our provision of any goods or services shall be limited to that proportion of your actual loss and damage which was directly and solely caused by us (**Direct Loss**).
- 3.2.1 Subject to clause 3.1, and for the avoidance of doubt, even if you bring a matter to our attention Direct Loss shall not include any indirect or consequential loss or damage which means without limitation any loss of turnover; loss of profits; loss of business; loss of goodwill or similar losses; loss of anticipated savings; or any other economic loss, costs, damages, charges or expenses.
- 3.3 Subject to clause 3.1 our total liability to you for Direct Loss shall be limited to the total amount of charges payable by you to us in the Service Agreement in which the Direct Loss relates. You agree to take out comprehensive insurance with insurers of repute in respect of the liability we are not liable for.
- 3.4 Subject to clause 3.1 we shall not be liable in any way in respect of any failure, delay or defect in the supply or use of the Deliverables caused by your supply or specification of unsuitable Client Materials or content or by the reproduction of the Deliverables by a third party.
- 3.5 No claim regardless of its cause of action arising out of a Service Agreement may be brought by you against us more than six (6) months after the cause of action has arisen.
- 3.6 Subject to clause 3.1 you agree to indemnify us to the fullest extent possible from and against all liability whatsoever or howsoever arising (including without limitation reasonable professional fees) out of or in connection with your breach of any of the terms of a Service Agreement or any such liability brought or threatened against us by a third party (even if we have been negligent) arising out of any such breach.
- 3.7 You acknowledge and agree that in entering into a Service Agreement that you do not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to a Service Agreement) relating to the subject matter of a Service Agreement other than as expressly set out in a Service Agreement. These Terms and Conditions replace and supersede any previous proposals, correspondence, understandings or other communications between us whether written or oral.
- 3.8 You acknowledge that we only contract with persons dealing as businesses. If, however, it is deemed that you are dealing as a consumer (within the meaning of the Unfair Contract Terms Act 1977) your statutory rights are not affected.

#### **4 Confidentiality**

- 4.1 We shall both at all times use our best endeavours to keep confidential (and to procure that our employees and agents shall keep confidential) any confidential

information which either of us may acquire in relation to the business and affairs of the other party in relation to a Service Agreement and neither of us shall use or disclose such information except with the consent of that other or in accordance with the order of a court of competent jurisdiction

- 4.2 Both of our obligations under clause 4.1 shall continue without limit in point of time but shall cease to apply to any information coming into the public domain otherwise than by breach by one of us of our obligations under a Service Agreement provided that nothing contained in clause 4.1 shall prevent either of us from disclosing any such information to the extent required in or in connection with legal proceedings arising out of a Service Agreement.
- 4.3 You agree that we may cite the performance of the Services to our clients and prospective clients as an indication of our experience. We also reserve the right to use any work carried out on your behalf for our own promotional purposes at any time.

## **5 Our employees and sub-contractors**

- 5.1 You shall not, without our prior written consent, at any time during a Service Agreement, or for a period of six months after termination of any of a Service Agreement, solicit or entice away from us or employ or attempt to employ any person who is, or has been, engaged as an employee or sub-contractor of us.
- 5.2 Any consent given by us in accordance with clause 6.1 above shall be subject to you paying to us a fair amount of compensation which shall be an amount equivalent to the total of six months salary or six months service charges as the case may be, prevailing at the time of termination.

## **6 Risk and Property**

- 6.1 The risk in the Deliverables shall pass to you upon the commencement of their supply or transportation or, where you will not accept supply on the date required by us, to use temporary storage arranged by us. The ownership of the Deliverables and any campaign research including electronic files shall not pass to you until the later of the time when we have received in full (which means cleared funds in our bank account) all sums due in respect of the Deliverables and any other sum which is due to us from you relating to the Services, or the completion of the delivery.
- 6.2 Until ownership of the Deliverables has passed to you under condition 6.1 above you shall:
  - 6.2.1 keep the Deliverables stored (at your cost) in satisfactory condition and in such a manner that it remains readily identifiable as our property;
  - 6.2.2 hold the Deliverables on a fiduciary basis as our bailee;
  - 6.2.3 not destroy or obscure any identifying mark or packaging relating to the Deliverables; and

- 6.2.4 keep the Deliverables insured on our behalf for their full price against all risks and hold proceeds of any such insurance on trust for us and not mix them with any other money nor pay the proceeds into any overdrawn bank account.
- 6.3 Your right to possession of the Deliverables before ownership has passed to you shall terminate immediately if any of the circumstances set out in condition 7.1 of **section 2** of the these Terms and Conditions arise or if you fail to make any payment to us on its due date or you otherwise encumber Deliverables.
- 6.4 You grant us, our agents and employees an irrevocable licence to enter the premises where the Deliverables are stored in order to inspect them, or where your right to possession is terminated to remove them.
- 6.5 Termination of a Service Agreement shall not affect our rights under this clause.

## **7 Termination**

- 7.1 You may terminate any Service Agreement by giving written notice to us at any time, but any amounts paid by you to us shall not be refundable. You shall pay for all Services provided up to the date of termination, and for all expenditure falling due for payment after the date of termination from commitments reasonably and necessarily incurred by us for the performance of the Services prior to the date of termination.
- 7.2 Without prejudice to any other right or remedy available to us, we may terminate a Service Agreement if you:
  - 7.2.1 commit a material breach of any of the terms of a Service Agreement (including without limitation late payment) and, if such breach is capable of remedy, fail to remedy the breach within 14 days of receiving notice from us specifying the breach and requiring the breach to be remedied;
  - 7.2.2 enter into liquidation whether compulsorily or voluntarily (otherwise than for the purposes of a solvent amalgamation or reconstruction);
  - 7.2.3 become insolvent;
  - 7.2.4 cease or threaten to cease to carry on business;
  - 7.2.5 compound or make any voluntary arrangement with your creditors;
  - 7.2.6 are the subject of a notice of appointment of an administrator, or a notice of intention to appoint an administrator or liquidator;
  - 7.2.7 are unable to pay your debts as they fall due;
  - 7.2.8 have an encumbrancer take possession of, or a receiver or administrative receiver appointed over, all or any part of its assets; or
  - 7.2.9 take or suffer any similar action due to debt.
- 7.3 The expiry or termination of a Service Agreements for any reason shall not affect any rights and/or obligations:

- 7.3.1 accrued before the date of termination or expiry; or
- 7.3.2 expressed or intended to continue in force after and despite expiry or termination.

## **8 General**

- 8.1 You consent to the processing by us of all of your personal data (as defined in the Data Protection Act 1988) for the purposes connected with a Service Agreement.
- 8.2 Neither of us shall be liable for any breach of a Service Agreements directly or indirectly caused by circumstances beyond our reasonable control and which prevents us from performing our obligations to the other, provided that a lack of funds shall not be regarded as a circumstance beyond reasonable control.
- 8.3 The failure by either of us to enforce at any time or for any period any one or more of the terms or conditions under a Service Agreement shall not be a waiver of them or of the right at any time subsequently to enforce all terms and conditions of a Service Agreement.
- 8.4 If any term or provision in a Service Agreement shall in whole or in part be held to any extent to be illegal or unenforceable under any enactment or rule of law that term or provision or part shall to that extent be deemed not to form part of such Service Agreement and the enforceability of the remainder of a Service Agreement shall not be affected.
- 8.5 You shall not without our prior written consent assign, transfer, charge, sub-contract or otherwise deal in any manner with all or any of your rights or obligation under a Service Agreements. We may at any time assign, transfer, charge, sub-contract or otherwise deal in any manner with all or any of our rights or obligations under a Service Agreements.
- 8.6 A Service Agreement is made for both our respective benefit and (where applicable) our successors and permitted assigns, but are not otherwise intended to benefit, or be enforceable by anyone else.
- 8.7 Except for clause 6.4, nothing in a Service Agreements is intended to or shall operate to create a partnership, or to authorise either of us to act as agent of the other, and neither of us shall have authority to act in the name or on behalf of or otherwise to benefit the other in any way.
- 8.8 Where required under a Service Agreement, we shall act as principal and not agent for you and we will enter into all related contracts as principal.
- 8.9 For the purposes of the Contracts (Rights of Third Parties) Act 1999 a Service Agreement is not intended to, and does not, give any person who is not a party to a Service Agreement any right to enforce any of its provisions.

## **9 Interpretation**

- 9.1 Unless stated otherwise, references to a clause is to a clause in the respective section of these Terms and Conditions.

- 9.2 Unless the context requires otherwise, the singular includes the plural and vice versa.
- 9.3 Clause headings are inserted for convenience and are to be ignored for the purposes of construction.
- 9.4 A reference to a law is a reference to a law as it is in force for the time being taking into account of any amendment, extension, application or re-enactment and includes any subordinate legislation for the time being in force.
- 9.5 These Terms and Conditions may only be amended or varied with the written approval of one of our respective duly authorised officers.
- 9.6 Words and expressions of a technical nature are to be construed (unless the context otherwise requires) in accordance with general computer industry use in the United Kingdom.
- 9.7 You confirm and undertake that you have all necessary power, authorisation, consent and approval to validly enter into a Service Agreement.
- 9.8 Where the words **include(s), including or in particular** are used in these Terms and Conditions, they are deemed to have the words "without limitation" following them.

## 10 Definitions

- 10.1 Unless the context otherwise requires, the following definitions shall have the following meanings in these Terms and Conditions:

“Acceptable Use Policy”	the terms for the use of our Hosting Services as annexed to these Terms and Conditions, and such other similar terms we may provide from time to time;
“Acceptance Tests”	the test to be carried out on completion of the Services and/or Deliverables (or part of them as the case may be);
“Bespoke Materials”	any materials included in the Deliverables by us under a Service Agreement specifically for you and as set out in the Proposal and/or such updated other materials as expressly agreed in writing between us;
“Business Days”	means a day (other than a Saturday, Sunday or public holiday) when banks in the City of London are open for business;
“Client Materials”	any materials which are provided or made available to us by you (or on your behalf), including, without limitation, copy, artwork, layouts, designs, paper, software, printed material or electronics files for use by us in undertaking the Services or incorporation into the Deliverables including those set out in any Proposal and/or such other updated materials as expressly agreed in writing between us;

“Deliverables”	the materials produced on behalf of, or provided to you by us in connection with the Services;
“Evaluation Materials”	any evaluation material design work, strategic plans and ideas, innovations, creative plans, concepts and ideas and any other advertising or promotional plans or ideas developed by us or on our behalf whether relating specifically to a presentation we give to you or otherwise and including any of our confidential information;
“Fees”	the fees for our Services as defined by clause 2.1 of Section 2;
“Hosting Services”	means the website hosting services described in the Proposal;
“Intellectual Property Rights”	copyright, database right, patents, registered and unregistered design rights, registered and unregistered trade marks and all other industrial, commercial or intellectual property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world;
“Proof”	concepts, roughs of creative work, proofs of copy and drafts of other materials produced by or on our behalf;
“Proposal”	any estimate, proposal or quotation document issued by us to you setting out the Services we are offering to provide to you;
“Services”	the services we have agreed to provide to you as specified in a Proposal or as otherwise agreed between us that we may from time to time provide to you, which may include some or all of our website design and development services, hosting services and other design services;
“Specification”	the specification of the Services as provided in the Proposal;
“Supplier Materials”	any materials (including the Supplier Software) developed by us either before or during any Service Agreement and included in the Deliverables excluding the Bespoke Materials;
“Supplier Software”	any software (in object code only) and any databases developed by us either before or during any Service Agreement and included in the Deliverables;
“Third Party Materials”	any materials owned, supplied or licensed by a third party either before or during any Service Agreement that are used in undertaking Services and/or included in the Deliverables as set out in a Proposal and/or such other updated third

party materials as expressly agreed in writing between us;  
and

“Website” any website or intranet in respect of which our Services are being provided.

## **11 Notices**

11.1 Any notice required or authorised to be given by either party under a Service Agreement to the other shall be in writing and shall be sent by pre-paid registered or recorded delivery post or by electronic mail to the other party at the address stated in a Service Agreement or such other address as may be specified by the parties by notice to the other from time to time. Any such notice shall operate and be deemed to have been served at the expiration of 2 Business Days after it is posted or transmitted in the case of delivery by post and on the next Business Day in the case of delivery by electronic mail (if the email has been authenticated by a delivery receipt). In proving such service it shall be sufficient to show that the envelope containing the notice was properly addressed and posted or that the transmission was duly despatched and/or acknowledged as the case may be.

## **12 Governing law and jurisdiction**

12.1 A Service Agreements shall be governed by and construed in accordance with the law of England and each party agrees to submit to the exclusive jurisdiction of the English courts.

## **ANNEX – ACCEPTABLE USE POLICY**

- (a) Your use of the Hosting Services shall comply with all applicable laws and/or regulations from time to time in force that relate to your use of the Hosting Services and/or the use or distribution of the Website.
- (b) You shall not use the Hosting Services:
  - (i) in any manner that infringes (or may infringe) the Intellectual Property Rights or other proprietary rights of third parties or any applicable law;
  - (ii) to commit or encourage a criminal offence or otherwise do anything unlawful or in breach of any regulation or code of practice;
  - (iii) to knowingly distribute a virus or other electronic material with harmful or destructive properties;
  - (iv) to seek or obtain unauthorised or otherwise unlawful access to any third party computer or telecommunications system (including any of our systems) or to interfere with the functioning of any such systems;
  - (v) to distribute material that is, or may constitute, any type of unsolicited advertising or other promotional materials by multiple emails or other electronic means, commonly referred to as “spam”;

- (vi) to publish, send or receive Illegal Material (as defined by clause 6.1 of section 1 of these Terms and Conditions);
- (vii) to do anything which does not conform with the acceptable use policies of any connected networks and Internet standards generally; or
- (viii) for any illegal purpose and Client Materials shall not contain any material deemed illegal or against public policy in any relevant jurisdictions.