

## 1. DEFINITIONS & INTERPRETATION

1.1 In these Terms & Conditions the following definitions apply:

**"Affiliate"** means any entity that directly or indirectly Controls, is Controlled by or is under common Control with, another entity;

**"Bribery Laws"** means the Bribery Act 2010 and all other applicable UK legislation, statutory instruments and regulations in relation to bribery or corruption and any similar or equivalent legislation in any other relevant jurisdiction;

**"Business Day"** means a day other than a Saturday, Sunday or bank or public holiday when banks generally are open for non-automated business in England;

**"Confidential Information"** means any commercial, financial or technical information, information relating to the Services, plans, know-how or trade secrets which is obviously confidential or has been identified as such, or which is developed by the either party in performing its obligations under, or otherwise pursuant to the Contract;

**"Contract"** means the agreement between Fluid Commerce and the Customer for the sale and purchase of the Services incorporating these Terms & Conditions and the Order;

**"Control"** means the beneficial ownership of more than 50% of the issued share capital of a company or the legal power to direct or cause the direction of the management of the company;

**"Controller"** shall have the meaning given in applicable UK GDPR Data Protection Laws from time to time;

**"Customer"** means the person who purchases the Services from Fluid Commerce and whose details are set out in the Order;

**"Customer Materials"** means any materials owned by the Customer and provided to Fluid Commerce from time to time for the purposes of Fluid Commerce performing the Services;

**"Data Subject"** shall have the meaning in applicable UK GDPR Data Protection Laws from time to time;

**"Fluid Commerce"** means Fluid Commerce Limited, a company incorporated in England & Wales (Registration Number: 07026218), with its registered office situated at 18 Hilton Street, Manchester, England, M1 1FR;

**"Fluid Commerce Personnel"** all employees, officers, staff, other workers, agents and consultants of Fluid Commerce, its Affiliates and any of their sub-contractors who are engaged in the performance of the Services from time to time;

**"Force Majeure"** means an event or sequence of events beyond any party's reasonable control (after exercise of reasonable care to put in place robust back-up and disaster recovery arrangements) preventing or delaying it from performing its obligations under the Contract including an act of God, fire, flood, lightning, earthquake or other natural disaster; war, riot or civil unrest; interruption or failure of supplies of power, fuel, water, transport, equipment or telecommunications services or third party software platforms or third party software services or third party online services; or material required for performance of the Contract; strike, lockout or boycott or other industrial action including strikes or other industrial disputes involving Fluid Commerce's or its suppliers' workforce, but excluding the Customer's inability to pay or circumstances resulting in the Customer's inability to pay];

**"Heads of Terms"** means, in connection with the Website Development Services, the document setting out the services to be provided by Fluid Commerce in establishing the Customer's requirements for the Website Development Services and for the Specification in respect of the Website Development Services;

**"Intellectual Property Rights"** means copyright, patents, know-how, trade secrets, trade marks, trade names, design rights, rights in get-up, rights in goodwill, rights in confidential information, rights to sue for passing off, domain names and all similar rights and, in each case:

- (a) whether registered or not
- (b) including any applications to protect or register such rights
- (c) including all renewals and extensions of such rights or applications
- (d) whether vested, contingent or future
- (e) to which the relevant party is or may be entitled, and
- (f) in whichever part of the world existing;

**"Marketing Services"** means services relating to the delivery of paid search campaigns, social media campaigns, Amazon organic search campaigns and Amazon paid search campaigns, as provided by Fluid Commerce;

**"Modern Slavery Policy"** means Fluid Commerce's anti-slavery and human trafficking policy in force and notified to the Customer from time to time;

"**Order**" means the Customer's order for the Services in substantially the same form as set out in the Customer's order form;

"**Personal Data**" has the meaning given in the applicable UK GDPR Data Protection Laws from time to time;

"**Personal Data Breach**" has the meaning given in the applicable UK GDPR Data Protection Laws from time to time;

"**Price**" has the meaning given in clause 3.1;

"**processing**" has the meaning given to it in applicable UK GDPR Data Protection Laws from time to time (and related expressions, including "**process**", "**processed**", "**processing**", and "**processes**" shall be construed accordingly);

"**Processor**" has the meaning given to it in applicable UK GDPR Data Protection Laws from time to time;

"**Protected Data**" means Personal Data received from or on behalf of the Customer in connection with the performance of Fluid Commerce's obligations under the Contract;

"**Services**" means the Website Development Services, the Website Support Services, or the Marketing Services as set out in the Order and to be performed by Fluid Commerce for the Customer;

"**Specification**" means the description or specification of the Services set out or referred to in the Order;

"**Sub-Processor**" means any agent, subcontractor or other third party (excluding its employees) engaged by Fluid Commerce for carrying out any processing activities on behalf of the Customer in respect of the Protected Data;

"**Terms & Conditions**" means Fluid Commerce's terms and conditions of sale set out in this document;

"**UK GDPR Data Protection Laws**" means, as binding on either party or the Services:

- (a) The Data Protection Act 2018;
- (b) The General Data Protection Regulation (EU) (2016/679) as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018;
- (c) Any laws which implement any such laws; and
- (d) Any laws that replace, extend, re-enact, consolidate or amend any of the foregoing;

"**VAT**" means value added tax under the Value Added Taxes Act 1994 or any other similar sale or fiscal tax applying to the sale of the Services;

"**Website Development Services**" means services relating to the design and development of ecommerce websites, as provided by Fluid Commerce;

"**Website Support Services**" means services relating to the support of ecommerce websites including platform maintenance, bug fixing, and change requests, as provided by Fluid Commerce.

1.2 In these Terms & Conditions, unless the context otherwise requires:

1.2.1 A reference to the Contract includes these Terms & Conditions, the Order, and their respective schedules, appendices and annexes (if any);

1.2.2 Any clause, schedule or other headings in these Terms & Conditions are included for convenience only and shall have no effect on the interpretation of these Terms & Conditions;

1.2.3 A reference to a "**party**" means either Fluid Commerce or the Customer and includes that party's personal representatives, successors and permitted assigns;

1.2.4 A reference to a "**person**" includes a natural person, corporate or unincorporated body (in each case whether or not having separate legal personality) and that person's personal representatives, successors and permitted assigns;

1.2.5 A reference to a "**company**" includes any company, corporation or other body corporate, wherever and however incorporated or established;

1.2.6 A reference to a gender includes each other gender;

1.2.7 Words in the singular include the plural and vice versa;

1.2.8 Any words that follow "**include**", "**includes**", "**including**", "**in particular**" or any similar words and expressions shall be construed as illustrative only and shall not limit the sense of any word, phrase, term, definition or description preceding those words;

1.2.9 A reference to "**writing**" or "**written**" includes any method of reproducing words in a legible and non-transitory form;

1.2.10 A reference to legislation is a reference to that legislation as amended, extended, re-enacted or consolidated from time to time except to the extent that any such amendment, extension or re-enactment would increase or alter the liability of a party under the Contract; and

1.2.11 A reference to any English action, remedy, method of judicial proceeding, court, official, legal document, legal status, legal doctrine, legal concept or thing shall, in respect of any jurisdiction other than England, be deemed to include a reference to that which most nearly approximates to the English equivalent in that jurisdiction.

## **2. APPLICATION & ORDER**

2.1 These Terms & Conditions apply to and form part of the Contract between Fluid Commerce and the Customer. They supersede any previously issued terms and conditions of purchase or supply.

2.2 No terms or conditions endorsed on, delivered with, or contained in the Customer's purchase conditions, order, confirmation of order, specification or other document shall form part of the Contract except to the extent that Fluid Commerce otherwise agrees in writing.

2.3 No variation of these Terms & Conditions or to an Order or to the Contract, shall be binding unless expressly agreed in writing and executed by a duly authorised signatory on behalf of Fluid Commerce.

2.4 In respect of the Website Development Services:

2.4.1 Fluid Commerce and the Customer shall discuss the Customer's requirements;

2.4.2 Fluid Commerce shall provide the Customer with an estimated quotation;

2.4.3 In the event that the Customer notifies Fluid Commerce that it shall proceed with the Website Development Services, Fluid Commerce shall provide the Customer with the Heads of Terms;

2.4.4 Upon the Customer signing and returning the Heads of Terms to Fluid Commerce, Fluid Commerce will commence work in establishing the Customer's detailed requirements in connection with the Website Development Services, subject to the provisions of the Heads of Terms;

2.4.5 Upon the completion of the work in establishing the Customer's detailed requirements in connection with the Website Development Services, and in the event that the Customer notifies Fluid Commerce that it shall proceed with the Website Development Services, Fluid Commerce shall prepare an Order form and Specification for the Customer setting out details of the Website Development Services to be carried out by Fluid Commerce;

2.4.6 In the event that the Customer wishes to proceed with the Website Development Services, the Customer shall sign and return the Order form to Fluid Commerce;

2.4.7 In the event that Fluid Commerce accepts the Customer's offer to purchase the Website Development Services as set out in the Order, Fluid Commerce shall sign and return the Order form to the Customer.

2.5 In respect of the Website Support Services and the Marketing Services:

2.5.1 Fluid Commerce and the Customer shall discuss the Customer's requirements;

2.5.2 Fluid Commerce shall prepare an Order form and Specification for the Customer setting out details of the Services to be carried out by Fluid Commerce;

2.5.3 In the event that the Customer wishes to proceed with the Website Support Services or the Marketing Services, the Customer shall sign and return the Order form to Fluid Commerce;

2.5.4 In the event that Fluid Commerce accepts the Customer's offer to purchase the Website Support Services or the Marketing Services as set out in the Order, Fluid Commerce shall sign and return the Order form to the Customer.

2.6 Each Order by the Customer to Fluid Commerce shall be an offer to purchase the Services subject to these Terms & Conditions.

2.7 An Order may be withdrawn or amended by the Customer at any time before acceptance by Fluid Commerce. If Fluid Commerce is unable to accept an Order, it shall notify the Customer promptly.

2.8 The offer constituted by an Order shall remain in effect and capable of being accepted by Fluid Commerce until withdrawn by the Customer giving notice to Fluid Commerce.

2.9 Fluid Commerce may accept or reject an Order at its discretion. An Order shall not be accepted, and no binding obligation to perform any Services shall arise, until the earlier of:

2.9.1 Fluid Commerce's written acceptance of the Order by signing and returning the Order form to the Customer; or

2.9.2 Fluid Commerce performing the Services or notifying the Customer that they are ready to be performed.

2.10 Rejection by Fluid Commerce of an Order, including any communication that may accompany such rejection, shall not constitute a counter-offer capable of acceptance by the Customer.

2.11 Fluid Commerce may issue estimated quotations to the Customer from time to time. Estimated quotations are invitations to treat only. They are not an offer to perform Services and are incapable of being accepted by the Customer.

2.12 Marketing and other promotional material relating to the Services are illustrative only and do not form part of the Contract.

### **3. PRICE**

3.1 The price for the Services shall be as set out in the Order or, in default of such provision, shall be calculated in accordance with Fluid Commerce's scale of charges in force from time to time ("**Price**").

3.2 The Prices are exclusive of VAT.

3.3 The Customer shall pay any applicable VAT to Fluid Commerce on receipt of a valid VAT invoice.

3.4 Fluid Commerce may increase the Prices at any time by giving the Customer not less than 20 Business Days' notice in writing.

3.5 Notwithstanding clause 3.4, Fluid Commerce may increase the Prices with immediate effect by written notice to the Customer where there is an increase in the direct cost to Fluid Commerce of performing the relevant Services which is due to any factor beyond the control of Fluid Commerce.

### **4. PAYMENT**

4.1 Fluid Commerce shall invoice the Customer for the Services as set out in the Order and/or the Website Development Services Schedule in respect of Website Development Services, the Website Support Services Schedule in respect of Website Support Services, or the Marketing Services Schedule in respect of Marketing Services.

4.2 The Customer shall pay all invoices:

4.2.1 In full without deduction or set-off, in cleared funds; and

4.2.2 To the bank account nominated by Fluid Commerce.

4.3 Time of payment is of the essence. Where sums due under these Terms & Conditions are not paid in full by the due date:

4.3.1 Fluid Commerce may, without limiting its other rights, charge interest on such sums at 5% a year above the base rate of the Bank of England from time to time in force; and

4.3.2 Interest shall accrue on a daily basis, and apply from the due date for payment until actual payment in full, whether before or after judgment.

### **5. CREDIT LIMIT**

5.1 Fluid Commerce may set and vary credit limits from time to time and withhold all further performance of the Services if the Customer exceeds such credit limit.

### **6. PERFORMANCE & DELIVERY**

6.1 The Services shall be performed by Fluid Commerce as set out in the relevant Schedule.

6.2 Fluid Commerce may perform the Services in instalments. Any delay in performance or defect in an instalment shall not entitle the Customer to cancel any other instalment.

6.3 Time is not of the essence in relation to the performance of the Services. Fluid Commerce shall use its reasonable endeavours to meet estimated dates for performance, but any such dates are approximate only.

6.4 Fluid Commerce shall not be liable costs, charges or losses sustained or incurred by the Customer that arise directly or indirectly from any delay in or failure of performance caused by:

6.4.1 The Customer's failure to provide Fluid Commerce with adequate instructions for performance or otherwise relating to the Services;

6.4.2 Any act or omission of the Customer or the Customer's employees or sub-contractors or agents;

6.4.3 Force Majeure.

6.5 Each party shall appoint a project manager who shall:

6.5.1 Provide professional and prompt liaison with the other party; and

6.5.2 Have the necessary expertise and authority to make decisions relating to the Services on behalf of the party in respect of which they are appointed.

6.6 The project managers shall meet, either in person or via a conference call, at least once every month until the completion of the performance of the Services.

## 7. RISK

7.1 Risk in the output of the Website Development Services shall pass to the Customer on the completion of the performance of the Website Development Services.

7.2 Risk in the output of the Website Support Services shall pass to the Customer on the completion of the performance of the Website Support Services.

## 8. TITLE

8.1 Title to the output of the Website Development Services and the Website Support Services shall pass to the Customer once Fluid Commerce has received payment in full and cleared funds for the performance of the Services.

8.2 Until title to the output of the Website Development Services and the Website Support Services has passed to the Customer, the Customer shall:

8.2.1 Hold the output of the Website Development Services and the Website Support Services as bailee for Fluid Commerce;

8.2.2 Store the output of the Website Development Services and the Website Support Services on secured servers; and

8.2.3 Inform Fluid Commerce immediately if it becomes subject to any of the events or circumstances set out in clauses 17.2.1 to 17.2.4 or 17.3.1 to 17.3.11.

8.3 If, at any time before title to the output of the Website Development Services and the Website Support Services has passed to the Customer, the Customer informs Fluid Commerce, or Fluid Commerce reasonably believes, that the Customer has or is likely to become subject to any of the events specified in clauses 17.2.1 to 17.2.4 or 17.3.1 to 17.3.11, Fluid Commerce may terminate the Contract in accordance with clause 17.2 or clause 17.3.

## 9. WARRANTY

9.1 Fluid Commerce warrants that, for a period of 3 months from delivery in accordance with clause 6.1 (**“the Warranty Period”**), the Services, and the output of the Website Development Services and the Website Support Services shall:

9.1.1 Conform in all material respects to their description and to the Specification;

9.1.2 Be free from material defects in design and workmanship and will be free from errors in any relevant code;

9.1.3 Be supplied with reasonable care and skill within the meaning of the Supply of Goods and Services Act 1982, Part II, s 13; and

9.1.4 Be fit for purpose and any purpose held out by Fluid Commerce and as set out in the Order.

9.2 The Customer warrants that it has provided Fluid Commerce with all relevant, full and accurate information as to the Customer’s business and needs.

9.3 Fluid Commerce shall, at its option, correct, repair, remedy, re-perform or refund the Services that do not comply with clause 9, provided that the Customer:

9.3.1 Serves a written notice on Fluid Commerce within a reasonable period of time from performance of the Services in the case of latent defects;

9.3.2 Such notice specifies that some or all of the Services do not comply with clause 9.1 and identifying in sufficient detail the nature and extent of the defects; and

9.3.3 Gives Fluid Commerce a reasonable opportunity to examine the claim of the defective Services.

9.4 The provisions of these Terms & Conditions shall apply to any Services that are corrected, repaired, remedied or re-performed with effect from delivery or performance of those Services.

9.5 Except as set out in this clause 9:

9.5.1 Fluid Commerce gives no warranty and makes no representations in relation to the Services; and

9.5.2 Shall have no liability for their failure to comply with the warranty in clause 9.1;

And all warranties and conditions (including the conditions implied by ss 12–16 of the Supply of Goods and Services Act 1982), whether express or implied by statute, common law or otherwise are excluded to the extent permitted.

## 10. ANTI-BRIBERY

10.1 For the purposes of this clause 10 the expressions “adequate procedures” and “associated with” shall be construed in accordance with the Bribery Act 2010 and legislation or guidance published under it.

10.2 Each party shall comply with applicable Bribery Laws including ensuring that it has in place adequate procedures to prevent bribery and use all reasonable endeavours to ensure that:

10.2.1 All of that party’s personnel;

10.2.2 All others associated with that party; and

10.2.3 All of that party’s subcontractors;

Involved in performing the Contract so comply.

10.3 Without limitation to clause 10.2, neither party shall make or receive any bribe (as defined in the Bribery Act 2010) or other improper payment, or allow any such to be made or received on its behalf, either in the United Kingdom or elsewhere, and shall implement and maintain adequate procedures to ensure that such bribes or payments are not made or received directly or indirectly on its behalf.

10.4 Each party shall immediately notify the other as soon as it becomes aware of a breach or possible breach of any of the requirements in this clause 10.

## 11. INDEMNITY & INSURANCE

11.1 The Customer shall indemnify, and keep indemnified, Fluid Commerce from and against any losses, damages, liability, costs (including legal fees) and expenses incurred by Fluid Commerce as a result of or in connection with the Customer’s breach of any of the Customer’s obligations under the Contract.

11.2 Each party shall have in place contracts of insurance with reputable insurers incorporated in the United Kingdom to cover its obligations under the Contract. On request, each party shall supply to the other party, so far as is reasonable, evidence of the maintenance of the insurance and all of its terms from time to time applicable.

## 12. LIMITATION OF LIABILITY

12.1 The extent of the parties’ liability under or in connection with the Contract (regardless of whether such liability arises in tort, contract or in any other way and whether or not caused by negligence or misrepresentation) shall be as set out in this clause 12.

12.2 Subject to clauses 12.5 and 12.6, Fluid Commerce’s total liability shall not exceed the value of the Contract.

12.3 Subject to clauses 12.5 and 12.6, Fluid Commerce shall not be liable for consequential, indirect or special losses.

12.4 Subject to clauses 12.5 and 12.6, Fluid Commerce shall not be liable for any of the following (whether direct or indirect):

12.4.1 Loss of profit;

12.4.2 Loss or corruption of data;

12.4.3 Loss of use;

12.4.4 Loss of production;

12.4.5 Loss of contract;

12.4.6 Loss of opportunity;

12.4.7 Loss of savings, discount or rebate (whether actual or anticipated);

12.4.8 Harm to reputation or loss of goodwill.

12.5 The limitations of liability set out in clauses 12.2 to 12.4 shall not apply in respect of any indemnities given by either party under the Contract.

12.6 Notwithstanding any other provision of the Contract, the liability of the parties shall not be limited in any way in respect of the following:

- 12.6.1 Death or personal injury caused by negligence;
- 12.6.2 Fraud or fraudulent misrepresentation;
- 12.6.3 Any other losses which cannot be excluded or limited by applicable law;
- 12.6.4 Any losses caused by wilful misconduct.

12.7 For the avoidance of doubt, the Customer shall be liable to pay to Fluid Commerce, on demand, all reasonable costs, charges or losses sustained or incurred by Fluid Commerce that arise directly or indirectly from the Customer's fraud or fraudulent misrepresentation, negligence, failure to perform, or delay in the performance, of any of its obligations under the Contract, subject to Fluid Commerce confirming such costs, charges or losses sustained or incurred by Fluid Commerce to the Customer in writing.

### **13. INTELLECTUAL PROPERTY RIGHTS**

13.1 In respect of the Website Development Services, Intellectual Property Rights shall be owned in accordance with clause 7 of the Website Development Services Schedule.

13.2 In respect of the Website Support Services, Intellectual Property Rights shall be owned in accordance with clause 5 of Website Support Services Schedule.

13.3 In respect of Customer Materials, the Customer hereby grants Fluid Commerce a non-exclusive licence for the use of the Customer Materials, including the use of any Customer logos, for the purposes of carrying out the Services.

13.4 Fluid Commerce shall indemnify the Customer from and against any losses, damages, liability, costs and expenses (including reasonable professional fees) incurred by it as a result of any action, demand or claim that use of the Services infringes the Intellectual Property Rights of any third party ("**IPR Claim**"), provided that Fluid Commerce shall have no such liability if the Customer:

- 13.4.1 Does not notify Fluid Commerce in writing setting out full details of any IPR Claim of which it has notice as soon as is reasonably possible;
- 13.4.2 Makes any admission of liability or agrees any settlement or compromise of the relevant IPR Claim without the prior written consent of Fluid Commerce;
- 13.4.3 Does not let Fluid Commerce at its request and own expense have the conduct of or settle all negotiations and litigation arising from the IPR Claim at its sole discretion;
- 13.4.4 Does not take all reasonable steps to minimise the losses that may be incurred by it or by any third party as a result of the IPR Claim;
- 13.4.5 Does not, at Fluid Commerce's request, provide Fluid Commerce with all reasonable assistance in relation to the IPR Claim (at the Customer's expense) including the provision of prompt access to any relevant premises, officers, employees, contractors or agents of the Customer.

13.5 If any IPR Claim is made or is reasonably likely to be made, Fluid Commerce may at its option:

- 13.5.1 Procure for the Customer the right to continue receiving the benefit of the relevant Services; or
- 13.5.2 Modify or replace the infringing part of the Services so as to avoid the infringement or alleged infringement, provided the Services remain in material conformance to their Specification.

13.6 Fluid Commerce's obligations under clause 13.4 shall not apply to the output of the Website Development Services, the Website Support Services, and the Marketing Services modified or used by the Customer other than in accordance with the Contract or Fluid Commerce's instructions. The Customer shall indemnify Fluid Commerce against all losses, damages, liability, costs and expenses (including reasonable legal fees) incurred by Fluid Commerce in connection with any claim arising from such modification or use.

### **14. CONFIDENTIALITY & ANNOUNCEMENTS**

14.1 The receiving party shall keep confidential all Confidential Information of the disclosing party and of any Affiliate of the disclosing party and shall only use the same as required to perform the Contract. The provisions of this clause shall not apply to:



14.1.1 Any information which was in the public domain at the date of the Contract;

14.1.2 Any information which comes into the public domain subsequently other than as a consequence of any breach of the Contract or any related agreement;

14.1.3 Any information which is independently developed by the receiving party without using information supplied by the disclosing party or by any Affiliate of disclosing party; or

14.1.4 Any disclosure required by law or a regulatory authority or otherwise by the provisions of the Contract.

Except that the provisions of clauses 14.1.1 to 14.1.3 shall not apply to information to which clause 15.4 relates.

14.2 This clause shall remain in force in perpetuity.

14.3 Neither party shall make any public announcement or disclose any information regarding the Contract, except to the extent required by law or regulatory authority or as agreed by both parties in writing. For the avoidance of doubt, Fluid Commerce will not use the Customer's name, logo or any other Customer content on Fluid Commerce's website or any promotional material, including, but not limited to, case studies and brochures, without the Customer's prior written agreement.

14.4 To the extent any Confidential Information is Protected Data such Confidential Information may be disclosed or used only to the extent such disclosure or use does not conflict with any provisions of clause 15.

## **15. PROCESSING OF PERSONAL DATA**

15.1 The parties agree that the Customer is a Controller and that Fluid Commerce is a Processor for the purposes of processing Protected Data pursuant to the Contract. Fluid Commerce shall at all times comply with all UK GDPR Data Protection Laws in connection with the processing of Protected Data. The Customer shall ensure all instructions given by it to Fluid Commerce in respect of Protected Data (including the terms of the Contract) shall at all times be in accordance with UK GDPR Data Protection Laws.

15.2 Fluid Commerce shall process Protected Data in compliance with the obligations placed on it under UK GDPR Data Protection Laws and the terms of the Contract.

15.3 The Customer shall indemnify and keep indemnified Fluid Commerce against all losses, claims, damages, liabilities, fines, sanctions, interest, penalties, costs, charges, expenses, compensation paid to Data Subjects, demands and legal and other professional costs (calculated on a full indemnity basis and in each case whether or not arising from any investigation by, or imposed by, a supervisory authority) arising out of or in connection with any breach by the Customer of its obligations under this clause 15.

15.4 Fluid Commerce shall:

15.4.1 Only process (and shall ensure Fluid Commerce Personnel only process) the Protected Data in accordance with the written instructions of the Customer and as may be set out in schedule 1 (and not otherwise unless alternative processing instructions are agreed between the parties in writing) except where otherwise required by applicable law (and shall inform the Customer of that legal requirement before processing, unless applicable law prevents it doing so on important grounds of public interest); and

15.4.2 If Fluid Commerce believes that any instruction received by it from the Customer is likely to infringe the UK GDPR Data Protection Laws it shall promptly inform the Customer and be entitled to cease to provide the relevant Services until the parties have agreed appropriate amended instructions which are not infringing.

15.5 Taking into account the state of technical development and the nature of processing, Fluid Commerce shall implement and maintain the technical and organisational measures set out in Part 2 of schedule 1 to protect the Protected Data against accidental, unauthorised or unlawful destruction, loss, alteration, disclosure or access.

15.6 Fluid Commerce shall:

15.6.1 Not permit any processing of Protected Data by any agent, subcontractor or other third party (except its or its Sub-Processors' own employees in the course of their employment that are subject to an enforceable obligation of confidence with regards to the Protected Data) without the written authorisation of the Customer;

15.6.2 Prior to the relevant Sub-Processor carrying out any processing activities in respect of the Protected Data, appoint each Sub-Processor under a written contract containing materially the same obligations as under this clause 16 that is enforceable by Fluid Commerce and ensure each such Sub-Processor complies with all such obligations;



15.6.3 Remain fully liable to the Customer under the Contract for all the acts and omissions of each Sub-Processor as if they were its own; and

15.6.4 Ensure that all persons authorised by Fluid Commerce or any Sub-Processor to process Protected Data are subject to a binding written contractual obligation to keep the Protected Data confidential.

15.7 The Customer authorises the appointment of the Sub-Processors as may be required for Fluid Commerce to perform the Services, such Sub-Processors to be notified to the Customer from time to time. For the avoidance of doubt, Fluid Commerce shall notify the Customer in the event that Fluid Commerce is required to appoint or alter the appointment of any Sub-Processors. The Customer shall notify Fluid Commerce within 20 Business Days of such notice as to whether it provides its consent to such appointment or alteration of the appointment. In the event that the Customer does not provide its consent, Fluid Commerce agrees that such Sub-Processors shall not process any Protected Data.

15.8 Fluid Commerce shall (at the Customer's cost):

15.8.1 Assist the Customer in ensuring compliance with the Customer's obligations pursuant to the UK GDPR Data Protection Laws taking into account the nature of the processing and the information available to Fluid Commerce; and

15.8.2 Taking into account the nature of the processing, assist the Customer (by appropriate technical and organisational measures), insofar as this is possible, for the fulfilment of the Customer's obligations to respond to requests for exercising the Data Subjects' rights pursuant to the UK GDPR Data Protection Laws in respect of any Protected Data.

15.9 Fluid Commerce shall not process and/or transfer, or otherwise directly or indirectly disclose, any Protected Data in or to countries outside the United Kingdom or to any international organisation without the prior written consent of the Customer.

15.10 Fluid Commerce shall, in accordance with UK GDPR Data Protection Laws, make available to the Customer such information that is in its possession or control as is necessary to demonstrate Fluid Commerce's compliance with the obligations placed on it under this clause 16 and to demonstrate compliance with the obligations on each party imposed by the UK GDPR Data Protection Laws, and allow for and contribute to audits, including inspections, by the Customer (or another auditor mandated by the Customer) for this purpose (subject to a maximum of 1 audit request in any 12 month period under this clause 15.10).

15.11 Fluid Commerce shall notify the Customer without undue delay and in writing on becoming aware of any Personal Data Breach in respect of any Protected Data.

15.12 On the end of the performance of the Services relating to the processing of Protected Data, at the Customer's cost as included in any Price and the Customer's option, Fluid Commerce shall either return all of the Protected Data to the Customer or securely dispose of the Protected Data (and thereafter promptly delete all existing copies of it) except to the extent that any applicable law requires Fluid Commerce to store such Protected Data.

15.13 This clause 15 shall survive termination or expiry of the Contract.

## **16. FORCE MAJEURE**

16.1 A party shall not be liable if delayed in or prevented from performing its obligations due to Force Majeure, provided that it:

16.1.1 Promptly notifies the other of the Force Majeure event and its expected duration; and

16.1.2 Uses reasonable endeavours to minimise the effects of that event.

16.2 If, due to Force Majeure, a party:

16.2.1 Is or shall be unable to perform a material obligation; or

16.2.2 Is delayed in or prevented from performing its obligations for a continuous period exceeding 10 Business Days or total of more than 20 Business Days in any consecutive period of 40 Business Days;

The parties shall, within 20 Business Days, renegotiate the Contract to achieve, as nearly as possible, the original commercial intent.

## **17. TERMINATION**

17.1 Fluid Commerce or the Customer may terminate the Contract:

17.1.1 In respect of the Website Development Services, as set out in clause 2 of the Website Development Services Schedule.

- 17.1.2 In respect of the Website Support Services, as set out in clause 2 of the Website Support Services Schedule.
- 17.1.3 In respect of the Marketing Services, as set out in clause 2 the Marketing Services Schedule.
- 17.2 Fluid Commerce may terminate the Contract at any time by giving immediate notice in writing to the Customer if:
- 17.2.1 The Customer commits a material breach of the Contract and such breach is not remediable;
- 17.2.2 The Customer commits a material breach of the Contract which is not remedied within 10 Business Days of receiving written notice of such breach;
- 17.2.3 The Customer has failed to pay any amount due under the Contract on the due date and such amount remains unpaid within 20 Business Days after Fluid Commerce has given notification that the payment is overdue; or
- 17.2.4 Any consent, licence or authorisation held by the Customer is revoked or modified such that the Customer is no longer able to comply with its obligations under the Contract or receive any benefit to which it is entitled.
- 17.3 Fluid Commerce may terminate the Contract at any time by giving 20 Business Days' notice in writing to the Customer if the Customer:
- 17.3.1 Stops carrying on all or a significant part of its business, or indicates in any way that it intends to do so;
- 17.3.2 Is unable to pay its debts either within the meaning of section 123 of the Insolvency Act 1986 or if Fluid Commerce reasonably believes that to be the case;
- 17.3.3 Becomes the subject of a company voluntary arrangement under the Insolvency Act 1986;
- 17.3.4 Has a receiver, manager, administrator or administrative receiver appointed over all or any part of its undertaking, assets or income;
- 17.3.5 Has a resolution passed for its winding up;
- 17.3.6 Has a petition presented to any court for its winding up or an application is made for an administration order, or any winding-up or administration order is made against it;
- 17.3.7 Is subject to any procedure for the taking control of its goods that is not withdrawn or discharged within 5 Business Days of that procedure being commenced;
- 17.3.8 Has a freezing order made against it;
- 17.3.9 Is subject to any recovery or attempted recovery of items supplied to it by a supplier retaining title in those items;
- 17.3.10 Is subject to any events or circumstances analogous to those in clauses 17.3.1 to 17.3.9 in any jurisdiction;
- 17.3.11 Takes any steps in anticipation of, or has no realistic prospect of avoiding, any of the events or procedures described in clauses 17.3.1 to 17.3.10 including for the avoidance of doubt, but not limited to, giving notice for the convening of any meeting of creditors, issuing an application at court or filing any notice at court, receiving any demand for repayment of lending facilities, or passing any board resolution authorising any steps to be taken to enter into an insolvency process.
- 17.4 Fluid Commerce may terminate the Contract at any time by giving not less than 20 Business Days' notice in writing to the Customer if the Customer undergoes a change of Control or if it is realistically anticipated that it shall undergo a change of Control within two months.
- 17.5 If the Customer becomes aware that any event has occurred, or circumstances exist, which may entitle Fluid Commerce to terminate the Contract under this clause 17, it shall immediately notify Fluid Commerce in writing.
- 17.6 Termination or expiry of the Contract shall not affect any accrued rights and liabilities of either party at any time up to the date of termination.
- 17.7 The Customer shall not, without the prior written consent of Fluid Commerce, at any time from the date on which Fluid Commerce commences the provision of the Services until the expiry of 6 months after the date of termination, solicit or entice away from Fluid Commerce or employ or attempt to employ any Fluid Commerce Personnel who is, or has been, engaged in the provision of the Services.
- 17.8 Any consent given by Fluid Commerce in accordance with clause 17.7 above shall be subject to the Customer paying to Fluid Commerce a sum equivalent to 50% of the then current annual remuneration of such Fluid Commerce Personnel or, if higher, 50% of the annual remuneration to be paid by the Customer to such Fluid Commerce Personnel.
- 17.9 On termination or expiry of the Contract the Customer shall pay to Fluid Commerce all of Fluid Commerce's outstanding unpaid invoices and interest and, in respect of Services supplied but for which no invoice has been submitted, Fluid Commerce may submit an invoice, which shall be payable in accordance with clause 4.

## **18. DISPUTE RESOLUTION**

- 18.1 Any dispute arising between the parties out of or in connection with the Contract shall be dealt with in accordance with the provisions of this clause 18.
- 18.2 The dispute resolution process may be initiated at any time by either party serving a notice in writing on the other party that a dispute has arisen. The notice shall include reasonable information as to the nature of the dispute.
- 18.3 The parties shall use all reasonable endeavours to reach a negotiated resolution through the following procedures:
- 18.3.1 Within 5 Business Days of service of the notice, the Account Managers of the parties shall meet to discuss the dispute and attempt to resolve it.
- 18.3.2 If the dispute has not been resolved within 5 Business Days of the first meeting of the Account Managers, then the matter shall be referred to the Managing Directors (or persons of equivalent seniority). The Managing Directors (or equivalent) shall use their reasonable endeavours to meet within 5 Business Days to discuss the dispute and attempt to resolve it.
- 18.4 The specific format for the resolution of the dispute under clause 18.3.1 and, if necessary, clause 18.3.2 shall be left to the reasonable discretion of the parties, but may include the preparation and submission of statements of fact or of position.
- 18.5 If the dispute has not been resolved within 10 Business Days of the first meeting of the Managing Directors (or equivalent) under clause 18.3.2 then the matter may be referred to mediation in accordance with the London Court of International Arbitration Mediation Rules.
- 18.6 Until the parties have completed the steps referred to in clauses 18.3 and 18.5, and have failed to resolve the dispute, neither party shall commence formal legal proceedings or arbitration except that either party may at any time seek urgent interim relief from the courts or emergency arbitrator relief.

## **19. NOTICES**

- 19.1 Any notice or other communication given by a party under these Terms & Conditions shall:
- 19.1.1 Be in writing and in English;
- 19.1.2 Be signed by, or on behalf of, the party giving it (except for notices sent by e-mail); and
- 19.1.3 Be sent to the relevant party at the address set out in the Contract.
- 19.2 Notices may be given, and are deemed received:
- 19.2.1 By hand: On receipt of a signature at the time of delivery;
- 19.2.2 By Royal Mail Recorded post: At 9.00 am on the second Business Day after posting;
- 19.2.3 By Royal Mail International Recorded post: At 9.00 am on the fourth Business Day after posting; and
- 19.2.4 By email: On receipt of a delivery e-mail from the correct e-mail address.
- 19.3 Any change to the contact details of a party as set out in the Contract shall be notified to the other party in accordance with clause 19.1 and shall be effective:
- 19.3.1 On the date specified in the notice as being the date of such change; or
- 19.3.2 If no date is so specified, 5 Business Days after the notice is deemed to be received.
- 19.4 All references to time are to the local time at the place of deemed receipt.
- 19.5 This clause does not apply to notices given in legal proceedings or arbitration.

## **20. CUMULATIVE REMEDIES**

- 20.1 The rights and remedies provided in the Contract for Fluid Commerce only are cumulative and not exclusive of any rights and remedies provided by law.

## **21. TIME**

- 21.1 Unless stated otherwise, time is of the essence for any date or period specified in the Contract in relation to the Customer's obligations only.

## 22. FURTHER ASSURANCE

22.1 Either party at its own cost shall at the request of the other party do all acts and execute all documents which are necessary to give full effect to the Contract.

## 23. ENTIRE AGREEMENT

23.1 The parties agree that the Contract constitutes the entire agreement between them and supersedes all previous agreements, understandings and arrangements between them, whether in writing or oral in respect of its subject matter.

23.2 Each party acknowledges that it has not entered into the Contract in reliance on, and shall have no remedies in respect of, any representation or warranty that is not expressly set out in the Contract. No party shall have any claim for innocent or negligent misrepresentation on the basis of any statement in the Contract.

23.3 Nothing in these Terms & Conditions purports to limit or exclude any liability for fraud.

## 24. VARIATION & CHANGE CONTROL

24.1 No variation of the Contract shall be valid or effective unless it is in writing, refers to the Contract and these Terms & Conditions and is duly signed or executed by, or on behalf of, Fluid Commerce.

24.2 Fluid Commerce and the Customer may discuss any change to the Services ("**Change**") proposed by the other and such discussion may result in either:

24.2.1 A written request for a Change by the Customer; or

24.2.2 A written recommendation for a Change by Fluid Commerce; or

24.2.3 Neither party shall submit a written request or written recommendation, as the case may be.

24.3 In the event that neither party submits a written request or written recommendation in accordance with clause 24.2.3, the proposal for the Change will not proceed.

24.4 Where a written request for a Change is received from the Customer, Fluid Commerce shall, unless otherwise agreed, submit a Change Control Note ("**CCN**") to the Customer within the period agreed between parties or, if no such period is agreed, within 5 Business Days from the date of receipt of such request for a Change, or inform the Customer that Fluid Commerce is not able to comply with such written request for a Change.

24.5 A written recommendation for a Change by Fluid Commerce shall be submitted as a CCN directly to the Customer at the time of such recommendation.

24.6 Each CCN shall contain:

24.6.1 The title of the Change;

24.6.2 The originating party and the date of the request or recommendation for the Change;

24.6.3 The reason for the Change;

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

24.6.5 The Price, if any, of or associated with the Change;

24.6.6 A timetable for implementation, together with any proposals for acceptance of the Change;

24.6.7 The impact, if any, of the Change on the Price, the Contract, or Fluid Commerce Personnel;

24.6.8 The date of expiry of validity of the CCN, which shall not be less than 7 Business Days; and

24.6.9 The provision for signature of the CCN by the Customer and Fluid Commerce.

24.7 For each CCN submitted, the Customer shall, within the period of validity of the CCN as set out in clause 24.6.8:

24.7.1 Allocate a sequential number to the CCN;

24.7.2 Evaluate the CCN, and as appropriate either:

(a) Request further information; or

(b) Approve the CCN; or

(c) Notify Fluid Commerce of the rejection of the CCN.

24.8 In the event that a CCN is approved by the Customer in accordance with clause 24.7.2(b), the Customer shall arrange for two copies of the approved CCN to be signed for and on behalf of the Customer. The signing of the CCN shall confirm acceptance of a Change by the Customer.

24.9 Fluid Commerce shall sign one copy of the CCN signed by the Customer and return such copy to the Customer for its records.

24.10 Upon Fluid Commerce returning a copy of the CCN signed by both parties to the Customer, the Change shall become effective, and the parties shall be bound to carry out their respective obligations in connection with the Change.

## **25. ASSIGNMENT**

25.1 The Customer may not assign, subcontract or encumber any right or obligation under the Contract, in whole or in part, without Fluid Commerce's prior written consent, such consent not to be unreasonably withheld or delayed.

25.2 Notwithstanding clause 25.1, the Customer may perform any of its obligations and exercise any of its rights granted under the Contract through any Affiliate provided that it gives Fluid Commerce prior written notice of such subcontracting or assignment including the identity of the relevant Affiliate. The Customer acknowledges and agrees that any act or omission of its Affiliate in relation to the Customer's rights or obligations under the Contract shall be deemed to be an act or omission of the Customer itself.

## **26. SET OFF**

26.1 Fluid Commerce shall be entitled to set-off under the Contract any liability which it has or any sums which it owes to the Customer under the Contract.

26.2 The Customer shall pay all sums that it owes to Fluid Commerce under the Contract without any set-off, counterclaim, deduction or withholding of any kind, save as may be required by law.

## **27. NO PARTNERSHIP OR AGENCY**

27.1 The parties are independent persons and are not partners, principal and agent or employer and employee and the Contract does not establish any joint venture, trust, fiduciary or other relationship between them, other than the contractual relationship expressly provided for in it. None of the parties shall have, nor shall represent that they have, any authority to make any commitments on the other party's behalf.

## **28. EQUITABLE RELIEF**

28.1 The Customer recognises that any breach or threatened breach of the Contract may cause Fluid Commerce irreparable harm for which damages may not be an adequate remedy. Accordingly, in addition to any other remedies and damages available to Fluid Commerce, the Customer acknowledges and agrees that Fluid Commerce is entitled to the remedies of specific performance, injunction and other equitable relief without proof of special damages.

## **29. SEVERANCE**

29.1 If any provision of the Contract (or part of any provision) is or becomes illegal, invalid or unenforceable, the legality, validity and enforceability of any other provision of the Contract shall not be affected.

29.2 If any provision of the Contract (or part of any provision) is or becomes illegal, invalid or unenforceable but would be legal, valid and enforceable if some part of it was deleted or modified, the provision or part-provision in question shall apply with such deletions or modifications as may be necessary to make the provision legal, valid and enforceable. In the event of such deletion or modification, the parties shall negotiate in good faith in order to agree the terms of a mutually acceptable alternative provision.

## **30. WAIVER**

30.1 No failure, delay or omission by Fluid Commerce in exercising any right, power or remedy provided by law or under the Contract shall operate as a waiver of that right, power or remedy, nor shall it preclude or restrict any future exercise of that or any other right, power or remedy.

30.2 No single or partial exercise of any right, power or remedy provided by law or under the Contract by Fluid Commerce shall prevent any future exercise of it or the exercise of any other right, power or remedy by Fluid Commerce.

30.3 A waiver of any term, provision, condition or breach of the Contract by Fluid Commerce shall only be effective if given in writing and signed by Fluid Commerce, and then only in the instance and for the purpose for which it is given.

### **31. COMPLIANCE WITH LAW**

31.1 Each party shall comply with all laws, enactments, regulations, regulatory policies, guidelines and industry codes applicable to it and shall maintain such authorisations and all other approvals, permits and authorities as are required from time to time to perform its obligations under or in connection with the Contract.

### **32. CONFLICTS**

32.1 If there is a conflict between the terms contained in the Terms & Conditions and the terms of the Order, schedules, appendices or annexes to the Contract, the terms of the Order and the schedules to the Contract, and Part 1 and Part 2 of schedule 1 shall prevail.

### **33. COSTS & EXPENSES**

33.1 Each party shall pay its own costs and expenses incurred in connection with the negotiation, preparation, signature and performance of the Contract (and any documents referred to in it).

### **34. THIRD PARTY RIGHTS**

34.1 Except as expressly provided for in clause 34.2, a person who is not a party to the Contract shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any of the provisions of the Contract.

34.2 Any Affiliate of Fluid Commerce shall be entitled under the Contracts (Rights of Third Parties) Act 1999 to enforce any of the provisions of the Contract. The consent of any such Affiliate is not required in order to rescind or vary the Contract or any provision of it.

### **35. GOVERNING LAW**

35.1 The Contract and any dispute or claim arising out of, or in connection with, it, its subject matter or formation (including non-contractual disputes or claims) shall be governed by, and construed in accordance with, the laws of England and Wales.

### **36. JURISDICTION**

36.1 The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of, or in connection with, the Contract, its subject matter or formation (including non-contractual disputes or claims).

## Schedule 1

### Part 1

#### Data Processing Details

Processing of the Protected Data by Fluid Commerce under the Contract shall be for the subject-matter, duration, nature and purposes and involve the types of personal data and categories of Data Subjects set out in this Part 2 of schedule 1.

**1. SUBJECT-MATTER OF PROCESSING:**

Personal Data and/or Protected Data for the purposes of Fluid Commerce and the Customer carrying out the parties' respective obligations in accordance with the Contract.

**2. DURATION OF THE PROCESSING:**

The duration of the Contract.

**3. NATURE AND PURPOSE OF THE PROCESSING:**

The collection, recording, organisation, storage, retrieval, erasure and destruction of Protected Data for the purposes of Fluid Commerce and the Customer carrying out the parties' respective obligations in accordance with the Contract.

**4. TYPE OF PERSONAL DATA:**

Name, Email Address, Telephone Number, Address

**5. CATEGORIES OF DATA SUBJECTS:**

Customers.

**6. SPECIFIC PROCESSING INSTRUCTIONS:**

n/a

### Part 2

#### Technical & Organisational Security Measures

1. Fluid Commerce shall implement and maintain the following technical and organisational security measures to protect the Protected Data:

1.1 In accordance with the UK GDPR Data Protection Laws, taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of the processing of the Protected Data to be carried out under or in connection with the Contract, as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons and the risks that are presented by the processing, especially from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to the Protected Data transmitted, stored or otherwise processed, Fluid Commerce shall implement appropriate technical and organisational security measures appropriate to the risk.

1.2 The Customer acknowledges and agrees that Fluid Commerce engages third party service providers, details of which shall be provided upon request of the Customer.