

TERMS OF SERVICE

1 INTERPRETATION

1.1 **Definitions:** In these Terms of Service, the following terms have the stated meaning:

Confidential Information: the terms and conditions of the Terms of Service and any information that is not public knowledge and which is obtained from the other party in the course of, or in connection with, the Service. The Forrest Creative's Confidential Information includes Intellectual Property owned by Forrest Creative.

Fees: the fees indicated to the Client prior to commencement, or if none, at the rate of \$60 per hour.

Force Majeure: an event that is beyond the reasonable control of a party, excluding an event to the extent that it could have been avoided by a party taking reasonable steps or reasonable care.

Intellectual Property Rights: includes copyright and all rights existing anywhere in the world conferred under statute, common law or equity relating to inventions (including patents), registered or unregistered trade marks and designs, circuit layouts, data and databases, confidential information, know-how, and all other rights resulting from intellectual activity. *Intellectual Property* has a consistent meaning.

Services: the services as agreed between the parties in correspondence.

1.2 **Interpretation:** In these Terms of Service:

- a clause and other headings are for ease of reference only and do not affect the interpretation of the Terms of Service;
- b words in the singular include the plural and vice versa; and
- c a reference to:
 - i a **party** includes that party's permitted assigns; and
 - ii **including** and similar words do not imply any limit.

2 OBLIGATIONS

2.1 **General:** In addition to the other obligations:

- a Forrest Creative must provide the Services:
 - i in accordance with the Terms of Service, including any requirement set out in prior correspondence, and all applicable laws;
 - ii exercising reasonable care, skill and diligence; and
- b the Client must promptly make decisions (including approvals) and provide Forrest Creative with all information reasonably required to provide the Services.

3 INTELLECTUAL PROPERTY

3.1 **Retained Intellectual Property:** The following Intellectual Property (including any modification, enhancement or derivative work of that Intellectual Property) remains the property of the current owner, regardless of its use in the Services:

- a Intellectual Property that existed prior to the date of Services commenced; and
- b Intellectual Property that was developed independently of Service.

3.2 **Know-how:** To the extent not owned by Forrest Creative, the Client grants Forrest Creative a royalty-free, transferable, irrevocable and perpetual licence to use for Forrest Creative's own business purposes any know-how, techniques, ideas, methodologies, and similar Intellectual Property used by Forrest Creative in the provision of the Services.

3.3 **Ownership going forward:**

- a Subject to clauses 3.1 and 3.2, all new Intellectual Property created for the Client as part of the Services, is owned by the Client on payment in full of all of the Fees relating to those Services.
- b Notwithstanding clause 3.3a, the Client grants Forrest Creative a royalty-free, transferable, irrevocable and perpetual licence to display work examples inclusive of new Intellectual Property as part of a work portfolio, provided that such work examples do not contain any Confidential Information.

4 FEES

4.1 **Fees:** The Client must pay the Fees to Forrest Creative for providing the Services.

4.2 **Invoicing:**

- a Forrest Creative must provide the Client with a monthly invoice for Services undertaken in the previous month.
- b The Client must pay Forrest Creative's invoice by the date and in the manner indicated on the invoice.

5 CONFIDENTIALITY

5.1 **Security:** Each party agrees that, unless it has the prior written consent of the other party, it will:

- a keep confidential at all times the Confidential Information of the other party; and
- b ensure that any personnel or professional advisor to whom a party discloses the other party's Confidential Information is aware of, and complies with, this clause 5.1.

5.2 **Disclosure required:** The obligations of confidentiality in clause 5.1 do not apply to any disclosure:

- a for the purpose of performing the Service;
- b of Confidential Information which:
 - i is publicly available through no fault of the recipient of the Confidential Information or its personnel; or
 - ii was rightfully received from a third party without restriction and without breach of any obligation of confidentiality; or
- c by Forrest Creative if required as part of a *bona fide* sale of its business (assets or shares,

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whether in whole or in part) to a third party, provided that Forrest Creative enters into a confidentiality agreement with the third party on terms no less restrictive than this clause 5.

6 LIABILITY

- 6.1 **Maximum liability:** The maximum aggregate liability of Forrest Creative under or in connection with the Service, whether in contract, tort (including negligence), breach of statutory duty or otherwise, must not exceed the Fees paid by the Client for Services in the previous 12 month period.
- 6.2 **Unrecoverable loss:** Except for the Client's liability to pay the Fees, neither party is liable to the other under or in connection with the Service for any loss of profit, data, savings, business, revenue, and/or goodwill, or any indirect, consequential, incidental or special loss or damage of any kind.
- 6.3 **No liability for the other's failure:** Neither party will be responsible, liable, or held to be in breach of the Terms of Service for any failure to perform its obligations under these Terms of Service or otherwise, to the extent the failure is directly caused by the other party failing to comply with its obligations under the Terms of Service, or by the negligence or misconduct of the other party or its personnel.
- 6.4 **No liability for third party failure:** Unless otherwise agreed in writing, neither party will be liable to the other for any activity undertaken by any third party making use of artwork, including but not limited to providers of website hosting or printing services.
- 6.5 **Mitigation:** Each party must take reasonable steps to mitigate any loss or damage, cost or expense it may suffer or incur arising out of anything done or not done by the other party under or in connection with the Terms of Service.

7 TERM AND TERMINATION

- 7.1 **Duration:** Unless terminated under this clause 7, the Service shall .
- 7.2 **Termination rights:** Either party may, by notice to the other party, terminate the Services if the other party:
- a breaches any material provision of the Terms of Service and the breach is not:
 - i remedied within 10 days of the receipt of the notice from the first party requiring it to remedy the breach; or
 - ii capable of being remedied;
 - b has an administrator, receiver, liquidator, statutory manager, mortgagee's or chargee's agent appointed, becomes subject to any form of external administration, or ceases to continue business for any reason; or
 - c is unable to perform a material obligation under the Terms of Service for 30 days or more due to Force Majeure.
- 7.3 **Termination for convenience:** subject to 7.4, either party may terminate the services on 5 days' notice.
- 7.4 **Consequences of expiry or termination:**

- a Expiry or termination of the Service does not affect each party's rights and obligations accrued before the expiry or termination date.
- b The Client must pay for Services provided before the expiry or termination date.

- 7.5 **Obligations continuing:** Clauses which, by their nature are intended to survive expiry or termination, including clauses 5, 6, and 7 continue in force.

8 DISPUTES

- 8.1 **Good faith negotiations:** Before taking any court action, a party must use best efforts to resolve any dispute under, or in connection with, the Terms of Service through good faith negotiations.
- 8.2 **Obligations continue:** Each party must, to the extent possible, continue to perform its obligations under the Terms of Service even if there is a dispute.
- 8.3 **Right to seek relief:** This clause 9 does not affect either party's right to seek urgent interlocutory and/or injunctive relief.

9 GENERAL PROVISIONS

- 9.1 **Force Majeure:** Neither party is liable to the other for any failure to perform its obligations under the Terms of Service to the extent caused by Force Majeure, provided that the affected party:
- a immediately notifies the other party and provides full information about the Force Majeure;
 - b uses best endeavours to overcome the Force Majeure; and
 - c continues to perform its obligations as far as practicable.
- 9.2 **Independent contractor:** Forrest Creative is an independent contractor of the Client. No other relationship (e.g. joint venture, agency, trust or partnership) exists.
- 9.3 **Severability:** Any illegality, unenforceability or invalidity of a provision of the Terms of Service does not affect the legality, enforceability or validity of the remaining provisions of the Terms of Service.
- 9.4 **Variation:** Any variation to the Terms of Service must be in writing.
- 9.5 **Law:** These Terms of Service are governed by, and must be interpreted in accordance with, the laws of New Zealand. Each party submits to the non-exclusive jurisdiction of the Courts of New Zealand in relation to any dispute connected with the Terms of Service.