

# Terms & conditions

## INTERPRETATION

- 1.1 The definitions and rules of interpretation in this clause apply in these terms and conditions (**Conditions**).
- Brand Equity:** the current and potential value of the Client's brand and its associated intellectual property rights.
- Confidential Information:** information of a confidential nature belonging to either party including but not limited to trade secrets, business dealings, transactions or affairs of either party to the Contract which may come to the attention of the other party or its affiliates during the term of the Contract.
- Contract:** a contract incorporating these Conditions and the Proposal entered into between the Client and Upshot Marketing Ltd in accordance with condition 2.2.
- Creative Origination:** the process by which Upshot Marketing Ltd will create ideas and concepts for the Client which may subsequently become embodied within the Commissioned Materials.
- Client:** the person, firm or company who purchases Services from Upshot Marketing Ltd.
- Commissioned Materials:** all Documents, products and materials developed by Upshot Marketing Ltd in relation to the Proposal in any form, including design templates, computer programs, data, reports and specifications.
- Document:** includes any document in writing, any drawing, map, plan, diagram, design, picture or other image, tape, disk or other device or record embodying information in any form.
- Client Material:** all Documents, information and materials provided by the Client relating to the Services including computer programs, data, reports and specifications.
- Intellectual Property Rights:** all patents, copyright and related rights, format rights, look and feel, trade marks, trade, business and domain names, rights in trade dress or get-up, rights in goodwill or to sue for passing off, rights in designs, rights in computer software, database right, moral rights, rights in confidential information (including know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered and including all applications for and renewals or extensions of such rights, and all similar or equivalent rights or forms of protection in any part of the world.
- Upshot Marketing Ltd:** Upshot Marketing Ltd Ltd whose registered office is at 73 Church Road, Hove, East Sussex BN3 2BB.
- Upshot Marketing Ltd Materials:** all Documents, information and materials provided by Upshot Marketing Ltd relating to the Services which existed prior to the commencement of the Contract including design templates, computer programs, data, reports and specifications.
- Project:** the project as described in the Proposal.
- Proposal:** the detailed plan, estimate or proposal describing the Project and setting out the estimated timetable and responsibilities for the provision of the Services.
- Services:** the services, which may include Creative Origination, to be provided by Upshot Marketing Ltd under the Contract as set out in the Proposal, together with any other services which Upshot Marketing Ltd provides or agrees to provide to the Client.
- 1.2 Condition and paragraph headings shall not affect the interpretation of these conditions.
- 1.3 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality) and that person's legal and personal representatives, successors and permitted assigns.
- 1.4 Words in the singular shall include the plural and vice versa.
- 1.5 A reference to a statute or statutory provision is a reference to it as it is in force for the time being, taking account of any amendment, extension, or re-enactment and includes any subordinate legislation for the time being in force made under it.

## 2. APPLICATION OF CONDITIONS

- 2.1 These Conditions shall:
- (a) apply to and be incorporated into the Contract; and

- (b) prevail over any inconsistent terms or conditions contained, or referred to, in the Client's purchase order, confirmation of order, acceptance of a quotation or specification, or implied by law, trade custom, practice or course of dealing.

The Client's purchase order, or the Client's acceptance of a quotation for Services by Upshot Marketing Ltd, constitutes an offer by the Client to purchase the Services specified in it on these Conditions. No offer placed by the Client shall be accepted by Upshot Marketing Ltd other than:

- (a) by a written acknowledgement issued and executed by Upshot Marketing Ltd; or
- (b) (if earlier) by Upshot Marketing Ltd starting to provide the Services,

when a contract for the supply and purchase of those Services on these Conditions will be established. The Client's standard terms and conditions (if any) attached to, enclosed with or referred to in any purchase order or other Document shall not govern the Contract.

Quotations are given by Upshot Marketing Ltd on the basis that no Contract shall come into existence except in accordance with condition 2.2. Any quotation is valid for a period of 30 days from its date, provided that Upshot Marketing Ltd has not previously withdrawn it.

These Conditions shall also apply to any future orders and acceptances made and agreed verbally between the Client and Upshot Marketing Ltd whether or not a further copy of these Conditions is supplied or referred to at the time.

### COMMENCEMENT AND DURATION

The Services supplied under the Contract shall be provided by Upshot Marketing Ltd to the Client from the date of acceptance by Upshot Marketing Ltd of the Client's offer in accordance with condition 2.2 unless specified otherwise.

The Services supplied under the Contract shall continue to be supplied until the Project is completed in accordance with the Proposal or the Contract is terminated in accordance with condition 13.

### UPSHOT MARKETING LTD'S OBLIGATIONS

Upshot Marketing Ltd shall use reasonable endeavours to provide the Services and to deliver the Commissioned Materials to the Client in accordance, in all material respects, with the Proposal.

Upshot Marketing Ltd shall use reasonable endeavours to meet any performance dates specified in Proposal, but any such dates shall be estimates only and time shall not be of the essence of the Contract.

### CLIENT'S OBLIGATIONS

The Client shall:

- (a) co-operate with Upshot Marketing Ltd in all matters relating to the Services;
- (b) provide and license as necessary, in a timely manner, such Client Material and other information as Upshot Marketing Ltd may request and ensure that it is accurate in all material respects;
- (c) obtain and maintain all necessary licences and consents and comply with all relevant legislation in relation to the Services and the use of Client Material insofar as such licences, consents and legislation relate to the Client's business and staff in all cases before the date on which the Services are to start;

If Upshot Marketing Ltd's performance of its obligations under the Contract is prevented or delayed by any act or omission of the Client, its agents, sub-contractors or employees, Upshot Marketing Ltd shall not be liable for any costs, charges or losses sustained or incurred by the Client arising directly or indirectly from such prevention or delay.

The Client shall be liable to pay to Upshot Marketing Ltd, on demand, all reasonable costs, charges or losses sustained or incurred by Upshot Marketing Ltd (including any direct, indirect or consequential losses, loss of profit and loss of reputation,) arising directly or indirectly from the Client's

fraud, negligence, failure to perform or delay in the performance of any of its obligations under the Contract.

- 5.4 The Client shall approve all creative content and accepts full responsibility for all statements, imagery and creative7.1 message being portrayed in the Commissioned Materials7.1 and shall provide such approval to Upshot Marketing Ltd in writing or via email. If the Client provides such approval verbally, Upshot Marketing Ltd shall confirm this in writing or via email and the Client shall be bound by such approval. If the request for approval is rejected, the Client shall submit7.2 a change request in accordance with condition 7. If no response or rejection has been received by Upshot Marketing Ltd 48 hours after approval has been requested, the Client will be deemed to have approved the Commissioned Materials and Upshot Marketing Ltd shall proceed to the next stage of the production process.
- 5.5 The Client warrants that all Client Material provided by it shall not be in breach of any code, regulation or legislation or otherwise violate the legal rights of any individual, group or organisation.
- 5.6 Any Client Material supplied by the Client shall remain entirely at the Client's risk save only for loss and damage arising directly from the wilful damage or neglect of Upshot Marketing Ltd or its employees or agents and the Client warrants that it has taken out appropriate insurance if it considers this necessary.
- 5.7 The Client shall not, without the prior written consent of7.3 Upshot Marketing Ltd, at any time from the date of the Contract to the expiry of six months after the termination of the Contract, solicit or entice away from Upshot Marketing Ltd or employ or attempt to employ any person who is, or has been, engaged as an employee or sub-contractor of Upshot Marketing Ltd in the provision of the Services.
- 5.8 Any consent given by Upshot Marketing Ltd in accordance with condition 5.7 shall be subject to the Client paying to Upshot Marketing Ltd a sum equivalent to 20% of the then current annual remuneration of Upshot Marketing Ltd's7.4 employee or sub-contractor or, if higher, 20% of the annual remuneration to be paid by the Client to that employee or sub-contractor.
- 6. CHANGE CONTROL**
- 6.1 If either party wishes to change the scope or execution of the Services, it shall wherever possible submit details of the requested change to the other in writing. If a change is7.5 requested verbally, the other party shall confirm such request in writing.
- 6.2 If either party requests a change to the scope or execution of the Services, Upshot Marketing Ltd shall, within a reasonable time, provide a written estimate to the Client of:
- the likely time required to implement the change;
  - any variations to Upshot Marketing Ltd's charges arising from the change;
  - the likely effect of the change on the Proposal; and
  - any other impact of the change on the terms of the Contract.
- 6.3 Upshot Marketing Ltd may, from time to time and without notice, change the Services in order to comply with any applicable safety or statutory requirements, provided that such changes do not materially affect the nature, scope of, or the charges for the Services. Upshot Marketing Ltd may, from time to time change the Services, provided that such changes do not materially affect the nature or quality of the Services and, where practicable, it will give the Client at least7.6 1 month's notice of any change.
- 6.4 If the Client wishes Upshot Marketing Ltd to proceed with the change, Upshot Marketing Ltd has no obligation to do so7.7 unless and until the parties have agreed in writing on the necessary variations to its charges, the Proposal and any other relevant terms of the Contract to take account of the change.
- 6.5 Upshot Marketing Ltd may charge for its time spent in assessing a request for change from the Client on a time and materials basis in accordance with condition 7.
- 6.6 If it is agreed between the parties that the requested change is minor in nature, the necessary changes may discussed and

agreed verbally. Upshot Marketing Ltd shall then confirm the nature of the change and any alteration to the Proposal and charges to the Client in writing or via email.

#### **CHARGES AND PAYMENT**

Condition 7.2 shall apply if Upshot Marketing Ltd provides the Services on a time and materials basis. Condition 7.3 shall apply if Upshot Marketing Ltd provides the Services for a fixed price. The remainder of this condition 7 shall apply in either case.

Where the Services are provided on a time and materials basis:

- the charges payable for the Services shall be calculated in accordance with Upshot Marketing Ltd's standard daily fee rates as notified to the Client and as amended from time to time;
- Upshot Marketing Ltd's standard daily fee rates for each individual person are calculated on the basis of an eight-hour day, worked between 9.00 am and 6.00 pm on weekdays (excluding public holidays);
- all charges quoted to the Client shall be exclusive of VAT from which Upshot Marketing Ltd;
- Upshot Marketing Ltd shall invoice the Client monthly for its charges for time, expenses and materials for activity scheduled each month, calculated as part of the agreed work schedule.

Where the Services are provided for a fixed price or an agreed retainer, the total price for the Services shall be the amount set out in the Proposal. The total price shall be paid to Upshot Marketing Ltd (without deduction or set-off) in instalments, as set out in the Proposal. At the end of a period specified in the Proposal in respect of which an instalment is due, Upshot Marketing Ltd shall invoice the Client for the charges that are then payable, together with expenses and the costs of materials, calculated as provided in condition 7.5.

Upshot Marketing Ltd reserves the right to require the Client to pay in advance the full amount or a proportion of the amount of any costs or expenses that it anticipates it is likely to incur on behalf of the Client. Upshot Marketing Ltd reserves the right not to commence provision of the Services or incur any expense until the Client has paid the requested amount.

Any fixed price and daily rate contained in the Proposal excludes:

- the cost of hotel, subsistence, travelling and any other ancillary expenses reasonably incurred by the individuals whom Upshot Marketing Ltd engages in connection with the Services, the cost of any materials and the cost of services reasonably and properly provided by third parties and required by Upshot Marketing Ltd for the supply of the Services. Such expenses, materials and third party services shall be invoiced by Upshot Marketing Ltd;
- VAT. Upshot Marketing Ltd is not VAT registered
- any extra charges that Upshot Marketing Ltd may incur for handling, storing, collecting or delivering Client Materials or any other property or materials supplied by or on behalf of the Client. Such charges shall be invoiced by Upshot Marketing Ltd.

The Client shall pay each invoice submitted to it by Upshot Marketing Ltd, in full and in cleared funds, within 30 days of receipt.

Without prejudice to any other right or remedy that it may have, if the Client fails to pay Upshot Marketing Ltd on the due date, Upshot Marketing Ltd may:

- charge interest on such sum from the due date for payment at the annual rate of 4% above the base lending rate from time to time of Barclays Bank plc, accruing on a daily basis and being compounded quarterly until payment is made, whether before or after any judgment and Upshot Marketing Ltd may claim interest under the Late

Payment of Commercial Debts (Interest) Act 1998; and

- (b) suspend all Services until payment has been made in full.

7.8 All sums payable to Upshot Marketing Ltd under the Contract shall become due immediately on its termination, despite any other provision.

## 8. INTELLECTUAL PROPERTY RIGHTS

8.1 The Upshot Marketing Ltd Materials and all Intellectual Property Rights contained within or associated with them shall be owned by Upshot Marketing Ltd. Nothing within this Contract shall grant the Client any rights to them unless expressly agreed in writing.

8.2 The Client acknowledges that, where Upshot Marketing Ltd does not own any Upshot Marketing Ltd Materials, the Client's use of rights in Upshot Marketing Ltd Materials is conditional on Upshot Marketing Ltd obtaining a licence (or sub-licence) from the relevant licensor or licensors on such terms as will entitle Upshot Marketing Ltd to license such rights to the Client.

8.3 Ownership of the Commissioned Materials and all of their associated Intellectual Property Rights together with the Client's right to use them shall be as specified in the Proposal. The Proposal shall specify whether the Commissioned Materials and all of their associated Intellectual Property Rights are owned in accordance with Option A or Option B as more particularly described below:

(a) Option A: Upshot Marketing Ltd shall assign all Intellectual Property Rights in the Commissioned Materials to the Client on payment in full of any Creative Origination fee and all of Upshot Marketing Ltd's other fees, charges and expenses;

(b) Option B: Upshot Marketing Ltd shall be the exclusive owner of all Intellectual Property Rights in the Commissioned Materials and shall grant to the Client a royalty free licence to use the Commissioned Materials in the territories and in respect of the products and services described in the Proposal.

8.4 For the avoidance of doubt, the Client shall not make any use of the Intellectual Property Rights or the Commissioned Materials beyond the scope of the licence granted in condition 9.3(b) above without the consent of Upshot Marketing Ltd. Upshot Marketing Ltd may grant or withhold such consent at its sole discretion and reserves the right to require a fee to be paid for such alternative or additional use.

8.5 If it is agreed between the parties that the ownership of Intellectual Property Rights in and use of the Commissioned Materials shall be in accordance with Option B, the Client may at any time during the Contract and for a period of 1 year following termination of the Contract request an assignment of the Intellectual Property Rights in the Commissioned Materials.

8.6 If the Client makes a request in accordance with condition 9.6 Upshot Marketing Ltd will provide the Client with an estimate of the assignment fee which may include a Creative Origination fee and a figure representing any increase in Brand Equity directly or indirectly attributable to the Intellectual Property Rights, the Commissioned Materials or the Services provided by Upshot Marketing Ltd.

8.7 Upshot Marketing Ltd is under no obligation to consider any request made in accordance with condition 9.5 if the Contract was terminated by Upshot Marketing Ltd in accordance with condition 13.2.

8.8 On termination of the Contract for any reason, any licence granted in accordance with condition 9.3(b) shall automatically terminate. If the Client wishes to make any continued use of the Intellectual Property Rights or the Commissioned Materials following termination of the Contract or licence it shall only do so on terms subsequently agreed between the parties.

8.9 Upshot Marketing Ltd may use the Client's name, logo and the Commissioned Materials in its publicity and promotional material to identify the Client as a client of Upshot

Marketing Ltd and as Upshot Marketing Ltd as the creator of the Commissioned Materials.

For the avoidance of doubt the Client shall have no right to use any draft or sample Documents, products, materials, ideas or suggestions which are produced by Upshot Marketing Ltd during the term of the Contract, in any pre-contractual discussions or pitch made to the Client, or any Documents, products, materials or Commissioned Materials that are rejected by the Client.

## CONFIDENTIALITY AND UPSHOT MARKETING LTD'S PROPERTY

Each party recognises that during the term of this Contract it may have access to or otherwise receive Confidential Information. Each party agrees to use all reasonable endeavours not to divulge the other party's Confidential Information to any of its employees or sub-contractors who do not need to know it, and to use all reasonable endeavours to prevent its disclosure to or access by any third party without the prior written consent of the other party.

The provisions of condition 10.1 shall not apply to the whole or any part of the Confidential Information to the extent that it is already in the other party's possession or in the public domain other than as a result of a breach of this condition 10 or which the other is required to disclose by reason of a statutory or regulatory requirement having the force of law or by reason of an order of a court of competent jurisdiction. This condition 9 shall survive termination of the Contract, however arising.

## LIMITATION OF LIABILITY - THE CLIENT'S ATTENTION IS PARTICULARLY DRAWN TO THE PROVISIONS OF THIS CONDITION

This condition 10 sets out the entire financial liability of Upshot Marketing Ltd (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Client in respect of:

- (a) any breach of the Contract;
- (b) any use made by the Client of the Services, the Commissioned Materials or any part of them; and
- (c) any representation, statement or tortious act or omission (including negligence) arising under or in connection with the Contract.

All warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Contract.

Nothing in these Conditions limits or excludes the liability of Upshot Marketing Ltd:

- (a) for death or personal injury resulting from negligence; or
- (b) for any damage or liability incurred by the Client as a result of fraud or fraudulent misrepresentation by Upshot Marketing Ltd.

Subject to condition 10.2 and condition 10.3

- (a) Upshot Marketing Ltd shall not be liable for loss of profits, business, anticipated savings, goods, contract, use, corruption of data or information or depletion of goodwill and/or similar losses or any special, indirect, consequential or pure economic loss, costs, damages, charges or expenses.
- (b) Upshot Marketing Ltd's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise arising in connection with the performance or contemplated performance of the Contract shall be limited to the price paid for the Services.

Upshot Marketing Ltd shall not be liable for any mistakes, errors or omissions from or to the Commissioned Materials after the Client has provided its approval of the Commissioned Materials in accordance with condition 6.4.

## TERMINATION

Subject to condition 11.3, and without prejudice to any other rights or remedies the parties may have, the Contract shall terminate automatically:

- (a) on completion of the Project in accordance with the Proposal; or

- (b) on expiry of not less than 3 months written notice. **13.**
- 11.2 Without prejudice to any other rights or remedies the party may have, either party may terminate the Contract with immediate effect on giving written notice to the other if:
- (a) the other party commits a material breach of any of the terms of the Contract and (if such a breach is remediable) fails to remedy that breach within **14.** 30 days of that party being notified in writing of **14.1** the breach; or
  - (b) an order is made or a resolution is passed for the winding up of the other party, or circumstances arise which entitle a court of competent **14.2** jurisdiction to make a winding-up order of the other party; or
  - (c) an order is made for the appointment of an **15.** administrator to manage the affairs, business and **15.1** property of the other party, or documents are filed with a court of competent jurisdiction for the appointment of an administrator of the other party, or notice of intention to appoint an **15.2** administrator is given by the other party or its directors or by a qualifying floating charge holder (as defined in paragraph 14 of Schedule B1 to the Insolvency Act 1986); or
  - (d) a receiver is appointed of any of the other party's **15.3** assets or undertaking, or circumstances arise which entitle a court of competent jurisdiction or a creditor to appoint a receiver or manager of the other party, or if any other person takes possession of or sells the other party's assets; or
  - (e) the other party makes any arrangement or composition with its creditors, or makes an **16.** application to a court of competent jurisdiction for the protection of its creditors in any way; or
  - (f) the other party ceases, or threatens to cease, to trade; or
  - (g) the other party takes or suffers any similar or analogous action in any jurisdiction in consequence of debt.
- 11.3 On termination of the Contract for any reason: **17.**
- (a) the Client shall immediately pay to Upshot **17.1** Marketing Ltd all of Upshot Marketing Ltd's outstanding unpaid invoices and interest and, in respect of Services supplied but for which no invoice has been submitted, Upshot Marketing **17.2** Ltd may submit an invoice, which shall be payable immediately on receipt;
  - (b) the Client shall return all Upshot Marketing Ltd **18.** Materials to Upshot Marketing Ltd; and
  - (c) the accrued rights of the parties as at termination and the continuation of any provision expressly stated to survive or implicitly surviving termination, shall not be affected.
- 11.4 If for any reason the Contract is terminated prior to completion of a Project, Upshot Marketing Ltd shall be entitled to invoice the Client for and the Client shall **19.** immediately pay to Upshot Marketing Ltd the balance of any fees, expenses or charges that are included or referred to within the Proposal.
- 12. FORCE MAJEURE**
- Upshot Marketing Ltd shall have no liability to the Client **20.** under the Contract if it is prevented from or delayed in performing its obligations under the Contract or from carrying on its business by acts, events, omissions or accidents beyond its reasonable control, including strikes, lock-outs or other industrial disputes (whether involving the workforce of Upshot Marketing Ltd or any other party), failure of a utility service or transport network, act of God, act of terrorism, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or sub-contractors.

#### **VARIATION**

Subject to condition 6, no variation of the Contract or these Conditions or of any of the documents referred to in them shall be valid unless it is in writing and signed by or on behalf of each of the parties or acceptance of the changes have otherwise been confirmed in writing by both parties.

#### **WAIVER**

A waiver of any right under the Contract is only effective if it is in writing and it applies only to the party to whom the waiver is addressed and the circumstances for which it is given.

Unless specifically provided otherwise, rights arising under the Contract are cumulative and do not exclude rights provided by law.

#### **SEVERANCE**

If any provision (or part of a provision) of the Contract is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions will remain in force.

If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted or amended, that provision will apply with whatever modification is necessary to make it valid, enforceable and legal.

The parties agree, in the circumstances referred to in condition **15.1** and if condition **15.2** does not apply, to attempt to substitute for any invalid, unenforceable or illegal provision a valid, enforceable and legal provision which achieves to the greatest extent possible the same effect as would have been achieved by the invalid or unenforceable provision.

#### **STATUS OF PRE-CONTRACTUAL STATEMENTS**

Each of the parties acknowledges and agrees that, in entering into the Contract it does not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to these terms and conditions or not) relating to the subject matter of the Contract, other than as expressly set out in the Contract.

#### **ASSIGNMENT**

The Client shall not, without the prior written consent of Upshot Marketing Ltd, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Contract.

Upshot Marketing Ltd may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Contract.

#### **NO PARTNERSHIP OR AGENCY**

Nothing in the Contract is intended to, or shall operate to, create a partnership between the parties, or to authorise either party to act as agent for the other, and neither party shall have authority to act in the name or on behalf of or otherwise to bind the other in any way (including the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).

#### **RIGHTS OF THIRD PARTIES**

The Contract is made for the benefit of the parties to it and (where applicable) their successors and permitted assigns and is not intended to benefit, or be enforceable by anyone else.

#### **NOTICES**

Notice given under the Contract shall be in writing, sent for the attention of the person, and to the address or fax number, given in the Contract (or such other address, fax number or person as the relevant party may notify to the other party) and shall be delivered personally, sent by fax or sent by pre-paid, first-class post or recorded delivery. A notice is deemed to have been received, if delivered personally, at the time of delivery, in the case of fax, at the time of transmission, in the case of pre-paid first class post or recorded delivery, 48 hours from the date of posting and, if deemed receipt under this condition 20 is not within business hours (meaning 9.00 am to 5.30 pm Monday to Friday on a day that is a business day), at 9.00 am on the first business day following delivery. To prove service, it is

sufficient to prove that the notice was transmitted by fax, to the fax number of the party or, in the case of post, that the envelope containing the notice was properly addressed and posted.

**21. GOVERNING LAW AND JURISDICTION**

- 21.1 The Contract and any dispute or claim arising out of or in connection with it or its subject matter, shall be governed by, and construed in accordance with, the law of England and Wales.
- 21.2 The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with the Contract or its subject matter.