

Agreement

Addendum for Hosting Services

1. Definitions

- 1.1 '*Application*' means the specific hosted application(s) for which the Hosting Services are provided, identified and described in the Schedule.
- 1.2 '*Client Branding*' means the client's corporate branding, including but not limited to, trade marks or names or logos.
- 1.3 '*Client Equipment*' means the hardware and software which the Client uses to access the Hosting Services and Application to be provided.
- 1.4 '*Client Information*' means data input, created or used by the Client and their users in using the Application and the Hosting Services.
- 1.5 '*Downtime*' means an outage causing interruption or failure to the provision of the Hosting Services.
- 1.6 '*Intellectual Property Rights*' means all copyrights, patents, registered and unregistered design rights, trade marks and service marks and applications for any of these, together with all database rights, trade secrets, know-how and other intellectual property rights in all parts of the world.
- 1.7 '*Network*' means a network comprising all or any of the following: modems, leased circuits and other telecommunications hardware and software.
- 1.8 '*Service Levels*' means the levels of performance to which the Hosting Services are to be provided to the Client by Toplevel.
- 1.9 '*Technical Environment*' means the Network together with the Client Equipment, and any related equipment and connections, all as specified in the Schedule.

2. Service Provision

- 2.1 Toplevel agrees to provide the Hosting Services to the Client in consideration of the payment of the Services Fees by the Client, subject to these terms and conditions.
- 2.2 Toplevel's obligations regarding Service Levels will be as set out in the Schedule.

3. Scope of Client's Use

- 3.1 The Client may use the Application and the Hosting Services only by:
 - (a) accessing the Application and the Hosting Services in accordance with the procedures (if any) notified to it by Toplevel; and
 - (b) entering, editing, transferring or deleting and moving its input comprising Client Information, documents, data, files and other content within the Application and/or the Hosting Services.
- 3.2 The Client acknowledges that it is its sole responsibility to determine that the Application and Hosting Services meet the needs of its business and to satisfy itself that the Application is ready for operational use in its business before it is so used.

4. Client Obligations

- 4.1 The Client acknowledges and undertakes that it:
- (a) will use the Application and the Hosting Services only for lawful purposes and in accordance with this Agreement; and
 - (b) will comply in every respect with all the instructions which Toplevel provides concerning the Application and Hosting Services; and
 - (c) will use and adhere to the user names, passwords and any authentication codes or security procedures which Toplevel may notify to the Client from time to time.
- 4.2 The Client will not:
- (a) reproduce, disseminate or otherwise disclose the content of any Application except as expressly set out in this Agreement;
 - (b) electronically transmit any Application over a Network except as necessary for the Client's licensed use of the Application;
 - (c) use run-time versions of any third-party products which may be embedded in any Application, for any use other than the use of that Application;
 - (d) use any Application in any way not expressly provided for by this Agreement.
- 4.3 The Client is responsible for using only Client Equipment which is in good working order and in compliance with the Technical Environment
- 4.4 The Client is responsible for acquiring and maintaining all licences and permissions necessary in respect of any third party software it may use in connection with the Hosting Services or Application. The Client confirms that any Client Equipment, Client Information or other materials provided by the Client to Toplevel or utilised by the Client in the Hosting Services or Application will not infringe any Intellectual Property Rights of any third party, and will not be obscene or defamatory, and will not violate the laws or regulations of any state which may have jurisdiction over such activity.
- 4.5 If, for the purpose of providing the Hosting Services, it is necessary or desirable for Toplevel to access or use any Client Equipment, Client Information, facilities or services the Client will make these available to Toplevel for access free of charge to enable Toplevel to perform its obligations under this Agreement, and the Client grants to Toplevel a non-exclusive, royalty-free licence solely for such purposes.
- 4.6 The Client acknowledges that it is responsible for its input to and use of the Application and the Hosting Services and that Toplevel has no responsibility for such input or its use.
- 4.7 The Client licenses Toplevel to incorporate items of the Client's corporate branding, such as a trade mark or name or logo, for the purpose of customising its pages and input. If, for this purpose, Toplevel needs to become a registered user of any of the Client's branding, the Client undertakes promptly to do everything necessary to procure such registration for Toplevel.
- 4.8 If the Client learns about or is informed of any of the components, processes or methods of operating any software comprised in any Service it will treat that knowledge or information as Toplevel's trade secret, and not use it to the benefit of any party other than Toplevel or convey it in any way to any third party or allow any third party to acquire it.
- 4.9 If the Client is in breach of any of its obligations above, then, without prejudice to the other terms and conditions in this Agreement:
- (a) Toplevel cannot be held liable for any failure to meet the Service Levels which arises as a direct or indirect result of such Client breach;

- (b) Toplevel will be entitled to charge the Client for staff time engaged on rectifying any resulting problems at Toplevel's standard charge rates for the time being.
- 4.10 If Toplevel suffers any loss, damage or expense as a result of:
- (a) any unauthorised access to, or use or misuse of, the Hosting Services by any employee, agent or sub-contractor of the Client;
 - (b) any unauthorised access to, or use or misuse of, the Application and/or the Hosting Services by any third party if such access, use or misuse was permitted or facilitated by such employee, agent or sub-contractor,
- the Client will fully indemnify Toplevel in respect of such loss, damage or expense.

5. Security

- 5.1 Toplevel will effect and maintain at all times continuous and sufficient security measures, in order to safeguard Client Information from unauthorised access and use, and to minimise the risk of a security breach.
- 5.2 Toplevel will promptly notify the Client of any security attack which it learns of or suspects, which appears to be directed towards the Client Information.

6. Client Branding and Client Information

- 6.1 The Client warrants that it is the owner or authorised user of all Intellectual Property Rights and all other rights in the Client Branding. The Client agrees that for the purpose of customising the Application, Toplevel may incorporate items of Client Branding, and the Client hereby licenses Toplevel to do this. If for this purpose it is necessary for Toplevel to become a registered user of any Client Branding, the Client undertakes promptly to do everything necessary to procure such registration.
- 6.2 The Client acknowledges and agrees that it is entirely responsible for its Client Information and any use that it or third party may make of it for any purposes, and that Toplevel will have no responsibility for the Client Information or such use. Without prejudice to the generality of the previous sentence the Client hereby undertakes:
 - (a) to inform itself (and, if appropriate, Toplevel) concerning, and in performing its obligations under this Agreement fully to comply with, all laws, regulations, licences or binding codes or standards of practice relevant to personal data (including without limitation the Data Protection Act 1998);
 - (b) not to provide any item of Client Information or upload, transmit or download any message or material that:
 - (i) is defamatory, racist or sexist, threatening or menacing to any person or group of people, or contains any obscene elements (in particular, anything which is or could be interpreted as paedophilia), or which in Toplevel's reasonable opinion is likely to cause annoyance or distress to any person; or
 - (ii) infringes the copyright or other Intellectual Property Rights of any other person, company or partnership, anywhere in the world; or
 - (iii) in any way act in a manner that constitutes, or may involve Toplevel in, sending any spam e-mail.

7. Service Availability

- 7.1 Subject to the provisions set out in this clause, Toplevel will use its reasonable endeavours to make the Hosting Services and Application available during the times specified (if any) in the Service Levels.
- 7.2 Notwithstanding the above, the Hosting Services or any particular Service Levels may be suspended for so long as is reasonably necessary:
- (a) to enable either party to comply with an order or request from a governmental, or other competent regulatory body or administrative authority; or
 - (b) to enable Toplevel to carry out work which is necessary in its reasonable opinion to maintain or improve the Hosting Services; or
 - (c) to carry out standard maintenance and support,
- provided that Toplevel will use all reasonable endeavours to schedule such Downtime during hours of low usage of the Hosting Services in order to minimise impact, and to ensure that there is no permanent material degradation of the Hosting Services.
- 7.3 If the Application requires immediate correction to enable it to run effectively or for immediate compliance with a governmental or regulatory requirement, Toplevel may suspend that Application without advance warning for so long as reasonably necessary to implement the correction or to ensure compliance.
- 7.4 Toplevel will be entitled in its sole discretion to make changes or upgrades to the Application or Hosting Services or their accessibility or to the Technical Environment, provided that such changes or upgrades do not cause any material reduction in functionality. Toplevel will endeavour to give at least seven days' written notice of any such changes. The Application may be suspended for so long as is reasonably necessary, but Toplevel will use reasonable endeavours to minimise the Downtime that may be caused by such change or upgrade. If as a result of such changes, the Client's ability to use the Hosting Services or the cost to the Client of using the Hosting Services is materially and adversely affected, the Client may terminate the Agreement on 30 days' written notice to Toplevel.

8. Intellectual Property Rights Indemnity

- 8.1 In the event of any claim or if the use of any Service is restricted as a result of any claim, Toplevel may at its option and expense: (a) obtain the right for the Client to continue to use the Service; or (b) modify or replace the Service for the Client to use; or (c) if the use of the Service is permanently prevented by the courts, terminate it and refund to the Client a sum equal to the sum the Client will have paid for its use over the 12 months immediately prior to such termination. Toplevel will not be liable if any claim is caused by combining the Service with any software, database or information or data of any kind of which Toplevel has not approved. These clauses 11.1 and 11.2 state Toplevel's entire liability and the Client's entire remedy in respect of any infringement by any Service.

9. Warranties

- 9.1 Toplevel uses its reasonable endeavours to maintain the Hosting Services free of bugs and viruses but Toplevel strongly recommends that the Client should have its own effective anti-virus programs.
- 9.2 Toplevel does not and cannot control the Network on which the technology operates or the flow of data to or from its network. Such flow depends largely on the performance of

services provided or controlled by third parties. At times, actions or omissions of such third parties can impair or disrupt connections. Although Toplevel will use commercially reasonable efforts to avoid such events and take actions it deems appropriate to remedy such events, Toplevel cannot guarantee that such events will not occur. Accordingly, Toplevel cannot and does not warrant that the Hosting Services will be uninterrupted, error-free or entirely secure, and disclaims any and all liability resulting from or related to such events.

- 9.3 Toplevel uses reasonable endeavours to provide back-up facilities covering equipment, data, operating systems and application software. The Client agrees that notwithstanding any backup facilities provided by Toplevel, Toplevel will not be responsible or liable if, for any reason concerning any of these, the Hosting Services cannot be provided.
- 9.4 Toplevel does not make any other warranties, guarantees or representations concerning the operation or performance of the Hosting Services. The Client is entirely responsible for deciding to select the Hosting Services for its own business purposes and Toplevel accepts no liability for any use to which the Client puts the Hosting Services.
- 9.5 Each party warrants to the other that it has obtained, where required by law or regulatory authority, all registrations, permits, licences and approvals necessary in any relevant country for it to perform its obligations hereunder, or alternatively, that it is exempt from obtaining them. Upon request, each party will provide the other with copies of all such registrations, permits, licences and approvals. Each party further warrants to the other that in performing its obligations under the terms of this Agreement it will comply with all applicable national and local laws and regulations.

10. Limitations on Use

- 10.1 If at any time the Client's access to, or use of, the Hosting Services and Application is not in compliance with any applicable law or regulation, the Client will be in breach of these terms, and Toplevel will be entitled at its sole discretion to terminate it under clause 12 and to discontinue the Hosting Services in respect of the Client. The Client acknowledges and agrees that Toplevel is entitled to report such a breach or non-compliance to any relevant regulatory body or agency, and that Toplevel will not incur any liability to the Client as a result of the breach, the non-compliance, or Toplevel's reporting of it.
- 10.2 In addition to any other remedies available at law or in equity and without prejudice to its rights under this Agreement, Toplevel will have the right to suspend the Hosting Services immediately if deemed reasonably necessary by Toplevel in order to protect the proper interests of Toplevel or of its other clients. If practicable and depending on the nature of the reason for such suspension, Toplevel may, in its absolute discretion, give the Client an opportunity to remedy the situation. In such case, if the Client remedies the situation, Toplevel will promptly restore the Hosting Services.

11. Limitation of liability

- 11.1 The Client acknowledges that it has accepted these terms and conditions in the knowledge that Toplevel must limit its liability and that the Services Fees have been calculated accordingly.
- 11.2 Except in respect of death or personal injury caused by its negligence or in respect of fraud or fraudulent misrepresentation (for which no limit applies), Toplevel shall not be liable to the Client for any loss of profit, contracts, business, data, goodwill, revenue or anticipated savings or for any special, indirect, incidental or consequential loss or damage of any nature whatsoever and howsoever caused, whether arising in contract, tort or otherwise.

- 11.3 Without prejudice to any other provision of this clause 11, the maximum aggregate liability of Toplevel arising out of or in connection with the Hosting Services shall be limited to the annual Services Fees to which the claim relates.
- 11.4 The Client undertakes that if Toplevel suffers any loss, damage, fine or expense as a result of:
- (a) any unauthorised access to, or use or misuse of, any Service by any employee, agent or sub-contractor of the Client;
 - (b) any unauthorised access to, or use or misuse, by any third party if that access or use or misuse was enabled or permitted by such an employee, agent or sub-contractor; or
 - (c) the ownership or nature or any use made of Client Information;
- the Client will fully indemnify Toplevel in respect of such loss, damage, fine or expense.

12. Termination

- 12.1 This Agreement may be terminated immediately by notice in writing:
- (a) by Toplevel if the Client fails to pay any sums due under this Agreement by the due date notwithstanding any other provisions for late payment in this Agreement;
 - (b) by either party if the other party is in material or continuing breach of any of its obligations under this Agreement and fails to remedy the same (if capable of remedy) for a period of 30 days after written notice of the breach by the other party;
 - (c) by either party if the other party is involved in any legal proceedings concerning its solvency, or ceases trading, or commits an act of bankruptcy or is adjudicated bankrupt or enters into liquidation, whether compulsory or voluntary, other than for the purposes of an amalgamation or reconstruction, or makes an arrangement with its creditors or petitions for an administration order or has a receiver or manager appointed over all or any part of its assets or generally becomes unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986 or anything analogous to such event occurs in any applicable jurisdiction.
- 12.2 Any termination of this Agreement under this clause will be without prejudice to any other rights or remedies of either party under this Agreement or at law and will not affect any accrued rights or liabilities of either party at the date of termination.
- 12.3 On termination of this Agreement for any reason, the Client must immediately cease all use of all Hosting Services and promptly certify in writing to Toplevel that this has been done.

13. Force Majeure

No party shall be liable in respect of any failure or delay to perform any of its obligations under this Agreement to the extent that such delay or failure is caused by any circumstances beyond the reasonable control of that party (including, without limitation, acts of God, war, riots, civil commotion, fire, severe weather conditions, strikes, lock-outs, other industrial disputes or terrorist attacks).