

## CUSTOMER TERMS OF SERVICE

Last Updated on January 23, 2024

This Customer Terms of Service is entered into by and between Create, Inc. ("**Create**") and the entity or person placing an order for or accessing any Services ("**Customer**" or "**you**"). If you are accessing or using the Services on behalf of your company, you represent that you are authorized to accept this Agreement on behalf of your company, and all references to "you" or "Customer" reference your company. **Please note that if you sign up for the Services using an email address from your employer or another entity, then (1) you will be deemed to represent such party, (2) your acceptance will bind your employer or that entity to these terms, and (3) the words "Customer", "you" or "your" in this Agreement will refer to your employer or that entity.**

This Agreement permits Customer to purchase subscriptions to online software-as-a-service products and other services from Create pursuant to any applicable Create ordering documents, online registration, order descriptions or order confirmations referencing this Agreement ("**Order Form(s)**") and sets forth the basic terms and conditions under which those products and services will be delivered.

The "**Effective Date**" of this Agreement is the earlier of (a) Customer's initial access to the Services (as defined below) through any online provisioning, registration or order process or (b) the effective date of the first Order Form referencing this Agreement.

**BY INDICATING YOUR ACCEPTANCE OF THIS AGREEMENT OR ACCESSING OR USING ANY SERVICES, YOU ARE AGREEING TO BE BOUND BY ALL TERMS, CONDITIONS, AND NOTICES CONTAINED OR REFERENCED IN THIS AGREEMENT. IF YOU DO NOT AGREE TO THIS AGREEMENT, PLEASE DO NOT USE ANY SERVICES. FOR CLARITY, EACH PARTY EXPRESSLY AGREES THAT THIS AGREEMENT IS LEGALLY BINDING UPON IT.**

### 1. DEFINITIONS

- 1.1. "**Affiliate**" means, with respect to a party, any entity which directly or indirectly Controls, is Controlled by, or is under common Control with such party.
- 1.2. "**Agreement**" means this Customer Terms of Service, any Order Forms, and any attachments, linked policies or documents referenced in the foregoing.
- 1.3. "**Beta Services**" means services or features identified as "alpha," "beta," "preview," "early access," or "evaluation," or words or phrases with similar meanings.
- 1.4. "**Control**" means 50% or greater voting power, or otherwise having the power to govern the financial and the operating policies or to appoint the management of an organization.
- 1.5. "**Connected Application**" means Customer's, or a third party's, web-based, mobile, or other software application that is made available by Customer or its Users.
- 1.6. "**Create Materials**" means all software, specifications, documentation and systems and any and all other information, data, documents, materials, works and other content, devices, methods, processes, hardware and other technologies and inventions, technical or functional descriptions, requirements, plans or reports, that are provided or used by Create in connection with the Services or otherwise comprise or relate to the Services or the Platform. Create Materials do not include Customer Data, Output, or Third-Party Materials.
- 1.7. "**Customer Data**" means any data in electronic form that Customer or Users make available through the Platform, and includes Output and Prompts, as further described in Section 4 below.

- 1.8. “Documentation”** means Create's user guides and other end user documentation for the Services made available by Create to its customers generally.
- 1.9. “Fees”** means any fees payable for the Services under this Agreement or an applicable Order Form.
- 1.10. “Force Majeure Event”** means an event which is unforeseeable, beyond the control of the party affected, and cannot be remedied by the exercise of reasonable diligence, including without limitation: acts of God, acts of government, flood, fire, earthquakes, civil unrest, acts of terror, strikes, computer, telecommunications, Internet service provider or hosting facility failures or delays involving hardware, software or power systems not within Create's possession or reasonable control, and denial of service attacks.
- 1.11. “Intellectual Property Rights”** means copyrights (including, without limitation, the exclusive right to use, reproduce, modify, distribute, publicly display and publicly perform the copyrighted work), trademark rights (including, without limitation, trade names, trademarks, service marks, and trade dress), patent rights (including, without limitation, the exclusive right to make, use and sell), trade secrets, moral rights, right of publicity, authors' rights, contract and licensing rights, goodwill and all other intellectual property rights as may exist now and/or hereafter come into existence and all renewals and extensions thereof, regardless of whether such rights arise under the law of the United States or any other state, country or jurisdiction.
- 1.12. “Platform”** means Create's proprietary platform of servers, software and technology used to provide the Services.
- 1.13. “Pricing Page”** means the publicly available web page(s) where Create publishes its list prices for Services, currently available at [create.xyz/pricing](https://create.xyz/pricing).
- 1.14. “Service Plan”** means the packaged subscription plan and associated features, as detailed at the Pricing Page to which Customer subscribes.
- 1.15.**
- 1.16. “Services”** means the services that Create will provide to Customer under this Agreement as described in the Order Form.
- 1.17. “Third-Party Materials”** means software or other components that are licensed to Create by third parties for use in the Services, which may include, but not limited to, open source software.
- 1.18. “Usage Data”** means any diagnostic and usage-related information and data from the use, performance and operation of the Platform and Services that may include, but is not limited to, usage interactions, usage patterns, traffic logs, and User engagement with the Platform and Services.
- 1.19. “Users”** means employees, agents, consultants or other representatives authorized by Customer to access or use the Services.

## 2. THE SERVICES

- 2.1. Customer Rights to the Services.** Subject to the terms and conditions set forth in this Agreement and the applicable Order Form, Create grants to Customer a limited, non-transferable/non-assignable (except as set forth in the Agreement), non-exclusive right to access and use the Services during the Term for its lawful business purposes solely in the form provided by Create and as permitted by the functionalities provided by Create therein.
- 2.2. Create Ownership.** All rights and title in and to the Platform, the Services, Usage Data, Aggregate Data (defined below), Create Materials and Documentation, including all enhancements, derivatives, and improvements to the foregoing and all Intellectual Property Rights inherent therein, belong exclusively to Create and its licensors. No rights are granted to Customer other than as expressly set forth in this Agreement.

**2.3. Connected Applications.** The Platform may contain features designed to interoperate with Connected Applications. To use such features, Customer or its Users may be required to obtain access to such Connected Applications from their providers, and grant Create access to Customer's or its Users' account(s) on such Connected Applications. If Customer uses a Connected Application with the Services, Customer grants Create permission to allow the Connected Application and its provider to access Customer Data solely as required for the interoperation of that Connected Application with the Services. Any acquisition by Customer of Connected Applications, and any exchange of Customer Data between Customer and any Connected Application provider, product or service, is solely between Customer and the applicable Connected Application provider. Create does not warrant or support Connected Applications. Create is not responsible for any disclosure, modification or deletion of Customer Data resulting from access by any Connected Application or its provider. Customer is solely responsible for ensuring that it has all necessary licenses and rights to use the Connected Application for the purposes contemplated herein.

### 3. CUSTOMER DATA

**3.1. Customer Ownership.** Except for the limited rights expressly granted to Create hereunder, Customer retains all rights, title and interest in and to all Customer Data, including without limitation all related intellectual property rights inherent therein. Customer is solely responsible for the accuracy, quality, legality, reliability, and appropriateness of all Customer Data. Customer shall ensure that it is entitled to transfer the relevant Customer Data to Create so that Create and its service providers may lawfully use, process, and transfer the Customer Data in accordance with this Agreement on Customer's behalf.

**3.2. Authorization.** Customer grants Create a nonexclusive, worldwide, royalty-free right to reproduce, display, adapt, modify, transmit, distribute and otherwise use the Customer Data (a) to maintain, provide, and improve the Services under this Agreement; (b) to prevent or address technical or security issues and resolve support requests; (c) at Customer's direction or request, including processing initiated by Users through their use of the Platform; and (d) as otherwise required by applicable law. No rights to the Customer Data are granted to Create hereunder other than as expressly set forth in this Agreement.

**3.3. Aggregate Data.** Create may use Customer Data to create aggregated data sets in a manner that does not permit identification of Customer, its customers, or its Users (collectively, the "Aggregate Data"). Create may use Aggregate Data for Create's lawful business purposes, including to improve, provide, and enhance the Platform and Services and for other development, diagnostic, and corrective purposes in connection with the Platform and Services and any other Create offerings.

**3.4. Security.** Create shall use commercially reasonable measures to maintain the security and integrity of the Services and the Customer Data and to provide technical and organizational safeguards against accidental, unlawful or unauthorized access to or use of, destruction, transfer, disclosure or alteration of Customer Data.

**3.5. Excluded Data.** Customer shall not provide Create with any Customer Data that constitutes personally identifiable information or is subject to heightened security requirements by law or regulation or contract.

### 4. RESTRICTIONS, RESPONSIBILITIES AND RIGHTS

**4.1. Customer Restrictions.** Customer shall not (and will not allow any third party to): (i) modify, copy, display, republish or create derivative works based on the Services or Create Materials; (ii) act as a reseller or distributor of, or a service bureau for, the Platform or Services or otherwise use, exploit, make available or encumber the Platform or Services to or for the benefit of any

third party; (iii) access or use the Platform or Services without the prior written consent of Create if Customer is or becomes a direct competitor to Create or its affiliates; (iv) share access, use, or information about the Platform or Services with a direct competitor of Create (v) disassemble, decompile, reverse engineer, make error corrections to the Services or Platform, or otherwise attempt to derive the structure, sequence or organization of source code, except as permitted by applicable law to achieve interoperability of the Services or Platform with the operation of other software or systems used by Customer; (vi) access the Services in order to build a competitive product or service, or copy any ideas, features, functions or graphics of the Services; (vii) use the Services to send spam or otherwise duplicative or unsolicited messages in violation of applicable laws; (viii) use the Services to post or send infringing, obscene, threatening, libelous, or otherwise unlawful material; (ix) use the Services to access blocked services in violation of applicable laws; (x) upload to the Services or use the Services to send or store viruses, worms, time bombs, Trojan horses or other harmful or malicious code, files, scripts, agents or programs; (xi) use the Services to run automated queries to web sites; (xii) intentionally or unintentionally interfere with or disrupt the integrity or performance of the Services or the data contained therein; (xiii) attempt to gain, or permit or allow, unauthorized access to the Services or its related systems or networks by Customer or an unauthorized third party; (xiv) remove or alter any trademark, logo, copyright or other proprietary notices, legends, symbols or labels in the Services; (xv) without the express prior written consent of Create, conduct any benchmarking or comparative study or analysis involving the Services for any reason or purpose except, to the limited extent absolutely necessary, to determine the suitability of the Services to interoperate with Customer's internal systems; (xvi) incorporate or merge the Create Materials into another software product, or otherwise access or use the Create Materials and/or Documentation to create, modify or enhance any software or competing service; (xvii) combine or use the Services or Platform with any third party hardware, networks, code, data, or services that infringes any third party right; or (xviii) permit any third party to do any of the foregoing. In addition, Customer agrees that it shall (a) only permit access to the Services by Users; and (b) not access or use the Services from an embargoed nation or any other country/region that becomes an embargoed nation, in violation of applicable export compliance laws.

#### **4.2. Customer Responsibilities.**

- 4.2.1. Customer agrees and understands that (i) it is responsible for all activity of Users and for Users' compliance with this Agreement; (ii) it shall: (a) have sole responsibility for the accuracy, quality, integrity, legality, reliability and appropriateness of all Customer Data; (b) prevent unauthorized access to, or use of, the Services, and notify Create promptly of any such unauthorized access or use; (c) comply with all applicable laws in using the Services; and (d) keep the Services, Create Materials, Create Tools (defined below), and Documentation confidential in accordance with Section 7. The Services shall not include Customer's access connection to the Internet or any equipment necessary for Customer to make such connection, which shall be Customer's sole responsibility. Customer shall be responsible for supplying Create with any technical data and other information Create may reasonably request to allow Create to provide the Services to Customer. Customer represents that it has obtained all consents necessary for Customer and Users to use the Services.
- 4.2.2. Customer shall provide Create with complete and accurate account, billing and payment information and keep such information up to date during the Term. Customer agrees not to provide any person or entity with access to the Services using Customer's user name,

password or other security information except as permitted under this Agreement and shall prevent Users from sharing their Create account access or login information with any other party, including any other Customer employee or third-party contractor. Customer is responsible for maintaining the security and confidentiality of all passwords associated with Customer's account. If Customer becomes aware of any unauthorized or illegal use of Customer's account, Customer shall immediately notify Create.

#### **4.3. Create Rights.**

4.3.1. Create reserves the right to suspend Customer's access to the Services in the event (a) Create believes Customer's use of the Services represents an imminent threat to Create's users, network, Services, or Platform, (b) of Customer's breach or violation of any laws or regulations applicable to Customer's use of the Platform or Services or Customer's uncured material breach of the Agreement, or (c) if so directed by a court or competent authority. In such cases, Create will (i) suspend such the Services only to the extent reasonably necessary to prevent harm to Create's users, network, Services, or Platform; (ii) use its best efforts to promptly contact Customer and give Customer the opportunity to change the configuration of its server(s) accordingly and/or work with Customer to resolve the issues causing the suspension of such the Services; and (iii) reinstate any suspended the Services promptly after the issue is abated. Without limiting the foregoing, Create reserves the right to manage bandwidth or route traffic across the Internet in a commercially optimal way, provided such actions do not compromise Create's obligations regarding the Customer Data.

4.3.2. Create shall have the right to (i) remove or limit distribution of Customer Data that Create deems reasonably necessary or appropriate if Create concludes that any Customer Data violates this Agreement, infringes any intellectual property right or other right of any person or entity, threatens the personal safety of any individual or could create any liability for Create; (ii) take appropriate legal action, including without limitation, referral to law enforcement, for any illegal use of the Services; and (iii) terminate or suspend Customer's access to all or part of the Services for any violation of this Agreement. Notwithstanding the foregoing, Create is not obligated to review Customer Data before it is posted via the Services, and Create cannot ensure prompt removal of objectionable Customer Data after it has been posted. Accordingly, Create assumes no liability for any action or inaction regarding transmissions, communications or content provided by any Customer User or third party. Create disclaims all liability or responsibility for exercise or nonexercise of its rights under this Section 4.3.2.

4.3.3. Create shall have the right to (i) use or act upon any suggestions, ideas, enhancement requests, feedback, recommendations or other information provided by Customer relating to the Services; (ii) utilize all other information provided by Customer (including Customer Data) relating to the Services to the extent necessary to comply with any legal requirements or contractual obligations; and (iii) utilize anonymized and/or aggregated data to protect and improve the Services, provided that Customer's and Users' identity may not be derived from such data. The foregoing shall in no way limit Create's confidentiality obligations set forth in this Agreement.

**4.4. THIRD-PARTY MATERIALS; THIRD-PARTY PROVIDER(S).** Customer acknowledges that the Services, or Platform, may include Third Party Materials originating from or belonging to third parties ("Third-Party Providers") that Create may use in order to provide the Services or Platform to Customer. Customer consents to Create's use of Third-Party Materials and Third-Party Providers in order to provide the Services. Create has no control over such Third

Party Materials or the content, information, goods, or services available in these Third Party Materials. If applicable, Customer should review the applicable terms and policies, including privacy and data gathering practices, of any site to which you navigate from the Platform or relating to any applications Customer uses or installs from the Platform. Create represents that these Third-Party Materials will not materially diminish the license rights provided herein or materially limit Customer's ability to use the Services in accordance with the applicable Documentation, and the use or inclusion of Third-Party Materials in the Services will not create any obligation on the part of Customer to license Customer's proprietary software or products under any open source or similar license.

**4.4.1. Artificial Intelligence Tools.** Subject to this Agreement, Create makes available to Customer certain artificial intelligence tools in connection with Customer's use of the Platform or Services (collectively, the "**Create Tools**"). Except where expressly specified otherwise in this Agreement, the Create Tools constitute "Services" for the purposes of the Agreement and the Agreement shall apply in full to Customer's use of the Create Tools. The Create Tools leverage third party large language models and artificial intelligence algorithms and platforms ("**Third-Party Services**") to generate suggested software code through the Platform (collectively, the "**Output**") in response to the Customer's prompts ("**Prompts**"). Create does not make any representations with respect to Third-Party Services or any Output provided in connection therewith. Such Third-Party Services are not under the control of Create and do not form part of the Platform. Create is not responsible for any Third-Party Services or Output generated thereby and Customer uses such Third-Party Services and Output at its own risk. By accessing and using the Services, Customer agrees to be bound by OpenAI's Terms of Use (currently accessible at <https://openai.com/policies/terms-of-use>) and its Privacy Policy (currently accessible at <https://openai.com/policies/privacy-policy>), and hereby consent and authorize Create to share any information you provide it with one or more Third-Party Services to the minimum extent required to complete your request.

**4.4.2. Ownership of Output.** As between the parties, each of the Prompts and Output are considered "Customer Data" for the purposes of the Agreement. Customer is the owner of Customer Data, and Create hereby assigns to customer all right, title and interest it may have, if any, in and to any Output. Customer acknowledges and agrees that: (i) such Prompts may be provided to Third-Party Services in order for Customer to access the Create Tools, and such Third-Party Services may not be required to maintain the confidentiality of any Prompts or Output; and (ii) such Third-Party Services may retain certain rights to use or disclose the Prompts and Output, including to further train their algorithmic models, in the terms and conditions or policies governing the Third-Party Services ("**Third-Party Terms**").

**4.4.3. Responsible Use of Create Tools.** Customer shall comply with all obligations and commitments in the Agreement with respect to Customer Data in connection with Customer's use of the Create Tools. Customer is solely responsible for the Prompts, its Outputs and its use thereof. Without limiting the disclaimers in Section 6 below, Customer is responsible for reviewing any Output prior to its use and exercising its own business and legal judgment as to its suitability for use. Without limiting the foregoing and Customer's representations and warranties under the Agreement, Customer shall not use any Prompts or Output that: (a) infringe or misappropriates any third party's intellectual property rights or other proprietary rights; (b) are deceptive, discriminatory, biased, unethical, defamatory, obscene, pornographic or illegal; (c) contain any viruses, worms or other malicious

computer programming codes that may damage the Platform; (d) contain any personal information, such as financial, medical or other sensitive personal information such as government IDs, passport numbers or social security numbers; or (e) violates Third-Party Terms. Create reserves the right to suspend or terminate your access to the Create Tools for any failure by Customer or an authorized User to comply with this Section. In addition to the foregoing, Customer's obligations under the Agreement with respect to use of the Services, its representations and warranties and indemnification obligations, shall apply in full with respect to Customer's use of the Create Tools. Customer acknowledges and agrees that, notwithstanding the automated suggestions provided by the Create Tools, it remains solely responsible for the content, legality, accuracy, and completeness of the Outputs, and any use thereof.

4.4.4. THE CREATE TOOLS ARE INTENDED AS OUTPUT GENERATION TOOLS ONLY AND CREATE MAKES NO WARRANTY OR GUARANTY THAT THE OUTPUT WILL PROVIDE ACCURATE, TAILORED OR INFORMATIVE RESULTS OR BE FIT FOR THE PARTICULAR PURPOSE OR USE CASE. CREATE DOES NOT REPRESENT OR WARRANT THAT THE INPUT OR OUTPUT ARE PROTECTABLE BY ANY INTELLECTUAL PROPERTY RIGHTS, OR THAT THE OUTPUT DOES NOT INCORPORATE, INFRINGE OR MISAPPROPRIATE THE INTELLECTUAL PROPERTY OR PROPRIETARY RIGHTS OF ANY THIRD PARTY. CUSTOMER ACKNOWLEDGES THAT THE CREATE TOOLS LEVERAGE THIRD-PARTY SERVICES AND THAT CREATE IS NOT LIABLE, AND CUSTOMER AGREES NOT TO SEEK TO HOLD CREATE LIABLE, FOR THIRD-PARTY SERVICES, AND THAT THE RISK OF INJURY FROM SUCH THIRD-PARTY SERVICES RESTS ENTIRELY WITH CUSTOMER. CUSTOMER SHALL BE SOLELY RESPONSIBLE FOR CUSTOMER'S USE OF THE CREATE TOOLS AND ANY OUTPUT RESULTING THEREFROM. CUSTOMER SHOULD EVALUATE THE FITNESS OF ANY OUTPUT AS APPROPRIATE FOR CUSTOMER'S SPECIFIC USE CASE.

## 5. FEES; PAYMENT TERMS

**5.1. Fees.** Customer shall pay Create the applicable Fees for its Service Plan(s) and any undisputed Fees set forth in an Order Form in accordance with this Section. Customer agrees and understands that if Customer does not pay Create the undisputed Fees due for the Services within the agreed time period, Create reserves the right to suspend Customer's access and use of the Services until such Fees are paid as provided in Section 5.4. If Customer reasonably and in good faith believes that Create has billed Customer incorrectly, and reasonably and in good faith disputes the Fees billed to Customer, then Customer must contact Create no later than thirty (30) days after the invoice date on the invoice in which the error or problem appeared, in order to receive an adjustment or credit (if applicable). All Fees are non-refundable and non-creditable, except as expressly set forth in this Agreement.

**5.2. Taxes.** All Fees and other amounts payable by Customer under this Agreement are exclusive of taxes and similar assessments. Customer is responsible for all sales, use and excise taxes, and any other similar taxes, duties and charges of any kind imposed by any federal, state or local governmental or regulatory authority on any amounts payable by Customer hereunder, other than any taxes imposed on Create's income.

**5.3. Payment.** Unless otherwise provided in an Order Form, Customer shall pay all Fees within thirty (30) days after the date of the invoice therefor. Customer shall make all payments hereunder in U.S. dollars. Customer shall make payments to the account specified in the applicable Order Form or such other account as Create may specify in writing from time to time. If Customer is paying Fees using a credit card or any digital payment method supported by Create, Customer authorizes Create to charge Customer's account for the Services using that payment method. Customer must keep all information in its billing account current to ensure that all Fees are

charged to the appropriate account and are timely paid. If Customer notifies Create to stop using a previously designated payment method and fails to designate an alternative, Create may immediately suspend use and access to the Services. Any notice from Customer changing its billing account will not affect charges Create submits to Customer's billing account before Create reasonably can act on Customer's request. Create may use a third-party intermediary to manage credit card processing, and this intermediary is not permitted to use Customer's credit card information except in connection with Customer's authorized purchases. Notice (including email) from Create's third-party credit card processor declining Customer's credit card or otherwise relating to Customer's account will be deemed valid notice from Create.

**5.4. Late Payment.** If Customer fails to make any payment when due then, in addition to all other remedies that may be available, Create may charge interest on the past due amount at the rate of 1.5% per month calculated daily and compounded monthly or, if lower, the highest rate permitted under applicable law. If such failure continues for five (5) days following written notice thereof, Create may suspend performance of the Services until all past due amounts and interest thereon have been paid, without incurring any obligation or liability to Customer by reason of such suspension.

## 6. WARRANTIES

**6.1. Mutual Warranty.** Each party represents and warrants that it has the legal power and authority to enter into this Agreement.

**6.2. Disclaimer of Warranties.** EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH HEREIN, (A) ALL SERVICES ARE PROVIDED ON AN "AS IS" BASIS WITHOUT ANY WARRANTY WHATSOEVER; (B) CREATE EXPRESSLY DISCLAIMS, TO THE MAXIMUM EXTENT PERMISSIBLE UNDER APPLICABLE LAW, ALL WARRANTIES, EXPRESS, IMPLIED AND STATUTORY, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, ACCURACY, NONINFRINGEMENT, OR ARISING FROM COURSE OF PERFORMANCE, DEALING, USAGE OR TRADE; AND (C) CREATE MAKES NO WARRANTY REGARDING NON INTERRUPTION OF USE OR FREEDOM FROM BUGS, AND MAKES NO WARRANTY THAT SERVICES WILL BE ERROR-FREE.

**6.3. Beta Services.** Customer may choose to use Beta Services in its sole discretion. Notwithstanding anything to the contrary in this Agreement or otherwise: (a) Beta Services may not be supported and may be changed or terminated at any time without notice; (b) Beta Services may not be as reliable or available as the Services; (c) Beta Services have not been subjected to the same security requirements, measures, and auditing as the Services; (d) Beta Services constitute Create's Confidential Information; and (e) BETA SERVICES ARE PROVIDED "AS IS" WITHOUT ANY WARRANTY, INDEMNITY OR SUPPORT AND CREATE'S LIABILITY FOR BETA SERVICES WILL NOT EXCEED FIFTY DOLLARS (US \$50).

## 7. CONFIDENTIAL INFORMATION

**7.1. Definition of Confidential Information.** As used herein, "Confidential Information" means all confidential and proprietary information of a party ("**Disclosing Party**") disclosed to the other party ("**Receiving Party**"), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information or the circumstances of disclosure, including the terms and conditions of this Agreement (including pricing and other terms reflected in the Order Form hereunder), the Customer Data, the Create Materials, Create Tools, the Platform, Services, Documentation, and each party's respective business and marketing plans, technology and technical information, product designs, and business processes. The obligations in this Section shall not apply to any information that: (i) is or becomes generally known to the public without breach of any obligation owed to the



Disclosing Party; (ii) was known to the Receiving Party prior to its disclosure by the Disclosing Party without an obligation of confidentiality; (iii) was independently developed by the Receiving Party without the use of or reference to the Confidential Information of the Disclosing Party; or (iv) is lawfully received from a third party without breach of any obligation owed to the Disclosing Party and without an obligation of confidentiality.

**7.2. Confidentiality.** The Receiving Party shall not disclose or use any Confidential Information of the Disclosing Party for any purpose outside the scope of this Agreement, except with the Disclosing Party's prior written permission. Either party may disclose Confidential Information to its personnel and agents who are subject to confidentiality obligations at least as restrictive as those of this Agreement. Receiving Party will use at least the same level of care to prevent unauthorized use of the Confidential Information as it uses for its own confidential and proprietary information of like kind, but in no event less than a reasonable standard of care.

**7.3. Compelled Disclosure.** If the Receiving Party is compelled by law to disclose Confidential Information of the Disclosing Party, it shall provide the Disclosing Party with prior notice of such compelled disclosure, to the extent legally permitted, and reasonable assistance, at Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure.

**7.4. Remedies.** If the Receiving Party breaches this Section, the Disclosing Party shall have the right, in addition to any other remedies available to it, to seek injunctive relief to enjoin such acts.

## 8. TERM AND TERMINATION

**8.1. Agreement Term.** The term of this Agreement shall commence on the Effective Date and continue until all Order Forms entered into hereunder have expired or have been terminated. Unless otherwise set forth in the applicable Order Form, this Agreement and any Order Forms will automatically renew for successive periods of one (1) year, unless either party provides written notice of non-renewal to the other party at least thirty (30) days prior to the end of the then-current term. Unless otherwise provided for in the applicable Order Form, Company reserves the right to increase fees for any renewal terms upon prior advance notice to Customer.

**8.2. Termination for Material Breach.** Either party may terminate this Agreement (i) if the other party materially breaches any terms and conditions of this Agreement and does not cure such breach within thirty (30) days of receiving notice of such breach; or (ii) if the other party becomes the subject of a petition in bankruptcy or any proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors. Notwithstanding the foregoing, this Agreement and any Order Form shall terminate automatically in the event Customer has breached any license restriction set forth in Section 4.1 and, in Create's determination, that breach cannot be adequately cured. If Customer terminates this Agreement for Create's uncured material breach, Create will refund Customer, on a prorated basis, any pre-paid Fees for any Services not received.

**8.3. Effect of Termination.** Upon expiration or termination of this Agreement for any reason, the rights and licenses granted to Customer shall terminate immediately. The following provisions shall survive the termination of this Agreement and all Order Forms: Section 1 (Definitions), Section 2.2 (Create Ownership), Section 3.1 (Customer Ownership), Section 4 (Restrictions, Responsibilities and Rights), Section 5 (Fees; Payment Terms), Section 6.4 (Beta Services), Section 6.3 (Disclaimer of Warranties), Section 7 (Confidential Information), Section 8.3 (Effect of Termination), Section 9 (Indemnity), Section 10 (Limitation of Liability), and Section 11 (General Provisions). Upon termination, Customer may delete Customer's account and all Customer Data from the Services, and Create will permanently delete such data from Create's

systems upon prior written request. If Customer fails to delete its account after termination, Customer's account will turn into a free account.

## 9. INDEMNITY

**9.1. Customer Indemnity.** Create will indemnify and hold Customer harmless from and against any third-party claim against Customer alleging that Customer's use of the Services as permitted hereunder infringe or misappropriate a third party's valid U.S. patent, copyright, trademark or trade secret. Create shall, at its expense, defend such claim and pay damages finally awarded against Customer in connection therewith, including the reasonable fees and expenses of the attorneys engaged by Create for such defense. If the Services, or parts thereof, become, or in Create's opinion may become, the subject of an infringement claim, Create may, at its option: (a) procure for Customer the right to continue using the Services as set forth herein; (b) replace or modify the Services to make it non-infringing; or (c) if options (a) or (b) are not commercially and reasonably practicable as determined by Create, terminate this Agreement and refund Customer, on a pro-rated basis, any pre-paid Fees for any Services not received. This Section 9.1 states Create's entire liability and Customer's sole remedy with respect to any infringement of intellectual property rights by the Services or Create Materials.

**9.2. Exceptions.** Create will have no liability or obligation under this Section with respect to any claim if such claim is caused in whole or in part by (i) compliance with designs, data, instructions or specifications provided by Customer; (ii) modification of the Services by anyone other than Create or its authorized agents; (iii) the combination, operation, or use of the Services with other hardware or software not provided by Create or its authorized agents where the Services would not by itself be infringing; (iv) continued use of the allegedly infringing Service after being provided non-infringing alternative or after Create has terminated the Agreement in accordance with Section 9.1 above; or (v) any breach of Customer's obligations under this Agreement.

**9.3. Create Indemnity.** Customer will indemnify and hold Create harmless from and against any third-party claim against Create that is subject to Section 9.2 above or arising from or related to (i) Customer's violation of Section 4.1 of this Agreement or (ii) any Customer Data, Prompts or Output.

**9.4. Process.** The indemnification obligations in this Section shall be subject to the indemnified party: (i) promptly notifying the indemnifying party in writing upon receiving notice of any threat or claim of such action; (ii) giving the indemnifying party exclusive control and authority over the defense and/or settlement of such claim (provided any such settlement unconditionally releases the indemnified party of all liability); and (iii) providing reasonable assistance requested by the indemnifying party, at the indemnifying party's expense.

## 10. LIMITATION OF LIABILITY

**10.1. Waiver of Consequential Damages.** TO THE EXTENT NOT PROHIBITED BY LAW, EXCEPT FOR CUSTOMER'S LIABILITY ARISING UNDER OR IN CONNECTION WITH SECTIONS 4 AND CUSTOMER'S PAYMENT OBLIGATIONS UNDER SECTION 5, IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, OR EXEMPLARY DAMAGES OF ANY KIND, INCLUDING BUT NOT LIMITED TO ANY LOST PROFITS AND LOST SAVINGS, HOWEVER CAUSED, WHETHER FOR BREACH OR REPUDIATION OF CONTRACT, TORT, BREACH OF WARRANTY, NEGLIGENCE, OR OTHERWISE, WHETHER OR NOT SUCH PARTY WAS ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGES.

**10.2. Limitation of Monetary Damages.** TO THE EXTENT NOT PROHIBITED BY LAW, EXCEPT FOR CUSTOMER'S LIABILITY ARISING UNDER OR IN CONNECTION WITH SECTIONS 4 AND CUSTOMER'S PAYMENT OBLIGATIONS UNDER SECTION 5, EACH PARTY'S TOTAL LIABILITY ARISING OUT OF THIS AGREEMENT AND ANY ORDER FORM SHALL BE LIMITED TO THE TOTAL

AMOUNTS PAID TO CREATE UNDER THE APPLICABLE ORDER FORM DURING THE SIX (6) MONTHS IMMEDIATELY PRECEDING THE FIRST OCCURRENCE OF THE EVENT(S) GIVING RISE TO SUCH LIABILITY.

**10.3. Applicability.** THE LIMITATIONS AND EXCLUSIONS CONTAINED HEREIN DO NOT APPLY TO (A) CUSTOMER'S BREACH OF ITS OBLIGATIONS UNDER SECTION 4.1, AND (B) CUSTOMER'S PAYMENT OBLIGATIONS AS SET FORTH IN SECTION 5, AND WILL APPLY ONLY TO THE MAXIMUM EXTENT PERMISSIBLE UNDER APPLICABLE LAW. NOTHING HEREIN PURPORTS TO LIMIT EITHER PARTY'S LIABILITY IN A MANNER THAT WOULD BE UNENFORCEABLE OR VOID AS AGAINST PUBLIC POLICY IN THE APPLICABLE JURISDICTION.

## 11. GENERAL PROVISIONS

**11.1. Relationship of the Parties.** The parties are independent contractors. This Agreement does not create a partnership, franchise, joint venture, agency, fiduciary, or employment relationship between the parties.

**11.2. Notices.** Create may give general notices related to the Services that are applicable to all customers by email or through the Platform. All other notices required to be sent hereunder will be in writing and will be effective upon (i) personal delivery, or (ii) the second business day after mailing, in each case addressed as follows: if to Create at 629 Dolores St, San Francisco, CA 94110 to the attention of Legal Department with copy to [legal@create.xyz](mailto:legal@create.xyz), and, if to Customer, to Customer's address on record in Create's account information, or to such other address or individual as the parties may specify from time to time by written notice to the other party.

**11.3. Waiver and Cumulative Remedies.** No failure or delay by either party in exercising any right under this Agreement shall constitute a waiver of that right. Other than as expressly stated herein, the remedies provided herein are in addition to, and not exclusive of, any other remedies of a party at law or in equity.

**11.4. Severability.** If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, the provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement shall remain in full force and effect.

**11.5. Assignment.** Neither party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the prior written consent of the other party (not to be unreasonably withheld). Notwithstanding the foregoing, either party may assign this Agreement in its entirety (including any Order Forms), without the consent of the other party, to (i) an Affiliate; or (ii) in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets. Any attempt by a party to assign its rights or obligations under this Agreement in breach of this Section shall be void and of no effect. Subject to the foregoing, this Agreement shall bind and inure to the benefit of the parties, their respective successors and permitted assigns.

**11.6. Subcontractors.** Create may use, and Customer hereby consents to the use of, third-party subcontractors who are subject to contractual obligations no less protective than those of this Agreement, as applicable. Create will remain responsible for their acts, omissions, and any subcontracted obligations.

**11.7. Publicity.** Create may include Customer's name and logo on its website or in other marketing materials or channels solely to reference Customer as Create customer, and subject to any trademark usage instructions provided to Create.

**11.8. Governing Law.** This Agreement and any disputes arising out of or related hereto shall be governed by and construed in accordance with the laws of the State of California, without giving effect to its conflicts of laws rules, the United Nations Convention on the International Sale of

Goods, or the Uniform Computer Information Transactions Act. Any legal suit, action or proceeding arising out of or related to this Agreement or the Services shall be instituted exclusively in the federal courts of the United States or the courts of the State of California, in each case located in the city of San Francisco, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding.

- 11.9. Force Majeure.** Except for payment obligations, neither party shall be liable for delay or non-performance of its obligations hereunder (or part thereof) if the cause of delay or non-performance is due to a Force Majeure Event. The party affected shall be relieved from its obligations (or part thereof) as long as the Force Majeure Event lasts and hinders the performance of said obligations (or part thereof). The party affected shall promptly notify the other party and make reasonable efforts to mitigate the effects of the Force Majeure Event.
- 11.10. No Third Party Beneficiaries.** The parties acknowledge that the covenants set forth in this Agreement are intended solely for the benefit of the parties, their successors and permitted assigns. Nothing herein, whether express or implied, will confer upon any person or entity, other than the parties, their successors and permitted assigns, any legal or equitable right whatsoever to enforce any provision of this Agreement.
- 11.11. Export Control.** The Services, Create technology and derivatives thereof may be subject to export laws and regulations of the United States and other jurisdictions. Each party represents that it is not named on any U.S. government denied-party list. Customer shall not, and shall not permit Users to, access or use the Services in violation of any U.S. export law or regulation.
- 11.12. Entire Agreement.** This Agreement, including all exhibits and addenda hereto and all Order Forms and SOWs, sets forth the entire agreement of the parties and supersedes and replaces all prior or contemporaneous writings, negotiations and discussions, whether written or oral, with respect to its subject matter. Neither party has relied upon any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except for the representations and warranties set forth in this Agreement. Create reserves the right to modify the terms and conditions of this Agreement, at its sole discretion, effective upon the commencement of any renewal subscription term. You are responsible for regularly reviewing this Agreement for updates. CONTINUED USE OF THE SERVICES AFTER ANY SUCH CHANGES SHALL CONSTITUTE YOUR CONSENT TO SUCH CHANGES. If Create modifies this Agreement during Customer's subscription term, and Customer objects to the updated agreement, as Customer's exclusive remedy, Customer may choose to terminate this Agreement prior to the next renewal term and cease using the Services. Notwithstanding any language to the contrary therein, no terms or conditions set forth on any Customer purchase order or in any other Customer order documentation shall be incorporated into or form any part of this Agreement, and all such terms or conditions shall be null and void.