

## WHOLESALE TERMS OF USE

### 1. AGREEMENT

- 1.1. Your Agreement with Modica is made up of your Schedule together with these Terms of Use.
- 1.2. The Privacy Policy, the Acceptable Use Policy and the Schedule shall be read in conjunction with and shall form part of these Terms of Use.

### 2. SERVICES

- 2.1. The Client has appointed Modica and Modica has agreed to provide certain Services to you on the terms of your Agreement.
- 2.2. From time to time the Parties may mutually agree to add or remove a Service to or from your Agreement by way of a variation to your Schedule.

### 3. CLIENT OBLIGATIONS

- 3.1. You must provide us with information and Subscription Data that is sufficient in order for us to comply with our obligations under your Agreement and you warrant to us that such information is true, accurate, current and complete.
- 3.2. If you fail to comply with Clause 3.1 we have the right to suspend or terminate your account and refuse any and all current or future use of the Services (or any portion thereof), including any transition rights.
- 3.3. You may be issued with usernames or account designations and passwords upon completing the Service subscription process. You are responsible for maintaining their confidentiality, and for all activities that occur under your password or account. You agree to (a) immediately notify Modica of any unauthorised use of your password or account or any other breach of security, and (if applicable) (b) exit from your account at the end of each session.
- 3.4. You shall obtain at your own cost, any third party licences or authorisations required to enable us to use your Existing Material for the purposes specified under your Agreement.
- 3.5. You must comply with all provisions of our acceptable use policy as published at <https://confluence.modicagroup.com/display/SC/AUP+-+English> relating to the Service and Content, and as may be amended by us from time to time such amendments to be in accordance with the provisions of Clause 10.7 of these Terms of Use.
- 3.6. You are solely responsible for ensuring at all times that you: (a) comply with Applicable Law in the countries of operation and, if requested by Modica, provide evidence reasonably satisfactory to Modica of such compliance; (b) do not use the Services in a manner so as to cause Modica to breach applicable laws or policies; (c) do not do anything which may damage, interfere with, disrupt, disparage or bring into disrepute Modica or any Mobile Network Provider or any of their respective systems or networks.

- 3.7. You acknowledge and agree that Modica may use third parties (for example Mobile Network Providers) for the provision of the Services and that Modica shall have no responsibility or liability for the acts or omissions of such third parties.
- 3.8. You acknowledge and agree that a Mobile Network Provider may place a bar on a Customer's mobile device that prevents that Customer from using Services. When these circumstances apply, you will still be charged for undelivered SMS messages.
- 3.9. You acknowledge and agree that the scope of the Services may be amended by Modica from time to time in order to comply with applicable Laws and Policies and that you will comply with all reasonable requests of Modica with respect to the manner in which you use the Services in order to comply with applicable laws and policies. However, you acknowledge that, despite this term, Modica has no obligation to monitor such compliance.
- 3.10. Modica and its Suppliers will not be liable for any breach of your Agreement with Modica, or any loss, damage or claim, to the extent it arises from your failure to comply with the provisions of this Clause 3.
- 3.11. The Client indemnifies Modica from and against all liabilities, damages, losses, costs and expenses (including legal expenses) arising from or related to any claim by a third party (including a claim by a Mobile Network Provider) that arises from or relates to any breach of your Agreement or any Applicable Law in using the Service.
- 3.12. Modica acknowledges and agrees that the Client is in the business of SMS Messages aggregation and, as such, is a conduit for distribution and publication of content. The Client is only responsible for the provision of Its content and distribution to the extent required by Applicable Laws. The Client shall ensure that its contract with direct third party clients (the Client Customers) contain provisions stating that the Client Customers are responsible for complying with applicable law in the provision and distribution of the content.

#### **4. PAYMENT**

- 4.1. The Fees for the Services and the manner of payment will be as described in the Schedule. Payment is to take place at the latest by the 20th day of the month for which the invoice was issued. All Fees are listed exclusive of applicable taxes.
- 4.2. You must pay all applicable taxes, duties, imposts, levies or government charges relating to the supply of the Services under your Agreement.
- 4.3. If Fees have not been paid as required in the Schedule(s) (other than pursuant to a dispute under clause 4.4), Modica may, after giving the Client five days written notice, or such notice as is stated in the relevant Schedule(s), suspend all or part of the Services until the Fees are paid.
- 4.4. If you have a genuine dispute in relation to amounts we have charged you, you must pay the undisputed charges and notify us immediately you become aware of any disputed Fees. Both Parties will then follow the Dispute Resolution Procedure as defined in Clause 8 of these Terms of Use.
- 4.5. We may review the Fees for a Service by notice in writing to You. If you do not agree to pay any reviewed Fees, you may, within five (5) Days of receiving that written notification from us, notify us in writing that you do not accept the reviewed Fees for that Service and terminate that Service accordingly. If you do not terminate the affected Service and You continue to use the affected Services after five (5) Days from our initial notification, You agree that You are deemed to have consented to the reviewed Fees. Termination of a particular Service under this Clause shall not affect the provision of other Services.

- 4.6. Records held and logging procedures adopted by Us in relation to usage by or provision of Services to You are prima facie evidence that you have used or ordered that product or service as indicated.

## **5. INTELLECTUAL PROPERTY RIGHTS**

- 5.1. Client will be granted a Right to Use Modica's OMNI Platform which is delivered as a cloud based service. As such, no specific software is being licensed to Client and the Services are delivered as a Platform as a Service.
- 5.2. Permission to use any enhancements to the OMNI Platform, regardless of who asked for and paid for such enhancements, will be made available to OMNI Platform users at Modica's sole discretion for such period as those users are purchasing the right to use the Services. For the avoidance of doubt, at no time will any existing or new Intellectual Property Rights in the OMNI Platform vest in anyone other than Modica. The Client must not, nor may it permit any other person to:(a) copy, alter, modify, reproduce, reverse assemble, reverse compile or enhance any software or products provided or made available to the Client by Modica; (b) alter, remove or tamper with any trademarks, any patent or copyright notices, or any confidentiality, proprietary or trade secret legend or notice, or any numbers, or other means of identification used on or in relation to any component of the software or products provided or made available to the Client by Modica; (c) provide, or make available, any component of the Services or any software or products provided or made available to the Client by Modica to any third party except as expressly contemplated by these Terms of Use; or (d) do any act which would or might invalidate or be inconsistent with Modica's or its licensor's Intellectual Property Rights.
- 5.3. Each Party ("first party") indemnifies the other Party against all liability costs and expenses suffered or incurred by the other Party as a result of any claim or threatened claim that any Existing Material provided by the first party under the Agreement infringes the Intellectual Property Rights or other rights of any person. Each Party will promptly notify the other Party in writing upon becoming aware of any such claim or threatened claim. The first party will control the conduct of any such claim or threatened claim and all negotiations for its settlement or compromise. The first party will consult with the other Party and keep the other Party reasonably informed of such matters. The other Party will reasonably co-operate with the first party in defending or settling any claim or threatened claim under this clause 5.3.
- 5.4. No indemnity is given under clause 5.3 to the extent the claim or threatened claim arises as a result of material provided under a separate third party licence.

## **6. TERM AND TERMINATION**

- 6.1. Your Agreement shall come into effect on the Service Commencement Date and shall remain in force until the expiry or termination of all Services.
- 6.2. Either Party may terminate the Agreement immediately by notice in writing to the other Party: (a) if the other Party commits any material breach of the Agreement that is incapable of remedy; (b) if the other Party fails to remedy any material breach of the Agreement that is capable of remedy within 30 days of receipt of notice of that breach from the non breaching Party; (c) on the commencement of liquidation or the insolvency of the other Party(except for the purposes of solvent amalgamation or reconstruction) or on the appointment of a receiver, statutory manager or trustee of the other Party's property or up on an assignment for the benefit of the other Party's creditors or on execution being levied against the other Party or on the other Party compounding with its creditors or being unable to pay its debts in the ordinary course of business; or (d) in the event that Force Majeure prevents the ability of a Party to comply with its obligations under the Agreement.
- 6.3. Modica may at its option terminate or suspend the Agreement or any individual Service (a) where the Client is in persistent breach of the Agreement, (b) if any of Modica's Mobile Network Providers or any third party terminates or suspends the provision of any services to Modica for any reason, (c) if a

Mobile Network Provider does not accept a specific Service in relation to the Client, (d) if otherwise required to do so by any Mobile Network Provider or any government, law enforcement or other authority, (e) in the event Modica is no longer delivering any Services (or the relevant Service being terminated, as applicable) to you for whatever reason, or (f) with ten Days' notice in writing after suspension of Services in accordance with Clause 4.3 of these Terms of Use.

- 6.4. On termination of the Agreement: (a) the Client will immediately cease use of Modica's brand(s) and other Intellectual Property Rights; and (b) each Party will immediately destroy or return to the other all copies of any Confidential Information in written, electronic or any form made available by the other Party, and (on any such request being made) the returning Party will certify in a form acceptable to the requesting Party that the returning Party has complied with its obligations under this clause 6.4.
- 6.5. Termination of this Agreement does not affect clauses 3.11, 5, 6, 7, 8, 9.4-9.8 (inclusive), 10.14 (which will continue to operate along with any other clauses that by their nature are intended to survive termination) or any rights or remedies that have accrued before termination.

## **7. CONFIDENTIALITY**

- 7.1. Neither Party may disclose any Confidential Information of the other Party other than (a) to its directors, employees or permitted contractors (and then only to the extent necessary to enable that Party to perform its obligations under the Agreement); (b) with the express prior written consent of the other Party; and (c) to its professional advisers to the extent that such advisers need to know such Confidential Information for the purposes of providing advice.
- 7.2. Neither Party may advertise or publicly announce any matter relating to the existence or contents of the Agreement without the other Party's prior written consent.
- 7.3. Without in any way limiting its obligations under the Agreement, each Party will, and will procure that all of its staff and any contractors and employees, will comply with the New Zealand Privacy Act 2020 in all respects.

## **8. DISPUTE RESOLUTION**

- 8.1. If a Party considers that a dispute has arisen in connection with the Agreement or with the Services provided under the Agreement (Dispute), the disputing Party may give written notice to the other Party that a dispute has arisen (Dispute Notice).
- 8.2. If the Parties cannot resolve the Dispute within 10 Working Days of the Dispute Notice, then a Party may refer the Dispute to mediation by written notice to the other Party. Promptly following the notice of referral to mediation, the Parties shall attempt to agree the appointment of a mediator approved by the Resolution Institute and attempt to resolve the Dispute by mediation applying the then current Resolution Institute mediation terms or rules (as the case may be), subject to any variation agreed by the Parties. If the Parties are unable to agree on a mediator within 5 Working Days of the notice of referral to mediation, a mediator may be appointed by the Resolution Institute. The mediation will be discontinued if either Party gives an Arbitration Notice pursuant to clause 8.3 of these Terms of Use.
- 8.3. If the Parties have been unable to resolve the Dispute within 40 Working Days, or such further time as the Parties agree, of the date of the Dispute Notice, then either Party may refer the Dispute to arbitration by notice in writing to the other Party (Arbitration Notice).
- 8.4. The arbitration will be determined by a sole arbitrator (being a New Zealand resident) as soon as possible in New Zealand. If the Parties cannot agree on an arbitrator within five Working Days of the giving of the Arbitration Notice, the arbitrator will be appointed by the president of the New Zealand Law Society or his/her nominee. The arbitration will be conducted in accordance with the Arbitration Act 1996 (excluding clauses 4 and 5 of the Second Schedule to that Act). The award in the

arbitration will be final and binding.

- 8.5. Neither Party may resort to court proceedings (except where that Party seeks urgent interlocutory relief) unless a Dispute Notice has been given in relation to the relevant Dispute and it has taken all reasonable steps to comply with this clause 8.

## **9. WARRANTIES, LIABILITY AND INSURANCE**

- 9.1. We will utilise our reasonable efforts to maintain acceptable performance of the Services. However we do not guarantee the Service will be continuous or fault free.
- 9.2. We may, without liability to you, suspend the Service if we need to carry out any maintenance determined by us to be necessary from time to time. We will make all reasonable efforts to notify you in advance of any suspension of Service for reasons of maintenance.
- 9.3. We warrant as follows: (a) the Service will comply in all material respects with the service description on our website; and (b) all employees, personnel and contractors of Modica engaged in the performance of the Services will be appropriately qualified and experienced and will be suitable and capable of performing their obligations to the standard required under the Agreement. However, no breach of these warranties will be deemed to have occurred where the relevant breach has occurred as a result of the acts or omissions of you (or your employees, contractors, agents or representatives) or any third party, or as a result of any event of Force Majeure.
- 9.4. Except for any warranties, conditions or representations that are expressly set out in these Terms of Use, all warranties, representations or conditions (including without limitation, warranties as to fitness for purpose and merchantability), whether express or implied by statute, common law or otherwise, are excluded to the maximum extent permitted by law. Each Party's total liability to the other Party for damages in connection with one or more breaches of your Agreement, tortious or other action or contravention of any statute will not in any circumstances exceed in aggregate the total amount paid by you to us pursuant to your Agreement in the twelve month period preceding the date the claim is first filed against the non claiming Party.
- 9.5. Neither Party shall under any circumstances be liable for any loss of business, profit, revenue, goodwill, opportunity or anticipated profits or data or savings or any indirect, special or consequential loss or damage arising out of or in connection with this Agreement or your use of the Services.
- 9.6. The limitations and exclusions of liability in this clause 9 will apply however liability arises, whether in contract, tort, equity, breach of statutory duty or otherwise.
- 9.7. Neither Party will be responsible for any failure to perform its obligations under the Agreement to the extent that the failure is due to: (a) the other Party (and its employees and agents) failing to comply with its obligations under the Agreement (other than where the failure is itself caused by the first party) or (b) a Force Majeure event.
- 9.8. During the term of your Agreement and for three years afterwards, we will maintain insurance coverage in amounts and against risks that are normal for businesses similar to that of Modica including coverage against public liability, property damage, professional indemnity and product liability, in amounts of at least NZ\$2 million per claim. We will, upon request, provide to you a certificate from the insurer confirming the terms of such insurance.

## **10. GENERAL**

- 10.1 Force Majeure: Neither Party will be liable for any failure to perform its obligations under the Agreement during the time and to the extent that such failure is caused or contributed to by a Force Majeure event. The Party unable to fulfil its obligations due to a Force Majeure event will promptly notify the other in writing of the reasons for its failure to fulfil its obligations and the effect of such

failure, and use its reasonable endeavours to remedy or mitigate the effect of the Force Majeure event and perform its obligations as far as is reasonably practicable.

- 10.2 Order of precedence: Except to the extent expressly agreed otherwise, if there is any conflict between the parts of the Agreement then the following order of precedence will apply (with the part highest in precedence first): (a) Clauses 1 to 9 of these Terms of Use (b) the Schedule(s); (c) any appendices thereto.
- 10.3 Staff: Neither Party will offer employment to an employee of the other during the term of the Agreement or for six (6) months after the Agreement has ended without the prior written consent of the other Party.
- 10.4 Subcontracting: Either Party may subcontract any of its obligations under the Agreement only with written consent from the other Party (not to be unreasonably withheld). However, the Party subcontracting its obligations under the Agreement will remain responsible for the performance of those obligations under the Agreement.
- 10.5 Assignment: Either Party may assign or transfer any or all of its rights and obligations under the Agreement only with written consent from the other Party (not to be unreasonably withheld).
- 10.6 Entire Agreement: These Terms of Use together with your Schedule constitute the entire agreement between the Parties, superseding all proposals or prior agreements, oral or written and all other communications between the Parties, relating to the subject matter of the Agreement. This Agreement also prevails over, and is not modified by, any additional or different terms that the Client provides to Modica, including terms contained, or referred to in any purchase order or similar document.
- 10.7 Amendments: Modica reserves the right to modify clauses in these Terms of Use with thirty (30) Days' notice. Notice shall be in writing and by email and in accordance with Clause 10.11. If you do not agree to any amendment under this Clause you may, within thirty (30) Days of receiving that written notification from us, notify us in writing that you do not accept the amendments and terminate an affected Service in a Schedule and/or the Terms of Use (if applicable). If you do not notify us in writing that you do not accept the amendments after thirty (30) days from our initial notification, You agree that You are deemed to have consented to the amendment. Termination of a particular Service in a Schedule pursuant to this Clause shall not affect the provision of other Services.
- 10.8 Waiver: No exercise or failure to exercise or delay in exercising any right or remedy by a Party will constitute a waiver by that Party of that or any other right or remedy available to it.
- 10.9 Partial invalidity: If any provision of this Agreement or its application to either Party or circumstance is or becomes invalid or unenforceable to any extent, the remainder of the Agreement and its application will not be affected and will remain enforceable to the greatest extent permitted by law.
- 10.10 Relationships: Nothing in this Agreement creates or evidences any partnership, joint venture, agency or employer/employee relationship between the Parties.
- 10.11 Notices: Any notice or other communication in connection with the Agreement will be: (a) in writing; (b) and left at the address or sent by prepaid post or email to the relevant address of the relevant Party specified in your Schedule or any replacement address as updated on Modica's website. Notices or other communications are deemed received: if delivered by hand, on delivery; if delivered by post: (i) on the third Working Day following posting if sent and received within New Zealand; and (ii) on the tenth Working Day following posting to or from an overseas destination; and if delivered by email, on receipt of the email.
- 10.12 Governing law: The Agreement will be governed by and construed in accordance with the laws of New Zealand, and the Parties agree to submit to the non exclusive jurisdiction of the courts of New Zealand.

- 10.13 Third Party Beneficiaries: The Parties acknowledge and agree that the provisions of the Agreement that relate to Mobile Network Providers are for the benefit of, and enforceable by, those Mobile Network Providers under the Contract and Commercial Law Act 2017. To the extent permitted by the Contract and Commercial Law Act 2017 it shall not be necessary for the Parties to obtain the consent or Agreement of any Mobile Network Providers in order to amend the Agreement.
- 10.14 Privacy: All data held by us about you, including Subscription Data, is held in accordance with our Privacy Policy as per Clause 10 of the Schedule to the Terms of Use, and as may be amended by us from time to time such amendments to be notified to you accordingly.
- 10.15 Marketing: For the purpose of marketing and promoting the Services and or the Mobile Network Provider's networks, Modica and the Mobile Network Provider may, with the prior written consent of the Client use the Client's name, logos and any other marketing material commonly used by the Client.

## 11. DEFINITIONS

"Access Code" means a Short Code, or a combination of a keyword and a Short Code, used by the Customer to participate in a particular service or application provided under the Agreement.

"Advertising" means publication, in any form, which is intended to promote the Customers' use of the Services and includes any reference to an Access Code, Short Code or any other method of accessing Content or services.

"Agreement" means your Schedule together with the Terms of Use.

"Applicable Law" means any statute, statutory instrument, regulation, order and other legislative provision, including any delegated or subordinate legislation, or any code and any judgment of a relevant court of law or decision of a tribunal or competent authority, to the extent any of the foregoing applies to a Party's performance of obligations under this Agreement in the relevant jurisdiction.

"AUP" means our Acceptable Use Policy.

"Charge" means any amount chargeable by a Mobile Network Provider for delivering SMS or MMS messages, and mobile data.

"Confidential Information" means information which is or has been disclosed by one Party to the other which is marked as being confidential or which would reasonably be expected to be confidential and includes the existence and terms and conditions of the Agreement, but does not include information to the extent it is: a) in the public domain or which subsequently enters the public domain without any breach of the Agreement; (b) already known by The Party receiving it; (c) at any time after the date of receipt, received in good faith from a third party; (d) required by law to be disclosed to the person to whom it is disclosed; (e) received lawfully from any third parties not under any restrictive confidentiality obligations; and (f) can be proven (by reference to the relevant documentation and materials) to have been independently developed.

"Connection" means a connection to the Mobile Network Provider into or out of the Network.

"Content" means data or other information and includes all text, pictures, graphics, audio, video, images, other data, functionality, computer software and code provided by the Client for the use of the Customer.

"Customer" means a person who has a customer contract with a Mobile Network Provider and who is able to access Content by means of a mobile device.

"Customer Charged Content" means Content, the transport of which, is charged to the Customer.

“Existing Material” means all documentation, software and other materials used or incorporated in the Services that are owned by, or licensed to, either Party prior to the Service Commencement Date of the relevant Service under the Schedule or developed independently from the Agreement by either Party.

“Force Majeure” means any event beyond the reasonable control of the affected Party, which shall include any strikes (not caused by the affected Party), war, riot, sabotage, natural or manmade disaster, pandemic, epidemic, any failure of or defect in any third party telecommunications, electricity or other networks, systems or infrastructure and, in the case of Modica, any acts or omissions of third party service providers.

"GST" means goods and services tax pursuant to the New Zealand Goods and Services Tax Act 1985.

"Intellectual Property Rights" means copyright, all rights in relation to inventions (including patents), registered and unregistered trademarks, registered and unregistered designs, circuit layouts, and all other rights anywhere in the world resulting from intellectual activity in the commercial, industrial, scientific, literary or artistic fields, and includes without limit, all rights in or to business methodologies, templates and software.

“Message” means, either a Short Message sent to a mobile handset (mobile terminated or MT message) or a Short Message sent from a mobile handset (mobile originating or MO message).

“Mobile Network Provider” means the wireless telecommunications provider(s) that Modica and the Client are connected to.

“MSISDN” means a mobile phone number (or address) applied to messages that allow recipients identify the sender of a SMS message and be able to reply to a message

“Net Revenue” means revenue actually paid to us which is the gross revenue paid by Customers less any Taxes, revenue share portion of the Mobile Network Provider, and the cost of running and delivering the Service (including traffic charges).

“Network” means a wireless telecommunication network of a Mobile Network Provider.

“OMNI Platform” means Modica’s IT Platform on which Modica hosts the Services.

"Party" means Modica Group Limited or the Client and “Parties” as they may be collectively referred to herein.

"Platform as a Service" is the software distribution model whereby Modica hosts the Services and makes them available to Clients over the internet.

“Premium Rate Service” means any Content considered a premium rate service by the Mobile Network Provider.

“Privacy Policy” means Modica’s privacy policy which can be found on its website, as updated from time to time.

“Profit Percentage” means any percentage of Net Revenue stated in the Premium Rate Messaging Schedule to be shared with you.

"Right to Use" means a non-exclusive licence for the Client to access or use the Services.

“Schedule” means the Schedule signed by the Client containing the Services to be provided to the Client.



"Service" or "Services" means the Modica Services set out in your Schedule and as agreed upon by the Parties from time to time.

"Service Commencement Date" means the date of the Client's signature on the Schedule for a Service or the date that our records show that you have first used or ordered a Service on the OMNI Platform whichever is the earlier.

"Short Code" means a digit based code allocated by the Mobile Network Provider to us for use by you for the purpose of this agreement and to which a Customer may send an SMS message in order to participate in a particular service or application under this Agreement.

"Short Message" means an alphanumeric message sent to or from a handset device.

"SMS" means the service provided by the Mobile Network Provider to Customers utilising the Network for a Short Message.

"Subscription Data" means the data you supply to us when requesting us to supply Services.

"Supplier" means any supplier of products or services to Modica including any Mobile Network Provider.

"Terms of Use" means this agreement and all documents identified as forming part of it, including the AUP and Privacy Policy.

"We", "our" and "us" and "Modica" means Modica Group Limited, and "you" and "your" means the Client.

"Working day" or "Day" or "Business Hours" means 0830 hours to 1700 hours any day of the week except a Saturday, Sunday or a public holiday in Wellington, New Zealand.

**12. EXECUTED**

Signed by Modica:

Name:

Title:

Date:

Signed by You:

Name:

Title:

Date: