

## **End User Agreement**

This User Agreement ("Agreement") is an agreement between Kiwihosting.net Limited ("Kiwihosting.net" also trading as "KiwiGeeks" and "Kiwihosting.net International Ltd" and also referred to in this agreement as "we" or "us") and the party set forth in the related Order Form or Quotation and incorporated herein by reference and referred to as "Order" in this agreement together with any subsequent Orders submitted by Customer, and applies to the purchase of all goods (collectively, the "Goods") and services (collectively, the "Services") ordered by Customer on the Order. Such party is referred to in this Agreement as "Customer" or "you".

*PLEASE READ THIS AGREEMENT CAREFULLY. BY SUBMITTING THE ORDER OR ACCEPTING A QUOTATION EITHER VERBALLY OR IN WRITING, YOU ARE AGREEING TO BE BOUND BY THE TERMS OF THIS AGREEMENT AND ALL TERMS AND CONDITIONS INCORPORATED BY REFERENCE IN THIS AGREEMENT, INCLUDING KIWIHOSTING.NET'S USAGE AND PRIVACY POLICY. YOUR USE OF, OR PAYMENT FOR GOODS OR SERVICES CONSTITUTES ACCEPTANCE OF THIS AGREEMENT.*

Kiwihosting.net reserves the right to reject this Agreement for any reason or no reason, prior to acceptance. Activation or delivery of the Services shall indicate Kiwihosting.net's acceptance of this Agreement and subject to the terms and conditions of this Agreement, Kiwihosting.net will provide to Customer the Services selected by Customer set forth on the Order.

Kiwihosting.net endeavours to always operate in a fair and reasonable manner, Kiwihosting.net's goal is to build long lasting relationships with Customers by providing high quality Professional Services.

## **1. Services and Service Usage.**

### **1.1 Web Hosting Shared/Reseller; Virtual/Dedicated Servers.**

Under this Agreement, Customer shall comply with the current "Usage Policy", as amended, modified or updated from time to time by Kiwihosting.net, and which can be viewed online at <http://kiwihosting.net> and which is incorporated in this Agreement by reference.

Customer hereby acknowledges they have reviewed the Usage Policy and that the terms of the Usage Policy are incorporated herein by reference. In the event of any inconsistencies between this Agreement and the Usage Policy, the terms of the Usage Policy shall govern.

Kiwihosting.net does not intend to systematically monitor the content which is submitted to, stored on, distributed or disseminated by Customer via the Service (the "Customer Content"). Customer Content includes content of Customer's customers and/or users of Customer's website. Accordingly, under this Agreement, you will be responsible for your customer's content and activities on your website.

Notwithstanding anything to the contrary contained in this Agreement, Kiwihosting.net may immediately take corrective action, including removal of all or a portion of the Customer Content, disconnection or discontinuance of any and all Services, or termination of this Agreement in the event of notice of possible violation by Customer of the Usage Policy.

In the event Kiwihosting.net takes corrective action due to a violation of the Usage Policy, Kiwihosting.net shall not refund to Customer any fees paid in advance of such corrective action.

Customer hereby agrees that Kiwihosting.net shall have no liability to Customer or any of Customer's customers due to any corrective action that Kiwihosting.net may take (including, without limitation, disconnection of Services) and be under no obligation to notify the Customer of the actions taken.

### **1.2 Web Design.**

In the absence of a specific Web Design and Development Services Agreement between Kiwihosting.net and Customer, the terms of this Agreement shall apply.

Upon receipt of a request for proposal or request for quotation from a Customer, Kiwihosting.net will respond in writing within 14 working days.

Kiwihosting.net may request, and the Customer shall not withhold any reasonable information required to ensure Customer requirements are fully understood by Kiwihosting.net prior to completion of a proposal or quotation.

Upon acceptance of the proposal or quotation, Customer may be required to pay a deposit to Kiwihosting.net equal to no more than 50% of the agreed total price.

Kiwihosting.net will commence work on the project immediately, but if for any reason Kiwihosting.net is unable to commence work immediately this will be communicated to Customer in advance.

If during the design process you request additional or changed functionality/content that in Kiwihosting.net's opinion differs from the agreed upon requirement, then Kiwihosting.net will provide a time and materials quote which will be in addition to the already agreed scope of work.

All material, both text and images, supplied by the Customer and used in the construction of the Customer's web site, will remain the Customer's property. All such material will be assumed by Kiwihosting.net to be the property of the client and free to use without breach of copyright laws.

The copyright for all material provided by Kiwihosting.net such as HTML, graphics, photographs and text will remain the property of Kiwihosting.net until such time as Kiwihosting.net receives full payment whereupon they will become the property of the Customer.

With the exclusion of any software used to create Customers website that is already governed by an Open Source License, all software code provided as part of the web site will remain at all times the property of Kiwihosting.net. The Customer will be granted a single use, single site, source code license to the software code. The Customer may not sell or distribute the software code. The Customer may not use the software code in more than one installation. The Customer will be given access to the source code and may take the code to another developer for the purposes of maintaining or extending the system.

Kiwihosting.net provides maintenance services for its Customers; however, maintenance or updates are outside the scope of the design project.

Request for changes or updates to websites received via phone or email from Customers will be presumed to be authorised and once actioned by Kiwihosting.net will be invoiced in the next billing cycle.

### **1.3 IT Support Services.**

In the absence of a specific IT Services Support Agreement between Kiwihosting.net and Customer, the terms of this Agreement shall apply to all IT Support Services.

All related Services rates will be published online at <http://kiwigeeks.nz> and are hereby incorporated into this Agreement by reference.

Where you request on-site support, we will attend the premises for that request at the arranged time. Once we have arrived on-site you must pay the fees for that visit, including the minimum charge.

To cancel or stop a request you must advise Kiihosting.net at least two (2) hours prior to such arranged time.

Upon arriving on-site we will try to diagnose any problem described by you; and we may provide an estimate of the time required to provide any Services. However, we do not guarantee any diagnosis or estimate of time will be accurate.

The duration of time spent on-site will be agreed with you. If the Services are not complete within that duration we will discuss the options available, which may include extending or abandoning provision of the Services, scheduling an alternative time to complete the Services, or removal of the device(s) from the premise and continuing to complete the work offsite.

You must provide us with all information, assistance, co-operation and access to premises and equipment that we may reasonably require to undertake the Services.

The Customer, or some person over 18 yrs, must be present while we provide the Services.

We will use all reasonable endeavours to achieve the objectives of the Services but we provide no guarantee, express or implied that the objective will be achieved and we will not be liable for any failure to meet the objectives provided we have used our reasonable endeavours.

## 2. Amendment.

Kiihosting.net may at any time in its sole discretion amend, modify or update this Agreement or associated policies, and Customer shall be bound by any such amendment, modification or update. Kiihosting.net may, but is under no obligation to, provide notice of any amendment, modification or update of this Agreement or the Usage Policy.

Any modification is effective on the earlier of two days after posting on Kiihosting.net website(s) or two (2) days after the sending of a notice by Kiihosting.net to Customer by e-mail or conventional mail.

If any material modification to this Agreement or the Usage Policy is unacceptable to you, you may terminate your agreement as provided in Section 3. However, if you do not terminate the Agreement, or if you continue to use the Services following effectiveness of the modification, your continued use will mean that you have accepted that modification.

Kiihosting.net reserves the right to amend its service offerings and add, delete, suspend or modify the terms and conditions of the Services, at any time and to determine whether and when any such changes apply to both existing and future customers.

## 3. Term; Termination; Cancellation Policy.

For the purposes of Services supplied under section 1.1 of this Agreement The initial term shall be as set forth in the Order (the "Initial Term"). The Initial Term shall begin upon commencement of the Services to Customer. After the Initial Term, the Agreement shall automatically renew for successive terms of equal length as the Initial Term, unless terminated, modified or cancelled by either party as provided in this section. The Initial Term and all successive renewal periods shall be referred to, collectively, as the "Term".

This Agreement may be terminated

- i. by either party by giving the other party 30 days prior written notice (subject to an early cancellation fee as provided below),
- ii. by Kiihosting.net in the event of non-payment by Customer,
- iii. by Kiihosting.net, at any time, without notice, if, in Kiihosting.net's judgment, Customer is in violation of any term or condition of the Usage Policy or Customer's use of the Service

disrupts or, in Kiihosting.net judgment, could disrupt, Kiihosting.net business operations, brand, reputation or good will of its Customers, or Customer's customers,

- iv. If Kiihosting.net becomes aware that a Customer becomes insolvent, in receivership or any bankruptcy petition is filed by the Customer, or any third party against the Customer,
- v. by Kiihosting.net in accordance with Sections 1, 11, and 14 of this Agreement.

If you cancel this Agreement prior to the end of the Term,

- i. you shall be obligated to pay all fees and charges accrued prior to the effectiveness of such cancellation,
- ii. Kiihosting.net shall refund to you all pre-paid fees for basic hosting services (shared, dedicated and/or managed) for any full term remaining after effectiveness of cancellation (i.e., no partial or pro-rated fees shall be refunded), less any setup fees, good will credits and any discount applied for prepayment,
- iii. you shall be obligated to pay 100% of all charges for all Services for each full period remaining in the Term (other than basic hosting fees as provided in (2.) above) and
- iv. Kiihosting.net shall have the right to charge you an early cancellation fee equal to the amount paid by the Customer in the previous month.

Any cancellation request shall be effective 30 days after receipt by Kiihosting.net, unless a later date is specified in such request.

If Kiihosting.net cancels this Agreement prior to the end of the Term, Kiihosting.net shall not refund to you any fees paid in advance of such cancellation and

- i. you shall be obligated to pay all fees and charges accrued prior to the effectiveness of such cancellation,
- ii. you shall be obligated to pay 100% of all charges for all Services for each full period remaining in the Term and
- iii. Kiihosting.net shall have the right to charge you an early cancellation fee equal to the amount paid by the Customer in the previous month.

For the purposes of Services supplied under section 1.2 of this Agreement, either party may terminate the agreement upon providing 7 working days' written notice to the other party

If at any point during the web site development a Customer wishes to cancel, they may do so but will be invoiced and be obligated to pay for an amount that Kiihosting.net judges to be proportional to the amount of work completed. If a deposit has been paid and the work completed is less than the deposit, the Customer will be refunded the difference, If more work is judged to have been completed than is covered by Customer deposit, Kiihosting.net will invoice the difference to the Customer.

## 4. Cancelled and Returned Goods.

All Goods to be returned must have a Return Authority ("RA") issued by us. The issue of an RA does not guarantee that we will accept the return.

Where a faulty product is returned and you have requested an RA within 7 working days of despatch, and the returned product has not been used or opened or otherwise deemed unsaleable by us you will be credited in full unless the return is due to an error by us. Freight charges will not be credited under any circumstances.

Faulty Goods will be subject to the normal return procedures for the specific brand and supplier of the product being returned.

Non-faulty product will require a Goods Return Authority, must be in saleable condition, and will be subject to a minimum 20% restocking fee. Freight charges will not be credited under any circumstances.

You will be liable for all delivery and insurance charges incurred in respect of returned Goods.

## 5. Billing and Payment.

Purchase prices are in New Zealand Dollars and exclude GST unless otherwise stated.

All fees for Goods and Services shall be in accordance with Kiihosting.net fee schedule then in effect, the terms of which are incorporated herein by reference, and shall be due at the times provided therein. We can revise our prices at any time prior to accepting your order. All invoices are due upon receipt unless otherwise stated on the invoice.

The purchase price for Goods supplied and packed is exclusive of installation and maintenance.

We don't have to provide you any specific Goods or Services until you have fully paid all money that you owe us.

A quotation does not give rise to a binding contract until you place an order which we subsequently accept. You are bound to pay us the price once we accept your order.

Kiihosting.net may, with 30 days' notice to Customer, amend the Services and/or the rates and fees it charges for the Services.

Fees for renewal periods after the Initial Term shall be due and owing immediately upon the first day of such renewal period.

Kiihosting.net may impose a default penalty equal to a rate of two point five percent (2.5%) of the overdue balance (or such lesser amount as may be required by law) for each month or fraction thereof the overdue amount remains unpaid. In addition, in the event that any amount due Kiihosting.net remains unpaid twenty (20) days after such payment is due, Kiihosting.net, in its sole discretion, may immediately terminate this Agreement, and/or withhold or suspend Services. There will be a \$25.00 charge to reinstate accounts that have been suspended.

All taxes, fees and governmental charges relating to the Services provided hereunder (other than income taxes of Kiihosting.net) shall be paid by Customer.

Any unpaid account will be deleted 21 days after its initial suspension date unless an arrangement with Kiihosting.net is in place and you will, on demand, pay to us any amount we incur (including reasonable legal fees, collection agency costs, court costs and disbursements) in recovering payment of any overdue account.

Customer agrees that Kiihosting.net may pre-charge Customer's fees for the Services to the credit card or PayPal account supplied by Customer during registration.

## 6. Delivery

Where we agree to transport Goods to a specified place, we will deliver, or arrange delivery of, the Goods to that place.

Except where otherwise agreed, you will pay for all resulting transportation costs.

If no place of delivery is specified, delivery shall take place at the time when the Goods are made available for despatch at our premises.

Any time stated for delivery is an estimate only. No claim shall be made by you on account of late shipment, or delivery however caused.

All freight charges shall be at your cost unless otherwise agreed and stated.

You acknowledge and agree that if you have ordered Products comprising software by electronic delivery and that software has been installed by us and the software licence is activated either on your computer or a computer you have agreed to purchase, then it is not reasonably practicable to remove the software installation or de-activate the software. In that event and for that reason once you have ordered the software with the instruction to proceed with installation, you agree that you shall be committed to that purchase and subject to these Terms and conditions and the software cannot be returned unless we agree otherwise pursuant to a specific individual agreement made with you by us at our discretion, within seven days of invoice.

## 7. IP Address Ownership.

If Kiihosting.net assigns the Customer an IP ("Internet Protocol") address for Customer's use, the right to use that IP address shall belong only to Kiihosting.net, and Customer shall have no right to use that IP address except as permitted by Kiihosting.net during the term of this Agreement.

Kiihosting.net shall maintain and control ownership of all IP numbers and addresses that may be assigned to Customer by Kiihosting.net, and Kiihosting.net reserves the right in its sole and absolute discretion to change or remove any such IP numbers at any time.

## 8. Web Site Caching.

Customer expressly

- i. grants to Kiihosting.net a license to cache the entirety of the Customer Content and Customer's web site, including content supplied by third parties hosted by Kiihosting.net under this Agreement and
- ii. agrees that such caching is not an infringement of any of Customer's or any third parties' intellectual property rights.

## 9. CPU Usage.

Customer agrees that Customer shall not use excessive amounts of CPU processing on any of Kiihosting.net servers. Any violation of this policy may result in corrective action by Kiihosting.net. Such actions may include assessment of additional charges, disconnection or discontinuance of any and all Services, or termination of this Agreement, which actions may be taken are at Kiihosting.net's sole and absolute discretion. If Kiihosting.net takes any corrective action under this section, Customer shall not be entitled to a refund of any fees paid in advance prior to such action or require notification in advance of any corrective action being taken.

## 10. Bandwidth and Disk Usage.

Customer agrees that bandwidth and disk usage shall not exceed the number of megabytes per month for the Services ordered by Customer on the Order (the "Agreed Usage"). Kiihosting.net will monitor Customer's bandwidth and disk usage. Kiihosting.net shall have the right to take corrective action if Customer's bandwidth or disk usage exceeds the Agreed Usage. Such corrective action may include the assessment of additional charges, disconnection or discontinuance of any and all Services, or termination of this Agreement, which actions may be taken in Kiihosting.net's sole and absolute discretion. If Kiihosting.net takes any corrective action under this section, Customer shall not be entitled to a refund of any fees paid in advance prior to such action or require notification in advance of corrective action being taken.

For 'Unlimited' shared Hosting services, which include either no bandwidth, no storage space limit or both are not intended to support the needs of large enterprises or users that require substantial bandwidth and storage. To ensure that our shared hosting is reliable and available for all of our users, your usage cannot adversely affect the performance of other customers' sites. Using our 'Unlimited' shared hosting services as online storage space for archived electronic files is prohibited. You agree that if your bandwidth and storage space usage adversely affects other customers on our shared hosting platform, Kiwihosting.net may suspend or terminate your Hosting Services without liability.

#### **11. Property Rights; Risk; Retention of title.**

Kiwihosting.net owns all right, title and interest in and to the Services and Kiwihosting.net trade names, trademarks, service marks, inventions, copyrights, trade secrets, patents, know-how and other intellectual property rights relating to the design, function, marketing, promotion, sale and provision of the Services and the related hardware, software and systems ("Marks"). Nothing in this Agreement constitutes a license to Customer to use or resell the Marks.

All Content and User Content stored by Customer on Kiwihosting.net's servers and/or computers shall at all times remain the property of Customer. Customer grants to Kiwihosting.net a non-exclusive, worldwide license to the Content and User Content only to the extent necessary for Kiwihosting.net to host the Website.

Risk of any loss, damage or deterioration of or to Goods passes to you on delivery, or if you state to leave Goods at a certain location, at the time Goods are placed there.

Ownership of the Goods remains with Kiwihosting.net and does not pass to you until you pay all amounts you owe to us.

#### **12. Use of Information**

You agree that in the course of our business, we may obtain information about you from any other person or business (including any credit or debt collection agencies), and you consent to any person providing us with such information.

You agree that we may give any information we have about you relating to your credit worthiness to any other person, including any credit or debt collection agency, for credit assessment and debt collection purposes.

You must notify us of any change in circumstances that may affect the accuracy of the information you provided to us.

If you are an individual, you have rights under the Privacy Act 1992 to access and request the correction of any personal information that we hold about you.

#### **13. Guarantees**

Where the Consumer Guarantees Act 1993 ("Act") applies:

If the goods are acquired by you for business purposes, you agree that the Act does not apply.

You acknowledge that no Express Guarantees (as defined in the Act) are provided

If you resell our goods you must;

- i. Do so on the basis that the Act does not apply where the goods are resold for business purposes

- ii. Notify consumers that neither we, our suppliers nor any manufacturer undertake that repair facilities or spare parts will be available

Nothing in these terms is intended to have the effect of contracting out of the provisions of the Act except to the extent permitted by the Act.

Except as otherwise required or prevented by laws including the Consumer Guarantees Act, Fair Trading Act, Sale of Goods Act and other Government legislation, or except as expressly provided under these terms, we are not liable for any claim in relation to any goods we supply to you (including as a result of negligence or otherwise) and all representations, guarantees, warranties and terms of whatever nature are completely excluded.

For more information on the Consumer Guarantees Act see <http://www.consumeraffairs.govt.nz/for-consumers/law/consumerguarantees-act>

#### **14. Customer Website; E-Commerce; Warranties.**

Customer shall be solely responsible for the development, operation and maintenance of Customer's web site, online store and/or e-commerce activities for all products and services offered by Customer or appearing online, and for all contents and materials appearing online or on Customer's products, including, without limitation

- i. the accuracy and appropriateness of the Customer Content and content and material appearing in its store or on its products and
- ii. ensuring that the Customer Content and content and materials appearing in its store or on its products do not violate or infringe upon the rights of any person, and
- iii. ensuring that the Customer Content and the content and materials appearing in its store or on its products are not defamatory or otherwise illegal.

Customer shall be solely responsible for accepting, processing and filling customer orders and for handling customer inquiries or complaints. Customer shall be solely responsible for the payment or satisfaction of any and all taxes associated with its web site and online store.

Customer shall be responsible for the security and confidentiality of any customer information (including, without limitation, customer credit card numbers) that Customer may receive as a result of its web site or online store.

Customer represents and warrants to Kiwihosting.net that Customer owns or has the right to use the Customer Content and material contained therein, including all text, graphics, sound, music, video, programming, scripts and applets, and the use, reproduction, distribution and transmission of the Customer Content and any information and materials contained therein does not, and will not,

- i. infringe or misappropriate any copyright, patent, trademark, trade secret or any other proprietary right of a third party
- ii. violate any criminal laws or
- iii. constitute false advertising, unfair competition, defamation, an invasion of privacy, violate a right of publicity or violate any other law or regulation.

Customer grants Kiwihosting.net the right to reproduce, copy, use and distribute all and any portion of the Customer Content to the extent needed to provide and operate the Services.

#### **15. Disclaimer of Warranty.**

Customer agrees to use all Services and any information obtained through or from Kiwihosting.net, at Customer's own risk. Customer

acknowledges and agrees that Kiihosting.net exercises no control over, and accepts no responsibility for, the content of the information passing through Kiihosting.net host computers, networks or the Internet.

Customers are responsible for backing up of all data, including but not limited to web content, emails and database content. Kiihosting.net does not warrant or otherwise guarantee that it will back up your data or that data which has been backed up can be retrieved, and will not be responsible for any archiving or backup of Customer data. If any Customer data is damaged, deleted, lost or corrupted in any way, or becomes otherwise unavailable due to termination or suspension of your account pursuant to this Agreement, Kiihosting.net will have no obligation or liability to you.

*THE GOODS AND SERVICES PROVIDED UNDER THIS AGREEMENT ARE PROVIDED ON AN AS IS, AS AVAILABLE BASIS. NONE OF KIIHOSTING.NET'S PARENT, SUBSIDIARY OR AFFILIATED CORPORATIONS, OR ANY OF THEIR RESPECTIVE EMPLOYEES, OFFICERS, DIRECTORS, SHAREHOLDERS, AFFILIATES, AGENTS, SUPPLIERS, THIRD-PARTY INFORMATION PROVIDERS, MERCHANTS, LICENSORS OR THE LIKE (EACH, A "KIIHOSTING.NET PERSON") MAKE ANY WARRANTIES OF ANY KIND, EITHER EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT, FOR THE SERVICES OR ANY EQUIPMENT KIIHOSTING.NET PROVIDES. NO KIIHOSTING.NET PERSON MAKES ANY WARRANTIES THAT THE SERVICES WILL NOT BE INTERRUPTED OR ERROR FREE; NOR DO ANY OF THEM MAKE ANY WARRANTIES AS TO THE RESULTS THAT MAY BE OBTAINED FROM THE USE OF THE SERVICES OR AS TO THE ACCURACY, RELIABILITY OR CONTENT OF ANY INFORMATION, SERVICES OR GOODS CONTAINED IN OR PROVIDED THROUGH THE SERVICES. KIIHOSTING.NET IS NOT LIABLE, AND EXPRESSLY DISCLAIMS ANY LIABILITY, FOR THE CONTENT OF ANY DATA TRANSFERRED EITHER TO OR FROM CUSTOMER OR STORED BY CUSTOMER OR ANY OF CUSTOMER'S CUSTOMERS VIA THE SERVICES PROVIDED BY KIIHOSTING.NET. NO VERBAL ADVICE OR WRITTEN INFORMATION GIVEN BY ANY KIIHOSTING.NET EMPLOYEE OR AUTHORISED REPRESENTATIVE, WILL CREATE A WARRANTY; NOR MAY YOU RELY ON ANY SUCH INFORMATION OR ADVICE.*

The terms of this section shall survive any termination of this Agreement.

#### **16. Indemnification.**

Customer agrees to indemnify, defend and hold harmless Kiihosting.net and its parent, subsidiary and affiliated companies, and each of their respective officers, directors, employees, shareholders and agents (each an "indemnified party" and, collectively, "indemnified parties") from and against any and all claims, damages, losses, liabilities, suits, actions, demands, proceedings (whether legal or administrative), and expenses (including, but not limited to, reasonable attorney's fees) threatened, asserted, or filed by a third party against any of the indemnified parties arising out of or relating to

- i. Customer's use of the Services
- ii. any violation by Customer of the Usage Policy
- iii. any breach of any representation, warranty or covenant of Customer contained in this Agreement or iv. any acts or omissions of Customer.

The terms of this section shall survive any termination of this Agreement.

#### **17. Limitation of Liability.**

Customer agrees that no Kiihosting.net Person, under any circumstances, shall be held responsible or liable for situations where the Services are accessed by third parties through illegal or illicit means, including situations where such data is accessed through the exploitation of security gaps, weaknesses or flaws (whether known or unknown to Kiihosting.net at the time) which may exist in the Services or Kiihosting.net equipment used to provide the Services.

Under no circumstances, including negligence, shall any Kiihosting.net Person be liable for any indirect, incidental, special, consequential or punitive damages, or loss of profits, revenue, data or use by Customer, any of its customers or any other third party, whether in an action in contract or tort or strict liability or other legal theory, even if Kiihosting.net has been advised of the possibility of such damages. No Kiihosting.net Person shall be liable to Customer, any of its customers, any Reseller Customer or any other third party, for any loss or damages that result or are alleged to have resulted from the use of or inability to use the Services, or that results from mistakes, omissions, interruptions, deletion of files, loss of data, errors, viruses, defects, delays in operations, or transmission or any failure of performance, whether or not limited to acts of God, communications failure, theft, destruction or unauthorized access to Kiihosting.net records, programs, equipment or services.

Notwithstanding anything to the contrary in this Agreement, Kiihosting.net's maximum liability under this Agreement for all damages, losses, costs and causes of actions from any and all claims (whether in contract, tort, including negligence, quasi-contract, statutory or otherwise) shall not exceed the actual dollar amount paid by Customer for the Services which gave rise to such damages, losses and causes of actions during the one (1) month period prior to the date the damage or loss occurred or the cause of action arose.

Customer understands, acknowledges and agrees that if Kiihosting.net takes any corrective action under this Agreement because of an action of Customer or Customer's customer, that corrective action may adversely affect other customers of Customer, and Customer agrees that Kiihosting.net shall have no liability to Customer or any of its Customer's customers due to such corrective action by Kiihosting.net.

This limitation of liability reflects an informed, voluntary allocation between the parties of the risks (known and unknown) that may exist in connection with this Agreement.

The terms of this section shall survive any termination of this Agreement.

#### **18. Force Majeure.**

Kiihosting.net shall not be liable for failure or delay in performing obligations hereunder if such failure or delay is due to circumstances beyond its reasonable control, including, without limitation, acts of any governmental body, war, insurrection, sabotage, embargo, fire, flood, strike or other labour disturbance, interruption of or delay in transportation, unavailability of, interruption or delay in telecommunications or third party services (including DNS propagation), failure of third party software or hardware or inability to obtain raw materials, supplies or power used in or equipment needed for provision of the Services.

#### **19. Governing Law; Jurisdiction; Arbitration.**

This Agreement shall be governed in all respects by New Zealand law without regard to the conflict of law provisions thereof. Any controversy or claim arising out of, relating to, or in connection with this Agreement, or the breach thereof, shall be subject to arbitration and judgment in any court having jurisdiction thereof. The place of arbitration shall be Wellington New Zealand, or any other place selected by mutual agreement of the parties.

The parties agree that the award of the arbitral tribunal will be the sole and exclusive remedy between them regarding any and all claims and counterclaims between them with respect to the subject matter of the arbitrated dispute.

The parties hereby waive all in personam jurisdictional defences in connection with any arbitration hereunder or the enforcement of an order or award rendered pursuant thereto.

In any legal action, the prevailing party will be entitled to recover all legal expenses incurred in connection with the action, including but not limited to its costs, both taxable and non-taxable, including court costs and reasonable legal fees.

The terms of this section shall survive any termination of this Agreement.

## **20. Assignment.**

Customer shall not have the right to assign this Agreement without the prior written consent of Kiwihosting.net. This Agreement shall be binding upon and inure to the benefit of Customer and Kiwihosting.net and their successors and permitted assigns.

## **21. Entire Agreement; Severability.**

This Agreement, together with the Order and any other documents or agreements specifically identified in this Agreement, represents the entire agreement between the parties, and supersedes all previous representations, understandings or agreements. If any provision of this Agreement shall be held by a court of competent jurisdiction to be invalid, unenforceable, or void, the remainder of this Agreement shall remain in full force and effect.

Customer hereby represents that he or she is either, an individual entering into this Agreement for his or her personal use and is over 18 years of age or, a corporation, limited partnership or other legal entity, duly organized, validly existing and in good standing under the laws of the country of its organisation, and that the person acting on behalf of Customer is duly authorised to accept, execute and deliver this Agreement on behalf of Customer.