

# Terms and Conditions of Sale

Please ensure you have read and understood these Terms and Conditions of Sale (“Terms”) before you connect your Wallet to the Site to buy an NFT as they set out the terms and conditions on which we, Non Fungible Gaskets Ltd, a limited company registered in England and Wales with company number 13751821 and having its registered office at 35 Ballards Lane, London, N3 1XW, United Kingdom (“Seller”, “we” or “us”) offer the NFTs for minting and sale. By submitting an offer to mint and buy an NFT, you acknowledge and agree that these Terms create a legally binding contract with you (“Buyer” or “you” as applicable).

## 1. Definitions

1.1. In these Terms, the following expressions have the following meanings:

“**Contract**” means the contract between the Seller and the Buyer for the sale and purchase of the NFT in accordance with these Terms;

“**Creator**” means the creator and author of the NFTs;

“**Delivery**” has the meaning in clause 6.1;

“**Media**” means the digital images associated with the NFT;

“**Mint Price**” means the price in ETH as displayed on the Site once a user has connected their Wallet;

“**NFT(s)**” means the ‘The Kiss’ non-fungible tokens as generated by Ethereum contract address 0x976A145BcE31266d3Ed460a359330Dd53466db97;

“**Site**” means the website accessible at <https://thekiss.xyz/>; and

“**Wallet**” means an electronic Ethereum wallet extension that is compatible with the Site.

## 2. Our role

2.1. We are the Seller and Creator of the NFTs and owner and manager of the Site. We are not acting as agent for a third party.

## 3. Transaction Terms

3.1. In order to mint and buy an NFT, you must first have a Wallet which you must connect to the Site. By clicking on the “Kiss me!” button on the Site, you acknowledge and agree that you are submitting an irrevocable legally binding offer to mint and buy the NFT for the Mint Price and associated costs set out in these Terms. **Please note that you must be at least 18 years old to enter into the transaction and by clicking on the “Kiss me!” button, you are declaring that you are at least 18 years old.**

3.2. When submitting an offer either as an individual or on behalf of an entity, you accept that in doing so, you are accepting personal liability to pay the Mint Price, and any Ethereum gas fees associated with the transaction.

3.3. If your offer is accepted the Wallet you used to place the offer will be charged for the Mint Price automatically and an NFT will be minted by you and deposited directly into your cryptocurrency wallet upon generation.

3.4. If you do not have sufficient funds in your Wallet to meet your offer plus any Ethereum gas fees payable, your offer will automatically be cancelled but you may still incur Ethereum gas fees associated with the failed transaction.

3.5. Please note that an Ethereum transaction can take anywhere from a few seconds to multiple days, depending on network congestion and the gas fees paid by you. We do not take responsibility for network congestion or high gas prices.

3.6. We shall use our best endeavours to retain 10% of the Minting Proceeds to (i) use towards offsetting carbon impact of the minting and sale of the NFTs, and (ii) to donate any remaining amounts to STEM charities chosen in our sole discretion.

## 4. Minting Windows and Other Restrictions

4.1. Certain Wallets will be eligible for ‘advance’ minting of a specific number of NFTs ahead of the public ‘open’ minting. These advance minting spots are available to owners of select divergence NFTs (from the Brotchain and PROOF OF {ART}WORK projects), as well as winners of competitions held by us (on Twitter) and by some other NFT communities.

4.2. The Mint Price for divergence NFT holders may be lower than the Mint Price for all other Wallets, and a very small number of NFTs (not more than ten) will be awarded for free to competition winners and supporters. The timing of any minting window will be indicated in the “DROP INFORMATION” section of the “Minting” tab of the Site and is subject to change by us at any

time and for any reason and we make no guarantees or representations as to the length of the 'advance' minting period, the number of NFTs that will be minted during this period or how many NFTs will be available during the 'open' minting period.

- 4.3. By connecting your Wallet you agree that information associated with the contents of that Wallet may be used by us for the purposes of determining whether you are eligible for advance minting as set out in Clause 4.1
- 4.4. We may at our sole discretion introduce restrictions on the number of NFTs that may be purchased in any single transaction or by any single Wallet, or on the placing of offers by bots or smart contracts.
- 4.5. We reserve the right to reserve and retain twenty (20) of the NFTs for ourselves as the Creator.

## **5. Title and Risk**

- 5.1. Title to an NFT shall pass to you upon the generation of that NFT pursuant to a successful transaction in which the Mint Price is transferred from you to us.
- 5.2. Risk in the NFT shall pass to you on Delivery. We shall not be responsible for the NFT, or for the hosting or availability of the Media, after Delivery has transferred to you, and we shall be under no obligation to retain any information, data or copies of the same, relating to the NFT or the Media.

## **6. Transfer of an NFT**

- 6.1. Upon the generation of an NFT by you, your Wallet address shall automatically be entered in that NFT's ownership log on the Ethereum blockchain. On completion of this process, "Delivery" shall be deemed to have occurred. The time taken for Delivery can take between several minutes or several days. This is a process outside of our control and we shall not be responsible for any delays, errors (whether human or technical) or increased network congestion in this process. We cannot and do not represent or warrant that any NFT is reliable, current or error-free, that it is compatible with your equipment or meets your requirements, or that any defects in the NFT will be corrected.
- 6.2. Your access to the Media shall be solely via the hash contained in the NFT and the Media shall not be transferred by us separately.

## **7. The NFTs**

- 7.1. The NFTs are sold "as is" and "as available", and we make no representation or warranties as to the condition of the NFTs which are sold with all faults, inherent defects and errors. Any statements on the Site referring to the NFTs are for information only and cannot be relied upon as a guarantee as to the NFTs' condition, fitness for purpose, satisfactory quality, merchantability or future value. The sale of the NFTs is not a sale by description.
- 7.2. By submitting an offer on an NFT, you acknowledge and agree that you understand the content and code contained in the smart contract associated with the NFTs, and that you have a sufficient knowledge and understanding of NFTs, cryptocurrency, NFT platforms/ marketplaces and blockchain technology to make an informed purchase of an NFT.
- 7.3. You acknowledge that ownership of an NFT does not confer or grant any rights in the underlying code, or any intellectual property rights other than the licence in the Media provided by us in Clause 10.1, and you shall not be entitled (unless offered by us in our discretion) to any additional or associated products, artwork, or media even if connected to or associated with the NFT you purchase from us.
- 7.4. You acknowledge and agree that the NFT is a relatively new type of asset and is reliant on new technology. By purchasing an NFT you acknowledge the risks associated with potential loss including but not limited to loss of your private key, faults or weaknesses in security, risk of phishing attacks or hacking, change to regulation in one or more jurisdictions to which you may be subject (which may include changes to rules, regulation and policy around tax).
- 7.5. You acknowledge that changes in functionality, use, hosting, transmission mechanisms and blockchain technology affecting the NFTs may affect your use of or availability to access an NFT.
- 7.6. You are solely responsible for payment of all national, federal, state, local or other taxes of any jurisdiction, of whatever nature whether now in effect or imposed in the future by any governmental authority, tax authority or other competent authority with jurisdiction, including, without limitation, any income, sales, use, value-added (VAT), goods and services and other taxes and duties associated with your purchase, use or sale of the NFTs.

## **8. Your Warranties**

- 8.1. You warrant and represent to us, at the time of registration and in respect of an offer you make, that:
  - 8.1.1. the funds used to bid to purchase an NFT are not connected with any criminal activity, including tax evasion;
  - 8.1.2. you are not the subject of any investigation, nor have you been charged with or convicted of money laundering offences, terrorist activities or other crimes and you are not subject to sanctions in the UK or the EU;

- 8.1.3. buying or holding an NFT in your jurisdiction is not in violation of any laws or rules and you acknowledge that blockchain technologies and digital assets are subject to many legal and regulatory uncertainties, which could impede or limit your ability to continue the use and enjoyment of your NFT;
- 8.1.4. you have acknowledged and agreed to the post sale royalty set out at Clause 9.1 below and will use your best endeavours to ensure any future buyers of your NFT comply with and pay to us the same royalty.

## 9. Re-Sale Royalty

- 9.1. We have set an automatic royalty on secondary sales of the NFTs at seven point five per cent (7.5%) of the sale proceeds. This royalty will be automatically transferred to our creator wallet following a secondary sale made by you through trading platforms that honour royalties, including <https://opensea.io> and <https://looksrare.org>.

## 10. Intellectual Property

- 10.1. The Media are published under the CC-BY-NC-SA 4.0 Creative Commons licence accessible at the following link (as at 9 February 2022): <https://creativecommons.org/licenses/by-nc-sa/4.0/>.
- 10.2. Subject to Clause 10.1 all intellectual property rights in the NFTs, their underlying code, and the Media are reserved.
- 10.3. Our logos, product or service names, our slogans and the look and feel of the Site are our trade marks and may not be copied, imitated or used, in whole or in part, without our prior written permission.

## 11. Waiver of Right to Cancel

- 11.1. If you are a Consumer pursuant to the EU Consumer Rights Directive and habitually reside in the UK or European Union, special cancellation rules apply in respect of the supply of digital content not on a tangible medium. **By clicking the “Kiss me!” button on the Site, you give us your express consent to the supply of an NFT beginning during the Cancellation Period and you acknowledge that, as a result of the supply of an NFT beginning, your right to cancel will be lost.**

## 12. Connectivity and Technical Issues

- 12.1. Some users of the Site may experience technical problems in connecting their Wallet or placing offers on an NFT which are beyond our reasonable control such as firewalls, loss of internet connection or other technical issues with the blockchain technology, the digital wallet providers used, the smart contracts deployed to Ethereum or your own device. The technology utilised to submit and offer on as NFT depends on public peer-to-peer Ethereum network that is not under our control or influence and are subject to many risks and uncertainties. We will not be responsible to you for any errors or failures to connect a Wallet or to purchase an NFT, including, without limitation, errors or failures caused by any loss of connection or technical faults.

## 13. Our Liability to you

- 13.1. Nothing in these Terms limits or excludes our liability for: (i) death or personal injury caused by negligence; or (ii) fraud or fraudulent misrepresentation.
- 13.2. We do not give any representation, warranty or guarantee or assume any liability of any kind in respect of an NFT's merchantability, fitness for purpose, quality, description, condition, authenticity, rarity, importance, value, marketability or relevance in the history of NFTs and save for where Clause 13.5 applies, we exclude any liability for breach of any term, warranty or condition which may be implied by the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982.
- 13.3. We are not liable (i) for the statements, data, information and opinions of others including those set out in the in relation to the NFTs, or those of our representatives or employees; (ii) hosting, maintenance, availability or compatibility of an NFT or the Media with existing or future platforms or servers and (ii) in circumstances where you fail to comply with any reasonable instructions on the storing, hosting or safekeeping of an NFT.
- 13.4. Notwithstanding the above, if we are found to be liable to you, our total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation or otherwise, arising in connection with our contract for sale with the Buyer pursuant to these Terms, shall be limited to the Mint Price. We shall not be liable for any loss of profits, loss of business, goodwill, loss of anticipated savings or for any special, indirect, incidental, or consequential loss, costs, damages, charges or expenses to the fullest extent permitted by law.
- 13.5. If the Buyer is a Consumer: We shall not be liable for any loss or damage that is not foreseeable (loss or damage is foreseeable if it is an obvious consequence of our breach or if it was contemplated by us and the Buyer at the time the Contract was entered into).

## 14. General

- 14.1. We shall not be responsible for any failure to meet any obligation which we, or you have under these Terms which is caused by circumstances beyond our, or your reasonable control. This includes, but is not limited to strikes, lock-outs, fire, flood, natural disasters, epidemics, wars, armed conflict, terrorist attacks and nuclear and chemical contamination.

- 14.2. These Terms, the documents referred to herein (Privacy Policy and Website Terms) and the smart contract associated with the NFTs constitute the entire agreement and understanding between us relating to the subject matter of these Terms and expressly exclude any previous agreement, third party terms, or statements or information included on our Site unless expressly incorporated in these Terms.
- 14.3. We will hold and process your personal information you provide or make available to us and may share it in line with, and for uses as described in, our Privacy Policy published on our Website at <https://thekiss.xyz/terms> or available on request by email to [info@divergencetech.xyz](mailto:info@divergencetech.xyz).
- 14.4. If a court finds that any part of these Terms is not valid, or is illegal or impossible to enforce, that part of these Terms will be treated as being deleted, and the rest of these Terms will not be affected.
- 14.5. You may not grant a security over or transfer your rights or responsibilities under these Terms or the Contract unless we have given our written permission. These Terms will be binding on your successors, estate and anyone who takes over your rights and responsibilities. No term of these Terms shall be enforceable under the Contracts (Rights of Third Parties) Act 1999 by anyone other than you.
- 14.6. No failure or delay to exercise any right or remedy provided under these Terms shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.
- 14.7. Any notice pursuant to or in connection with these Terms shall be in writing by email to [info@divergencetech.xyz](mailto:info@divergencetech.xyz). Notices are deemed delivered immediately upon transmission if transmitted during normal business hours in the country of the recipient, or otherwise on the following business day.
- 14.8. These Terms and any contractual or non-contractual dispute arising out of or in connection with these Terms, will be governed and construed in accordance with the law of England and Wales. Each party irrevocably agrees, for the sole benefit of the Seller that, subject as provided below, the courts of England shall have exclusive jurisdiction over any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this agreement or its subject matter or formation. Nothing in this clause shall limit our right to take proceedings against you in any other court of competent jurisdiction, nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdictions, whether concurrently or not, to the extent permitted by the law of such other jurisdiction.