

NewBay Media LLC

TERMS OF SERVICE

Last Updated: May 30, 2006

1. Acceptance of Terms

NewBay Media LLC provide our Internet sites and the content, products and services offered on or through those sites (collectively, the "**Services**"), to you subject to the following Terms of Service ("**TOS**"). Your use of the Services in whole or in part constitutes your binding acceptance of these TOS. If you do not agree to these TOS, you should not use the Services. Some Services may be subject to additional posted rules, policies and terms. When you use those Services, you and NewBay shall be subject to those additional conditions, which are incorporated by reference into these TOS (and, consequently, form part of your agreement with us). Other Services may be governed by different usage terms (for example, different usage terms apply to users of our Gamasutra Internet site). In the event of an inconsistency between these TOS and any additional posted conditions or separate usage terms, the provisions of the additional conditions and/or separate usage terms shall control. Because we may modify all or any part of these TOS from time to time without notice to you, you should check back often so you are aware of your current rights and responsibilities. Your continued use of a given Service after changes to the TOS have been published on that Service constitutes your binding acceptance of the updated TOS. If at any time the TOS are no longer acceptable to you, you should immediately cease all use of the Services.

2. Description of Services

The Services include a combination of content that we create and that other third party content suppliers create. In addition, some Services provide you and other users with an opportunity to submit, post, display, transmit and/or exchange information, ideas, opinions, photographs, images, video, creative works or other information, messages, transmissions or material to us or others on or through that Service (collectively, the "**Postings**"). We adhere to high journalistic standards, and use every reasonable effort to provide informative and relevant content as part of the Services. However, in using the Services, you may be exposed to content that you find offensive, indecent, objectionable or that is inaccurate and you bear all risks associated with using that content. You understand that the Services are provided by NewBay "AS IS", as further described in Section 15 of these TOS, and that NewBay does not guarantee the accuracy, integrity or quality of any content available on or through the Services. In this regard, you acknowledge that you may not rely on any of this content, whether created by or submitted to NewBay, including, but not limited to, product reviews, white papers, product descriptions, stock quotes, or Postings on any bulletin board, chat, news group, community, forum or other feedback section of the Services (collectively, the "**Forums**"). You understand that from time to time, you may communicate with, receive communications from, or otherwise

participate in or use the services or obtain goods and services of or from, third parties (e.g., advertisers) as a result of your use of the Services. All such communication, interaction and participation is strictly and solely between you and such third party and NewBay shall not be responsible or liable to you in any way in connection with these activities or transactions (including, but not limited to, any representations, warranties, covenants, contracts or other terms or conditions that may exist between you and the third party, or any goods or services you may purchase or obtain from any third party). In particular, the appearance or availability of links to third party sites on or through the Services does not constitute an endorsement by NewBay with respect to the content, advertising, products, or other materials available on or from such sites. You further understand and agree that the Services may include certain communications from NewBay (such as administrative messages and certain newsletters), and that these communications are considered part of the Service and you may not be able to opt out of receiving them. Unless explicitly stated otherwise, any new features that augment or enhance the current Services shall be subject to the TOS. Finally, you are responsible for obtaining access to the Services and that access may involve third party fees (such as Internet service provider or airtime charges). You are responsible for those fees, including those fees associated with the display or delivery of advertisements. In addition, you must provide and are responsible for all equipment necessary to access the Services.

3. General Rules of Conduct

Your use of the Services is subject to all applicable local, state, national and international laws and regulations, and you agree not to violate such laws and regulations. In addition, you agree that:

- you will not interfere with another member's use and enjoyment of the Services; you will not interfere with or disrupt the security measures of the Services; you will not interfere with or disrupt networks connected to the Services, and will comply with all regulations, policies and procedures of such networks; and

- you will comply with United States law regarding the transmission of technical data exported from the United States.

- You further agree that you will not use the Services to:
 - send or result in the transmission of junk e-mail, chain letters, duplicative or unsolicited messages, or so-called "spamming"; harm minors in any way; promote or generate revenue for any business or commercial purposes, whether or not for a charge or through linking with any other web services or pages, unless authorized by NewBay; impersonate any person or entity; intentionally or unintentionally violate any applicable local, state, national or international law; "stalk" or otherwise harass another;or

- collect or store personal data about other users.

4. Postings

Although we reserve the right to edit Postings prior to their inclusion on the Services, as a general matter NewBay does not screen or monitor such content. Therefore, you understand that you are solely responsible for all Postings and other materials, whether publicly posted or privately transmitted, that are uploaded, posted, emailed, transmitted or otherwise made available from your email address on our through the Services. You further agree that your Postings will not violate these TOS. Specifically, you represent and warrant that your Postings will not contain any material that:

- is false, inaccurate, or misleading; infringes any third party's copyright, patent, trademark, trade secret or other proprietary rights, or rights of publicity or privacy; violates a nondisclosure agreement, or violates any law or regulation (including, without limitation, those governing export control, unfair competition, or false advertising); is defamatory, constitutes trade libel or product disparagement, or is unlawfully threatening or harassing; is obscene or contains child pornography; or

- contains viruses, Trojan horses, time bombs, worms, cancelbots, easter eggs or other computer programming routines that may damage or interfere with the operation of any system, or unlawfully intercept any data or personal information.
You also agree that you will not:

- reproduce, distribute, republish or retransmit material posted by any other Services users without the permission of that user and NewBay; take any action that imposes an unreasonable or disproportionately large load on our infrastructure; or
- interfere or attempt to interfere with the proper working of the Services, any activities conducted on or through the Services, or any networks through which you access the Services.

You further represent and warrant that:

- your Postings will be original and/or you will obtain all third-party permission necessary for the use of the Postings as set forth below; you are the sole and exclusive owner of all rights herein conveyed to NewBay and its affiliates; and
- you have the full and restricted power to convey such rights to NewBay and its affiliates free and clear of the claims of any other person or entity.

In sum, Postings do not reflect the views of NewBay and NewBay does not verify, endorse, of vouch for any such content. We do, however, enforce these TOS, and if we determine in our

sole discretion that any Posting is inaccurate, was posted without authorization, or otherwise does or may violate these TOS, we reserve the right, at any time, without prior notice and without limiting any and all other rights we may have, at law or in equity, to (a) modify, refuse or remove the Posting; (b) revoke the applicable user's right to use the Services; and/or (d) use any technological, legal, operational or other means available to NewBay to enforce the provisions of these TOS, including, without limitation, blocking specific IP addresses or deactivating the applicable user's registration.

Finally, you specifically grant to NewBay and its affiliates and service providers (or warrant that the owner of such content grants to NewBay and its affiliates and service providers) a perpetual, worldwide, royalty-free, irrevocable, nonexclusive right and license, sublicensable through multiple tiers, to:

- use, reproduce, modify, adapt, publish, translate, create derivative works from, distribute, perform and display all Postings submitted by you or through your account, in whole or in part; use, in whole or in part, your name, likeness, photograph, voice, company name, screen name, e-mail address and/or other identifying information submitted by you as part of or in connection with such Postings ("Image"), and reproduce, publish, create derivative works from, distribute, perform and display materials containing the same; and
- incorporate the Postings and the Image in other works in any form, media or technology now known or later developed throughout the universe, and reproduce, publish, display and otherwise distribute the same.

For sake of clarity, by virtue of the above grant, you also give NewBay and its affiliates permission to copy your Postings and the Image as part of the normal backup process and/or to archive discussions containing your Postings and/or the Image.

5. NewBay's Proprietary Rights

All Services software, design, text, images, photographs, illustrations, audio and video material, artwork, graphic material, database, proprietary information and all copyrightable or otherwise legally protectible elements of the Services, including, but not limited to, the selection, sequence and 'look and feel' and arrangement of items, and all trademarks, service marks and trade names, excluding any of your Postings (individually and/or collectively, "**Material**"), are the property of NewBay, its subsidiaries, affiliates, licensors or suppliers and are legally protected, without limitation, under U.S. Federal and State, as well as applicable foreign, laws, regulations and treaties. The compilation of all content on each site is the exclusive property of NewBay. You may not reproduce, modify, create derivative works from, display, perform, publish, distribute, disseminate, broadcast or circulate to any third party (including, without limitation, on or via a third party web site), or otherwise use, any materials contained on the Services (except for your Postings) without the express prior written consent of NewBay or its owner if NewBay is not the owner. In particular, you may not frame any Material without the express prior written consent of NewBay or the Material owner. You must

not alter, delete or conceal any copyright or other notices contained on the Services, including notices on any Material you download, transmit, print or reproduce from the Services. Any unauthorized or prohibited use of any Material, may subject you to civil liability or criminal prosecution, or both, under applicable federal and state laws. You further agree not to access the Service by any means other than through the interface that is provided by NewBay for use in accessing the Service.

6. Forums

Some of our Services give users the opportunity to participate in Forums operated by NewBay or by a third party. We ask that our users exercise appropriate caution when participating in any type of Forum. In particular, please remember that if you publicly disclose personal identifying information, such as your name or email address, in connection with a Forum, the information may be collected and used by others. You should also take reasonable precautions with regard to any material you download from or through Forums (for example, scanning for viruses or other damaging computer programming routines). Finally, you agree to use the Forums only to send and receive messages and material that are proper and related to that particular Forum.

7. Directories and Other Membership Listings

Some of our Services allow users to make some of their personal information (including, but not limited to, name, company affiliation and job title) available to other visitors as part of a membership directory or other listing for that Service. Please remember: If you do not want certain information to be available to other Service users, you should **not** include it in any membership directory listing. As with all other content on the Services, we reserve the right to refuse (or remove) listings in our sole discretion, and without prior notice, if we determine that they are inaccurate, were posted without authorization, or otherwise violate these TOS.

8. Promotions

Some of our Services may from time to time conduct promotions, including, but not limited to, auctions, contests and sweepstakes ("Promotions"). Each Promotion will have additional terms, conditions and rules which will be posted or otherwise made available to you and, for purposes of each Promotion in which you participate, will be deemed incorporated by reference into these TOS (and therefore a part of your agreement with NewBay).

9. Fee-Based Services

Some of our Services require that you to pay a fee to access or use such Service, as described in the specific conditions included where those Services are offered. You agree to pay all fees and charges that you incur. Unless otherwise noted, all currency references are in U.S. dollars. We may, upon notice if required by applicable laws, at any time change the amount of, or basis for determining, any fee or charge, or institute new fees or charges. All

fees and charges are payable in accordance with payment terms in effect at the time the fee or charge becomes payable.

10. Registrations Obligations

Some of our Services require that you register with that Service in order to access or use it. If such registration is required, you agree that you will provide accurate information (such as your real name and a valid e-mail address) and will update your relevant information if it becomes outdated. If you provide any information that is, or that NewBay in its reasonable discretion determines may be, untrue, inaccurate, not current or incomplete, NewBay has the right, without prior notice, to suspend or terminate your account and refuse any and all current or future use of the Services (or any portion thereof). For more detailed information about how we treat the registration information you provide to us, please see our [Privacy Policy](#), which is incorporated by reference into these TOS (and therefore a part of your agreement with us).

11. Passwords and Other Security Issues

If we issue you a password, you agree to help protect your information by guarding that password, and by changing it as soon as possible if you believe its security has been compromised. If NewBay allows you to choose a username and you select, in NewBay's sole discretion, one that is obscene, indecent, abusive or which is otherwise objectionable, NewBay has the right, without prior notice to you, to automatically change your username, delete your Postings under it, deny you access to the Services, or any combination of these options. You may not transfer your registration, password or user name to another person or share it with anyone. We will not be responsible for any loss or damage that may result if you fail to comply with these requirements. If you believe your information has been used without your authorization, you agree to notify NewBay immediately.

12. Privacy Policy

NewBay respects your privacy. Please see our [Privacy Policy](#) for important information and disclosures relating to the collection and use of your personally identifiable information in connection with your use of the Services.

13. Service Deactivation or Termination

We have the right, but not the obligation, to take any of the following actions in our sole discretion at any time and for any reason without giving you any prior notice:

- Restrict, suspend or terminate your access to all or any part of our Services;
- Refuse, move or remove for any reason any material that you submit on or through the Services;
- Refuse, move, or remove any content that is available on or through the Services;
- Deactivate or delete your accounts and all related information and files in your account;
- Establish general practices and limits concerning use of the Services

We may take any of the above actions for any legitimate business reason, as determined by NewBay in its sole discretion, including, but not be limited to, (a) breaches or violations of the TOS or other incorporated agreements or guidelines, (b) requests by law enforcement or other government agencies, (c) a request by you, (d) discontinuance or material modification to the Services (or any part thereof), and (e) unexpected technical or security issues or problems. You agree that we will not be liable to you or any third party for taking any of these actions.

14. Indemnification

You hereby agree to indemnify, defend and hold NewBay, its subsidiaries, parent corporation and affiliates, and all of their respective officers, directors, owners, employees, agents, licensors, representatives, licensors and suppliers (collectively, the "**NewBay Parties**"), harmless from and against any and all liability, losses, expenses, damages and costs (including attorneys' fees), incurred by any NewBay Party in connection with any claim arising out of your use of the Services, any use or alleged use of your accounts or your passwords by any person, whether or not authorized by you, the content you submit, post, transmit or make available through the Services, your violation of these TOS, your connection to the Services, or your violation of the rights of any other person or entity.

NewBay reserves the right to assume, at its sole expense, the exclusive defense and control of any claim, action or other matter for which you are required to indemnify us, and all negotiations for settlement or compromise thereof, and you agree to fully cooperate with NewBay in the defense of any such claim, action, settlement or compromise negotiations, as requested by NewBay.

15. Disclaimers of Warranties

THE SERVICES, AND MATERIALS, PRODUCTS AND POSTINGS ARE MADE AVAILABLE ON AN "AS IS" AND "AS AVAILABLE" BASIS, WITHOUT ANY REPRESENTATION, PROMISE OR WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, OR ANY GUARANTY OR ASSURANCE THE SERVICES WILL BE AVAILABLE FOR USE, OR UNINTERRUPTED OR ERROR FREE, OR THAT ALL PRODUCTS, FEATURES, FUNCTIONS OR OPERATIONS WILL BE AVAILABLE OR PERFORM AS DESCRIBED OR THAT ANY ERRORS WILL BE CORRECTED. IN ADDITION, ANY MATERIAL THAT YOU DOWNLOAD OR OTHERWISE OBTAIN THROUGH OUR SERVICES IS DONE AT YOUR OWN DISCRETION AND RISK, AND YOU WILL BE SOLELY RESPONSIBLE FOR ANY POTENTIAL DAMAGES TO YOUR COMPUTER SYSTEM OR LOSS OF DATA THAT RESULTS FROM YOUR DOWNLOAD OF ANY SUCH MATERIAL. Without limiting the foregoing, NewBay is not responsible or liable for any malicious code, delays, inaccuracies, errors, or omissions arising out of your use of the Services. As between you and NewBay, you are assuming the entire risk as to the quality, accuracy, performance, timeliness, adequacy, completeness, correctness, authenticity, security and validity of any and all features and functions of the Services, including, without limitation, postings and materials associated with

your use of the Services. Under no circumstances shall any NewBay Party be liable for any loss or damage caused by your reliance on information obtained through the Services. It is your responsibility to evaluate the information, opinion, advice, or other content available through the Services.

16. Limitation of Liability

IN NO EVENT SHALL ANY NewBay PARTY BE LIABLE TO YOU OR ANY OTHER PERSON OR ENTITY, UNDER ANY THEORY, INCLUDING NEGLIGENCE, FOR DAMAGES OF ANY KIND ARISING FROM THE USE OF THE SERVICES, INCLUDING BUT NOT LIMITED TO DIRECT, INDIRECT, ACTUAL, INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES, LOST INCOME, REVENUE OR PROFITS, LOST OR DAMAGED DATA, OR OTHER COMMERCIAL OR ECONOMIC LOSS, THAT RESULT FROM YOUR USE OF, OR INABILITY TO USE, THE SERVICES, EVEN IF SUCH NewBay PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR SUCH DAMAGES ARE FORESEEABLE. BY USING THE SERVICES, YOU AGREE THAT THIS LIMITATION WILL APPLY TO ANY MERCHANDISE, SERVICES, AND CONTENT THAT MAY BE AVAILABLE THROUGH SUCH SERVICES. IN THE EVENT THAT APPLICABLE LAW DOES NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY OR DAMAGES, YOU AGREE THAT IN NO EVENT SHALL THE TOTAL LIABILITY OF ANY NewBay PARTY TO YOU FOR ALL DAMAGES, LOSSES AND CAUSES OF ACTION OF ANY KIND EXCEED ONE HUNDRED DOLLARS (\$100.00). Notwithstanding any claim that a sole or exclusive remedy which is provided in this agreement may or does fail of its essential purpose, you specifically acknowledge and agree that your sole and exclusive remedy for any loss or damage shall be to have NewBay, upon written notice from you to us, attempt to repair, correct or replace any deficient Service and, if repair, correction or replacement is not reasonably commercially practicable for NewBay, in its sole discretion, to refund any monies actually paid by you for the Service involved and to terminate and discontinue your use of the Services.

17. Miscellaneous

General. This site is created, controlled and operated by NewBay in the USA, and is intended solely and exclusively for residents of the United States, its territories and possessions who are at least 13 years of age or older. If you choose to access this site from another location, you are responsible for complying with local laws, if and to the extent that local laws apply.

Entire Agreement. These TOS, including the policies referred to in these TOS, constitute the entire agreement between you and NewBay and govern your use of the Services, superceding any prior agreements between you and NewBay. As noted above, you also may be subject to additional terms and conditions that may apply when you use or purchase certain other NewBay services, affiliate services, third-party content or third-party software. These TOS cannot be changed or terminated orally. *Notice.* We may be required by state or federal law to notify you of certain events. You hereby acknowledge and consent that such notices will be effective upon our posting them on or through the Services or delivering them to you through

email. You may update your email address by visiting the Services where you have provided contact information. If you do not provide us with accurate information, we cannot be held liable if we fail to notify you. You have the right to request that we provide such notices to you in paper format, and may do so by contacting the General Counsel, NewBay Media LLC, 600 Community Drive, Manhasset, New York 11030. If you are a California resident, you may have this same information emailed to you by sending a letter to the foregoing address with your email address and a request for this information.

Assignment. You agree that the TOS may be automatically assigned, in whole or in part, by NewBay or its affiliate to a third party, in our sole discretion, in connection with a merger, acquisition, reorganization or sale of substantially all of our assets, in whole or in part.

Choice of Law and Forum. The formation, construction and interpretation of this agreement shall be controlled by the laws of the State of New York, giving no effect to choice of law provisions. The U.N. Convention of Contracts for the International Sale of Goods is expressly excluded from any interpretation of this Agreement. Any dispute relating to this agreement shall be subject to the exclusive jurisdiction of the state and federal courts in New York, New York, U.S.A., and the parties agree to submit to the personal and exclusive jurisdiction of these courts.

No Third Party Beneficiaries. You agree that, except as otherwise expressly provided in this TOS, there shall be no third party beneficiaries to this Agreement. *Waiver and Severability of Terms.* The failure of NewBay to exercise or enforce any right or provision of the TOS shall not constitute a waiver of such right or provision. If any provision of the TOS is found by a court of competent jurisdiction to be invalid, the parties nevertheless agree that the court should endeavor to give effect to the parties' intentions as reflected in the provision, and the other provisions of the TOS remain in full force and effect.

Statute of Limitations. You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to use of the Service or the TOS must be filed within one (1) year after such claim or cause of action arose or be forever barred.

18. Violations

NewBay respects the intellectual property of others, and we ask our users to do the same. If you believe that content you own has been copied and made accessible in a manner that violates your intellectual property rights, please review our Copyright Notice.

We also ask that you bring Service problems to our attention, but California residents may also choose to contact the Complaint Assistance Unit of the Division of Consumer Services of the Department of Consumer Affairs, at 400 R Street, Sacramento, California 95814 or (800) 952-5210.

For questions about terms of service, the practices of this site or any dealings with NewBay Media LLC, contact us at:

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