

SMILEY MEDIA PUBLISHER AGREEMENT

This Publisher Agreement (the “Agreement”) constitutes a legal agreement between Smiley Media, Inc., which does business as Smiley Media (“Smiley Media”), and Publisher (“Publisher”)(collectively, the “Parties”). Publisher’s use of the Smiley Media Advertising Network is subject to the terms set forth in this document. This Agreement supersedes all prior or contemporaneous communications and proposals, whether electronic, oral or written, between Publisher and Smiley Media with respect to the Smiley Media Advertising Network. Publisher agrees that this Agreement is not intended to confer and does not confer any rights or remedies upon any person other than Publisher and Smiley Media. Smiley Media may amend this Agreement at any time, from time to time, by posting an amended Agreement on the Smiley Media website. Any changes to this Agreement will become effective immediately upon posting and may be changed without notice to Publisher. This Agreement may not be otherwise amended except in a writing signed by Publisher and Smiley Media. Smiley Media and Publisher agree to these terms governing Publisher’s participation in the Smiley Media Advertising Network as follows:

1. Definitions.

“Advertiser” means the manufacturers, advertisers, service providers, and merchants that provide Offers through the Smiley Media Advertising Network.

“Agreement” means this Publisher Agreement and any Insertion Orders.

“Consumer” means a user of Publisher’s Site or Publisher Network.

“Effective Date” means the date upon which this Agreement becomes fully executed by both Parties.

“Entry Page” means the first Hosted Page to which Publisher will direct Consumers under this Agreement. The Entry Page will contain registration information fields for Consumers to review and update prior to entering the Offer Form Pages in the Smiley Media Advertising Network.

“Hosted Page” means the Entry Page and the Offer Form Page, and all elements contained therein, developed, hosted, and maintained by Smiley Media, through which Registered Users may opt in to Offers from Advertisers.

“Insertion Order” means Publisher’s written directive to Smiley Media to display Offers on Publisher’s Site through the Smiley Media Advertising Network under specified terms.

“Live Date” means the date Publisher first directs Registered Users to Hosted Pages.

“Notice” means written notice, including by email.

“Offer” means the offers, coupons, or other promotional marketing provided by Advertiser through an Offer Form Page on the Smiley Media Advertising Network.

“Offer Form Page” means the Hosted Pages on which Registered Users review, update, and confirm the Valid Registration Fields and provide additional information as required by the Offer.

“Publisher Integration Document” means the document containing the set of technical parameters required to display a Hosted Page on Publisher’s Publisher Network.

“Publisher Network” means any network of internal Sites (Sites owned and operated by Publisher) and Sub-Publishers from whom Publisher obtains Internet traffic that is directed to the Smiley Media Advertising Network.

“Registered User” means a Consumer who has provided data in all Valid Registration Fields on any of Publisher’s Sites and has reached an Offer Form Page.

“Registered User Action” means a unique registration by a Registered User to participate in an Offer.

“Revenue” means revenue as calculated and tracked by Smiley Media’s reporting system.

“Site” means a website sending traffic to the Smiley Media Advertising Network.

“Smiley Media Advertising Network” means the advertising platform through which Smiley Media displays Offers to Internet users.

“Sub-Publisher” means a website publisher from whom Publisher obtains Internet traffic but that is not owned, operated, or controlled by Publisher.

“Valid Registration Fields” means the first name, last name, phone number, street address, city, state, zip code, email address, date of birth, gender, and/or any other Consumer information required for Offers.

“Visit” means a Consumer directed to the Smiley Media Advertising Network by Publisher and who successfully loads the first Hosted Page.

2. Use of the Smiley Media Advertising Network.

2.1. Smiley Media will provide various advertising services to Publisher according to this Agreement and any Insertion Order. Each Insertion Order may contain additional terms and conditions specific to the services described therein. An Insertion Order will not be binding unless signed by both Parties and, once so signed, will become part of this Agreement.

2.2. Smiley Media is responsible for the development, operation, and maintenance of Smiley Media’s advertising service technology, proprietary systems, and related equipment.

2.3. Smiley Media and Publisher agree that Smiley Media will have sole responsibility and authority for: (a) obtaining Advertiser participation in the Smiley Media Advertising Network and for providing and updating Offers on the Hosted Page and in the Smiley Media Advertising Network as set forth in the Insertion Order; and (b) obtaining from Advertisers all Offer information and other Advertiser-specific information for display on the Hosted Page or on the Smiley Media Advertising Network.

2.4. Offers containing objectionable content, as determined by Publisher, or content in violation of applicable law, will be excluded from appearing on the Hosted Pages within 24 hours of Publisher providing Smiley Media Notice of such content. Publisher shall otherwise accept all Offers on the Hosted Pages.

2.5. Smiley Media will provide online reporting of Revenue, traffic volume, and pass-through rates to Publisher.

2.6. Publisher shall use all commercially reasonable efforts to integrate Publisher’s Publisher Network with the Smiley Media Advertising Network by, among other things, providing all information required in the Publisher Integration Document.

2.7. Publisher shall use all commercially reasonable efforts to deliver Consumers to the Hosted Page.

2.8. Publisher is prohibited from offering any kind of incentive, including but not limited to cash, credits, loyalty points, or any such rewards to Consumers in exchange for Consumers taking any specific action on any Offer. Additionally, Publisher will not promote or obtain traffic from parties that promote: (a) sexually explicit materials; (b) violent, illegal or hate-related speech, ideas or conduct; or (c) discrimination based on sex, race, religion, age, sexual orientation, nationality, disability, or ethnicity. Publisher will not violate, the intellectual property rights (including without limitation, copyright, trademark, and trade secrets) of third parties in the course of generating traffic to be directed to the Smiley Media Advertising Network. Publisher will impose contractual restrictions on its Sub-Publishers substantially similar to those set forth in this Section 2.8. In the event that Smiley Media determines, in its reasonable discretion, that Publisher or any of its Sub-Publishers has breached this Section 2.8,

Smiley Media may immediately terminate this Agreement without Notice to Publisher and, because damages resulting from such breach will be difficult to quantify, Publisher agrees that Smiley Media may retain any sums then otherwise due Publisher under the operative Insertion Order as liquidated damages for such breach in addition to any other remedies Smiley Media may have at law or in equity.

2.9. Smiley Media may provide, or third parties may provide, links to other websites or resources. Because Smiley Media has no control over such sites and resources, Publisher acknowledges and agrees that Smiley Media is not responsible for the availability of such external sites or resources, and does not endorse and is not responsible or liable for any content, advertising, products, or other materials on or available from such sites or resources. Publisher further acknowledges and agrees that Smiley Media shall not be responsible or liable, directly or indirectly, for any damage or loss caused or alleged to be caused by or in connection with use of or reliance on any such content, goods or services available on or through any such website or resource.

3. Privacy.

3.1. Internet user privacy is of paramount importance to Smiley Media and all participants in the Smiley Media Advertising Network. Publisher therefore affirms and attests that it adheres to fair information collection practices with respect to its performance under this Agreement and contractually requires its Sub-Publishers to adhere to such practices as well.

3.2. Some of the information gathered from Valid Registration Fields and elsewhere may be personally identifiable information of Consumers. Publisher shall clearly post on its corporate website, and any internal Sites, an easy to understand privacy policy that: (a) is in compliance with all Federal Trade Commission guidelines and any other applicable laws, rules, and regulations with respect to personally identifiable information and online privacy, including all applicable laws, rules and regulations with respect to the online privacy of minors; and (b) identifies the nature and scope of the collection and use of information gathered by Publisher and offers Consumers an opportunity to opt-out from collection and use of personal data. Publisher will also contractually require its Sub-Publishers to post a privacy policy on their Site(s) meeting the criteria set forth in this Section 3.2.

3.3. Notwithstanding the foregoing, the Parties reserve the right at all times to disclose any information deemed necessary to satisfy any applicable law, regulation, legal process or governmental request, or to edit, refuse to post, or to remove any information or materials, in whole or in part, in each Parties' sole discretion. Publisher understands and agrees that the Smiley Media Privacy Policy, including enforcement of that policy, is not intended to confer, and does not confer, any rights or remedies upon any person. Smiley Media understands and agrees that the Publisher Privacy Policy, including enforcement of that policy, is not intended to confer, and does not confer, any rights or remedies upon any person.

4. Payment.

4.1. Smiley Media and Publisher shall pay all fees as indicated in this Agreement and any Insertion Orders. Publisher will receive payment from Smiley Media based on Revenue reported in the Smiley Media Publisher reporting interface at the end of the relevant billing period.

4.2. Unless otherwise agreed by the Parties in writing (including by email), Smiley Media will send payments to Publisher thirty days after the end of each calendar month. If the Agreement is terminated, Smiley Media will pay Publisher's earned balance to Publisher within sixty days after the end of the calendar month in which the Agreement is terminated.

4.3. To ensure proper payment, Publisher is solely responsible for providing and maintaining accurate contact information. For U.S. taxpayers, this information includes a valid U.S. tax identification number and a completed Form W-9.

4.4. Publisher shall pay all applicable taxes or charges imposed on it by any government entity in connection with Publisher's participation in the Smiley Media Advertising Network.

4.5. If Publisher disputes any payment made by Smiley Media, Publisher shall notify Smiley Media in writing within ten days of receiving such payment;

failure to do so will result in waiver by Publisher of any claim relating to such payment. Payment will be calculated based solely on records maintained by Smiley Media. Other measurements or records will not be used for the purpose of determining amounts owed under this Agreement.

5. Term; Termination.

5.1. This Agreement will commence on the Effective Date. Either Party may terminate or suspend this Agreement upon Notice to the other Party.

5.2. Upon termination of this Agreement: (a) all licenses applicable to this Agreement (including all trademark licenses) shall terminate, and (b) Smiley Media and Publisher shall remove all links applicable to this Agreement from the Publisher Publisher Network and the Hosted Page, as applicable.

6. License and Trademark Use. Neither Smiley Media nor Publisher shall use the other Party's trademarks or logos (and Publisher shall not use any Advertiser trademark or logo), nor any adaptation or variation thereof, in any manner whatsoever, without the other Party's prior written consent in each instance. All such uses shall be in accordance with the licensor's guidelines.

7. Proprietary Rights.

7.1. Smiley Media will own any and all right, title, and interest in and to: (a) the Smiley Media Advertising Network; (b) all Registered User transaction data related to Registered User Actions and behavior occurring on the Hosted Pages collected by Smiley Media, including without limitation analyses, compilations, overlays, summaries, service performance evaluation, public reporting requirements, marketing activities, abstracts, or other manipulations of such data; and (c) all intellectual property rights (including without limitation copyrights and patent rights) in each of the foregoing. Notwithstanding Publisher's right to participate in the Smiley Media Advertising Network as provided in this Agreement, Publisher agrees it has no rights in or licenses to any of the foregoing.

7.2. If provided through a Registered User Action, all Valid Registration Fields data are the sole and exclusive property of Advertiser and are deemed Confidential Information under this Agreement.

7.3. Publisher acknowledges that Smiley Media optimizes Offers based on Smiley Media's proprietary optimization methods to ensure lead quality and volume. Publisher agrees that any optimized Offers produced by Smiley Media in the course of performing its services under this provision, as well as all Smiley Media optimization methods, concepts, and design features are the property of Smiley Media and shall not be used by Publisher, either directly or indirectly, without the express written consent of Smiley Media.

8. Representations.

8.1. Each party represents to the other party that: (a) it has the full power and authority to enter into this Agreement and to carry out its obligations as set forth in this Agreement; (b) it owns or has sufficient licenses to its and, as applicable, the Advertiser's trademarks and the Offers provided hereunder; (c) it has no other agreements or commitments that conflict with its obligations under this Agreement; (d) it will comply with all applicable laws, codes, ordinances, rules and regulations of the federal and state governments, and of any political subdivisions and regulatory authorities thereof; and (e) the use, reproduction, distribution, or transmission of the Offers will not violate any civil or criminal laws, rules, or regulations.

8.2. Publisher specifically represents that no email sent by Publisher violates any laws or regulations, including without limitation, the CAN-SPAM Act of 2003 as amended.

9. Limitations of Liability.

9.1. ALL SERVICES PROVIDED BY THE PARTIES UNDER THIS AGREEMENT ARE PROVIDED ON AN "AS IS" "AS

AVAILABLE” BASIS. TO THE FULLEST EXTENT PERMISSIBLE PURSUANT TO APPLICABLE LAW, THE PARTIES MAKE NO WARRANTIES, GUARANTEES, REPRESENTATIONS, PROMISES, STATEMENTS, ESTIMATES, CONDITIONS, OR OTHER INDUCEMENTS, EXPRESS, IMPLIED, ORAL, WRITTEN, OR OTHERWISE EXCEPT AS EXPRESSLY SET FORTH HEREIN. THE PARTIES ARE NOT RESPONSIBLE FOR DELAYS CAUSED BY ACCIDENT, WAR, ACT OF GOD, EMBARGO, COMPUTER SYSTEM FAILURE, OR ANY OTHER CIRCUMSTANCE BEYOND ITS CONTROL.

9.2. NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY EITHER PARTY FROM THE OTHER PARTY OR THROUGH OR FROM THE SMILEY MEDIA ADVERTISING NETWORK SHALL CREATE ANY WARRANTY NOT EXPRESSLY STATED IN THIS AGREEMENT.

9.3. UNDER NO CIRCUMSTANCES SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR EXEMPLARY DAMAGES (EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES), ARISING FROM ANY ASPECT OF THE ADVERTISING RELATIONSHIP PROVIDED HEREIN. REGARDLESS OF ANY LAW TO THE CONTRARY, NO ACTION, SUIT OR PROCEEDING SHALL BE BROUGHT AGAINST EITHER PARTY MORE THAN ONE YEAR AFTER THE DATE UPON WHICH THE CLAIM AROSE.

9.4. THE PARTIES ACKNOWLEDGE THAT THEY HAVE AGREED TO PRICING IN RELIANCE UPON THE LIMITATIONS OF LIABILITY AND THE DISCLAIMERS OF WARRANTIES AND DAMAGES SET FORTH HEREIN, AND THAT THESE CONSIDERATIONS FORM AN ESSENTIAL BASIS OF THE BARGAIN BETWEEN THE PARTIES. THE PARTIES AGREE THAT THE LIMITATIONS AND EXCLUSIONS OF LIABILITY AND DISCLAIMERS SPECIFIED IN THIS AGREEMENT WILL SURVIVE AND APPLY EVEN IF FOUND TO HAVE FAILED OF THEIR ESSENTIAL PURPOSE.

10. Mutual Indemnification.

10.1. Each Party agrees to indemnify, defend, and hold harmless the other Party and its officers, directors, employees, and agents against all claims, actions, liabilities, suits, proceedings, fines, damages, costs (including without limitation settlement costs and attorneys’ fees), losses, and expenses that may at any time be incurred by reason of any claims, suits, or proceedings: (a) for libel, defamation, violation of right of privacy or publicity, patent, copyright or trademark infringement, or other infringement of any third party right, fraud, false advertising, misrepresentation, product liability or violation of any law, statute, ordinance, rule, or regulation throughout the world in connection with Publisher’s use of the Smiley Media Advertising Network; or (b) arising out of any material breach of any duty, representation, or warranty under any agreement between Smiley Media and Publisher.

10.2. Publisher further agrees specifically to indemnify, defend, and hold harmless Smiley Media and its officers, directors, employees, and agents against all claims, actions, liabilities, suits, proceedings, fines, damages, costs (including without limitation settlement costs and attorneys’ fees), losses, and expenses that may at any time be incurred by reason of any claims, suits, or proceedings resulting from any violation of Section 2.8 of this Agreement.

10.3. The foregoing obligation is contingent upon: (a) the indemnified party giving written notice to the indemnifying party of any such claim, action or demand within 60 days of receipt of notice of such claim, action or demand; and (b) the indemnified party fully assisting, at the indemnifying party’s expense, in the defense.

10.4. The indemnified party agrees that the indemnifying party will have sole and exclusive control over the defense and settlement of any third-party claim; however, any compromise or settlement will require the prior written consent of both Publisher and Smiley Media. Consent to compromise or settlement shall not be unreasonably withheld or delayed.

11. Confidentiality.

11.1. For purposes of this Agreement, “Confidential Information” means any and all information disclosed to a Recipient by a Discloser under this

Agreement that is designated as confidential at the time of disclosure. If information is disclosed orally or in intangible form, it will be deemed confidential if summarized in writing within a reasonable time after disclosure. Confidential information includes, but is not limited to “Technical Information,” including operating characteristics, optimizations, methods of optimization, implementations, and development plans. Confidential information further includes, but is not limited to “Business Information,” including business plans, product pricing and roadmaps, and identities of websites on which Offers are published. Notwithstanding the foregoing, Confidential Information will not include any information the Recipient can substantiate: (a) is now available or becomes publicly available without breach of this Agreement; (b) is disclosed to a third party by the Discloser without a duty of confidentiality; (c) is known by the Recipient before receipt from the Discloser; (d) is independently developed by the Recipient without use of or access to the Discloser’s Confidential Information; (e) is lawfully obtained from a third party that has a right to make such disclosure; or (f) is expressly approved for release by written authorization of the Discloser. A “Discloser” means a party who discloses Confidential Information under this Agreement. The “Intended Purpose” means the display of Advertisers’ Offers through the Smiley Media Advertising Network. A “Recipient” means a party who receives Confidential Information under this Agreement.

11.2. All Confidential Information of a Discloser shall be used by a Recipient only for the Intended Purpose. The Parties hereby agree that a Recipient shall: (a) refrain from disclosing the Confidential Information to any third party; (b) restrict dissemination of the Confidential Information to only those employees who must be directly involved with accomplishing the Intended Purpose or any other purpose under this Agreement; (c) use the same degree of care it would use for its own information of like importance, but at least use reasonable care, in safeguarding against disclosure of the Confidential Information of the Discloser.

11.3. The Parties agree that all Confidential Information received is and will remain the property of the Discloser and that such information shall not be copied, transmitted, or reproduced without the express permission of the Discloser, except for such copies as may be reasonably necessary in order to accomplish the Intended Purpose or any other purpose under this Agreement. Upon written request of the Discloser, the Recipient shall immediately discontinue all use of Confidential Information of the Discloser, and shall, at the Discloser’s option, either destroy or return to the Discloser all hard copies in the Recipient’s possession of such Confidential Information and any derivatives thereof (including all hard copies of any translation, modification, compilation, optimization, abridgement, or other form in which the Confidential Information has been recast, transformed, or adapted), and delete all electronic copies thereof; provided, however, that the Recipient may retain one archival copy of the Confidential Information, which shall be used only in the event of a dispute concerning this Agreement. Notwithstanding the foregoing, neither party shall be required to destroy or alter any computer-based back-up files generated in the normal course of its business, provided that such files are maintained in a confidential manner.

12. Fraudulent Traffic.

12.1. Smiley Media exercises commercially reasonable efforts to monitor traffic to protect against fraudulent traffic being delivered to the Hosted Pages by publishers participating in the Smiley Media Advertising Network. If Smiley Media detects fraudulent activity on the part of Publisher, Publisher’s account will be suspended pending further investigation.

12.2. If Smiley Media determines, in its reasonable discretion, that Publisher has engaged in fraudulent activity, Smiley Media may suspend or cancel all Insertion Orders and may retain any sums then otherwise due Publisher under the operative Insertion Order as liquidated damages for such breach in addition to any other remedies Smiley Media may have at law or in equity.

13. Choice of Law; Attorneys’ Fees.

13.1. This Agreement is governed by the laws of the State of Texas, except that the conflict-of-law provisions of the State of Texas will not apply.

13.2. The exclusive forum for any action related to this Agreement will be in the state courts in Austin, Texas and, to the extent that federal courts have exclusive jurisdiction, in the U.S. District Court for the Western District of Texas – Austin Division.

13.3. The parties consent to such venue and jurisdiction and agree to waive the personal service of any process upon them by agreeing that service may be effectuated by overnight mail (using a commercially recognized service) or by U.S. Mail with delivery receipt to the last address provided by each party hereto.

13.4. A party that substantially prevails in an action brought under this Agreement is entitled to recover from the other party its reasonable attorneys' fees and costs, including in-house counsel costs.

14. Non-Solicitation. Each party acknowledges and agrees that the employees of the other party who are involved in the performance of the services under this Agreement are a valuable asset to such party and are difficult to replace. Accordingly, each party agrees that, during the term of this Agreement and for a period of one year after the termination of this Agreement, neither party will hire as an employee or as a consultant any of the other party's employees who are involved with the performance of services under this Agreement without the other party's prior written consent. Notwithstanding the foregoing, either party may employ any person who (a) initially contacts such party without solicitation, directly or indirectly, by such party or (b) responds to any general advertisement of employment or engagement by such party or to any solicitation or inquiry from a recruiter retained by such party provided that such person is not specifically identified or targeted by such party for such solicitation or inquiry.

15. General.

15.1. Smiley Media and Publisher acknowledge and agree that their relationship is that of independent contractors. Neither Publisher nor Smiley Media shall in any way represent itself as a partner, joint venturer, agent, employee, or general representative of the other party

15.2. Any notices relating to this Agreement shall be given in writing (including by email) and will be deemed effective for all purposes upon the first to occur of actual delivery evidenced by signed receipt, receipt of email into the mailbox of the then-serving CEO or General Counsel of a party, delivery by generally recognized overnight courier service with return receipt requested, or by facsimile transmission (with the original subsequently delivered by other means permitted by this Agreement) at the addresses set forth in any Insertion Order

15.3. Rights and obligations under this Agreement which by their nature should survive, including, but not limited to any and all payment obligations invoiced prior to the termination or expiration hereof, will remain in effect after termination or expiration hereof.

15.4. This Agreement (and any documents incorporated herein by reference) constitutes the entire agreement between the parties hereto and contains all of the agreements between said parties with respect to the subject matter hereof. This Agreement supersedes any and all prior agreements, either oral or in writing, between the parties with respect to the subject matter hereof.

15.5. This Agreement will not be changed, modified, or amended except by a writing executed by both parties or by posting of revisions of the Agreement at <http://www.smileymedia.com/media/Publisher-Terms.pdf>. Publisher is responsible for checking for modifications to this agreement on a regular basis. Publisher's use of the Smiley Media Advertising Network after the posting of modifications to this agreement constitutes assent to any modification provided by Smiley Media. If Publisher does not agree to the changes proposed by Smiley Media, or to any of the terms in this Agreement, Publisher's only remedy is to terminate this Agreement and any Insertion Orders pursuant to Section 5.

15.6. This Agreement may not be assigned by a party without the prior written consent of the other party; however, the parties may assign this Agreement without consent in connection with a merger, reorganization, or sale of all or substantially all of a party's assets or voting securities.

15.7. This Agreement may be executed in counterparts and all such executed documents (including facsimiles) when taken together have the same force and effect as a single document.

15.8. This Agreement is binding upon and inures to the benefit of Publisher and Smiley Media and their successors and permitted assigns.

15.9. If any section, provision, term, or clause of this Agreement is found to be invalid or unenforceable, such section, provision, term, or clause shall be modified or severed from this Agreement to the extent necessary to make such provision enforceable and consistent with the remainder of this Agreement.

15.10. The failure of either party to insist upon strict performance of any of the provisions contained in this Agreement will not constitute a waiver of its rights as set forth in this Agreement, at law or in equity, or a waiver of any other provisions or subsequent default by the other party in the performance of or compliance with any of the terms and conditions set forth in this Agreement.

Effective February 25, 2011
