

# SMILEY MEDIA – ADVERTISER STANDARD TERMS & CONDITIONS

These Terms and Conditions (this “Agreement”) constitute a legal agreement between Smiley Networks, Inc., which does business as Smiley Media (“Smiley Media”), and Advertiser (“Advertiser”). Advertiser’s use of the Smiley Media Advertising Network is subject to the terms laid out in this document. By Advertiser’s continued use of the Smiley Media Advertising Network and all services provided by Smiley Media, Advertiser expressly agrees to the terms found in this Agreement. This Agreement supersedes all prior or contemporaneous communications and proposals, whether electronic, oral or written, between Advertiser and Smiley Media with respect to the Smiley Media Advertising Network. Advertiser agrees that this Agreement is not intended to confer and does not confer any rights or remedies upon any person other than Advertiser 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 Advertiser. This Agreement may not be otherwise amended except in a writing signed by Advertiser and Smiley Media. Smiley Media and Advertiser agree to these Terms and Conditions governing Advertiser’s participation in the Smiley Media Advertising Network as follows:

1. **Definitions.** “**Advertiser**” means the entity providing Offers through the Smiley Media Advertising Network under this Agreement. “**Agreement**” means these Terms and Conditions, the attached signature page, and any Insertion Orders executed between Advertiser and Smiley Media, whether pre-existing, concurrent, or subsequent. “**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. “**Consumer**” means a user of Smiley Media’s Site or the third-party Sites participating in the Smiley Media Advertising Network. “**Creative**” means the graphic and/or text file Advertiser provides to Smiley Media for the purpose of marketing the Offer. “**Discloser**” means a party who discloses Confidential Information under this Agreement. “**Email Confirmation**” means an email sent to Advertiser by Smiley Media, in the absence of a written Insertion Order, setting forth the terms under which a specific Offer will be displayed on the Smiley Media Advertising Network. “**Intended Purpose**” means the display of Advertisers’ Offers through the Smiley Media Advertising Network. “**Insertion Order**” means Advertiser’s written directive to Smiley Media to display an Offer on the Smiley Media Advertising Network under specified terms. “**IFrame Offer**” means an Offer presented in an HTML document embedded in a Site on the Smiley Media Advertising Network. “**Offer**” means the offers or other promotional marketing provided by Advertiser through a hosted Offer Form Page or in an IFrame on the Smiley Media Advertising Network. “**Offer Form Page**” means the web page on which Registered Users review, update, and confirm the Valid Registration Fields and provide additional information pursuant to Offers. “**Publisher**” means the entity that directs Internet users to the Smiley Media Advertising Network and any affiliated entities through which Publisher directs Internet users to the Smiley Media Advertising Network. “**Recipient**” means a party who receives Confidential Information under this Agreement. “**Registered User**” means a Consumer who has participated in an Offer by providing data in all Valid Registration Fields. “**Registered User Action**” means the participation in an Offer by a Registered User. “**Site**” means any Internet location on which an Offer is presented within the Smiley Media Advertising Network. “**Smiley Media Advertising Network**” means the network of publishers and advertisers through which Smiley Media displays Offers to Internet users by means of interstitial ad placement. “**Valid Registration Fields**” means the first name, last name, phone number, street address, city, state, zip code, email address, date of birth, and gender of a Consumer, or any other Consumer information required for participation in an Offer.

## 2. **Use of the Smiley Media Advertising Network.**

2.1 Smiley Media will post Offers on the Smiley Media Advertising Network as described in each Insertion Order.

2.2 Subsequent Insertion Orders will be subject to the terms of this Agreement and will become, once signed by Smiley Media and Advertiser, part of this Agreement. Further, the terms of this Agreement will apply to the display of any Offers as agreed by Smiley Media and Advertiser, with or without a written Insertion Order.

2.3 In the absence of a written Insertion Order, Smiley Media may provide Advertiser with an Email Confirmation setting forth specific terms, and such Email Confirmation will be deemed to constitute an Insertion Order under this Agreement.

2.4 Each Insertion Order will specify the data required by the Advertiser from the Consumer, the amount per Registered User Action to be paid to Smiley Media, and any special terms. Smiley Media is entitled to and will receive prompt payment when the Insertion Order’s requirements are fulfilled. Advertiser’s obligation to make payment to Smiley Media is triggered by the event identified in the Insertion Order, referred to herein as a Registered User Action. Such Registered User Actions may include clicks, leads, click-throughs, sales, registrations, or impressions. The definition of the applicable Registered User Action will be set forth in the Insertion Order.

2.5 Smiley Media or Advertiser may change an Insertion Order at any time upon reasonable notice, unless otherwise specified. However, any modification to an Insertion Order is not valid unless such modification is documented in an Email Confirmation from Smiley Media.

2.6 If Advertiser’s Offer is presented in an IFrame, Advertiser agrees to provide Smiley Media at least three days notice before any modifications to the Offer are implemented. Notice of such modifications shall be emailed to Smiley Media at [iframemodification@smileymedia.com](mailto:iframemodification@smileymedia.com), with the subject heading “IFrame Modification.” ADVERTISER FURTHER AGREES THAT THE CONTENT OF ALL IFRAME OFFERS WILL BE VISIBLE WITHIN THE WINDOW PROVIDED BY SMILEY MEDIA ON THE SMILEY MEDIA ADVERTISING NETWORK AND THAT THE IFRAME OFFER WILL NOT REDIRECT CONSUMERS AWAY FROM THE SMILEY MEDIA ADVERTISING NETWORK. Advertiser acknowledges that any failure to comply with the requirements set forth in this paragraph will cause material harm to the integrity of the Smiley Media Advertising Network, the amount of which will be difficult to quantify. Accordingly, if Advertiser fails to comply with the requirements set forth in this Section, Smiley Media will be entitled to liquidated damages equal to fifty percent of the gross revenues resulting from sales conducted by Advertiser in violation of this paragraph in addition to any other remedies Smiley Media may have at law or in equity. 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, Advertiser 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. Advertiser 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. Advertiser therefore affirms and attests that it will adhere to fair information collection practices with respect to its performance under this Agreement.

3.2 Some of the information gathered from Valid Registration Fields and elsewhere may be personally identifiable information of Consumers. Advertiser shall clearly post on its website 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 Advertiser and offers Registered Users an opportunity to opt-out from collection and use of personal data.

3.3 Advertiser shall fully comply with the privacy policy posted on Advertiser's website at all times. Advertiser shall notify Smiley Media at least three business days in advance of any changes to any applicable privacy policy and shall provide Smiley Media with a revised copy of the privacy policy prior to the effective date of the change.

3.4 If Advertiser rents, sells, shares, or licenses any Consumers' personal data (including any personally identifiable information) to third parties, Advertiser agrees that all Offers posted on the Smiley Media Advertising Network shall contain a hyperlink to Advertiser's privacy policy and any such renting, selling, sharing, or licensing shall be in compliance with all 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.

3.5 Certain information about Advertiser may be subject to the Smiley Media Privacy Policy. For more information, see the full Privacy Policy at <http://www.smileymedia.com/pp.html>. Notwithstanding the foregoing, Smiley Media reserves the right at all times to disclose any information as Smiley Media deems 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 Smiley Media's sole discretion. Advertiser 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 may change its Privacy Policy from time to time, and such changes are effective upon the posting of those changes on the Smiley Media website. This posting may be done without notice to Advertiser, as provided in the Privacy Policy.

#### 4. Payment.

4.1 Advertiser shall pay Smiley Media per Registered User Action as specified in each applicable Insertion Order. Advertiser shall promptly compile, calculate, and electronically deliver data required to determine Smiley Media billing and compensation, but Smiley Media's calculations are final and binding in the event of a dispute.

4.2 Billing invoices to Advertiser will be dated on the first day of the billing month and will be due on the last day of the billing month. If Advertiser is late in compiling, calculating, and electronically delivering data, Smiley Media will prepare billing invoices when such data is received and will backdate resulting invoices to the first day of the billing month. Backdated invoices will be due on the last day of the billing month. Questions regarding any data or bills provided by Smiley Media must be submitted in writing within 14 days of receipt, or the data or bills will be deemed accurate and accepted as presented by Smiley Media.

4.3 Advertiser and Smiley Media agree that payment shall be owed to Smiley Media by Advertiser on terms of NET 30 End Of Month unless other arrangements have been approved in writing by Smiley Media. If Advertiser's balance for any given month exceeds \$50,000, Advertiser agrees to make payment by wire transfer, credit card, or electronic payment. If Advertiser's balance for any given month exceeds \$100,000.00, payment will be due on terms of NET 15 End Of Month unless other arrangements have been approved in writing by Smiley Media.

4.4 All balances will be paid in U.S. dollars. Unless otherwise required by Section 4.3, payment shall be made via credit card, electronic payment service (such as PayPal or eCheck), or by check. All payments shall be based on actual figures supplied by Advertiser and revised, accounted, and audited by Smiley Media. In the event that Advertiser's payment becomes past due, Advertiser agrees that monthly interest in the amount of 1.5% shall accrue to Advertiser's past-due balance.

4.5 If Advertiser fails to make payment to Smiley Media, Smiley Media will have no further obligation to present Advertiser's Offers on the Smiley Media Advertising Network. If Advertiser fails to pay timely, Smiley Media may notify Advertiser and undertake collection.

#### 5. Terms; Termination.

5.1 This Agreement shall commence upon Advertiser's acceptance and shall remain in effect until terminated.

5.2 Smiley Media reserves the right, in its sole discretion, to cancel an Insertion Order and remove any Offers at any time for any reason, with or without notice to Advertiser.

5.3 Smiley Media also reserves the right to discontinue Advertiser's access to the Smiley Media Advertising Network at any time without notice.

5.4 Smiley Media reserves the right to terminate this Agreement for any reason. Termination notice, if provided by Smiley Media, will be provided via email and will be effective immediately.

5.5 Advertiser may terminate this Agreement upon three days notice to Smiley Media by delivering a Termination notice. Termination notice, if provided by Advertiser, must be submitted in an email with the subject heading "Termination" ("Termination Email"). Unless and until such Termination Email is submitted, Advertiser will remain obligated to pay Smiley Media for any Registered User Actions. After termination, Advertiser shall pay all funds due to Smiley Media by the end of the subsequent billing cycle.

5.6 This Agreement will terminate immediately upon the dissolution or insolvency of either party.

#### 6. License; Proprietary Rights.

6.1 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 Advertiser's right to participate in the Smiley Media Advertising Network as provided in this Agreement, Advertiser agrees it has no rights in or licenses to any of the foregoing.

6.2 Smiley Media grants Advertiser a non-transferable, non-exclusive limited license to use the Smiley Media Advertising Network and any data, reports, information, or analyses arising out of such use and provided by Smiley Media. Advertiser neither has nor will claim any right, title, or interest in the Smiley Media Advertising Network software, applications, data, methods of doing business, or any elements thereof. Advertiser must access the Smiley Media Advertising Network only via web browser, email, or in a manner expressly approved by Smiley Media.

6.3 Subject to the terms and conditions of this Agreement, Advertiser hereby grants to Smiley Media a nonexclusive, nontransferable, worldwide, limited license, during the term of this Agreement, to reproduce and display Advertiser's trademarks and logos.

6.4 Advertiser agrees that Smiley Media may run approved banners and text in the course of presenting an Offer and may create banners or advertising text, unless expressly prohibited in writing by Advertiser.

6.5 Smiley Media reserves the right to optimize Advertiser's Creatives, based on Smiley Media's methods, to ensure lead quality and volume.

#### 7. Representations.

7.1 Each party represents and warrants 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.

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

## 8. Limitations of Liability.

8.1 ALL SERVICES PROVIDED BY SMILEY MEDIA ARE PROVIDED ON AN "AS IS" "AS AVAILABLE" BASIS. TO THE FULLEST EXTENT PERMISSIBLE PURSUANT TO APPLICABLE LAW, SMILEY MEDIA MAKES NO WARRANTIES, GUARANTEES, REPRESENTATIONS, PROMISES, STATEMENTS, ESTIMATES, CONDITIONS, OR OTHER INDUCEMENTS, EXPRESS, IMPLIED, ORAL, WRITTEN, OR OTHERWISE EXCEPT AS EXPRESSLY SET FORTH HEREIN. SMILEY MEDIA IS NOT RESPONSIBLE FOR DELAYS CAUSED BY ACCIDENT, WAR, ACT OF GOD, EMBARGO, COMPUTER SYSTEM FAILURE, OR ANY OTHER CIRCUMSTANCE BEYOND ITS CONTROL.

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

8.3 UNDER NO CIRCUMSTANCES WILL SMILEY MEDIA BE LIABLE TO ADVERTISER FOR INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR EXEMPLARY DAMAGES (EVEN IF SMILEY MEDIA HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES), ARISING FROM ANY ASPECT OF THE ADVERTISING RELATIONSHIP PROVIDED HEREIN. IN NO EVENT WILL SMILEY MEDIA'S TOTAL OBLIGATIONS OR LIABILITY HEREUNDER EXCEED THE LESSER OF THE SPECIFIC ADVERTISING CAMPAIGN IN QUESTION OR TEN THOUSAND DOLLARS (\$10,000.00). REGARDLESS OF ANY LAW TO THE CONTRARY, NO ACTION, SUIT OR PROCEEDING SHALL BE BROUGHT AGAINST SMILEY MEDIA MORE THAN ONE YEAR AFTER THE DATE UPON WHICH THE CLAIM AROSE.

8.4 ADVERTISER ACKNOWLEDGES THAT SMILEY MEDIA HAS 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. ADVERTISER AGREES 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.

## 9. Indemnification.

9.1 Advertiser agrees 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: (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 Advertiser's use of the Smiley Media Advertising Network; or (b) arising out of any material breach by Advertiser of any duty, representation or warranty under any agreement between Smiley Media and Advertiser.

9.2 Advertiser agrees 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 any of them by reason of any claims, suits, or proceedings resulting from Advertiser's breach of Sections 15 or 16.

9.3 The obligations set forth in Sections 9.1 and 9.2 are contingent upon: (a) the indemnified party giving written notice to the indemnifying party of any such claim, action or demand within sixty 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.

9.4 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 Advertiser and Smiley Media. Consent to compromise or settlement shall not be unreasonably withheld or delayed.

## 10. Non-circumvention.

10.1 During the term of any Insertion Order in effect and for a period of 180 days thereafter, Advertiser shall not engage, contract with, work with, license, or permit any person, firm, or entity to represent Advertiser in any performance-based advertising relationship with any Publisher within the Smiley Media Advertising Network unless a previously existing business relationship between Advertiser and such Publisher can be demonstrated to Smiley Media's reasonable satisfaction.

10.2 If a Publisher initiates a performance-based advertising relationship with Advertiser and Advertiser later determines that such Publisher was a Publisher within the Smiley Media Advertising Network at the time Publisher initiated the relationship, the Advertiser shall immediately terminate its relationship with Publisher.

10.3 If Advertiser fails to comply with any requirements set forth in this Section, because the resulting damages will be difficult to quantify, Smiley Media will be entitled to liquidated damages equal to fifty percent of the gross revenues resulting from sales conducted by Advertiser in violation of this paragraph in addition to any other remedies Smiley Media may have at law or in equity.

## 11. Confidentiality.

11.1 All Confidential Information of a Discloser shall be used by a Recipient only for the Intended Purpose. Advertiser and Smiley Media 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.

11.2 Advertiser agrees 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.

11.3 Advertiser agrees that any optimized Offers, which are produced by Smiley Media in the course of performing its obligations under this Agreement, are the property of Smiley Media and shall not be used outside

of the Smiley Media Advertising Network without the express written consent of Smiley Media. Advertiser further agrees that any optimization methods and concepts revealed by Smiley Media are Confidential Information and, in addition to being handled as described above, for a period of four years beginning at the termination of this Agreement, will not be used by Advertiser in Offers displayed on websites outside the Smiley Media Advertising Network or any websites that were formally within the Smiley Media Advertising Network during the term of this Agreement.

## 12. Alternative Dispute Resolution.

12.1 The parties shall first attempt to settle all disputes arising out of this Agreement through good-faith negotiation by executives of the Parties who have authority to finally settle such dispute. If such negotiation is not successful in resolving the dispute within ten days, the Parties agree to submit such dispute to confidential mediation in Austin, Texas in accordance with the then-current International Institute for Conflict Prevention and Resolution Public Resources Mediation Procedure (see <http://www.cpradr.org>).

12.2 If such mediation is not successful in resolving the dispute within an additional 30 days, either party may submit the dispute to binding arbitration, before one arbitrator, under the rules of the American Arbitration Association, for arbitration in Austin, Texas. Any arbitration brought hereunder, and all disputes determined therein, will be governed by the law of Texas without regard to conflict of laws principles. In any arbitration brought hereunder, the arbitrator may order the pre-hearing production or exchange of documentary evidence and may require written submissions from the parties, but may not otherwise order pre-hearing depositions or discovery. Unless the parties otherwise agree, the arbitrator shall not have the power to appoint experts. The prevailing party may be entitled to recover its reasonable attorneys' fees, costs, and other expenses, as determined by the arbitrator. The arbitrator shall not issue any award, grant any relief, or take any action prohibited by or inconsistent with this Agreement and may not, under any circumstances, award punitive or exemplary damages. Judgment on the award rendered by the arbitrator may be entered in any court located in Austin, Texas or having jurisdiction thereof. Notwithstanding the foregoing, either party may apply at any time to any court of competent jurisdiction for a temporary restraining order or preliminary injunction to protect that party's Confidential Information or otherwise mitigate that party's damages pending resolution of the dispute in accordance with the process set forth above.

## 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.

## 14. General.

14.1 This Agreement, including all attachments, constitutes the entire agreement between the parties with respect to the subject matter hereof, and supersedes and replaces all prior and contemporaneous understandings or agreements, written or oral, regarding such subject matter.

14.2 Notwithstanding the paragraph above, the terms of this agreement will apply to the display of any Offers as agreed by Smiley Media and Advertiser, with or without a written Insertion Order.

14.3 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/services/adv/doc/SmileyMediaAdvertiser-terms.pdf>. Advertiser is responsible for checking for modifications to this agreement at <http://www.smileymedia.com/services/adv/doc/SmileyMediaAdvertiser-terms.pdf> on a regular basis. Advertiser'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 Advertiser does not agree to the changes proposed by Smiley Media, or to any of the terms in this Agreement, Advertiser's only remedy is to terminate this Agreement and any Insertion Orders pursuant to Section 5.

14.4 Sections 1, 3, 6, 8, 11, 12, 13 and 14 shall survive expiration or early termination of this Agreement.

14.5 Nothing in this Agreement shall be deemed to create a partnership or joint venture between the parties, and neither Smiley Media nor Advertiser shall hold itself out as the agent of the other, except as specified in this Agreement.

14.6 Neither party shall be liable to the other for delays or failures in performance resulting from causes beyond the reasonable control of that party, including, but not limited to, acts of God, labor disputes or disturbances, material shortages or rationing, riots, acts of war, governmental regulations, communication or utility failures, or casualties.

14.7 Advertiser shall not assign this Agreement, in whole or in part, without written consent from Smiley Media. Any reasonable request to assign this agreement in the event of a significant change in ownership of Advertiser, or such similar event, will not be unreasonably withheld. Any attempt to assign this Agreement without Smiley Media's consent will be void.

14.8 Failure by either party to enforce any provision of this Agreement shall not be deemed a waiver of future enforcement of that or any other provision.

14.9 Any waiver, amendment, or other modification of any provision of this Agreement shall be effective only if in writing and signed by the parties.

14.10 If for any reason a court of competent jurisdiction finds any provision of this Agreement to be unenforceable, that provision of the Agreement will be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remainder of this Agreement will continue in full force and effect.

14.11 From time to time it may be necessary for Smiley Media to update or revise certain provisions of this Agreement. By using the Smiley Media Advertising Network and accepting this Agreement, Advertiser agrees that Smiley Media may modify the terms of this Agreement in its sole discretion, at any time and without notice. Advertiser is responsible for regularly reviewing the latest version of this Agreement, and any additional terms and conditions that may be posted. Advertiser's continued use of the Smiley Media Advertising Network constitutes Advertiser's agreement to all such terms, conditions, and notices. If Advertiser does not agree to the changes proposed by Smiley Media, or to any of the terms in this Agreement, Advertiser's only remedy is to terminate this Agreement and any Insertion Orders pursuant to Section 5.

14.12 Any dispute Advertiser may have with respect to Smiley Media's performance of this Agreement must be commenced within one year after the basis for the dispute arises, or the cause of action is barred.

14.13 Headings used in this Agreement are for ease of reference only and shall not be used to interpret any aspect of this Agreement.

## 15. The European Commission's Directive on Data Protection - Advertiser's Declaration and Certificate of Compliance.

15.1 Advertiser wishes to receive leads provided by Smiley Media and wishes to pay for the leads generated by Smiley Media. Smiley Media wishes to generate leads, but also wishes Advertiser to certify that they are in compliance with the requirements of The European Commission's Directive on Data Protection. Therefore, in exchange for these and other

valuable considerations, Advertiser hereby certifies that, with respect to every Smiley Media lead:

15.2 Advertiser will notify individuals about the purposes for which Advertiser collects and uses information about them.

15.3 Advertiser will provide information about how individuals can contact Advertiser with any inquiries or complaints, the types of third parties to which Advertiser discloses the information and the choices and means the organization offers for limiting its use and disclosure.

15.4 Advertiser will give individuals the opportunity to choose (opt out) whether their personal information will be disclosed to a third party or used for a purpose incompatible with the purpose for which it was originally collected or subsequently authorized by the individual. For sensitive or personally identifiable information, affirmative or explicit (opt in) choice will be given if the information is to be disclosed to a third party or used for a purpose other than its original purpose or the purpose authorized subsequently by the individual.

15.5 Advertiser will apply the notice and choice principles described above if disclosing information to a third party. Where Advertiser wishes to transfer information to a third party acting as an agent, Advertiser may do so if it ensures that the third party subscribes to the privacy principles embodied in this declaration or is subject to the Directive or another adequacy finding. As an alternative, Advertiser may enter into a written agreement with such third party requiring that the third party provide at least the same level of privacy protection as is required by the relevant principles described herein.

15.6 Advertiser will provide individuals with access to personal information about them that Advertiser holds and be able to correct, amend, or delete that information where it is inaccurate, except where the burden or expense of providing access would be disproportionate to the risks to the individual's privacy in the case in question, or where the rights of persons other than the individual would be violated.

15.7 Advertiser will take reasonable precautions to protect personal information from loss, misuse and unauthorized access, disclosure, alteration and destruction.

15.8 Advertiser will ensure that personal information is relevant for the purposes for which it is to be used. Advertiser shall take reasonable steps to ensure that data is reliable for its intended use, accurate, complete, and current.

15.9 In order to ensure compliance with the privacy principles described herein, Advertiser will provide: (a) readily available and affordable independent recourse mechanisms so that each individual's complaints and disputes can be investigated and resolved and damages awarded where the applicable law or private sector initiatives so provide; (b) procedures for verifying that the commitments Advertiser makes to adhere to the privacy principles described herein have been implemented; and (c) obligations to

remedy problems arising out of a failure to comply with the principles. Sanctions must be sufficiently rigorous to ensure compliance by Advertiser.

15.10 Advertiser recognizes compliance with these privacy requirements is necessary for access to Smiley Media leads. In the event that Advertiser does not follow these agreed upon privacy practices, Advertiser agrees to indemnify and hold Smiley Media harmless against any and all claims arising out of Advertiser's failure to comply with the privacy principles described above.

16. THE CAN-SPAM ACT OF 2003 AS AMENDED -- Advertiser's Declaration and Certificate of Compliance. Advertiser wishes to mail on and in response to leads provided by Smiley Media and wishes to pay for the leads generated by Smiley Media. Smiley Media wishes to generate leads but also wishes Advertiser to certify that it is in compliance with the requirements of the Can-Spam Act of 2003. Therefore, in exchange for these and other valuable considerations, Advertiser hereby certifies that with every piece of mail it sends to any Smiley Media lead: (a) Advertiser will not use proxies or relays to send mail; (b) Advertiser will not falsify their headers when sending mail; (c) All registration information used by Advertiser when buying domains, or setting up e-mail accounts, or when registering for IP addresses was true and correct; (d) Mail from Advertiser will contain a valid From e-mail address, registered with true and correct information; (e) No subject lines will be used by Advertiser that would be likely to mislead the recipient about the contents of the e-mail; (f) Every outgoing piece of mail from Advertiser will have a conspicuous opt-out mechanism which works for at least 30 days after the mailing is completed; (g) Advertiser will honor all posted Smiley Media opt-outs before mailing begins, and Advertiser will honor all Smiley Media opt-outs within 10 days of request; (h) Each message from Advertiser will have a conspicuous identification that it is an advertisement; (i) Every message from Advertiser will contain a valid physical postal address of the sender; (j) No mail will be sent by Advertiser to a recipient address that was obtained after December 31, 2003 using an address harvester or obtained by means of a dictionary attack. For address lists created before January 1, 2004, the Advertiser certifies that they have no actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that the lists were created in this impermissible fashion; (k) No e-mail address used by Advertiser in the performance of their lead follow-up was created by use of automated means to register for multiple email addresses; (l) Advertiser recognizes compliance with these mailing requirements is necessary for every piece of mail it sends on any mailing to a Smiley Media lead. In the event that Advertiser does not follow these agreed upon mailing practices, Advertiser agrees to indemnify and hold Smiley Media harmless against any and all claims arising out of Advertiser's failure to comply with the listed mailing requirements.