

## 1.1 OVERVIEW

This commercial service Agreement (the "Agreement") is a legal and binding Agreement between YOU, ("Customer") and Ballyhoo Mobile Marketing, Inc. , a corporation organized under the laws of the state of Florida, United States. This Agreement shall become effective as of Your Registration Date.

## 1.2 BACKGROUND

Ballyhoo Mobile Marketing is a wireless messaging service company. Ballyhoo Mobile Marketing enables customers to send Content and services directly to mobile subscribers over telecommunications networks using various messaging technologies. Customer provides Content and services designed for delivery to and receipt from subscribers' wireless devices via short message service, WAP push, and/or other mutually agreed upon messaging technologies. The parties desire to permit Customer to connect to Ballyhoo Mobile Marketing 's Network to deliver messages to the aggregated Ballyhoo Mobile Marketing wireless carriers.

This Commercial Service Agreement consists of the following:

- \* This Terms of Service Agreement
- \* Terms of Use
- \* Privacy Policy

By registering for service, Customer represents and warrants that the information Customer provides below and on each of the attached forms is accurate, and that Customer has read and understood, and will act in accordance with, all of the terms set forth in the attached documents.

## 1.3 TERMS AND CONDITIONS

### 1 DEFINITIONS

1.1 "User(s)" shall mean the subscriber on a wireless telecommunications network that sends or receives SMS messages via a wireless Device. The User is the consumer of the messaging services provided by Ballyhoo Mobile Marketing and the Customer.

1.2 "Carrier(s)" shall mean Ballyhoo Mobile Marketing 's pre-approved paging and mobile networks, and other networks which may subsequently be approved; the number of said Carriers shall be at Ballyhoo Mobile Marketing 's discretion. A list of the current pre-approved Carriers providing the

Services can be found at the URL: <http://Ballyhoo Mobile Marketing.com/coverage.jsp> Carriers for specific programs such as Premium SMS may be defined separately.

1.3 "Services" shall mean Ballyhoo Mobile Marketing 's Wireless Messaging services used by Customer including SMS mobile originated and mobile terminated messaging for text and binary, message routing, short code provisioning, long code provisioning, premium billing, preview messaging lookups, handset data subscriptions, and other such services Ballyhoo Mobile Marketing may offer.

1.4 "Software" shall mean the object code version of Ballyhoo Mobile Marketing 's client Software Development Kit ("SDK"), HTML code, application programming interfaces (APIs), related documentation and other client software or code which Ballyhoo Mobile Marketing provides to Customer, including updates, to enable Ballyhoo Mobile Marketing to provide the Services to Customer. Unless otherwise specified, Software shall not include any source code. The Software is proprietary to Ballyhoo Mobile Marketing and is licensed to Customer under a separate SDK License Agreement at the time of download.

1.5 "Transaction(s)" shall mean information related to the origination or termination of a Wireless Message request by Customer and transmission and routing of same to the appropriate Carrier with requests for further delivery.

1.6 "Wireless Message(s) (Messaging)" shall mean the transmissions of Customer's instructions, and as converted and routed by Ballyhoo Mobile Marketing and delivered to the gateway of the Carrier, together with a request that the Carrier deliver said messages to the wireless Devices designated by Customer.

1.7 "SMS (Short Message Service)" shall mean a short message service text or binary message consisting of 160 characters of text or 140 bytes of binary data, or other length of text or binary data per the Carrier's network's support for such length of data.

1.8 "Short Code" means the unique 5-digit code assigned by CSCA the Common Short Code Authority, or CWTA in Canada, or a 4-digit or 3-digit code Customer is assigned by a specific carrier, that enables the Ballyhoo Mobile Marketing Network to identify that Customer is the intended recipient of a Message and is used to route the Message to the Customer.

1.9 "Content" means data, text, audio, music, ringtones, graphics, photographs, artwork and other materials in digital electronic form.

1.10 "Device(s)" shall mean any hardware capable of receiving or sending Wireless Messages to or from a Carrier.

1.11 "SMSC" shall mean a short messaging service center server operated by a Carrier that manages the distribution of Messages to/from Ballyhoo Mobile Marketing , to/from Users and/or Devices.

1.12 "SMPP Connection" shall mean a direct connection to an SMSC using the short message peer-to-peer protocol.

1.13 "Ballyhoo Mobile Marketing Network" shall mean Ballyhoo Mobile Marketing 's telecommunications network, including without limitation Ballyhoo Mobile Marketing 's SMSC, the Ballyhoo Mobile Marketing Carriers, Ballyhoo Mobile Marketing 's routing system, and the technical connectivity used to send/receive Wireless Messages.

1.14 "Wireless Number Portability" shall mean the ability for a User to keep a mobile number originally owned by one Carrier to a new Carrier.

1.15 "Premium SMS" shall mean the charging of Users for a specific use of SMS messaging with the use of Short Codes for a per event charge in addition to their already prescribed monthly service plan or standard rate message fee.

1.16 "Standard Rate SMS" shall mean the transmission of an SMS message without a Premium SMS fee applied that is charged to the Customer by Ballyhoo Mobile Marketing and where the user may still be charged a fee by the carrier for the termination or origination of the SMS message.

1.17 "Mobile Originated (MO)" shall mean the origination of an SMS by a User on their Device that is sent into the Carrier's SMSC and subsequently transmitted to Ballyhoo Mobile Marketing 's SMSC for delivery to the Customer.

1.18 "Mobile Terminated (MT)" shall mean an SMS that is sent by the Customer to Ballyhoo Mobile Marketing 's SMSC and subsequently transmitted to the Carrier's SMSC for delivery to the User.

1.19 "Customer Service" shall mean the application, service, Content, or information that the Customer is making available to the User via wireless Messaging.

## 2. CUSTOMER OBLIGATIONS

### 2.1 Connectivity and Application

Customer shall solely establish and maintain the appropriate and necessary TCP/IP connection between the Customer and Ballyhoo Mobile Marketing 's Network, including, without limitation, transmitting Customer's registration information and Transaction data to Ballyhoo Mobile Marketing 's servers via the Internet and ensuring that the data transmitted in conjunction with the Services, and for enrollment for the Services, is accurate, complete, and in the form as requested by Ballyhoo Mobile Marketing , and is not corrupted due to Customer's systems. Customer will only connect to the IPs and ports provided by Ballyhoo Mobile Marketing . Customer shall develop, host, run, and maintain the Customer Service application that will handle the business-logic of the Wireless Messaging service described in this Agreement and such application shall implement at all times the required policies of the Wireless Messaging service (as defined in section 2.9).

### 2.2 Content

Customer acknowledges that all Content, data, text, messages and other material contained in a Transaction (the "Content") are the sole responsibility of the Customer. In addition to the technical accuracy referred to in 2.1 above, the Customer is also solely responsible for the integrity and quality of the Content. The Customer acknowledges that any financial information that it may receive pursuant to any Transaction may or may not be a reliable basis for making, or refraining from making, investment decisions. Further, Customer shall maintain commercially reasonable business practices in conjunction with the Services, the Transactions, the Carriers, and generally complying with all applicable laws and regulations with respect to its use of the Services and with respect to the Transactions. Specifically, Customer agrees not to use the Service to transmit any Content which is tortious, defamatory, obscene, libelous, harmful to minors, "spam", material containing software viruses or otherwise designed to

disrupt the functionality of any computer software or hardware or telecommunications equipment, in violation of any regulation of the U.S. Securities and Exchange Commission or any stock exchange, infringing of another's rights in intellectual property, or is invasive of another's right to privacy.

### 2.3 Liability of Content

Under no circumstances will Ballyhoo Mobile Marketing or any of the Indemnified Parties (as defined in section 12) be responsible for any loss, damage or liability arising out of the Content of any Transaction, including any mistakes contained in the Content or the use or transmission of the Content.

### 2.4 Integrity of Content

Customer shall maintain the integrity of the Content per the policies and guidelines of Ballyhoo Mobile Marketing and the Carriers (as outlined in section 2.9) and as defined by the Short Code Program Form. Customer acknowledges that Ballyhoo Mobile Marketing is obligated by the Carriers to monitor the integrity of Content by Ballyhoo Mobile Marketing's Customers and that if such Customer breaches the integrity of the Content that Ballyhoo Mobile Marketing's Carrier relationships may be irreparably harmed. Ballyhoo Mobile Marketing is obligated by the Carriers to take any and all action necessary to maintain the integrity of Content, including without limitation the termination of this Agreement (as outlined in section 14).

### 2.5 Transmission

Customer acknowledges that use of the Service may involve transmissions involving companies other than Ballyhoo Mobile Marketing and the Content may not be private in certain circumstances and may be changed by those other companies to conform and adapt to their requirements and Devices. Ballyhoo Mobile Marketing assumes no responsibility for timeliness, deletions, mis-delivery or failure to store any Content or Transaction.

### 2.6 License of Content

Customer grants to Ballyhoo Mobile Marketing all licenses to the Content necessary to perform the Transactions.

## 2.7 Use of Software

Customer agrees that its use of the Software, and other materials and information provided by Ballyhoo Mobile Marketing to Customer, shall be limited to Customer's use of the Services and be in conjunction with the Transactions and governed by this Agreement.

## 2.8 Short Code Program Form

Customer shall supply Ballyhoo Mobile Marketing with an accurate Short Code Program Form for all Short Code programs and non-Short Code programs as defined in the Short Code Program Form documentation. Customer shall adhere to the Short Code Program Form throughout the length of this Agreement. If Customer changes the nature and structure of their Wireless Messaging program, Customer is obligated to supply Ballyhoo Mobile Marketing with an updated form. Customer acknowledges that Ballyhoo Mobile Marketing may modify the Short Code Program Form to more accurately describe the Customer's program.

## 2.9 Program Policies

Customer shall adhere to all policies from Ballyhoo Mobile Marketing and the Carrier's regarding the Content, User interaction, and Transmission of Messages as described below.

2.9.1 Customer will ensure that all such Content and materials do not and will not contain any material that: (a) is unlawful, obscene, or defamatory or violates any intellectual property Rights or any other rights of any third party; (b) facilitates any illegal activity; (c) contains any sexually explicit Content or images; (d) is false, misleading, or likely to mislead or deceive (including, without limitation, information relating to the source or the author of the message); or (e) promotes violence, discrimination, or illegal activities.

2.9.2 Customer may only send Messages from the Short Codes obtained by Customer from CSCA or CWTA and provided by Customer to Ballyhoo Mobile Marketing. (Applicable only for Dedicated Unique Short Codes). Ballyhoo Mobile Marketing may grant access for Customer to its shared or dedicated Short Codes if Customer's program fits in definitions attached to such Short Codes evaluated by Ballyhoo Mobile Marketing. Ballyhoo Mobile Marketing can grant or terminate access to its Short Codes in its sole discretion. Ballyhoo Mobile Marketing is not obligated to provide such access and if so, Short Code remains under control of Ballyhoo Mobile Marketing. No leasing or sub-leasing agreement will be created when Customer uses Ballyhoo Mobile Marketing's Short Codes. Customer may be able to use Ballyhoo Mobile Marketing Short Code via assigned Keywords defined and granted by Ballyhoo Mobile Marketing. Customer won't own such Keywords. Ballyhoo Mobile Marketing may add or append signature to outgoing messages via its Short Codes. Any use of Ballyhoo Mobile Marketing's Short Code is subject to general Terms of Use and Privacy Policy introduced by Ballyhoo Mobile Marketing on line on Ballyhoo Mobile Marketing .com.

2.9.3 Customer will not send any Messages to a User unless (i) Customer has obtained such User's "opt-in" consent to receive such Message or the (ii) recipient of the Message is an employee of Customer (a) using a device owned or paid for by Customer or (b) using a personal device and the employee has given Customer permission to communicate with employee via the device.

2.9.4 Customer must provide Users with a simple mechanism for opting out of receiving Messages from Customer, including information on how to "opt-out" of receiving Messages from Customer in the first Message sent to a User.

2.9.5 At a minimum, Customer must provide Users with the ability to opt-out of receiving Messages from Customer: (i) by sending a Message to Customer with "unsubscribe" in the text; (ii) via the same mechanism as the User registers for the Customer Service or opts-in to receiving Messages from Customer. Customer must include a prominent description of the opt-out mechanism at the same location and time as Customer provides the User an opportunity to opt-in. Customer will not send any Messages to any User that has indicated that they intend to opt-out of receiving Messages.

2.9.6 Customer will not send any Messages to a User unless such messages are directly related to the Customer Service as described in this Agreement including but not limited to the Short Code Program Form.

2.9.7 Customer agrees that, throughout the Term, the Messages, Content and/or Services delivered to a User on a specific Carrier network via the Ballyhoo Mobile Marketing Network will not include advertising or promotion of a Carrier's competitor. Customer agrees that, throughout the Term, any

Customer Service related web site pages (HTML, WAP, etc.) that are targeted directly at a Carrier's User will not include advertising or promotion of a Carrier's competitor. If Customer has any questions about whether a particular third party is a Carrier's competitor, Customer will contact Ballyhoo Mobile Marketing and Ballyhoo Mobile Marketing will escalate the issue to the specific Carrier in question and such Carrier will, in its sole discretion, determine whether the third party is a competitor of the Carrier.

2.9.8 Customer agrees to prominently provide contact information (at a minimum an email address) for Customer's User service (i) at the same time and location (i.e., on the same web page or in the same Message) as Users register for the Customer Service or otherwise opt-in to receiving Messages from Customer and (ii) at a location easily accessible to a User to allow the User to access the contact information after the User has registered for the Customer Service or opted in to receiving Messages from Customer.

2.9.9 Customer agrees to include a prominent notice that "other charges may apply" (or other language that clearly informs Users that other charges may apply such as standard SMS Message rates from the specific Carrier User maintains service with) at the same time and location (i.e., on the same web page or in the same Message) as Users register for the Customer Service or otherwise opt-in to receiving Messages from Customer.

2.9.10 If Ballyhoo Mobile Marketing or Carrier personnel receive questions or complaints from Users regarding the Customer Services, or if Ballyhoo Mobile Marketing or the Carriers experience any technical problems with the Customer Services such that Users are negatively affected, Customer will cooperate in good faith with Ballyhoo Mobile Marketing and use best efforts to resolve any problems raised by Ballyhoo Mobile Marketing, the Carriers, or the Users.

## 2.10 Policy Infringement

If Customer or Customer's Users infringe upon the Program Policies (as defined in section 2.9) Customer shall be immediately obligated to correct such an infringement. If Customer is purposely infringing upon the Program Policies then Ballyhoo Mobile Marketing and/or the Carriers reserve the right to immediately cutoff all message activity and de-provision Short Codes. If Customer's Users are infringing upon the Program Policies, then Customer is obligated to make all efforts possible to correct such infringements including, but not limited to, blocking the User from Customer's Service. If Customer is not able to correct User infringements, then Customer is in breach of this Agreement and Ballyhoo Mobile Marketing may terminate this Agreement (as outlined in section 14).

## 2.11 Permitted Messages

Customer is allowed to send text, binary, WAP Push, Java Midlet-Push, Brew-Directed (as defined in below), MMS alerts, Smart-Messaging, EMS, OTA Configuration, concatenated, alpha originator, source address overrides, and other types of messages where available and permitted by carriers as described in the Ballyhoo Mobile Marketing Access and Messaging Signup Form and the Ballyhoo Mobile Marketing Short Code Signup Form. Customer acknowledges that all such message types are not supported on all Ballyhoo Mobile Marketing Carriers. Customer also acknowledges that Ballyhoo Mobile Marketing has differing pricing and approval policies regarding certain types of messages on specific Carrier's networks.

### 2.11.1 Brew-Directed SMS

Customer is allowed to send Brew-Directed SMS on the Ballyhoo Mobile Marketing Network for development and production purposes. Customer acknowledges that some Carriers, including but not limited to Verizon (U.S.), have specific policies regarding Brew-Directed SMS and Ballyhoo Mobile Marketing requires additional addendums to this Agreement to support Brew-Directed SMS connectivity for production applications.

## 2.12 Security and Integrity of Messages

Customer agrees to maintain an appropriate level of security and integrity for the Ballyhoo Mobile Marketing Network and Customer's Users in connection with the Customer Services, including but not limited to, implementing procedures to prevent third parties who use the Customer Services from sending or transmitting to Users (i) unsolicited data or messages, (ii) viruses, or (iii) a volume of Messages that unreasonably burdens the Ballyhoo Mobile Marketing Network. Customer will immediately notify Ballyhoo Mobile Marketing if it knows or has reason to know that any such unsolicited data, messages, or viruses are being sent to Users by virtue of such Users' use of the Customer Services and agrees to use best efforts to prevent and/or block any such unsolicited data, Messages or viruses from being sent to Users. Customer agrees to notify Ballyhoo Mobile Marketing immediately if it knows or has reason to know that Users are being sent an unusual or abnormal flow, number or type of Messages in connection with the Customer Services and will cooperate with Ballyhoo Mobile Marketing to prevent continuing transmission of such data or Messages to Users.

### 2.13 Security of Account

Customer agrees to maintain all security regarding their account ID, password, and connectivity with the Ballyhoo Mobile Marketing Network. Customer is responsible for all messages transmitted to the Ballyhoo Mobile Marketing Network. If Customer's account ID or password are stolen, or otherwise compromised, and used for malicious purposes, Customer is responsible for all Messages transmitted using the stolen account information. Customer is obligated to immediately contact Ballyhoo Mobile Marketing to have such account ID or passwords changed to prevent continued malicious use of the Customer account.

### 2.14 Support Services for Users

Customer is obligated to provide Support Services to Users utilizing the Customer Service. Customer must provide one or more of the following: an email address, a web site URL, or a phone number for contacting the Customer. Such services shall be made available during reasonable business hours and follow-up shall occur in a timely manner. Ballyhoo Mobile Marketing or Carriers may refer Users to the Customer Support Services from time to time.

### 2.15 Blacklists

If Ballyhoo Mobile Marketing provides Customer with a list of mobile numbers that are "blacklisted," Customer will not send any Message to any mobile number on the blacklist. If Customer receives any Messages from any mobile number on the blacklist, Customer will send a response Message with text to be provided by Ballyhoo Mobile Marketing. In some cases, Ballyhoo Mobile Marketing may implement "blacklist" removal automatically and Customer will not need to implement such policies depending on whether the "blacklist" mobile number is specific to the Customer's Service or globally to all Message Services.

### 2.16 Throttle Rates

Ballyhoo Mobile Marketing will set a default throttle rate of 80 messages per second per customer or as otherwise negotiated between Ballyhoo Mobile Marketing and Customer.

### 2.17 Concurrency

Customer will not bind into the Ballyhoo Mobile Marketing Network more than twice, or as otherwise defined in the Ballyhoo Mobile Marketing Access and Messaging Signup Form, or as otherwise negotiated between Ballyhoo Mobile Marketing and Customer.

### 2.18 Forecasts

Customer shall provide to Ballyhoo Mobile Marketing upon execution of this Agreement, an estimate ("Forecast") of its Message traffic. This Forecast will be for at least three (3) months, and thereafter a three (3) month Forecast shall be provided at the start of each calendar quarter (January 1st, April 1st, July 1st, October 1st.) These Forecasts shall include estimated number of total SMS Messages with a summary of expected Mobile Originated and Mobile Terminated Messages.

## 3. BALLYHOO MOBILE MARKETING OBLIGATIONS

### 3.1 Grant of Access

Services subject to the terms in this Agreement, Ballyhoo Mobile Marketing agrees to (i) provide to Customer the Services requested and used by Customer related to the transmission of Transaction information to Carriers with whom Ballyhoo Mobile Marketing has established a relationship, and (ii) provide Customer with access to standardized reports regarding Customer's Transactions processed using the Services. Ballyhoo Mobile Marketing hereby grants to Customer the right to access and use the Services in accordance with the Agreement.

### 3.2 Method of Access

Ballyhoo Mobile Marketing shall provide to Customer the following methods of access to the Ballyhoo Mobile Marketing Network; via Software Development Kits (SDK), via the HTTP Protocol using a web service request/response method, and/or via the GUI. The use of specific protocols is subject to the Access Platform agreed upon in the Ballyhoo Mobile Marketing Terms of Use and Privacy Policy, or otherwise as negotiated between Ballyhoo Mobile Marketing and Customer. Ballyhoo Mobile Marketing may make other Methods of Access available in the future and such methods may be made available to Customer with or without addendums to this Agreement at Ballyhoo Mobile Marketing's discretion.

### 3.3 Delivery of Mobile Originated Messages

Ballyhoo Mobile Marketing shall provide to Customer the following methods of delivery of Mobile Originated Messages; via the HTTP Protocol as a POST method, or Java SDK or WebServices. The use of specific protocols is subject to the Access Platform agreed upon in the Ballyhoo Mobile Marketing Access and Messaging Signup Form, or otherwise as negotiated between Ballyhoo Mobile Marketing and Customer.

### 3.4 Changes to Services

Ballyhoo Mobile Marketing may modify the Services from time to time, in Ballyhoo Mobile Marketing's reasonable discretion, and upon reasonable electronic or written notice to Customer, provided that such modifications shall not materially diminish the functionality of the Services. Customer agrees to incorporate these modifications into the Software, connectivity, or Application.

### 3.5 Secure Transactions

Ballyhoo Mobile Marketing has implemented and will maintain reasonable security systems for the transmission of Customer's Transactions, namely "firewall" technologies that are understood in the industry to provide reasonable security for the transmission of such information over the Internet. Ballyhoo Mobile Marketing does not guarantee the security of the Services or Transaction data. Ballyhoo Mobile Marketing will not be responsible in the event of any infiltration of its security systems, provided that Ballyhoo Mobile Marketing has used commercially reasonable efforts to prevent any such infiltration. Customer further acknowledges and agrees that Ballyhoo Mobile Marketing is not responsible for the security of Transaction data or information or any other information stored on Customer's servers or any other party's servers (other than subcontractors of Ballyhoo Mobile

Marketing and then only to the extent that Ballyhoo Mobile Marketing is liable for its own actions hereunder).

### 3.6 Privacy of Data

Customer acknowledges and agrees that in the course of providing the Services, Ballyhoo Mobile Marketing will capture certain Transaction and user information (collectively, the "Data"). Ballyhoo Mobile Marketing shall not disclose Data to third parties or use the Data, except that Ballyhoo Mobile Marketing shall have the rights (i) to use the Data as necessary to perform the Services and Transactions contemplated in this Agreement (including distributing the Data to third parties providing services requested by Customer); (ii) to maintain the Data as long as necessary or as required by law and use internally for record keeping, internal reporting, and support purposes; (iii) to provide the Data as required by law or court order, or to defend Ballyhoo Mobile Marketing 's rights in a legal dispute or as it may be legally compelled by a third party; and (iv) use the Data in aggregate form, without identifying the Customer, to promote Ballyhoo Mobile Marketing 's ongoing business and do internal analysis of Ballyhoo Mobile Marketing 's business.

### 3.7 Technical Support for Services

Ballyhoo Mobile Marketing shall provide Customer with Ballyhoo Mobile Marketing's then-current technical support for the applicable Services including 24x7x365 emergency support services, and as specified at <<http://Ballyhoo Mobile Marketing.com/support> >

### 3.8 Service Availability

Ballyhoo Mobile Marketing shall provide a Service Level Agreement (SLA) to Customer as outlined in the Exhibit A: Service Level Agreement.

### 3.9 Delivery Receipts

Ballyhoo Mobile Marketing shall provide Customer with Delivery Receipts for all messages on the Ballyhoo Mobile Marketing Network where Delivery Receipts are available. Delivery Receipts will indicate that a carrier successfully acknowledged receipt of the Message. Ballyhoo Mobile Marketing may charge an additional fee for Delivery Receipts on specific Carrier networks. Where Delivery Receipts are not available, Ballyhoo Mobile Marketing will make available Transfer Receipts indicating that Messages were successfully accepted and passed to the Carrier's SMSC.

#### 4. SHORT CODE PROGRAMS

##### 4.1 Ownership of Short Code

Customer will retain ownership only of its Dedicated Short Codes.

##### 4.2 Short Code Approval; Refund

Ballyhoo Mobile Marketing must obtain approval from Carriers to activate a specific Program. Ballyhoo Mobile Marketing must receive all setup fees (as defined in section 7.1) prior to commencement of the approval process by Ballyhoo Mobile Marketing. In the case of Programs that are not approved by some or all Carriers, Customer has the option to cancel such Program(s) within 30 days of the Effective Date of this Agreement. Customer will receive a refund of the entire setup fee or a portion of the setup fee depending on whether Ballyhoo Mobile Marketing has incurred setup fees from specific Carriers. Customer acknowledges that Ballyhoo Mobile Marketing will determine whether a setup fee has already been incurred by a Carrier or Carriers. Monthly fees may also be incurred within the 30-day refund timeframe and all or a prorated portion of such fees may be charged by Ballyhoo Mobile Marketing if Customer chooses to cancel a Program.

##### 4.3 Monthly Fee Commencement

Due to the nature of the Short Code approval process, Ballyhoo Mobile Marketing has right to begin charging the Short Code portion of the monthly fee upon the first activation of a Short Code on any Carrier network.

#### 4.4 Program Review for Launch

Customer acknowledges that Ballyhoo Mobile Marketing must review all Programs prior to a production launch. Ballyhoo Mobile Marketing will not activate any Premium Fee Events (as defined in section 5.1) until Ballyhoo Mobile Marketing has fully reviewed and approved a Customer Program. Ballyhoo Mobile Marketing is obligated by all Carriers to perform such program reviews. Ballyhoo Mobile Marketing will ensure that all Customer Programs adhere to the Program Form as provided by the Customer. If Programs differ from the Program Form, Ballyhoo Mobile Marketing will require Customer to update the Program Form to reflect such differences. Customer acknowledges that Ballyhoo Mobile Marketing may need additional approval from Carriers to reflect such modifications.

#### 4.5 Approvals Subject to Change

Customer acknowledges that Program approvals by Carriers are subject to change. Ballyhoo Mobile Marketing cannot control approval changes by Carriers. If an approval of a specific Program changes or is removed, Ballyhoo Mobile Marketing will notify customer in writing and Customer will be obligated to institute such changes into their Program, including if necessary the deactivation of a Program.

#### 4.6 Program Modifications

Customer may modify Programs at any time including adding services, removing services, or modifying existing services. Program modifications must continue to adhere to all Program Policies and Content guidelines (as defined in section 2.9). Ballyhoo Mobile Marketing may charge additional fees for Program modifications.

### 5 PREMIUM SMS

#### 5.1 Premium Fee Event

Ballyhoo Mobile Marketing will trigger a Premium Fee charge on an MO or MT message "Premium Fee Event". Customer must choose either method as defined in the Short Code Signup Form. If the MT

method is selected, Customer must instruct Ballyhoo Mobile Marketing 's Network to trigger the Premium Fee Event. If the MO Method is selected, Customer must provide keywords for Ballyhoo Mobile Marketing to trigger the Premium Fee Event. If keywords are spelled incorrectly, the Premium fee shall not be triggered. It is the Customer's responsibility to ensure keywords are correctly spelled.

## 5.2 Multiple Price Tiers

Ballyhoo Mobile Marketing supports multiple price tiers on a single Short Code. Customer acknowledges that Multiple Price Tiers may not be available on all Carriers and that additional fees may apply for the provisioning and continuation of Multiple Price Tiers. Multiple Price Tiers may require the activation of Carrier-specific short codes and Ballyhoo Mobile Marketing may modify Premium SMS messages with such Carrier-specific short codes to implement Multiple Pricing Tiers. Carrier-specific short codes may be shared across Ballyhoo Mobile Marketing Customers as Ballyhoo Mobile Marketing may determine from time-to-time.

## 5.3 Price Tier Modifications

Customer has the right to change pricing tiers for Premium SMS programs at any time on a month-to-month basis. An updated Program Form must be submitted to Ballyhoo Mobile Marketing prior to any pricing tier modifications and is subject to approval by Carriers. Additional fees may apply for such modifications.

## 5.4 Charge Backs

Customer acknowledges that charge backs may occur on Premium SMS messages and such charge backs will be removed from the Premium Payout (as defined in section 8). Charge backs may occur if a User successfully contests with the User's Carrier that the service was not received by the User for the Premium fee such as delivery of a ringtone. Charge backs may also occur if User does not have sufficient funds available in a pre-paid wireless plan. Charge backs may occur up to 120 days or more after the Premium transaction has been completed. The Customer cannot dispute charge backs. Ballyhoo Mobile Marketing and the Carriers will make all attempts to avoid any charge back activity, including escalating

the User to the Customer's Support Services for resolution of issues prior to a charge back occurring. Ballyhoo Mobile Marketing will automatically remove charge backs from the Customer's Payout.

## 5.5 Refunds to Users

Fees charged to the customer are final. Service fees, message credit fees and other fees are non-refundable.

## 5.6 User Premium Limits

A User may be limited by the Carrier for the total aggregate Premium charges in a single calendar month. This total is calculated by adding all Premium charges used across any premium program available by a Carrier (not just Ballyhoo Mobile Marketing programs). Customer acknowledges that in most cases Ballyhoo Mobile Marketing is unable to block Premium SMS Messages to Users who have exceeded their premium limit. Customer agrees that Premium SMS payout, in this case, will not be available.

## 5.7 Concatenated Messages

Customer may not send any concatenated messages in connection with a Premium SMS Short Code except as follows: Customer may send concatenated messages as Standard Rate Messages; provided that each Message in the series shall be considered a separate Standard Rate Message for which Customer shall pay a separate Message fee.

# 6. PREVIEW MESSAGING SYSTEM

## 6.1 Usage Policies

Customer agrees that any data retrieved from the Preview Messaging System may be used for pricing, marketing information, reporting, Content formatting, or routing of Messages, provided that: (a) Messages have or will be eventually transmitted through the Ballyhoo Mobile Marketing Network; (b)

Messages are not eventually transmitted through a non-Ballyhoo Mobile Marketing route including email gateways; or (c) Messages will never be transmitted in the future. Customer is not allowed to resell data retrieved from Preview Messaging System to third party. Customer agrees data is for internal business-use only. Ballyhoo Mobile Marketing may immediately suspend or terminate use of the Preview Messaging System and/or this Agreement, without notice, if Customer breaches this usage policy.

## 6.2 Lookup Fees

Customer will be charged a fee for each lookup performed with the Preview Messaging System. Pricing for fees is outlined in the Ballyhoo Mobile Marketing Access and Messaging Signup Form.

## 6.3 Accuracy of Data

Ballyhoo Mobile Marketing makes no warranty of any kind, express, or implied or statutory, regarding the accuracy of data returned from the Preview Messaging System. Ballyhoo Mobile Marketing shall use commercially reasonable efforts to maintain accurate data and shall use reasonable efforts to correct or replace inaccurate data.

## 7. FEES AND PAYMENT TERMS

7.1 Payment Terms Customer agrees to pay Ballyhoo Mobile Marketing all initial setup (if applicable) and deposit fees within five (5) business days following the execution of this Agreement. Ballyhoo Mobile Marketing will invoice Customer on the first (1st) day of every calendar month. Unless expressly otherwise agreed, all payments must be received by Ballyhoo Mobile Marketing thirty (30) days from the invoice date. Customer agrees that any delay on the part of Ballyhoo Mobile Marketing in sending out any invoices will not relieve Customer of the obligation to pay the amounts reflected in such invoices by their specified due date. Each monthly invoice will reflect the fees payable for the preceding calendar month and the prepayment fees payable for the current calendar month. Fees owed are outlined in the Ballyhoo Mobile Marketing Access and Messaging Signup Form, Short Code Signup Form, or any other relevant Ballyhoo Mobile Marketing signup forms. Any amounts not paid by Customer when due under this Agreement will be subject to a finance charge equal to one and one half percent (1.5%) per month or the highest rate allowable by law, whichever is less, determined and compounded monthly from the date due until the date paid. Failure to pay invoices by their due date may result in suspension or termination of this Agreement as outlined in Section 14.

## 7.2 Probation

If the Effective Date of this Agreement does not fall on the first calendar day of the month, Ballyhoo Mobile Marketing will invoice Customer for a pro-rata portion of the recurring monthly fees owed by Customer for the first partial calendar month, in addition to any other fees that are owed for such months.

## 7.3 Deposits

Ballyhoo Mobile Marketing may require Customer to deposit a prepayment for specific Services the Customer subscribes to. Ballyhoo Mobile Marketing will maintain a running total of previously unpaid invoices and accrued fees for the current calendar month. Ballyhoo Mobile Marketing will notify Customer if the running total of fees accounts for at least eighty (80%) percent of the total deposit and if Customer risks an impending suspension of Services. If the running total of unpaid fees meets or exceeds one-hundred (100%) percent of the deposit, Ballyhoo Mobile Marketing reserves the right to temporarily suspend Customer's Services. Upon termination of this Agreement, Ballyhoo Mobile Marketing will reduce the remaining invoice amounts owed by the deposit amount. If the deposit amount is greater than the remaining invoice amounts, Customer is entitled to a refund of the remainder deposit within thirty (30) days, provided that: (a) if Customer subscribes to Premium SMS Services, Ballyhoo Mobile Marketing reserves the right to withhold the deposit refund for up to one-hundred and twenty (120) days to cover potential charge backs from the Carriers. Customer has the right to increase the amount of the deposit at any time. Customer has the right to decrease the amount of the deposit upon approval by Ballyhoo Mobile Marketing .

## 7.4 Payment Methods

Ballyhoo Mobile Marketing will accept several different methods of payment including check, money order, electronic funds transfer, wire transfer, or credit card. Ballyhoo Mobile Marketing reserves the right to change its payment methods at any time and will use its best efforts to notify Customer prior to the effective date of the change. Ballyhoo Mobile Marketing reserves the right to require payment by a specific method depending on which Services the Customer subscribes to. Credit cards will only be accepted for Customer's subscribing to the Basic Access Platform. Credit cards cannot be used as a payment method for deposits.

## 7.5 Disputes

If there is any dispute associated with billing, Customer shall make payment in accordance with the billing invoice as submitted to Customer. Customer shall have the right to dispute any amount so invoiced and paid and must notify Ballyhoo Mobile Marketing in writing of its dispute within sixty (60) calendar days of the receipt of such invoice or the dispute shall be waived. A notification of disputed charges plus any Customer documentation supporting Customer's claim shall be sent to Ballyhoo Mobile Marketing in electronic form or at the postal address as set forth in this Agreement.

#### 7.6 Prices Subject to Change

Ballyhoo Mobile Marketing reserves the right to change the prices for Services provided by Ballyhoo Mobile Marketing hereunder as necessary to account for considerations of CellTrus expenses, Carrier price changes, competition, and market conditions.

Ballyhoo Mobile Marketing will use its best efforts to notify Customer at least thirty (30) days prior to the effective date of the price change.

#### 7.7 Concatenated Messages

Customer may send concatenated messages; each Message in the series shall be considered a separate Standard Rate Message and charged accordingly.

#### 7.8 Taxes

Sales, use, gross receipts or other taxes or surcharges (excluding taxes on Ballyhoo Mobile Marketing income) determined by Ballyhoo Mobile Marketing to be due to Federal, state or local taxing jurisdictions on the Services provided under this Agreement, and which are not already reflected in the fees for services, shall be separately itemized on the bills rendered to Customer and paid by Customer. Should any Federal, state or local jurisdiction determine that additional sales, use, gross receipts or other taxes or surcharges (and interest, penalty and/or surcharges thereon) are due on the provision of the services provided under this Agreement, Ballyhoo Mobile Marketing shall so advise Customer and Customer shall be liable for any such tax, interest, penalty and surcharge. However, if the Customer

disagrees with the assessment of any such additional tax, penalty, surcharge and interest, the Customer shall, at its option and expense (including payment of any such assessment prior to final resolution of the issue), have the right to protest the assessment and participate in any legal challenge to such assessment, but shall be liable for any tax, penalty, surcharge and interest ultimately determined to be due. Ballyhoo Mobile Marketing shall, when requested by Customer and at Customer's expense, cooperate with Customer in any such protest or legal challenge.

## 8. PAYOUT TERMS FOR PREMIUM SMS

### 8.1 Payout Terms

The Total Payout to a Customer for a Premium SMS program is calculated by multiplying the number of successful Premium SMS transactions sent by Customer times the payout amount per Premium SMS message as defined in the Ballyhoo Mobile Marketing Short Code Signup Form. The Net Payout to the Customer will be calculated by taking the Total Payout minus any monthly, setup, deposit, or other fees due to Ballyhoo Mobile Marketing for the current payment period.

### 8.2 Payout Period

Payout Periods are a calendar month. Net Payouts from Ballyhoo Mobile Marketing to Customer occur on the first (1st) day of every month. Payouts for a Payout Period will occur sixty (60) days after the close of the period. Customer acknowledges that some or all of the Net Payout may be delayed beyond the sixty (60) day period if a Carrier has delayed their payment to Ballyhoo Mobile Marketing .

### 8.3 Minimum Payout

If the Net Payout is less than \$200.00 USD in a single Payout Period, the payout will be carried over to the following month's payout. A Payout will only occur once the Net Payout is greater than \$200.00 USD.

#### 8.4 Single Payment

Where Customer is acting as a Content aggregator there shall be a single payment of Premium SMS payout and it shall remain the responsibility of the Customer to ensure that any such payment is divided between third party Content providers.

#### 8.5 Method of Payout

Customer agrees to choose the payout method as outlined in the Short Code Messaging Signup Form. Payouts can be sent as a check via postal mail or as an electronic funds transfer ("EFT"). A separate bank approval form must be signed to complete EFT validation. Ballyhoo Mobile Marketing will send payout using method chosen in the Short Code Messaging Signup Form.

#### 8.6 User Non-Payment

Customer hereby acknowledges and agrees that Premium SMS Message revenue is not payable where a Carrier was unable to collect charges from the User.

### 9. CONFIDENTIALITY; FEEDBACK

#### 9.1 Confidentiality

Each party (the "Receiving Party") undertakes to retain in confidence the terms of this Agreement and all other non-public information, technology, materials and know-how of the other party disclosed or acquired by the Receiving Party pursuant to or in connection with this Agreement which is either designated as proprietary and/or confidential or, by the nature of the circumstances surrounding disclosure, ought in good faith to be treated as proprietary and/or confidential ("Confidential Information"); provided that each party may disclose the terms and conditions of this Agreement to its immediate legal and financial consultants in the ordinary course of its business. Neither party shall use any Confidential Information with respect to which it is the Receiving Party for any purpose other than to carry out the activities contemplated by this Agreement. Each party agrees to use commercially reasonable efforts to protect Confidential Information of the other party, and in any event, to take precautions at least as great as those taken to protect its own confidential information of a similar

nature. Each party shall also notify the other promptly in writing in the event such party learns of any unauthorized use or disclosure of any Confidential Information that it has received from the other party, and will cooperate in good faith to remedy such occurrence to the extent reasonably possible. The restrictions set forth in this paragraph shall not apply to any information that: (i) was known by the Receiving Party without obligation of confidentiality prior to disclosure thereof by the other party; (ii) was in or entered the public domain through no fault of the Receiving Party; (iii) is disclosed to the Receiving Party by a third party legally entitled to make such disclosure without violation of any obligation of confidentiality; (iv) is required to be disclosed by applicable laws or regulations (but in such event, only to the extent required to be disclosed); or (v) is independently developed by the Receiving Party without reference to any Confidential Information of the other party. Upon request of the other party, each party shall return to the other all materials, in any medium, which contain or reveal all or any part of any Confidential Information of the other party. Each party acknowledges that breach of this by such party would result in irreparable harm to the other party, for which money damages would be an insufficient remedy, and therefore that the other party shall be entitled to seek injunctive relief to enforce the provisions of this Section 9.1.

## 9.2 Feedback

Company agrees that if it provides Ballyhoo Mobile Marketing any suggestions, comments, or other feedback about Confidential Information of Ballyhoo Mobile Marketing (“Feedback”) such Feedback is given voluntarily. Company also agrees that even if Company designates such Feedback as confidential, unless the parties enter into a separate subsequent written Agreement, the Feedback shall not be confidential and Ballyhoo Mobile Marketing shall be free to use, disclose, reproduce, license, or otherwise distribute the Feedback in its sole discretion without any obligations or restrictions of any kind, including without limitation, intellectual property rights. Company agrees not to provide Ballyhoo Mobile Marketing with any Feedback that is subject to license terms that seek to require any Ballyhoo Mobile Marketing product, technology, service or documentation incorporating or derived from such Feedback, or any Ballyhoo Mobile Marketing intellectual property, to be licensed or otherwise shared with any third party.

## 10. PUBLICITY

### 10.1 Publicity

Both Customer and Ballyhoo Mobile Marketing shall have the right to mention the existence of this Agreement, the identity of either party, Services, or Customer Services, after the Effective Date and while the Agreement remains in force, in their marketing materials, public announcements, or as a reference for future customers. This right is given on the condition(s) that: (a) any such marketing

materials accurately reflect the nature of the business relationship created by this Agreement; or (b) any such marketing materials do not disclose Confidential Information pursuant to the terms in Section 9.1.

## 11. WARRANTY; DISCLAIMER

### 11.1 Warranty; Disclaimer

Ballyhoo Mobile Marketing represents and warrants that the Services shall conform, in all material respects, to the applicable documentation provided by Ballyhoo Mobile Marketing to Customer. Customer's sole remedy for Ballyhoo Mobile Marketing's breach of this warranty shall be Ballyhoo Mobile Marketing's reasonable efforts to repair or replace the Services. EXCEPT AS EXPRESSLY SET FORTH ABOVE AND TO THE EXTENT PERMITTED BY APPLICABLE LAW, BALLYHOO MOBILE MARKETING MAKES NO WARRANTY OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, REGARDING THE SERVICES, TRANSACTIONS AND/OR SOFTWARE, AND ALL SUCH WARRANTIES, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR PARTICULAR PURPOSE AND NON-INFRINGEMENT ARE HEREBY EXPRESSLY DISCLAIMED BY BALLYHOO MOBILE MARKETING. CUSTOMER ACKNOWLEDGES THAT BALLYHOO MOBILE MARKETING HAS NOT REPRESENTED OR WARRANTED THAT THE SERVICES WILL BE UNINTERRUPTED, ERROR FREE OR WITHOUT DELAY OR WITHOUT COMPROMISE OF THE SECURITY SYSTEMS RELATED TO THE SERVICES. NO REPRESENTATIONS OR WARRANTIES OF ANY KIND ARE MADE BY BALLYHOO MOBILE MARKETING WITH REGARDS TO ANY SERVICES PROVIDED BY ANY WIRELESS CARRIER.

## 12. INDEMNIFICATION

### 12.1 Indemnification

Customer will indemnify, defend and hold harmless Ballyhoo Mobile Marketing, its past, present, and future officers, directors, agents and employees, from and against any and all claims, losses, demands, liabilities, damages, costs and expenses (including reasonable attorneys' fees), either arising out of or relating to (i) the breach of this Agreement by Customer, (ii) the sale or use of any product or Services sold by Customer or (iii) claims brought or damages suffered by any Carrier, Ballyhoo Mobile Marketing, Ballyhoo Mobile Marketing's customers, or prospective customers of Customer relating to Customer's or its agents' misuse and/or abuse of the Services, except to the extent solely caused by Ballyhoo Mobile Marketing. Ballyhoo Mobile Marketing will indemnify, defend and hold harmless Customer, its past, present, and future officers, directors, agents and employees, from and against any damages (including reasonable attorney's fees) arising out of (a) Ballyhoo Mobile Marketing's breach of this Agreement, or (b) a third party claim that the Software or Services infringe a United States patent, copyright or trade secret right of a third party. Customer's sole remedies for a claim of infringement or misappropriation of any intellectual property shall be Ballyhoo Mobile Marketing's replacement of the offending Software or

Services, Ballyhoo Mobile Marketing's obtaining a license for Customer's continued use of the Software or Services, or Ballyhoo Mobile Marketing's termination of the affected licenses granted hereunder. The indemnification obligations set forth in this Section are contingent upon (a) the indemnified party giving prompt written notice to the indemnifying party of a claim for which the indemnified party is seeking indemnification, (b) the indemnified party allowing the indemnifying party to control the defense and related settlement negotiations for any such claim, and (c) the indemnified party fully assisting and cooperating in the defense so long as the indemnifying party pays the indemnified party's out-of-pocket expenses. The indemnifying party shall not settle a claim without the written consent of the indemnified party, such consent not to be unreasonably withheld.

## 13. LIMITATIONS ON LIABILITY

### 13.1 Limitations on Liability

Customer acknowledges that Ballyhoo Mobile Marketing is not a Carrier nor does it maintain any wireless infrastructure. The Services and any other services provided by any Carrier, which are provided by means of the Internet, are provided "as is", "where is" and "when available". Ballyhoo Mobile Marketing is responsible only for providing data transmission to effect certain routing of Wireless Text Message requests from Customer to the Carrier and is not responsible for the Carrier's actions and/or ability to effectuate Customer's requests. Ballyhoo Mobile Marketing is therefore not responsible for the availability of any Carrier, or the availability and/or performance of the Internet. Ballyhoo Mobile Marketing is also not responsible for any damages or costs Customer suffers or incurs as a result of any instructions given, actions taken or omissions made by Customer. IN NO EVENT WILL BALLYHOO MOBILE MARKETING 'S LIABILITY ARISING OUT OF THIS AGREEMENT EXCEED THE FEES PAID TO BALLYHOO MOBILE MARKETING BY CUSTOMER DURING THE THREE (3) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT WHICH GAVE RISE TO OPPORTUNITY OR PROFITS, COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, OR FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR SPECIAL DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT, UNDER ANY CAUSE OF ACTION OR THEORY OF LIABILITY (INCLUDING NEGLIGENCE), AND WHETHER OR NOT BALLYHOO MOBILE MARKETING HAS ADVISED CUSTOMER OR ANY THIRD PARTY OF THE POSSIBILITY OF SUCH DAMAGE. THESE LIMITATIONS WILL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. Notwithstanding the above, the limitations set forth above shall be enforceable to the maximum extent allowed by applicable law.

## 14. TERM AND TERMINATION

### 14.1 Term

This Agreement will commence on the Effective Date and will continue for a period of one (1) year, unless terminated earlier or suspended according to the provisions of this Agreement. The Agreement will thereafter automatically renew for successive twelve (12) month terms, unless either party gives the other party written notice of its intention not to renew the Agreement at least thirty (30) days prior to the end of the then-current term or renewal term.

#### 14.2 Termination and Suspension

Customer may terminate this Agreement upon no less than thirty (30) days prior written notice to Ballyhoo Mobile Marketing. Either party may terminate this Agreement upon any material breach of the terms of this Agreement by such other party, provided that such other party has not cured such material breach within such fifteen (15) day notice period. Ballyhoo Mobile Marketing reserves the right to immediately suspend this Agreement if Customer breaches program policies, transmits "spam" transmits improper Content or exceeds throttle rates, as outlined in Section 2.

#### 14.3 Non-Payment

Notwithstanding any other provisions of this Agreement, Ballyhoo Mobile Marketing shall have the right to terminate Customer's service and this Agreement without further notice if an invoice for services provided hereunder by Ballyhoo Mobile Marketing is not paid in full within thirty (30) days after the date of such invoice, and such invoice remains unpaid for ten (10) days after Customer's receipt of written notice of such non-payment from Ballyhoo Mobile Marketing .

#### 14.4 Insolvency

Either party may immediately terminate the Agreement if the other party (a) becomes or is declared insolvent or bankrupt; (b) is the subject of any proceeding related to its liquidation or insolvency (whether voluntarily or involuntarily) which is not dismissed within ninety (90) Days; (c) makes an assignment for the benefit of creditors; (d) experiences a material adverse change in financial condition which may reasonably be expected to affect its ability to perform; or (e) fails to comply with a written request for reasonable assurances within ten (10) business days or otherwise repudiates any Agreement.

#### 14.5 Effect of Termination; Retaining Payouts

Upon the expiration or termination of this Agreement for any reason, Customer's rights to use the Services, and any other rights granted hereunder shall immediately cease; and each party will be released from all obligations and liabilities to the other occurring or arising after the date of such termination, except that any termination of this Agreement will not relieve Ballyhoo Mobile Marketing or Customer from any liability arising prior to the termination of this Agreement. Notwithstanding the foregoing, the provisions of Sections 3.6, 9-14, warranty disclaimers, and Customer's obligations to pay accrued fees through the effective date of termination will survive any termination of this Agreement.

#### 15 NO EXCLUSIVITY/COMPETITION

##### 15.1 No Exclusivity

Each party acknowledges and agrees that the rights granted to and obligations due to the other party in this Agreement are non-exclusive, and that, without limiting the generality of the foregoing, nothing in this Agreement shall be deemed or construed to restrict either party's ability to develop, manufacture, license, sub-license, distribute, deploy, support, or promote any technology or service whether or not similar to or competitive with either parties' Services.

#### 16. MISCELLANEOUS TERMS

##### 16.1 Force Majeure (Events Beyond the Parties' Control)

Neither party will be liable for any failure or delay in performing any obligation under this Agreement that is due to causes beyond its reasonable control.

##### 16.2 Entire Agreement and Modification

The terms in this Agreement constitute the entire Agreement between Ballyhoo Mobile Marketing and Customer regarding its subject matter and its terms supersede any prior or simultaneous Agreement or terms, whether written or oral. Except as otherwise provided for herein, any waiver, modification, or amendment of any provision of this Agreement will be effective only if in writing, signed, and acknowledged by the parties herein.

### 16.3 Severability

In the event that any provision of this Agreement is unenforceable or invalid such unenforceability or invalidity will not render this Agreement unenforceable or invalid as a whole, and in such event, such provision will be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law or applicable court decisions.

### 16.4 Assignability

Customer may not assign this Agreement without the prior written consent of Ballyhoo Mobile Marketing . This Agreement is assignable by Ballyhoo Mobile Marketing .

### 16.5 Non-Solicitation

Both Parties agree that, during the term of this Agreement and for two (2) years after its termination, they will not directly or indirectly employ or offer employment to any person who was employed by the other Party unless such person shall have ceased to be employed by the respective Party for at least six (6) months.

### 16.6 Governing Law and Jurisdiction

This Agreement will be governed by and construed in accordance with the laws of the state of Arizona without reference to its conflicts of laws principles. Each party consents to the exclusive venue and jurisdiction of the state and local courts within Maricopa County, Arizona court for any dispute under this Agreement.

## 16.7 Export Restrictions

Customer acknowledges and agrees that it shall not import, export, or re-export directly or indirectly, any commodity, including Customer's products incorporating or using any Ballyhoo Mobile Marketing products in violation of the laws and regulations of any applicable jurisdiction.

## 16.8 Notice

Except as otherwise provided for in the Agreement, any notice, demand, or request with respect to this Agreement shall be in writing and shall be effective on the date received only if it is sent by a courier service that confirms delivery in writing, or if sent by certified or registered mail, postage prepaid, return receipt requested, addressed, if to Ballyhoo Mobile Marketing, Inc. , then to "Attention President" at the Ballyhoo Mobile Marketing, Inc. headquarters and if to Customer, then to the address provided on the Ballyhoo Mobile Marketing Website.

## 17. EXHIBIT A: SERVICE LEVEL AGREEMENT

Ballyhoo Mobile Marketing is committed to providing superior network performance and the highest quality of care for our customers under this Commercial Service Agreement. Our goal is to provide a Service Level Agreement that exceeds industry standards.

**Ballyhoo Mobile Marketing Network Uptime:** Ballyhoo Mobile Marketing's SLA guarantees that the Ballyhoo Mobile Marketing Network will be available for transmission and reception of SMS messages, delivery receipts, and other meta-data around such messages, 99% of the time in a given month, excluding scheduled maintenance. If a customer experiences downtime, Ballyhoo Mobile Marketing will refund such customer ten (10%) percent of the monthly Access Platform fee for each thirty (30) minute interval of downtime, up to one-hundred (100%) percent of the Customer's monthly Access Platform fee as defined in the Ballyhoo Mobile Marketing Access and Messaging Signup Form.

Ballyhoo Mobile Marketing Network uptime consists of correctly delivering messages to the appropriate carrier as listed in the Network Coverage List (available at <http://Ballyhoo Mobile Marketing.com/coverage.jsp>), or as otherwise negotiated between Ballyhoo Mobile Marketing and Customer, and the correct functioning of all Ballyhoo Mobile Marketing Network infrastructure including redundant Internet connectivity, electrical power, routers, switches, hubs, cabling, UPSs, server hardware, and Short Messaging Service Center (SMSC) software.

Ballyhoo Mobile Marketing Network uptime does not consist of the correct functioning of the SMS worldwide infrastructure beyond Ballyhoo Mobile Marketing's control. Ballyhoo Mobile Marketing has no ability to control the correct functioning of the Carrier's infrastructure or the User's mobile Device. Uptime does not consist of routing situations, where a delivery path that has functioned correctly for the last 30 days, has been disrupted such that messages cannot be delivered. Uptime does not consist of situations where transmission or reception of data to or from the Ballyhoo Mobile Marketing Network is due to a failure of the Customer's infrastructure including network connectivity, hardware, or software.

Ballyhoo Mobile Marketing Network downtime exists when a particular customer is unable to transmit or receive data and Ballyhoo Mobile Marketing records such failure in the Ballyhoo Mobile Marketing trouble ticket system. Network downtime is measured from the time the trouble ticket is opened by a customer to the time the Ballyhoo Mobile Marketing Network is once again able to transmit and receive data.

Refunds: Ballyhoo Mobile Marketing limits customer refunds to one hundred (100%) percent of the monthly Access Platform fee in a given month.

#### 18. Refunds of credits:

You can ask us to refund any unused credits within 7 days of buying those credits. However, we do not refund branding charges, licenses, monthly administration charges, and any other charges that you pay to us.

When you ask us to pay back credits we will -

- First deduct our charges for any messages sent;

- Pay you the amount on the scale that corresponds with the equivalent to the amount of message units sent;

- Keep 10% of the amount we refund you as an administration charge; and

- Keep any costs we incur to refund you (eg bank costs).