



## Email Marketing Services Agreement

This Services Agreement (the "Agreement", as modified from time to time by Actify Media in its sole discretion) is a legal agreement between You ("Customer", "You", "Your") and Actify Media ("Actify Media", "Company", "We", "Us", "Our") (collectively the "Parties"). By entering into an Ordering Document referencing this Agreement, You agree that the provision and receipt of Services are expressly conditioned on the acceptance terms of this Agreement and any terms incorporated herein.

This Agreement takes effect on the earliest of You: 1) creating an account, 2) executing or electronically accepting an Ordering Document or other agreement referencing this Agreement, or 3) using the Services, (the earliest of the foregoing being the "Effective Date"). If You enter into this Agreement or acquire the Services on behalf of an entity, You represent and warrant that You have the authority to accept this Agreement on the entity's behalf.

In order to use the Services, You must:

- be at least eighteen (18) years old;
- agree to this Agreement; and
- provide true, complete, and up to date contact information to Actify Media.

By using the Services, You represent and warrant that You meet all the requirements listed above. Actify Media may refuse to provide the Services, suspend or close Your account, and change eligibility requirements at any time. If You have any questions, feel free to contact our support team by emailing [support@actifymedia.com](mailto:support@actifymedia.com)

## Section 1. Definitions

In addition to terms defined elsewhere in this Agreement, the following definitions will apply to capitalized words in this Agreement:

- A. **“Add-On Features”** means Services that may be purchased by Customer that may not otherwise be included in a Subscription Plan or other package purchased by the Customer.
- B. **“Affiliate”** of a party means any entity that directly or indirectly controls, is controlled by, or is under common control of a party. “Control,” for purposes of this definition, means direct or indirect ownership or control of more than fifty percent (50%) of the voting interests of a party or the right to receive more than fifty percent (50%) of the profits or earning of the entity.
- C. **“Beta Features”** mean services and/or features available to Customer for use which are still in their beta stage and have not been fully tested.
- D. **“Contact”** means any individual 1) whose information is stored on or collected via the Services, or 2) to whom Users send emails to or otherwise engage or communicate with via the Services.
- E. **“Customer’s Account”** means the Web-based email-marketing account provided by Company to Customer (and where applicable, by Customer to its End Clients) which is accessible to Users via usernames and passwords created and/or assigned by Customer.
- F. **“Customer Content”** means information, data, text, software, photographs, graphics, video, messages, tags and/or other materials and content, excluding the Services, Pre-Existing IP, Statistical Data, that Users or Contacts post, upload, share, submit, store or otherwise provide or make available through or using the Services.
- G. **“Custom Works”** means, any custom designs, projects, email campaigns (or “mailings”), or other works, including Deliverables, created by Company for, or on behalf of, Customer by Company.
- H. **“Deliverables”** means any outputs specifically defined in an SOW and characterized as “Deliverables” that will be provided by Company to Customer; provided Deliverables specifically exclude the Services and any Pre-Existing IP.
- I. **“Intellectual Property Rights”** means any and all patents, inventions, copyrights, moral rights, trademarks, domain names, trade secrets, know-how, and any other form of intellectual property and/or proprietary rights recognized in any jurisdiction whether

existing now or acquired hereafter including any application or right to apply for registration of any of these rights.

J. **“Law(s)”** means any and all applicable laws, regulations, statutes, rules, orders and other requirements of any international, federal, state or local governmental authority, including where applicable, the Regulation 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of Personal Data and on the free movement of such data (General Data Protection Regulation) (**GDPR**). Where relevant to the Customer’s or User’s obligations, when assessing “applicability”, Customer and User shall take into account the Governing Law in Section 14 and the Laws relating to both the jurisdiction where User is using the Services and the jurisdiction where the Contact resides.

K. **“Ordering Document”** means any form (including an electronic form), either executed by the Parties or agreed to by the Customer via the Site, that sets out the commercial terms of Customer’s purchase of the Services. All Ordering Documents shall be deemed to incorporate, and shall be subject to and governed by, this Agreement.

L. **“Order Term”** means the period specified in an Ordering Document (including any renewals of the same) during which Customer will have access to the Services.

M. **“Pre-existing IP”** means any Intellectual Property Rights in materials and/or information (including, but not limited to, algorithms, methods, forms, software, software components in source or object code form) which is owned by, licensed to, or in the possession of Company either: 1) on or prior to the creation of the Custom Work; or 2) after the commencement of the Custom Work but not specifically created as a part of the Custom Work. Notwithstanding the foregoing, Pre-Existing IP expressly excludes the content, logos, graphics, photos, images or text of any type included in any email campaigns or mailing drafted by Company at Customer’s request.

N. **“Professional Services”** all Services, other than the Subscription Services, provided by Company staff including, but not limited to, onboarding services, support services, provision and/or creation of any Custom Works, and /or Customer-specific customizations.

O. **“Services”** means the Subscription Service, Professional Services, Site, Statistical Data, and Pre-Existing IP, products, services, applications, tools and other resources provided or made available by Company or accessible at the Site (or other website(s) owned by Company), including any applicable support services, manuals, documentation and related material, and all related service names, logos, design marks, slogans, and all other material comprising the Subscription Services, Professional

Services, Site, Services, and Pre-Existing IP, but excluding any Customer Content and Custom Works.

P. **“Statistical Data”** has the meaning ascribed in Section 5.D (Statistical Data).

Q. **“Statement of Work”** or **“SOW”** means a document entitled “SOW” or “Statement of Work” executed by the Parties and expressly incorporating this Agreement, as amended from time to time.

R. **“Subcontractor”** means a service provider engaged by Company that provides a part of the Services.

S. **“Subscription Plan”** means the subscription type chosen by the Customer on an Ordering Document which sets out the base set of Services ordered by the Customer. Different Subscription Plans shall have different Services associated with them.

T. **“Subscription Service”** means the online email marketing application offered by Company via the Site which requires payment in accordance with the Ordering Document.

U. **“Third Party Services”** means any software, products, tools, applications, or services that are used in connection with the Services that are not owned by Company or its Affiliates.

V. **“User”** means any person accessing and/or using the Subscription Service through Customer’s Account.

## Section 2. Agreement Structure

A. **Other Incorporated Documents.** This Agreement hereby incorporates the Actify Media Terms of Use available at [actifymedia.com/terms-of-use](https://actifymedia.com/terms-of-use), as updated from time to time (hereinafter, “TOU”) and Actify Media’s Privacy Notice available at [actifymedia.com/privacy-policy](https://actifymedia.com/privacy-policy), as updated from time to time (hereinafter, “Privacy Notice”). This Agreement governs any Services, Custom Works, and/or Deliverables ordered pursuant to an Ordering Documents or any SOWs incorporating this Agreement.

This Agreement, together with its incorporated documents and any Ordering Documents and/or SOWs referencing this Agreement, constitutes the entire agreement between Customer and Company regarding the Services and supersedes all prior and contemporaneous agreements, representations, and understandings, whether written or oral, concerning its subject matter.

Company may receive and sign or otherwise execute purchase orders or similar documents provided by Customer contemporaneously with or after the execution of this Agreement (including subsequent such documents provided in connection with a renewal), and the Parties agree that the sole purpose of such documents is for Customer's internal business purposes and that execution by Company does not constitute an acceptance of any of the terms or conditions of such document.

**B. Order of Precedence.** Notwithstanding the foregoing, if Customer and Company mutually execute a written agreement for use of the Services, the terms and conditions of the executed agreement shall prevail to the extent of any conflict with the terms of this Agreement. In the event of any conflict between the terms of this Agreement and the other incorporated documents, the conflict shall be resolved in the following order of precedence:

1. Terms of Use,
2. Privacy Notice,
3. Agreement, and
4. Ordering Document.

The above order of precedence will apply unless: 1) the conflicting term is expressly stated to vary the conflicting provision of the controlling document; 2) the controlling document specifically provides that a lower order document may vary the applicable term of the controlling document; or 3) the Parties expressly agree otherwise. All rights not expressly granted herein are reserved by Company.

**C. Agreement Modifications.** Company may make modifications to this Agreement by posting a revised Agreement on the Site and/or by sending an email to a Full Access User (or Administrator, if applicable). Customer acknowledges and agrees that use of the Services by Customer after the Last Modified Date constitutes Customer's acceptance of the modified terms, that such modified terms shall become effective on the Last Modified Date, and that it is Customer's responsibility to check this website regularly for modifications to this Agreement. No modification, addition, deletion or waiver of any rights under this Agreement will be binding on Company unless signed by a duly authorized representative of Company. To the extent the provisions of this Section 2.C (Agreement Modifications) are held unenforceable, they shall be modified or severed in accordance with Section 14.M.

## Section 3. Services

### A. Subscription Services.

- i. **Prerequisite to Use of Subscription Services.** Customer is responsible for obtaining all hardware, software and services, which are necessary to access the Subscription Service.
- ii. **Modification of the Subscription Services.** Company, in its sole discretion, reserves the right to modify the Subscription Services, or any features of the Subscription Services at any time and for any purpose, including but not limited to, improving performance or quality, correcting errors, or maintaining competitiveness.

### B. Professional Services.

- i. **Customer Cooperation** Customer acknowledges that its timely provision of and responses, assistance, cooperation, complete and accurate information and data from its officers, agents, and employees, and suitably configured computer products (collectively, "Cooperation") are essential to performance of any Professional Services, and that Company will not be liable for any deficiency in performing Professional Services if such deficiency results from Customer's failure to provide full Cooperation.
- ii. **Customer Definition of Requirements.** Where Customer engages Company to provide any Custom Works, Customer represents and warrants that Custom Works requested by Customer do not infringe the Intellectual Property Rights or any other rights of any third party. Customer shall be solely responsible for review of any Custom Works to ensure they do not violate or infringe a third party's Intellectual Property Rights or any other rights). Customer acknowledges and agrees that the provision of the Professional Services does not constitute any assumption of risk related to the Custom Works by Company.

## Section 4. Payment Terms

### A. Subscription Service Fees.

- i. **Overage Fees.** If Customer exceeds the limits of their Subscription Plan, Customer will be charged overage fees for such excess usage.
- ii. **Usage-based Features.** Customer acknowledges and agrees that fees for certain features of the Services may be assessed based on Users' actual usage of those features. Customer agrees to pay for Users' usage of any such features.

**B. Professional Services Fees.** The Professional Services are provided either on a fixed-fee or on a time and materials ("T&M") basis as described in the applicable Ordering Document. Customer shall pay all customary travel and living expenses ("Expenses"). For fixed-fee engagements, Customer shall pay Company the fees stated in the applicable Ordering Document plus all Expenses. For T&M engagements, Customer shall pay Company for time spent performing the Professional Services at the consulting rates set forth in the applicable Ordering Document plus all Expenses.

**C. Payment for Add-On Features.** Customer may order Add-On Features at any time by using the Add-On Feature and/or executing an Ordering Document for the Add-On Feature. Customer agrees to pay fees for such Add-On Feature for the remainder of the Order Term, and any renewals thereof.

**D. Payment Method.** Unless otherwise stated on Customer's Ordering Document, Company shall charge Customer and Customer agrees to pay, all fees for Services Customer purchases or uses in U.S. Dollars, up front via credit card, in accordance with the terms listed on Customer's Ordering Document and this Agreement. Customer agrees to provide accurate payment information, and hereby authorizes Company to charge such credit card for all fees set forth in the Ordering Document for the duration specified therein (and any renewal thereof). Customer is responsible for reviewing the pricing schedule, features, and limits associated with its Subscription Plan.

**E. Late Payment.** If any amount due is not received by the due date, then without limiting Company's rights or remedies, Company may (a) apply a late fee of 1.5% of the outstanding balance per month, or the maximum rate permitted by Law, whichever is lower, from the date such payment was due until the date paid; (b) accelerate the payment of any fees payable; and/or (c) condition future subscription renewals and orders on pre-payment or payment terms shorter than those specified in the Ordering Document.

**F. Taxes.** All fees stated in the Ordering Document are exclusive of any applicable taxes. Customer shall pay any sales, use, value added, excise, property withholding or similar tax, duties, and any related tariffs, and similar charges applicable to Customer's

purchase of the Services accessible by any local, provincial, federal, or foreign jurisdiction and shall include any related penalties or interest, except taxes based on Company's net income ("Customer's Taxes"). Customer's Taxes may be added to the final price charged to Customer on Customer's invoice. Customer shall pay Customer's Taxes with no reduction or offset in the amounts payable to Company hereunder. Customer will, and hereby agrees to, promptly reimburse Company for any and all of Customer's Taxes (and any applicable penalties) that Company may be required to pay in connection with this Agreement upon receipt of Company's invoice.

**G. Fees at Renewal.** Unless otherwise stated on Customer's Ordering Document, Company reserves the right to change fees for any Services at the time of renewal and Customer is responsible for reviewing the fees charged by Company prior to renewal, provided no fee change will be effective until renewal of that Service. Upon expiration of the applicable Order Term, Customer will automatically be charged in accordance with the payment method specified on Customer's Ordering Document for renewal unless Customer downgrades or terminates its account in accordance with this Agreement.

**H. Reactivation Fee.** Company may charge a re-activation fee to re-activate a suspended account.

**I. No Refunds.** Except as otherwise provided in this Agreement or required by Law, Company will not provide refunds or credits for partial or unused periods of service or mid-term downgrades.

**J. Disputing Charges.** Any dispute to a charge on your invoice must be made within 30 days after the date of the invoice that initially contained the disputed charge. Disputes can only be made in writing, via email to [billing@actifymedia.com](mailto:billing@actifymedia.com) or by phone at 406-356-6111.

## Section 5. Intellectual Property

**A. Customer's Property.** By using the Services, submitting any Customer Content through the Services, or providing any Customer Content to Company, Customer hereby grants Company and its Subcontractors a worldwide, non-exclusive, perpetual, irrevocable, royalty-free, fully paid, sublicensable and transferable license to use, process, store, edit, modify, aggregate, combine, reproduce, distribute, display, perform, and prepare derivative works of the Customer Content in connection with the Services. For clarity, the foregoing license granted to Company and its Subcontractors, does not affect Customer's ownership or license rights in its Customer Content (excluding any Pre-Existing IP) unless otherwise agreed in writing. Customer represents and warrants that Customer has all rights to grant such licenses to Company and its Subcontractors

without infringement or violation of moral rights or any third party rights, including without limitation, any privacy rights, publicity rights, copyrights, trademarks, contract rights, or any other Intellectual Property Rights. In addition, while using the Services, Customer may provide personal information (such as Customer's name, contact information, and/or other registration information) to Company. Customer agrees to, and agrees and warrants that it has the necessary rights and consents to, permit Company to use this information and any technical information about Customer's use of the Services to tailor the user experience of the Services to Customer, to facilitate Customer's use of the Services, and to communicate with Customer. Further, Customer agrees that Company shall have the right to use such information to identify and understand trends in the various interactions with our Services and to conduct internal business analysis based on meta-data about usage, feature adoption and forecasting, on an anonymized, aggregated basis (unless otherwise agreed by Customer).

**B. Company's Property.** Customer acknowledges and agrees that all rights, title and interest in and to Services and Pre-Existing IP are the exclusive property of Company or its affiliates, licensors or suppliers. Unless stated otherwise, Company and its licensors retain all Intellectual Property Rights in and to Services, Pre-Existing IP, and all logos, graphics, software, algorithms, functionality, content (other than Customer Content) comprising the Services and Pre-Existing IP. Customer is not authorized to copy, modify, re-package (unless otherwise expressly agreed by Company), reverse-engineer, disassemble, or otherwise use any of the Services without the prior written consent of Company. Customer's use of the Services confers no title or ownership in the Services and is not a sale of any rights in the Services. All ownership rights to the Services remain in Company or its third party suppliers, as applicable. Your access and use of the Services is non-exclusive.

**C. Custom Works.** In the course of providing the Professional Services, Company may create Custom Works for Customer that incorporates, embeds, or integrates Company's Pre-Existing IP. Other than any Pre-Existing IP incorporated, embedded, or integrated into the Custom Works, Customer owns all right title and interest in the Custom Works. Company grants to Customer for the duration of this Agreement a worldwide, non-exclusive license to use the Pre-Existing IP solely in connection with an unmodified version of the Custom Works. Customer will not, and will not allow any employee or third party to copy, reverse-engineer, modify, improve, create derivative works of or use the Pre-Existing IP in any way outside of the Custom Works as delivered by Company to Customer. In the event that any Customer employee or third party at Customer's request or direction modifies, improves or creates derivative works of the Pre-Existing IP, whether or not in violation of this Agreement, Customer will cause all right, title and interest in and to such modifications, improvements and/or derivative works to be assigned to Company.

D. **Statistical Data.** Notwithstanding anything to the contrary in this Agreement, but subject to the Privacy Notice, Company may monitor, analyze, and compile statistical and performance information based on and/or related to Customer's use of the Services, in an aggregated and anonymized format ("Statistical Data"). Customer agrees that Company may make such Statistical Data publicly available, provided that it does not contain personally identifying information of any individual or any information that would identify Customer. Company and/or its licensors own all right, title and interest in and to the Statistical Data and all related software, technology, documentation, and content provided in connection with the Statistical Data, including all Intellectual Property Rights in the foregoing.

E. **Feedback.** Customer may provide feedback, suggestions, and comments to Company regarding the Services ("Feedback"). Customer hereby grants to Company a worldwide, non-exclusive, perpetual, irrevocable, royalty-free, fully paid, sublicensable and transferable license to use, process, store, edit, modify, aggregate, combine, reproduce, distribute, display, perform, prepare derivative works, and otherwise fully exploit such Feedback in any medium or format, whether now known or later developed.

F. **Publicity.** Unless otherwise agreed by the parties, Customer hereby agrees that Company may reference Customer in marketing and public relations materials, including a press release announcing Customer as a customer. Customer hereby grants Company a nonexclusive, worldwide license to use and display Customer's trademarks, trade names and logos in connection with the foregoing.

## Section 6. Confidentiality, Security, & Privacy

A. **Confidential Information.** The Parties acknowledge that in the course of performing their obligations under this Agreement, each party (a "Recipient") may receive information that is either clearly marked as "confidential" or nonpublic information which, under the circumstances surrounding the disclosure, a reasonable person would conclude should be treated as confidential ("Confidential Information") from the other party (a "Discloser"). Recipient covenants and agrees that neither it nor its agents, employees, officers, directors or representatives will disclose or cause to be disclosed any Confidential Information of the Discloser, except (a) to those employees, representatives, or contractors of the Recipient who require access to the Confidential Information to exercise its rights under this Agreement and who are bound by confidentiality obligations, or (b) as such disclosure may be required by Law, subject to and to the extent permitted by Law, the Recipient providing to the Discloser written notice to allow the Discloser to seek a protective order or otherwise prevent the

disclosure. Notwithstanding the foregoing, nothing in this Agreement will prohibit or limit the Recipient's use of information: (i) previously known to it without breach or obligation of confidence, (ii) independently developed by or for it without use of or access to the Discloser's Confidential Information, (iii) acquired by it from a third party that was not under an obligation of confidence with respect to such information at the time of disclosure, or (iv) that is or becomes publicly available through no breach of this Agreement.

**B. Protection of Customer Content.** Without limiting the above, Company will maintain appropriate administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of the Customer Content. Company will not modify or access the Customer Content except as required to provide the Company Services, prevent or address service or technical problems, or at your request in connection with support matters.

**C. User Passwords.** Customer is solely responsible for keeping Customers' and/or Users' account name, password, and any other login credentials confidential. Customer is responsible for any and all activities that occur within Customer's Account, whether authorized by Customer or not. Customer must notify Company immediately of any unauthorized access or use of Customer's Account. Company will not be held responsible or liable for any losses due to lost or hacked passwords.

**D. Privacy Notice.** Notwithstanding anything to the contrary in this Agreement, the Privacy Notice explains how Company handles Customer Content and other data processed by the Services. Customer hereby acknowledges and agrees that Company will handle data in accordance with the Privacy Notice. Customer agrees to provide its Contacts with a privacy notice that complies with Laws and takes into account the processing activities it has engaged Company to provide. For more information on how personal data is handled in connection with the Services as well as information on rights to access, correct and lodge a complaint regarding the handling of personal data please refer to the Privacy Notice.

**E. HIPAA and PHI.** Customer understands and acknowledges that the Services are not configured to receive and store personal health information ("PHI"), as that term is defined under the Health Insurance Portability and Accountability Act ("HIPAA") and that Company is neither a "Covered Entity" nor a "Business Associate," as those terms are defined in HIPAA. As such, Customer agrees not to, and not to permit Users to, transmit, request, provide access to, submit, store, or include any PHI through the Services. Customer agrees that Company may terminate this Agreement immediately if Customer is found to be in violation of this Section 6.E.

F. **EU Personal Data Transfer.** In the event that Customer intends to transfer the Personal Data of an EU Data Subject, Customer shall notify Company and the parties shall execute Company's Data Protection Addendum incorporating the Company's requirements to adhere to the Privacy Shield Framework. Once executed, such Data Protection Addendum will be deemed wholly incorporated into this Agreement.

## Section 7. Third Party Services

A. Customer agrees and acknowledges that certain features of the Services depend on the continuing availability of Third Party Services. If the providers of these Third Party Services cease to make their services or programs available on reasonable terms, Company may cease providing any affected features or services without entitling Customer to any refund, credit, or other compensation.

B. If Customer enables, installs, connects, or provides access to any Third Party Services for use with the Services, Customer:

- i. acknowledges and agrees that access and use of such Third Party Services are governed solely by the terms and conditions of such Third Party Services, and Company does not endorse, is not responsible or liable for, and makes no representations as to any aspect of such Third Party Services, including, without limitation, their content or the manner in which they handle, protect, manage or process data (including Customer Content) or any interaction between Customer and the provider of such Third Party Services.
- ii. acknowledges and agrees that Company does not guarantee the continued availability of such Third Party Service features, and may cease enabling access to them without entitling Customer to any refund, credit, or other compensation, if, for example and without limitation, the provider of a Third Party Service ceases to make the Third Party Service available for interoperation with the corresponding Subscription Service in a manner acceptable to Company.
- iii. hereby permits the transmission of and access to Customer Content to such Third Party Services.

- iv. grants to Company and its Subcontractors a worldwide, non-exclusive, perpetual, irrevocable, royalty-free, fully paid, sublicensable and transferable right and license to use, process, store, edit, modify, aggregate, combine, reproduce, distribute, display, perform, and prepare derivative works of any data transmitted to or obtained by Company from any Third Party Service enabled, installed, or connected to the Services by Customer and represents and warrants that doing so will not violate Laws or any third party's privacy, Intellectual Property Rights, or other rights.
- v. agrees that Company is not liable for: a) damage or loss caused or alleged to be caused by or in connection with Customer's enablement, access, or use of any Third Party Services, or b) Customer's reliance on the privacy, data security, or other practices of such Third Party Services.
- vi. irrevocably waives any claim against Company with respect to such Third Party Services.
- vii. agrees to comply with any requests by Company to remove any connections to or from other websites and/or applications to the Services which Customer installs.

## Section 8. Term and Termination

A. **Term.** The term of this Agreement will commence on the Effective Date and, unless earlier terminated in accordance with this Agreement, will continue to apply to any use of the Services by a User. Except as otherwise specified in the applicable Ordering Document or where prohibited by applicable Law, the Ordering Document and all non-expiring items added during the course of the Order Term, shall automatically renew for additional periods equal in duration to the original Order Term or one year, whichever is shorter, unless either party gives the other notice of non-renewal at least 30 days before the end of the Order Term (or, if applicable, any renewal of the Order Term).

B. **Right to Suspend.** Company may suspend Customer's Account: (i) for non-payment or untimely authorization of payment; (ii) at any time without notice for conduct that it believes, in its sole discretion, violates: 1) this Agreement or other agreements or guidelines which may be associated with Customer's use of the Services; or 2) any Laws

applicable to Customer's use of the Services; or (iii) If Customer does not log into its account for more than 700 days ("Inactive Account"). INACTIVE ACCOUNTS HAVE 30 DAYS TO BECOME ACTIVE OR THE ACCOUNT AND ITS DATA, INCLUDING CONTACT SIGNUPS, MAY BE PERMANENTLY REMOVED FROM COMPANY'S DATABASE.

**C. Termination.** Either party may terminate this Agreement or any individual Ordering Document as follows: (a) for cause if the other party materially breaches this Agreement or an Ordering Document and does not remedy such breach within 30 days after its receipt of written notice of such breach; or (b) immediately if the other party: (i) terminates its business activities or becomes insolvent, (ii) admits in writing to the inability to pay its debts as they mature, (iii) makes an assignment for the benefit of creditors, or (iv) becomes subject to direct control of a trustee, receiver or similar authority. Customer agrees that Company will not be liable to Customer or to any third party for termination of Customer's access to the Services resulting from any violation of this Agreement by Customer. Company may terminate this Agreement or any individual Ordering Document at any time in its sole discretion.

**D. Effect of Termination.** Upon expiration or termination of this Agreement: (a) Customer's right to use the Services shall cease, and Company will have no further obligation to make the Services available to Customer; (b) except as otherwise expressly stated herein, all rights and licenses granted to Customer under this Agreement shall cease; (c) Customer will pay any unpaid fees incurred by Customer and/or for the remainder of the term under any applicable Ordering Document in effect prior to the termination date; and (d) Company may delete any of Customer's and/or archived data within 30 days after the date of expiration or any termination of this Agreement. Any statutory retention requirements with respect to Customer's and/or data or information remain Customer's responsibility.

**E. Survival.** The following sections of this Agreement will survive termination of this Agreement: 1 (Definitions), 2 (Agreement Structure), 3.B (Professional Services), 4 (Payment Terms), 5 (Intellectual Property), 6 (Confidentiality, Security, & Privacy), 7.B (Third Party Services), 8.D (Effect of Termination), 8.E (Survival), 10 (Disclaimers), 11 (Indemnification), 12 (Limitation of Liability), 13 (U.S. Federal Government End User Provisions), and 14 (General Provisions).

## Section 9. Warranties

**A. Mutual Warranties.** Each party represents and warrants that: (a) it has the full right, power and authority to enter into, execute, and perform its obligations under this Agreement; and (b) it will not violate Laws in the provision or receipt of the Services.

**B. Company Warranties.** Company represents and warrants that Company shall make every reasonable attempt to make sure that all email messages sent through Company's servers follow email standards.

**C. Customer Warranties.** Customer represents and warrants that: all personal information (including any Personal Data as defined in the EU Directive) provided by Customer to Company (including, without limitation, that of Users and Subscribers) has been collected with the relevant individual's consent; Customer has informed all persons whose information is collected: 1) of the purpose for which that information was collected, 2) that Customer may provide this information to its vendors and/or service providers for the purposes of use in relation to the Services, and 3) that such information may be processed and/or stored by Customer's vendors and/or service providers on servers located in the United States of America; and Customer has obtained the consent of such persons for processing of their personal information by its vendors and service providers in the foregoing manner.

## Section 10. Disclaimers

**A. Service Availability.** From time to time, down-time, either scheduled or unscheduled, may occur in respect of the Services. Company will work to ensure the amount of down-time is limited. In the case of anticipated or planned outages or system-wide issues affecting the basic use of the Subscription Service, Company will endeavor to provide you with reasonable advance notice. In the case of unexpected outages, Company will provide updates and information in a timely manner to you via email. Customer acknowledges and understand that Company does not warrant that the Subscription Services will be uninterrupted or error free and that Company may occasionally experience "hard outages" due to disruptions that are not within Company's control. Any such hard outage shall not be considered a breach of this Agreement by Company. Customer releases Company entirely of all responsibility for the consequences of any down-time.

**B. Advice.** From time to time, Customer may obtain advice or information from Company help or support pages, white papers, and/or Company's employees (collectively, "Advice"). Customer acknowledges and agree that such Advice will not be deemed to constitute financial, legal or tax advice. Customer should seek the advice of its own advisers prior to acting upon any such Advice. Customer agrees that use of and reliance on any such Advice is at its own risk and Customer releases Company entirely of all responsibility for any consequences of its use of and reliance on any such Advice.

C. CUSTOMER UNDERSTANDS THAT DOWNGRADING ITS ACCOUNT MAY RESULT IN THE LOSS OF CONTENT, FEATURES, OR CAPACITY OF CUSTOMER'S ACCOUNT AND COMPANY DOES NOT ACCEPT ANY LIABILITY FOR ANY SUCH LOSSES. USE OF THE SERVICES AND ANY RELIANCE BY CUSTOMER UPON THE SERVICES, BETA FEATURES, OR ADVICE, INCLUDING ANY ACTION TAKEN BY CUSTOMER BECAUSE OF SUCH USE OR RELIANCE, IS AT CUSTOMER'S SOLE RISK. TO THE MAXIMUM EXTENT PERMITTED BY LAW, COMPANY DOES NOT WARRANT OR GUARANTEE THAT THE SERVICES WILL BE UNINTERRUPTED, ACCURATE OR ERROR FREE; NOR DOES IT MAKE ANY WARRANTY OR GUARANTEE AS TO THE RESULTS THAT MAY BE OBTAINED FROM USE OF THE SERVICES. THE SERVICES, BETA FEATURES, AND ADVICE ARE PROVIDED "AS IS" AND TO THE EXTENT PERMITTED BY LAW COMPANY DISCLAIMS ALL WARRANTIES, GUARANTEES, EXPRESS OR IMPLIED, INCLUDING (BUT NOT LIMITED TO) IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NONINFRINGEMENT.

## Section 11. Indemnification

A. **Customer Indemnity.** Customer agrees to defend, indemnify and hold Company, its officers, directors, shareholders, successors in interest, employees, agents, subsidiaries and affiliates harmless from any claims, losses, damages, liabilities, settlements, and expenses (including, but not limited to attorney fees) by a third party ("Claims") related to, arising from, or connected with: 1) Users' use of the Subscription Services; 2) Customer's breach of this Agreement or any representation or warranty made by Customer herein; 3) Custom Works requested by Customer and/or the Customer Content (including, without limitation, Claims alleging that the Custom Works requested by Customer and/or the Customer Content violates or misappropriates the Intellectual Property Rights or other rights of any third party); 4) Users' negligence or intentional misconduct; 5) any actual or alleged violation of the TOU by a User; and/or 6) any violation of Law by Customer or a User. Notwithstanding the foregoing, Customer shall not make any admissions on behalf of Company or settle any claim without Company's consent.

B. **Company's Right to Defend.** Promptly upon learning of any Claim against Customer arising from or related to allegations that the Services violate or infringe a third party's Intellectual Property Rights (an "IP Claim"), Customer shall give notice to Company of the IP Claim and immediately deliver to Company all original notices and documents (including court papers) received in connection with and/or related to the IP Claim. Company shall have the exclusive right, but no obligation, to assume defense of such IP Claim at any time and at any stage. If Company assumes defense of any such IP Claim,

Customer agrees to, cooperate in the defense thereof as reasonably requested by Company. Upon assuming the defense of an IP Claim, Company may appoint any legal counsel selected by Company and settle any IP Claims on such terms and conditions it deems advisable. Customer agrees that upon Company's assumption of the defense of the IP Claim: i) Company will not be liable to Customer for any legal costs or expenses subsequently incurred by Customer in connection with the IP Claim; ii) is not an acknowledgment by Company that it is liable to indemnify Customer in respect of the IP Claim; and iii) it will not constitute a waiver by Company of any defenses it may assert against the Customer if Customer claims it is owed indemnification for such IP Claim.

## **Section 12. Limitation of Liability**

A. TO THE EXTENT PERMISSIBLE BY LAW, IN NO EVENT WILL COMPANY BE LIABLE TO CUSTOMER OR ANY THIRD PARTY FOR ANY LOSS OF PROFITS, LOSS OF USE, LOSS OF REVENUE, LOSS OF OPPORTUNITY, LOSS OF ANTICIPATED SAVINGS, LOSS OF GOODWILL, LOSS OF CUSTOMER CONTENT, OR LOSS OF ANY DATA RELATED THERETO, OR ANY INTERRUPTION OF BUSINESS, OR FOR ANY DIRECT, INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES OF ANY KIND ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE SERVICES, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, EVEN IF COMPANY HAS BEEN ADVISED OR ARE OTHERWISE AWARE OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING DISCLAIMER WILL APPLY TO THE MAXIMUM EXTENT PERMITTED BY LAW. CUSTOMER AGREES THAT THE CONSIDERATION WHICH COMPANY CHARGES HEREUNDER DOES NOT INCLUDE CONSIDERATION FOR ASSUMPTION BY COMPANY OF THE RISK OF CUSTOMER'S INCIDENTAL OR CONSEQUENTIAL DAMAGES.

B. IN NO EVENT WILL COMPANY'S TOTAL LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT EXCEED THE LESSER OF: THE PAYMENT OF THE COST OF HAVING THE SERVICES SUPPLIED AGAIN, OR REFUND OF FEES ACTUALLY PAID FOR THE SERVICES IN THE TWELVE MONTHS PRECEDING THE APPLICABLE CLAIM GIVING RISE TO LIABILITY. CUSTOMER AGREES THAT COMPANY'S LIABILITY TO CUSTOMER AT LAW WILL BE REDUCED BY THE EXTENT, IF ANY, TO WHICH CUSTOMER CONTRIBUTED TO THE LOSS. MULTIPLE CLAIMS WILL NOT EXPAND THIS LIMITATION. THE FOREGOING DISCLAIMER WILL APPLY TO THE MAXIMUM EXTENT PERMITTED BY LAW. THE PARTIES ACKNOWLEDGE THAT THE LIMITATIONS SET FORTH IN THIS SECTION ARE INTEGRAL TO THE AMOUNT OF FEES CHARGED IN CONNECTION WITH MAKING THE SERVICES AVAILABLE TO CUSTOMER, AND THAT, WERE COMPANY TO ASSUME ANY FURTHER LIABILITY OTHER THAN AS SET FORTH HEREIN, SUCH FEES WOULD OF NECESSITY BE SET SUBSTANTIALLY HIGHER.

### Section 13. US Federal Government End User Provisions

If the end user of the Services is the U.S. federal government (including any federal agency), then the following shall apply: (a) Government technical data and software rights related to the Services include only those rights described herein; and (b) if a government agency has a need for rights not conveyed under this Agreement, it must negotiate with Company to determine if there are acceptable terms for transferring such rights, and a mutually acceptable written addendum specifically conveying such rights must be included in any applicable contract or agreement. The Services and Site, including all documentation, are "Commercial Items," as that term is defined at 48 C.F.R. §2.101, and consist of "Commercial Computer Software" and "Commercial Computer Software Documentation."

The Commercial Computer Software and Commercial Computer Software Documentation are licensed to U.S. Government end users:

- a. only as Commercial Items,
- b. with the same rights as all other end users, and
- c. according to this Agreement.

### Section 14. Email, Permissions, Images & Prohibited Content

A. **Subscriber Opt Out.** Every email message transmitted by the Services must contain an "unsubscribe" link that allows subscribers to remove themselves from Your mailing list and a link to the then current Actify Media Privacy Policy. You acknowledge and agree that You will not remove, disable or attempt to remove or disable either link. You shall monitor and process unsubscribe requests received by You directly within 10 days of submission, and update the email addresses to which messages are sent through Your Actify Media account. Under the CAN-SPAM Act of 2003, You acknowledge that You are responsible for maintaining and honoring the list of unsubscribe requests following termination of Your account and this Agreement.

B. **Permission Practices.** You agree to import, access or otherwise use only Permission Based Lists in connection with Your use of the Services. You hereby covenant and agree

that You shall not use any other lists in connection with Your use of the Services. If You have used any feature of the Services that allows You to request a recipient to confirm that You have his or her permission to send emails to him or her, and such recipient has not responded or does not respond affirmatively to such request for confirmation, You agree that You shall not send emails to that recipient. Without limiting the foregoing, You agree that You shall not utilize the Services to send any commercial electronic mail message (as that term is defined in the CAN-SPAM Act of 2003) to any person who has opted out or otherwise objected to receiving such messages from You or another sender on whose behalf You may be acting. You cannot mail to distribution lists, newsgroups, or spam or unsolicited email addresses. You cannot copy a Actify Media template or any other features or functionality from the Services and use them for any purpose other than sending email messages from the Services. Emails that You send through the Services may generate spam complaints from recipients. As a matter of privacy, Actify Media may not share with You the email addresses of those who complain about Your email campaign. You are responsible for ensuring that Your email campaigns do not generate a number of spam complaints in excess of industry norms. Actify Media, in its sole discretion, shall determine whether Your level of spam complaints is within industry norms, and its determination shall be final, binding and conclusive for all purposes under this Agreement. Actify Media will terminate Your use of its Services if Actify Media determines that Your level of spam complaints is higher than industry norms.

C. **CAN-SPAN Act of 2003.** You shall use the Services only in compliance with this Agreement, the federal CAN-SPAM Act of 2003 and regulations thereunder and all other applicable U.S., state, local and international laws (including but not limited to policies and laws related to spamming, privacy, obscenity, or defamation, copyright and trademark infringement and child protective email address registry laws). Although Actify Media has no obligation to monitor the content provided by You or Your use of the Services, Actify Media may do so and may block any email messages, remove any such content or prohibit any use of the Services that Actify Media believes may be (or is alleged to be) in violation of the foregoing.

D. **Footers.** For every email message transmitted by the Services, You acknowledge and agree that Actify Media may add an identifying footer stating "Email Marketing by Actify Media," "Powered by Actify Media" or a similar message.

E. **Images.** Images hosted by Actify Media on Actify Media controlled servers may only be used in connection with the Services and for no other purpose whatsoever. To the extent You use images provided by Actify Media, Actify Media hereby grants to You a

limited, non-exclusive, non-transferable sublicense to use the images in an unaltered state solely in connection with Your use of the Services.

F. **Prohibited Content.** Actify Media prohibits the use of the Services by any person or entity that:

(i) Provides, sells or offers to sell any of the following products or content (or services related to the same): pornography or illicitly pornographic sexual products, including but not limited to magazines, video and software; escort services; illegal goods; illegal drugs; illegal drug contraband; pirated computer programs; instructions on how to assemble or otherwise make bombs, grenades or other weapons.

(ii) Displays or markets material that exploits children, or otherwise exploits children under 18 years of age.

(iii) Provides, sells or offers products, services or content frequently associated with unsolicited commercial email, a.k.a. spam, such as online and direct pharmaceutical sales, including but not limited to health and sexual well-being products, work at home businesses, credit or finance management, including but not limited to credit repair and debt relief offerings and stock and trading tips, and mortgage finance offers, DJ/nightclub, event/club promotions/party lists, and odds making and betting/gambling services, including but not limited to poker, casino games, horse and dog racing and college and pro sporting events.

(iv) Provides material that is grossly offensive, including blatant expressions of bigotry, prejudice, racism, hatred or excessive profanity or post any obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable content.

(v) Posts or discloses any personally identifying information or private information about children without their consent (or their parents' consent in the case of a minor).

(vi) Sells or promotes any products or services that are unlawful in the location at which the content is posted or received.

(vii) Introduces viruses, worms, harmful code and/or Trojan horses on the Internet.

- (viii) Promotes, solicits or participates in pyramid schemes.
- (ix) Engages in any libelous, defamatory, scandalous, threatening, harassing activity.
- (x) Posts any content that advocates, promotes or otherwise encourages violence against any governments, organizations, groups or individuals or which provides instruction, information or assistance in causing or carrying out such violence.
- (xi) Provides content, including images, of authors, artists, photographers or others without the express written consent of the content owner.

## Section 15. General

A. **Headers.** The headings in the Agreement do not affect its interpretation. References to sections are to sections of this Agreement.

B. **Force Majeure.** Company will not be liable for any delays or failure in performance of any part of the Services, from any cause beyond Company's control. This includes, but is not limited to, acts of God, changes to Laws, embargoes, war, terrorist acts, riots, fires, earthquakes, nuclear accidents, floods, strikes, power blackouts, and acts of hackers or third party internet service providers.

C. **Notices.** Notices to Customer will be effective when Company posts them to Customer's Account or sends them to the email address associated with Customer's Account. Notices to Company will be effective when delivered to Company at:

Actify Media

Attn. Legal Notices

2637 E Atlantic Blvd #26252

Pompano Beach, FL 33062

or any addresses as Actify Media may later post on the Site from time to time, with an electronic copy to [contact@actifymedia.com](mailto:contact@actifymedia.com).

D. **Governing Law.** The Laws of the State of Florida, excluding its conflict of Laws rules, will apply to any and all disputes arising out of or relating to the Services or this Agreement ("Disputes"). All legal actions in connection with a Dispute under this

Agreement will be subject to the non-exclusive jurisdiction of the courts exercising jurisdiction in Florida. The United Nations Convention on Contracts for the International Sale of Goods (the "Vienna Sales Convention 1980") is excluded from this Agreement.

**E. Disputes.** CUSTOMER AND COMPANY AGREE THAT ANY DISPUTE AGAINST THE OTHER MAY ONLY BE BROUGHT ON AN INDIVIDUAL BASIS AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE ACTION OR PROCEEDING. CLASS ARBITRATIONS, CLASS ACTIONS, PRIVATE ATTORNEY GENERAL ACTIONS, AND CONSOLIDATION WITH OTHER ARBITRATIONS ARE NOT PERMITTED, AND CUSTOMER IS FOREGOING A JURY TRIAL AND WAIVING ANY RIGHT TO PARTICIPATE IN A CLASS ACTION AGAINST COMPANY. All Disputes shall be resolved finally and exclusively by binding individual arbitration with a single arbitrator administered by the American Arbitration Association ([www.adr.org](http://www.adr.org)) or JAMS ([www.jamsadr.org](http://www.jamsadr.org)) according to this provision and the applicable arbitration rules for that forum. Consumer claimants (individuals whose use of the Services is intended for personal, family, or household use) may elect to pursue their claims in their local small-claims court rather than through arbitration. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, fully applies. If Customer is a consumer bringing a claim relating to personal, household, or family use, any arbitration hearing will occur within the county or parish where Customer resides. Otherwise, any arbitration hearing will occur in Florida, or another mutually agreeable location. The arbitrator's award shall be binding on the parties and may be entered as a judgment in any court of competent jurisdiction. For purposes of this arbitration provision, references to Customer and Company also include respective subsidiaries, affiliates, agents, employees, predecessors, successors and assigns as well as authorized Users or beneficiaries of the Services.

**F. Remedies.** Each party acknowledges and agrees that any actual or threatened breach of the TOU will constitute immediate, irreparable harm to the Company for which monetary damages would be an inadequate remedy, that injunctive relief is an appropriate remedy for such breach, and that if granted, the breaching party agrees to waive any bond that would otherwise be required. If any legal action is brought by a party to enforce this Agreement, the prevailing party will be entitled to receive its attorneys' fees, court costs, and other collection expenses, in addition to any other relief it may receive from the non-prevailing party.

**G. Export Control.** The Services made available by Company may be subject to the export control Laws of the United States and other jurisdictions. Customer shall comply with all applicable export Laws, and, without limiting the generality of the foregoing: (a) Customer represents that it is not named on any U.S. government list of persons or entities prohibited from receiving exports; and (b) Customer shall not permit Users to access or use Services in violation of any U.S. export embargo, prohibition or restriction.

**H. Anti-Corruption.** Customer agrees that Customer has not received or been offered any illegal or improper bribe, kickback, payment, gift, or thing of value from any of Company's employees or agents in connection with this Agreement. Reasonable gifts and entertainment provided in the ordinary course of business do not violate the above restriction. If Customer hears of any violation of the above restriction, Customer will use reasonable efforts to promptly notify Company's Legal Department at legal@actifymedia.com.

**I. Assignment.** Neither this Agreement nor any right or obligation under this Agreement may be transferred, assigned or delegated by Customer, by operation of Law or otherwise, without the prior written consent of Company. Any attempted assignment or transfer in violation of the foregoing will be null and void and shall not confer any rights or remedies upon any person or entity not a party hereto. This Agreement may be assigned or transferred by Company without the consent of the Customer. Subject to the foregoing, this Agreement will be binding upon and will inure to the benefit of the parties and their respective representatives, heirs, administrators, successors and permitted assigns.

**J. Relationship of the Parties.** The Parties are independent contractors. This Agreement does not create a partnership, joint venture, agency, or fiduciary relationship between the parties. Each party will be solely responsible for payment of all compensation owed to its employees, as well as employment related taxes. No rights for third party beneficiaries are created by this Agreement. Nothing in this Agreement is intended to confer any rights or remedies on any person or entity which is not a party to this Agreement.

**K. Non Solicitation.** During the Term, and for a period of one year thereafter, Customer shall not solicit for hire, on behalf of itself or any other organization, any personnel of the Company with Customer has had contact pursuant to the relationship established under this Agreement. If Customer violates this Section 14.K, it shall pay the Company an amount equal to six months' compensation of the hired personnel.

**L. Waivers.** Any waiver by Company must be in writing and signed by an authorized Company representative. No waiver by Company of any breach of this Agreement shall be a waiver of any preceding or succeeding breach. No failure or delay by Company in enforcing any right or provision under this Agreement shall be construed as a waiver of such right or provision or of any other right or provision.

**M. Severability.** If any provision of this Agreement is held invalid, illegal or otherwise unenforceable, it shall be deemed modified to render it enforceable while preserving the Parties' original intent to the fullest extent, and the rights and obligations of the parties shall be construed and enforced accordingly. If the provision cannot be modified, then

that provision will be deemed severed from this Agreement and all other provisions will remain in full force and effect.

**N. Electronic Signatures.** This Agreement and any Ordering Document may be executed in one or more counterparts, each of which when so executed and delivered or transmitted by facsimile, e-mail or other electronic means, shall be deemed to be an original and all of which taken together shall constitute but one and the same instrument.