

Red Fish Media, LLC Terms of Service

Sections 1 through 17 are applicable to all Clients, Services, and Campaigns.

1. **General.** These Terms of Service (TOS) govern the responsibilities of Red Fish Media, LLC (RFM) in providing the Services, as hereinafter defined, to its Client and the responsibilities of Client to RFM.
2. **Definitions.** For the purpose of the TOS the following definitions apply;
 - 2.1 "Aggregator" means an entity that facilitates transmission of content to Carriers.
 - 2.2 "Ancillary Documents" means a written proposal from RFM that has been accepted by Client and any other written compilation of terms agreed to by RFM and Client.
 - 2.3 "Campaign" means the advertising, marketing, promotion, publicity, web hosting, design, mobile telecommunication and billing services related and incidental to the delivery or sale of specific Content or to a specific offering of Client.
 - 2.4 "Carriers" means collectively all companies providing and billing mobile telecommunications services to End-users such as Verizon Wireless, AT&T Wireless, and Sprint/Nextel and "Carrier" means one of them
 - 2.5 "Client" means the party for whom RFM provides the Services.
 - 2.6 "Content" means the text, data, or binary code that is delivered to the End-user as part of the Services
 - 2.7 "Consumer Information" means the mobile phone number of a Device and any data provided by an End-user either on the Device or through the Internet that is intended to be used by RFM to perform the Services.
 - 2.8 "Carrier Rules" means the rules, restrictions, and policies imposed by Carriers or an Aggregator on the use of Shortcodes, the provision of the Services, or marketing activities related to the use of Shortcodes.
 - 2.9 "Device" means a mobile handset or other mobile communications device capable sending and receiving voice and data over the Carriers' networks.
 - 2.10 "End-User" means the consumer that is the owner of a mobile handset registered with a Carrier.
 - 2.11 "MMA and MMA Guidelines" mean respectively the Mobile Marketing Association and the Best Practices Guidelines published by the MMA, available for review or download at <http://mmaglobal.com/bestpractices.pdf>.

- 2.12 "Premium Rate Billing" means the billing and collection of revenue from End-users by RFM by using PSMS and receiving a portion of the funds collected by the Carrier.
- 2.13 "PSMS" means an SMS for which a charge is imposed by the Carrier to pay for content ordered by the End-user.
- 2.14 "Services" means mobile telecommunications, marketing, and technical services related to the delivery of Content to Devices and the receipt of Consumer Information from Devices, as may be more particularly defined in the Ancillary Documents, to include in whole or in part, without limitation:
- 3.14.1. Creating and hosting text alert services
 - 3.14.2. Creating and hosting contests, polls, and sweepstakes
 - 3.14.3. Delivery of Content
 - 3.14.4. Collection of Consumer Information
- 2.15 "Shortcode" means a five or six digit number assigned by the Registrar of Common Short Codes to be used by a provider of mobile content to identify the provider to the mobile communication networks. See www.usshortcodes.com.
- 2.16 "SMS" means Short Message Service, a text message service usually limited to 160 characters that is supported by almost all mobile handsets and Carriers.
- 2.17 "Standard SMS" means the sending and receipt of SMS without any charge for content or other fee imposed on the End-User other than charges imposed under his rate plan with the Carrier.
- 3 **Entire Agreement.** The entire Agreement (the "Agreement") between RFM and Client consists of the following:
- 3.1 These Terms of Service
 - 3.2 Terms and Conditions contained in Ancillary Documents.
 - 3.3 Carrier Rules.

Where inconsistencies exist among the foregoing, Carrier Rules take precedence over the provisions of the TOS and Ancillary Documents. Ancillary Documents take precedence over the provisions of the TOS.

4. **Engagement.** The Client hereby engages RFM to perform the Services set forth in Ancillary Documents and RFM hereby agrees to provide the Services in a diligent and workmanlike manner.. If Client desires to make any changes in or variations from the services set forth on the Ancillary Documents, and such changes result in additional costs to Client, RFM shall notify Client's authorized representative in writing of the amount of such additional costs before any such additional costs are incurred and shall proceed after receiving authorization from such representative. It is understood and agreed that the Services relate to mobile telecommunications

and that RFM is required to utilize the services and facilities of Carriers, mobile telecommunications gateways and aggregators, and server hosting and telecommunications/data transport facilities and that RFM may use any such services and facilities as in its discretion are necessary for the ordinary conduct of its business.

5. Service Level. Unless specifically and separately agreed in the Ancillary Documents RFM does not warrant or guaranty under its Service Level Addendum the availability of its facilities or the delivery to and receipt of data from the Carriers on an uninterrupted basis. Providing the Services requires data transport over the Internet and connectivity to the Carriers through their networks and the Aggregator's facilities. RFM has no control over the availability of all such networks and facilities. RFM will provide the Services on a best efforts basis using industry standard practices to assure receipt and delivery of data on a timely basis and to resolve outages and other service interruptions as promptly as possible. The complete Service Level Addendum, summarized in this paragraph, is available at www.redfishmedia.com.

6. Compliance. Except where superseded by Carrier Rule or governmental regulation, RFM adheres to the MMA Guidelines in providing services to Clients and requires that all clients adhere to the MMA Guidelines in all marketing and advertising to End-users and in providing content to them. Client is required to review the MMA Guidelines available at <http://mmaglobal.com/bestpractices.pdf>. In the event that RFM becomes aware that any aspect of Client's marketing, advertising, or content does not comply with MMA Guidelines, it shall promptly notify Client of the noncompliance with sufficient specificity to allow Client to take corrective action. Client shall take such corrective action as promptly as possible. Carrier Rules are both published and non-published and may be changed, reinterpreted, or superseded without prior notice. RFM will use its best efforts to advise Client of any Carrier Rule that may apply to the Services and to cause the Services to comply with Carrier Rules. In the event that at any time RFM becomes aware that any element of the Services does not comply with a Carrier Rule, it shall take corrective action as promptly as possible to the extent that correction is within its control.

7. Customer Service. Unless otherwise provided in the Ancillary Documents, RFM provides customer service to all End-users without charge for Campaigns involving Standard SMS and at a charge specified in the Ancillary Document, but not less than \$2.00 per incident if not specified. RFM's provision of customer service is a requirement of Carrier Rules that may only be delegated in exceptional circumstances.

8. Notices. All notices between RFM and Client shall be in writing. Except as provided below, delivery of notices by email constitutes a sufficient written communication provided that the party receiving the notice by email replies to the notifying email or otherwise acknowledges its receipt. Delivery by fax shall be assumed if evidenced by a machine generated delivery receipt showing the date and time of transmission and the fax number indicated

below as the receiving facsimile device. Delivery of notices by non-electronic means with positive confirmation of receipt is required for communications purporting to terminate or cancel the Services and for claims of breach or serious misconduct by either RFM or Client. Such notices shall be sent to Client at the address most recently indicated in the Ancillary Documents and to RFM as follows:

Red Fish Media, LLC
605 Lincoln Rd., Suite 220
Miami Beach, FL 33139
Fax number: 305 675 8281

9. Privacy and Ownership of Data. Consumer Information collected from End-users on behalf of Client ("Client Consumer Information") shall be property of Client subject to RFM's uses and the restrictions contained in this Section 8. RFM may use Client Consumer Information for any purpose related to providing the Services and for answering and resolving inquiries and complaints from End-users, Carriers, and governmental bodies. Without the consent of Client, RFM may not use Client Consumer Information for its own marketing purposes or sell, transfer, or disclose Client Consumer Information to a third-party for a purpose not provided in the Agreement. Client may not use End-user mobile phone numbers for commercial or marketing purposes other than the specific purpose accepted by the End-user. Client shall be limited to the uses of Client Consumer Information permitted under the MMA Guidelines and Carrier Rules. All uses of Consumer Information shall be subject to the End-user's reasonable expectation of privacy and to any applicable Privacy Policy published by RFM.

10. Limitation Of Liability And Disclaimer Of Warranties.

10.1 EXCEPT AS PROVIDED IN SECTIONS 14 AND 18 NEITHER PARTY BE LIABLE TO THE OTHER PARTY OR ANY THIRD PARTY FOR ANY SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL OR EXEMPLARY DAMAGES (INCLUDING WITHOUT LIMITATION LOSS OF REVENUE OR ANTICIPATED PROFITS OR LOST BUSINESS), EVEN IF SUCH PARTY HAS BEEN OR WILL HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ADDITION, RFM'S MAXIMUM LIABILITY FOR ANY AND ALL CLAIMS RELATING TO THIS AGREEMENT, WHETHER BASED ON BREACH OF CONTRACT, NEGLIGENCE, INFRINGEMENT OF ANY RIGHTS OF ANY PARTY OR THIRD PARTY, PRODUCT LIABILITY OR ANY OTHER CAUSE OF ACTION OR CLAIM WHATSOEVER, SHALL NOT EXCEED THE NET REVENUES EARNED BY RFM UNDER THIS AGREEMENT.

10.2 OTHER THAN AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, EACH PARTY HEREBY DISCLAIMS ALL REPRESENTATIONS AND WARRANTIES, EITHER EXPRESS OR IMPLIED, WHETHER ARISING UNDER ANY STATUTE, LAW, COMMERCIAL USAGE OR OTHERWISE, INCLUDING, WITHOUT

LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

11. Confidentiality. Under this TOS either RFM or Client may be a Receiving Party or a Disclosing Party. Receiving Party shall hold in strict confidence and will not utilize, other than in connection with the performance of its obligations under this Agreement, all non-public, proprietary, and other confidential information with respect to the business and operations of Disclosing Party, including any plans, strategies and pricing information furnished hereunder or which become known because of this Agreement; provided, however, that nothing contained in this section shall be deemed or construed to apply to information that is publicly available, is acquired from any third party without any obligation to maintain confidentiality, or is independently developed by the Receiving party without use of any confidential information of the Disclosing Party. Nothing contained in this section shall be deemed or construed to prohibit the Receiving party from disclosing any confidential information to the Receiving party's auditors, tax consultants, professional advisors, and attorneys. The foregoing shall not restrict the disclosure of any information or the filing of documents required by applicable law. Client authorizes RFM to disclose the provision of services to Client and display Client's logo on its corporate website among other RFM Clients.

12. Ownership of Intellectual Property. All processes, software, copyrights, or other intellectual property used by RFM to perform the Services are owned outright by RFM, licensed to it, or authorized by contract. Without specific written agreement to the contrary, no process or flow of information disclosed by Client and incorporated in the Services shall be claimed as the property of Client except for information relating to the business systems of Client. The Services do not constitute works for hire. Client shall acquire no ownership or rights in any process or software used or created by RFM to provide the Services.

13. Client's Content. Client warrants and represents that Content delivered to RFM for use in the Services shall be free from defects and malicious code and that such Content does not violate or infringe the Intellectual Property rights of any person.

14. Limitations on Use of Services. The Services are provided to Client solely for the uses intended or described in the Ancillary Documents. Client may not resell, assign, or transfer the Services, the use of the Services, or its rights under the Agreement to any party. Client may assign the rights under the Agreement to a subsidiary or other related party with the consent of RFM, which consent may not be unreasonably withheld. If the Services include computer code or software applications delivered to Client, Client shall disable such code or software upon completion of the Services.

15. Governing Law. These Terms of Service and any Agreement between RFM and Client shall be governed by the laws of the State of Florida without regard to its principles of conflicts of law.

16. Acceptance. These Terms of Service shall be conclusively presumed to be accepted by Client upon acceptance of the Ancillary Documents by Client.

The special provisions below apply only to the Clients for whom RFM provides Premium Rate Billing.

17. Additional Approvals and Monitoring Required. If RFM bills End-users using PSMS, the Campaign will be subject to specific approval by each of the Carriers. RFM shall submit applications to Carriers for approval of the Campaign and provide the Services in the manner required by the Carriers. RFM shall communicate specific Carrier requirements to Client as to matters, such as marketing and content, under Client's control. Campaigns are routinely monitored by the Carriers for ongoing compliance or to implement revised Carrier Rules. Client represents and warrants to RFM that it shall conform to all Carrier Rules and to requests for changes in its Campaign to avoid penalties or other adverse action against RFM by the Carriers. Anything in Section 9 to the contrary notwithstanding, Client shall indemnify and hold RFM harmless from all costs and damages paid or incurred by RFM on account of Client's failure to take corrective action after notice from RFM.

18. Reserves. RFM may establish a Reserve from Revenues payable to Client for Premium Rate Billing if it in good faith believes that there are 1) pending or threatened claims for which Client is responsible under Section 14. or to End-Users under Carrier Rules, 2) other obligations of Client to RFM have not been paid or provided for, or 3) such action is deemed necessary to protect the interests of End-Users. RFM shall notify Client in writing of the reason for establishing a Reserve prior to establishing a Reserve. The amount of any such Reserve must be reasonable and not punitive.