Sizmek Terms Of Use

BY ACCEPTING THIS AGREEMENT, EITHER BY CLICKING A BOX INDICATING YOUR ACCEPTANCE, OR BY EXECUTING AN ORDER THAT REFERENCES THESE TERMS OF USE, OR BY USING THE SERVICES, YOU AGREE TO THE TERMS OF THIS AGREEMENT (AS DEFINED BELOW). IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY AND ITS AFFILIATES TO THESE TERMS AND CONDITIONS, IN WHICH CASE THE TERMS "YOU" OR "YOUR" SHALL REFER TO SUCH ENTITY AND ITS AFFILIATES; PROVIDED, IF YOUR COMPANY HAS SEPARATELY EXECUTED AN ORDER OR OTHER CONTRACTUAL AGREEMENT WITH SIZMEK AND YOU ARE AUTHORIZED BY SUCH COMPANY TO CREATE A PLATFORM USER ACCOUNT, THIS SENTENCE DOES NOT APPLY TO YOU. IF YOU DO NOT HAVE SUCH AUTHORITY, OR IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS, YOU MUST NOT ACCEPT THIS AGREEMENT AND MAY NOT USE THE SERVICES.

1. **Definitions.** Terms and expressions not otherwise defined in the body of this Agreement will have the following meanings:

   1. “Ad” or “Advertisement” means a commercial notice, announcement or message made in a public medium to an advertiser’s customers or prospective customers to promote a person, entity, brand, product, service, or event.
   2. “Additional Terms and Conditions” means those additional terms and conditions specified by Sizmek from time to time for certain Services and attached to an Order (as defined below).
   3. “Ad Technologies” means, collectively, digital advertising technologies that include advertising tags (such as pixels, clear GIFs and similar methods), cookies, device identifiers or other identifiers and similar technologies.
   4. “Affiliate” of a party means an entity that, directly or indirectly through one or more entities, controls, is controlled by or is under common control with that party, where “control” means the possession, direct or indirect, of the power to direct the management and policies of such party, whether through the ownership of at least fifty percent (50%) of the voting interest of such party, through contractual provisions, or otherwise, and includes that entity’s officers, directors, agents, employees, successors and assigns.
   5. “Agreement” means these Sizmek Terms of Use and a particular Order entered into between you and Sizmek that references these Sizmek Terms of Use, including all schedules and attachments thereto and all amendments to any of the foregoing.
   6. “Customer,” “you” and “your” means the organization(s) identified in the Order and who is or are responsible for payment to Sizmek.
   7. “Customer Data” means, other than Non-Proprietary Data, all campaign data collected by Sizmek hereunder on behalf of or received from Customer, its advertisers or the agencies representing Customer, including any data, information, or materials that Customer, its Affiliates, or third-party vendors or partners on Customer’s behalf may disclose or submit to Sizmek and any and all Customer Reports; provided, Customer Data does not include Non-Proprietary Data or other data or information that Sizmek receives outside of its performance of the Services for Customer, even if such information is identical to a portion of data comprising Customer Data. References to Customer Data include Customer Personal Data (as defined at Section 6.2 below) unless Customer Personal Data is specifically excluded.
   8. “Customer Material(s)” means any Advertisement, creative, content, data, information or material of any kind created, managed, or delivered by or on behalf of Customer or its Third Party User(s) using the Services, and includes, without limitation, any creative works, content, data, information, media plan or material of any kind referenced by or accessed via an Advertisement, such as by a URL or other method.
9. “Customer Report” means any report or summary prepared for Customer in connection with the Services containing information about user activity or engagement with Advertisements.

10. “Fees” means the fees for the use of the Services as set out in the Order.

11. “Intellectual Property Rights” means all rights including future rights in inventions, patents, designs, copyrights, trademarks, service marks, databases and topography rights (whether or not any of those is registered and including applications for registration of the foregoing, renewals, extensions, continuations, divisions and reissues) together with all trade secrets, know-how and all rights or forms of protection of a similar nature or having equivalent or similar effect to any others which may subsist anywhere in the world.

12. “Non-Proprietary Data” means any non-proprietary and anonymous or pseudonymous data that may be generated or obtained by Sizmek in connection with the Services, including data included in a HTTP header or HTTP response, such as user agent strings and time stamps; IP addresses; URLs not provided by or on behalf of Customer; and persistent and non-persistent identifiers, such as session IDs, cookie IDs, cache-based IDs, mobile advertising identifiers and device IDs.

13. “Order” means an ordering document for the Services that refers to this Agreement and that is signed by both parties or submitted to Sizmek online.

14. “Payment Terms” means the payment terms set out in the Order.

15. “Platform” means the Sizmek service platform accessible via the Internet for the provision and use of the Services, including any administration website through which Sizmek provides access to such platform and all software (including source and object code), updates, enhancements, documentation or other materials (excluding Customer Materials) in or related to the platform that Sizmek makes available in the course of providing the Services.

16. “Privacy Rules” means, collectively: (i) the requirements of any privacy and data protection laws, treaties, inter-governmental agreements, and regulations to which a party is subject in the conduct of its business; (ii) with respect to all processing of personal data by or on behalf of a party to this Agreement in, or transfer of personal data to, the United States of America, the EU-U.S. Privacy Shield Framework Principles as set forth in Annex II to the Commission Implementing Decision of 12.7.2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (“Privacy Shield Principles”); (iii) the following digital advertising industry rules to the extent applicable to the conduct of a party’s business in the territories where such rules apply: (a) all United States Federal Trade Commission (“FTC”) rules and guidelines regarding the collection, use and/or disclosure of information from or about a unique user of a website, application and/or mobile website and/or the device associated with such user; (b) all enacting legislation of European Union member states of directives of the European Parliament and Council related to the processing of personal data or the storage of or access to information stored on an individual person's computing equipment, including mobile devices; (c) the advertising industry self-regulatory codes and principles promulgated by the Network Advertising Initiative (“NAI”), Digital Advertising Alliance (“DAA”), and the European Interactive Digital Advertising Alliance (“EDAA”), as each such rules, guidelines, codes or set of principles may be amended from time to time by the promulgating entity or any successor entity; (iv) any other relevant FTC, NAI, DAA, or EDAA code or principles relating to the collection and use of data obtained from individual persons for advertising purposes; and (v) any amendments, modifications, extensions, supplements or replacements of or to any of the foregoing.

17. “Services” means, collectively, the products and services specified in the Order which may include: (i) provision of digital advertising solutions in or through the Platform enabling the purchase, creation, delivery, management, measurement and analysis of digital media and advertising; (ii) professional, creative, media buying or selling and related trading services for agencies and their customers using Sizmek professional services, the Platform, or the technology and services of third party service providers and Sizmek alliances; and (iii) the data, products and services of third parties that Sizmek may make available to Customer from time to time.
18. “Site(s) Content” means all materials, data, images, texts, sounds, information or other content contained in or around and/or linked to the Site(s) (as defined in Section 6.9).
19. “Sizmek”, “we” and “us” means the Sizmek contracting entity as specified in Section 15 below.
20. “Term” means the term of this Agreement as set out in the Order.
21. “Third Party User” means any third party contractor, client, advertiser, agency or publisher as applicable, that accesses and uses the Services through Customer’s Account (as defined in Section 3.1).

2. Ordering and Use of Services.

1. Customer may request Services by submitting an Order for the selected Services to Sizmek, which shall be signed by Customer. Sizmek may reject any Order in its sole discretion. This Agreement shall include each Order accepted by Sizmek and signed by the parties identified in the Order. Any signature method approved by Sizmek shall be binding upon the parties to an Order, including electronic signatures or other indications of assent to the terms of the Agreement, such as assent given through the use of an online ordering process. In accordance with Section 14 hereunder, no supplemental or different terms presented by Customer, such as in a purchase or insertion order, or change made by Customer in writing or otherwise to an Order or these Terms of Use shall be acceptable or binding on Sizmek.

2. Subject to payment by Customer to Sizmek of the Fees as set out in the Order and pursuant to Section 3 below, Sizmek will make the Services available to Customer (and its Third Party User(s), as applicable) in accordance with the terms of this Agreement. Notwithstanding the foregoing, Customer acknowledges and agrees that certain Services, including but not limited to professional, creative, media buying, trading or third party services, may be subject to Additional Terms and Conditions which will be provided or referenced in the Order.


1. Customer may access certain Services through an administrative website or, subject to Section 3.2 below, an application programming interface (“API”) for the Platform maintained and controlled by Sizmek. For access to the Platform, Sizmek will provide Customer with one or more logins and passwords for access to Customer’s account and corresponding administrative controls (“Customer’s Account”) by authorized personnel of Customer and/or Third Party User(s) (“Customer’s Representative(s)”). In order to use the Platform, Customer will, and will procure that each of the Customer’s Representative(s) represent, warrant and covenant that they will provide Sizmek with accurate, truthful and complete registration information and will agree to the terms of this Agreement and any other Additional Terms and Conditions for use of the Platform that Sizmek may otherwise reasonably require. Upon acceptance of any application made by Customer, Customer’s Representative(s) will be assigned with a user name and password that will allow access to the Platform, and will become a registered user. Customer will ensure each of Customer’s Representative(s) that is provided registered user access to the Platform keeps their registration information accurate and up-to-date and does not share their password or registered user name with any third party except as otherwise set out in this Agreement, and Customer agrees that any failure by any Customer Representative(s) to do so will constitute a breach of this Agreement by Customer, which may result in immediate termination of Customer’s Account. Customer will immediately notify Sizmek in writing of any change in authorization, any unauthorized use of any Customer’s Account or any other account-related security breach of which it becomes aware. Upon termination of this Agreement for any reason, Sizmek will have the right to disable and delete each Customer Representative(s)’ access to Customer’s Account immediately and to delete all Customer Data thirty (30) days after termination or expiration of the Agreement. Sizmek will use commercially reasonable efforts to make the Platform accessible to Customer 24 hours per day, 7 days per week, subject to any downtime for maintenance, updating and repair. Notwithstanding the foregoing, Customer acknowledges and agrees that Sizmek will have no responsibility for Customer’s inability to use the Services or access the Platform due to Internet or other network interruption, communications failure, server downtime or other force.
majeure event.

2. **API Use**: If Customer authorizes Sizmek to set up API access under Customer’s Account: (i) Customer’s use of the API is deemed to be a use of the Platform and is subject to the terms of this Agreement and any Additional Terms and Conditions Sizmek may require regarding API use; (ii) Sizmek will provide access to the API in accordance with Customer’s written instructions and any additional usage terms set out in any Order; (iii) Customer acknowledges and agrees that Sizmek’s only obligations with respect to Customer and/or any Third Party User provided access to Sizmek’s API (“3rd Party API User”) are those specifically undertaken by Sizmek in the Order and Sizmek otherwise has no responsibility or liability for Customer’s or any 3rd Party API User’s performance or obligations under any separate agreement that may exist among Customer, any of Customer’s clients and any 3rd Party API Users; (iv) Customer is solely responsible for obtaining any 3rd Party API User’s written agreement to any Additional Terms and Conditions required for access to the API and returning a copy thereof to Sizmek; and (v) Sizmek may suspend providing API access without liability to Customer or any 3rd Party User, or any of their respective Affiliates or clients, if Sizmek believes, in its sole discretion, that the receipt or processing of any Customer Data via the API violates any Privacy Rules or otherwise may result in liability for Sizmek or any of its Affiliates or any of their respective customers.

4. **Limited Rights; Ownership**.
   1. Upon becoming a registered user, Sizmek hereby grants to Customer, and Customer hereby accepts, a non-exclusive, non-transferable (except as expressly provided in this Agreement), and limited right for Customer to access and use the Platform solely during the Term for the sole purpose of using the Services. Except as expressly permitted by this Agreement, Customer may not, directly or indirectly or by itself or through any other person or entity, use, rent, lease, sell, transfer (by sublicense, assignment, operation of law, change in control or otherwise), time share, modify, reproduce, copy, make derivative works from, distribute, publish, use to provide service bureau services, or publicly display the Platform. Moreover, Customer will not (and will ensure that Customer’s Representative(s) do not) reverse engineer, decompile, or otherwise attempt to discover the source code for the Platform or any of the Services. All rights not expressly assigned or licensed in this Agreement are reserved by Sizmek in full.
   2. Except as expressly provided herein, Sizmek has and will have the sole and exclusive ownership of all right, title and interest in and to the Platform and all applicable Services and all Intellectual Property Rights in the Platform and applicable Services, any enhancements thereto, any documentary or other materials regarding the use thereof and related thereto, and any Sizmek proprietary data provided to Customer by Sizmek in whatever form or media (collectively, “Sizmek Intellectual Property”). Neither this Agreement, nor anything contained herein, will be construed as a sale of the Platform or any of the Services. All rights not expressly assigned or licensed in this Agreement are reserved by Sizmek in full.
   3. If any deliverable to Customer produced by Sizmek’s Services includes Sizmek Intellectual Property, then Sizmek will remain the sole and exclusive owner of such included Sizmek Intellectual Property, and Sizmek grants Customer only a non-exclusive, perpetual, worldwide, royalty-free license to use such Sizmek Intellectual Property, for any purpose, including to sell, sublicense, disclose, publicly display, and create derivative works from such Sizmek Intellectual Property, but solely as incorporated into or embedded in such deliverables and not separately therefrom. Subject to the preceding sentence, Customer will own all right, title and interest in and to such deliverables, including the Intellectual Property Rights therein.
   4. As between Sizmek and Customer, Customer has and will have the sole and exclusive ownership of all right, title and interest in and to the Customer Material(s), Customer Data, and the Site(s) Content where applicable, and all Intellectual Property Rights in the same, except for any Sizmek Intellectual Property embedded therein.
   5. Customer grants Sizmek a non-exclusive license during the term of this Agreement to use, copy,
modify, process and distribute Customer Material(s) and Customer Data solely for the purpose of providing the Services in accordance with this Agreement and subject to its terms.

6. Customer agrees that Sizmek may use and disclose certain data, including Customer Data and Non-Proprietary Data, derived from Customer’s use of the Platform and Services (assuming no user opt-out of such use has been communicated to Sizmek, including as provided in Section 6.7 below) to create aggregated data and statistics about the Services and its features, which Sizmek may provide to others, including Sizmek’s customers, potential customers and the general public, provided that such aggregated data and statistics do not contain any Customer Personal Data (as defined in Section 6.2 below) or identify any living individual, Customer, Customer’s clients, or any of their respective products or brands.

7. Customer grants Sizmek a non-exclusive license during the Term to use its (and its Third Party User(s)’, as applicable) name and trademarks in marketing materials, the customer ad showcase area of the Platform, and customer lists; provided, that Customer has the right to notify Sizmek in writing if it does not agree to any of the foregoing uses of its name and trademarks.

5. **Confidential Information.**

- Any information provided hereunder by either party which is clearly marked as “confidential” or designated to be confidential by the terms of this Agreement, including, in particular, the terms and Fees set out in the Order (“Confidential Information”) will not be used, disclosed or reproduced by the other party without the express written consent of the party providing such information, other than for the performance of such party’s obligations under this Agreement. “Confidential Information” will include all information furnished by or on behalf of either party to the other party, whether furnished before or after the date of this Agreement and regardless of the form in which it is or was communicated or maintained, that is marked as “confidential” or that, from all of the circumstances, the receiving party knows or has reason to know or could reasonably be expected to believe that the disclosing party intended or expected the secrecy of such information to be maintained, that contains or otherwise reflects information concerning the disclosing party, including, without limitation, technical data, know-how, unpublished patent applications, research, product plans or proposals, product applications, inventions, experimental results, trade secrets, processes, designs, drawings, business plans or proposals, implementation strategies, methods of operation, standard operating procedures, marketing information, presentations, programs and strategies, pricing information, promotional information and techniques, analytical procedures, agreements with or information of third parties, financial information and conditions, and information relating to engineering, markets, suppliers or vendors, services, customers, personnel data and marketing, and any other confidential information concerning the business and affairs of the disclosing party, and will include all notes, studies, reports, memoranda and other documents prepared by the receiving party or its representatives that contain or reflect any Confidential Information. Confidential Information does not include information that: (i) is or becomes generally known or available to the public through no act or failure to act by the receiving party; (ii) is lawfully in the possession of the receiving party at the time of disclosure, as demonstrated by the receiving party’s written records immediately prior to the time of disclosure; (iii) is hereafter furnished to the receiving party by a third party, as a matter of right and without restriction on its disclosure; (iv) is required to be disclosed by applicable law or regulation; provided, that the receiving party will promptly notify the disclosing party of such request, furnish only the minimum portion of Confidential Information that the receiving party is advised by legal counsel is legally required to be furnished, and assist the disclosing party, if requested, in obtaining a protective order or other reliable assurance that confidential treatment will be accorded to such portion of the Confidential Information as is required to be disclosed.

6. **Data Protection and Privacy.**

- Sizmek and Customer (and its Third Party Users) each represents and warrants that it will at all times comply in full with the requirements of any applicable Privacy Rules and will refrain from
engaging in any behavior that renders or is likely to render the other party in breach of any applicable Privacy Rules.

1. To the extent that Sizmek processes personal user data about any living individual ("Personal Data", which may be referred to as “personally identifiable information” in the Privacy Rules of some countries) supplied or collected by or on behalf of Customer ("Customer Personal Data") in the course of providing the Services, it will do so only as a data processor acting on behalf of Customer (as data controller) and in accordance with the requirements of this Agreement. The terms “data processor,” “data controller,” “process” and their derivatives will have the meanings ascribed to them under the Privacy Rules enforceable in the geographic territories where such processing occurs, or if not defined in any territory, they will have their plain language meanings in that territory.

2. Sizmek will process any Customer Personal Data in accordance with Customer’s lawful instructions under applicable Privacy Rules and will not: (i) assume any responsibility for determining the purposes for which or the manner in which Customer Personal Data is processed; or (ii) other than certain Non-Proprietary Data that may be Personal Data under the Privacy Rules, process any Customer Personal Data for its own purposes.

3. Customer will process and disclose Customer Personal Data in accordance with the provisions of Customer’s privacy policy and applicable Privacy Rules, and if Sizmek is instructed by Customer to collect any Customer Personal Data through any Services, Customer will use such Customer Personal Data solely for the purposes identified within the Customer Material(s) and Customer’s privacy policy in order to provide the provider of Customer Personal Data with requested goods, services or information; provided, that Customer agrees not to, and will require its clients and any third parties with whom it shares Customer Personal Data not to: (i) merge or attempt to merge user data obtained via the Services with any Customer Personal Data; or (ii) re-identify any individual with any Customer Personal Data, in each case without first obtaining the express, opt-in consent of such individual to such merger or re-identification; further provided, that this requirement does not apply where such Customer Personal Data is the lawfully-obtained proprietary information of Customer.

4. Sizmek will have in place and maintain throughout the term of this Agreement appropriate technical and organizational measures to prevent accidental or unauthorized destruction, loss, alteration or disclosure of Customer Data. Customer acknowledges that Sizmek shall have the right to delete Customer Data in accordance with Sizmek’s data retention policies and as required by Privacy Rules.

5. Customer authorizes Sizmek to subcontract processing of Customer Data under this Agreement to one or more third parties provided that Sizmek: (i) complies with the Privacy Rules; (ii) flows down its obligations to protect the Customer Data to any subcontractor it appoints; and (iii) will remain liable to Customer for any failure to comply with the Privacy Rules by any subcontractor it appoints to process Customer Data.

6. In the course of performing the Services, Ad Technologies may be used by Sizmek in relation to websites or applications of Customer, its Third Party User(s), their respective customers, and other websites, applications and online and mobile presences to improve, analyze and measure the success of advertising campaigns delivered using the Services. Customer will ensure that it (and its Third Party User(s), where applicable) obtains all appropriate and necessary consents, and provides all necessary information, to enable the use of such Ad Technologies in compliance with the Privacy Rules. In particular, Customer will ensure that individuals are informed of their ability to refuse or opt-out of Sizmek Ad Technologies at any time by visiting Sizmek’s opt-out page available at https://www.sizmek.com/ or any other location specified by Sizmek from time to time. Customer agrees that Sizmek has no responsibility or liability for any Customer Ad Technologies or third party Ad Technologies deployed or used by Customer via the Services.

7. Use of the Services is also governed by Sizmek’s privacy policy ("Privacy Policy"), which is incorporated into this Agreement by reference. The Privacy Policy can be found at Sizmek’s
website and is available for review at https://www.sizmek.com/privacy-policy/ or any other location specified by Sizmek from time to time. Customer will maintain, implement and at all times comply with a publicly-available privacy policy that meets or exceeds the material provisions of Sizmek’s Privacy Policy.

8. Where Customer is an owner or publisher of one or more websites, applications or other digital properties in which Advertisements are displayed (“Site(s)” it will comply with the Privacy Rules and commercially reasonable industry standards and practices, including: (i) maintaining a privacy policy conspicuously on the Site(s) that complies with the Privacy Rules and, at a minimum, includes disclosures on Customer’s interest-based advertising activities, the type(s) of data collected from users by the Site(s), the Site(s)’ use of any such data and any disclosures or transfer of such data to third parties, and the types of Ad Technologies used by the Site(s) to collect such; (ii) providing a brief explanation within Customer’s and each Site’s privacy policy explaining that it works with third-party ad providers and, if applicable, allows such third-party ad providers to engage in interest-based advertising activities, serve Customer Material(s) and use Ad Technologies on the Site(s) to collect user data for use in connection with the delivery of advertising and content; and (iii) including in Customer’s and each Site(s’) privacy policy, where applicable, a conspicuous link to an industry opt-out page that allows users to opt-out of the interest-based advertising activities of third-party ad providers, such as the opt-out tools made available by the NAI, DAA, and EDAA from time to time.

9. Customer will not append any third party tags to Sizmek’s tags, nor will Customer allow any third party tracking or tagging (collectively “Third Party Tag(s)”) through the Platform unless any provider requesting to implement Third Party Tag(s) is in full compliance with this Section 6 and the Privacy Rules, including, without limitation, by presenting users with notice and choice to opt-out of data collection and processing in connection with such Third Party Tag(s). Customer will provide Sizmek and any client it represents, where applicable, with notice of any Third Party Tag(s) Customer wishes to implement in the Platform. Sizmek reserves the right to validate any Third Party Tag(s) or provider thereof for compliance with this Section 6 and the Privacy Rules, and for authenticity, and is under no obligation to allow the implementation of Third Party Tag(s). Sizmek may create lists of providers of Third Party Tag(s) who are certified to append Third Party Tag(s) in the Platform, and reserves the right to block any providers who are not validated for compliance; and (v) without derogating from the above, Customer will be solely responsible for any Third Party Tag(s) implemented through the Platform by Customer or any provider or other person authorized to act on Customer’s behalf, including any damage, cost or claim resulting from appending such Third Party Tag(s).

7. **Customer Responsibilities**

0. As between the parties, Customer is solely responsible for: (i) all aspects of any Customer Material(s) created, delivered, or managed through or processed or linked to the Services; and (ii) all campaign settings, including settings in the Platform designated as "Stop Serving", as determined and inserted by or on behalf of Customer on the Platform. Customer will conduct (and ensure that its Third Party User(s) conduct) all of its marketing, business, and other activities related to the Customer Material(s) and its use of the Services in compliance with local, state, federal and international laws, rules, treaties, inter-governmental agreements and governmental orders, regulations and regulatory codes of practice applicable to its business.

1. Customer represents and warrants that it will not (and will procure that its Third Party User(s) do not) use the Services in connection with, or to promote campaigns, Advertisements or other Customer Material(s) or Site(s) Content containing: (i) content that is an invasion of privacy, degrading, defamatory, libelous, unlawful, profane, obscene, pornographic, hate material or discriminatory; (ii) content that promotes any illegal or fraudulent activity, including, without limitation, the promotion of gambling where prohibited, illegal substances, software piracy or hacking, or invalid advertising traffic; (iii) content that infringes the personal rights or Intellectual Property Rights of any third party; (iv) content, links or codes that promote or reference software
piracy and/or activities generally understood as Internet abuse, including the sending of unsolicited bulk messages or the distribution or use of spyware, malware, worms, Trojan horses, time bombs, cancelbots, bots or other code that generate fraudulent or invalid advertising traffic, corrupted files or similar software; or (v) content that it knows or reasonably should have known to be false, fraudulent or misleading, including content, links or codes that facilitate the creation or use of fraudulent or invalid advertising traffic.

2. Customer represents and warrants that: (i) it is a business, not a consumer, and has the rights, authority and any required permission and consent to enter into this Agreement, and if applicable that it is acting as an agent for a disclosed principal, its advertiser, and that as such, Customer has the authority as agent to incur the Fees charged by Sizmek for the Services requested on such advertiser’s behalf; (ii) neither it nor its Third Party User(s) are currently the subject of any investigation or prosecution by any governmental or regulatory body or agency that may have a material detrimental effect on users of Customer’s products, services or advertising, or on Sizmek, any of its Affiliates or any of their respective customers; or (iii) if it or its Third Party User(s) becomes involved or is named in any investigation or prosecution by any governmental or regulatory body or agency that may have a material detrimental effect on Sizmek or users of Sizmek’s products, services or advertising, then Customer will immediately provide notice to Sizmek of such action, investigation, complaint or other proceeding, in which event Sizmek may terminate this Agreement immediately.

3. Customer represents and warrants that: (i) it and its Third Party User(s) have or will obtain all necessary rights, licenses, consents, waivers and permissions, including, without limitation, from advertisers, publishers, users and other third parties, to allow Sizmek: (A) to store and deliver the Customer Material(s) and otherwise provide the Services and operate the Platform on behalf of Customer; (B) to make any technical or other modifications that it may deem necessary to facilitate the delivery of the Advertisements and related Customer Material(s); provided, that Sizmek will not make any amendments to the creative content of any Advertisements or Customer Material(s) except as requested by Customer; (C) to use any Customer Data provided to or collected by Sizmek in the provision of the Services for Customer and according to Customer’s or its Third Party User(s)’ instructions; and (D) to receive, transfer and process any Customer Data from or to any third party according to Customer’s or its Third Party User(s)’ instructions, whether by API, FTP or other data transfer method; (ii) neither Customer nor its Third Party User(s), nor any of their respective users, will use the Platform or any of the Services in a way or for any purpose that infringes or misappropriates any third party’s Intellectual Property Rights or personal or other proprietary rights or in order to harass, abuse, or harm another person; (iii) it will ensure that the Customer Material(s), the contents of such Customer Material(s), the Site(s) Content and any data provided by, or delivered on behalf of, Customer or any Third Party User(s) to Sizmek, and Customer’s and its Third Party User(s)’ promotional and marketing materials and activities in connection with their use of the Platform or Services, will not be in violation of any third party’s rights, including Intellectual Property Rights, and will not be defamatory, fraudulent, obscene, misleading or otherwise illegal; (iv) it will notify Sizmek of any errors in any Customer Material(s) and any complaints or claims made in respect of any Customer Material(s) as soon as the same comes to its attention; and (v) if Sizmek considers, in its sole discretion, that any Customer Material(s) breaches any of the requirements set out in this Section 7, or may subject Sizmek to material adverse risks, and Sizmek requests that such Customer Material(s) be removed or amended, then Customer will withdraw such Customer Material(s) from the Platform or amend such Customer Material(s) to Sizmek’s satisfaction.

4. Customer agrees to indemnify, defend, and hold harmless Sizmek, its Affiliates and their respective officers, directors, employees and agents from and against any and all losses, costs, damages or liabilities, including, without limitation, legal fees, costs and expenses, arising out of any third party claim or action related to Customer’s or any Third Party User(s)’ breach of any of the obligations and warranties set out in this Section 7, or any other representations, warranties,
terms, conditions or obligations of Customer as provided in this Agreement. The foregoing obligations are conditioned on Sizmek: (a) notifying Customer promptly in writing of such action; (b) giving Customer sole control of the defense thereof and any related settlement negotiations; and (c) cooperating and, at Customer’s request and expense, assisting in such defense; and (d) having the right to participate in, but not control, any such defense or settlement, at Sizmek’s sole cost and expense. Sizmek is hereby authorized (but not obligated) prior to and during the notice period to file any motion, answer or other pleading and to take any other action that Sizmek shall deem necessary or appropriate to protect its interests.

8. **Sizmek Responsibilities**

  0. Sizmek represents and warrants that: (i) it is duly authorized to enter into this Agreement and provide the Services hereunder; (ii) it will perform the Services in a diligent and workmanlike manner consistent with applicable industry standards; (iii) the Services will perform substantially in accordance with the latest version of documentation as made generally available in the Platform or in an Order; (iv) its provision and operation of the Services is in compliance with all applicable local, state, federal and international laws, rules, treaties, inter-governmental agreements and governmental orders, regulations and regulatory codes of practice; and (v) there are no actions, suits or proceedings, pending or threatened, that could reasonably be expected to have a material adverse effect on Sizmek’s ability to fulfill its obligations under this Agreement.

  1. Sizmek agrees to indemnify, defend, and hold harmless Customer and Customer’s officers, directors, and employees from and against any and all losses, costs, damages or liabilities, including legal fees, costs, and expenses, arising out of or related to any third party action against Customer or its Affiliates authorized to use the Services, and their respective officers, directors, and employees to the extent it is based upon a third party claim that the Platform or Services, and use thereof in accordance with and subject to the limitations set out in this Agreement, infringes any Intellectual Property Right of a third party. The foregoing obligations are conditioned on Customer: (a) notifying Sizmek promptly in writing of such action; (b) giving Sizmek sole control of the defense thereof and any related settlement negotiations; and (c) cooperating and, at Sizmek’s request and expense, assisting in such defense; and (d) having the right to participate in, but not control, any such defense or settlement, at Customer’s sole cost and expense. Customer is hereby authorized (but not obligated) prior to and during the notice period to file any motion, answer or other pleading and to take any other action that Customer shall deem necessary or appropriate to protect its interests. Without limitation of the foregoing, if the Platform or Services become, or in Sizmek’s sole opinion are likely to become, the subject of an infringement claim, Sizmek may, at its option and expense: (i) procure for Customer the right to continue using the Platform or Services; (ii) replace or modify the Platform or Services so that they become non-infringing; or (iii) accept return of any deliverables provided as a result of the Services, terminate this Agreement, in whole or in part, as appropriate, upon written notice to Customer and refund Customer the Fees pre-paid in respect of the Services upon such termination. Notwithstanding the foregoing, Sizmek will be relieved of its obligation under this Section 8.2 to the extent that any third party action is based upon: (A) any use of the Platform or Services not in accordance with this Agreement; (B) any use of the Services in combination with products, equipment, software, or data not supplied by Sizmek if such infringement would have been avoided by the combination with other products, equipment, software or data; (C) any use of any release of the Platform or Services other than the most current release made available to Customer; or (D) any modification of the Platform or Services by Customer, its agents or subcontractors. THIS SECTION 8.2 STATES SIZMEK’S ENTIRE LIABILITY AND CUSTOMER’S EXCLUSIVE REMEDY FOR ANY THIRD PARTY CLAIMS OF INFRINGEMENT.

9. **Fees**

  0. All Fees payable under this Agreement by Customer will be made in accordance with the Payment Terms, and are exclusive of any applicable taxes (except for taxes on Sizmek’s net income) payable in connection with the Services provided hereunder, including, without limitation, VAT or
any relevant local sales taxes, for which Customer will be responsible. Non-payment of any Sizmek invoice in accordance with the Payment Terms will be a material breach of this Agreement.

1. Customer will be billed per the following scenarios with respect to Platform settings: (i) if the campaign is set to “Keep Serving as Usual,” then the Platform will keep serving even after the placement’s end date or volume goals are met; (ii) if the campaign is set to “Stop Serving” (based on: Volume Stop, Date Stop, soonest of Volume Stop/Date Stop or the latest of Volume Stop/Date Stop), then: (A) Out of Banner Formats (“OOB”) will stop serving on OOB Stop; and (B) Banner Formats will continue to serve the designated Ad Format until the predefined stop event and afterwards continue to serve Default Images, and in this case, impressions served until the stop event will be billed at their applicable rate and any impression served afterwards will be billed at the Default Image rate. Notwithstanding any Stop Serving settings or termination of the Order by Customer, Customer will pay Sizmek at its standard rates for professional, creative, media buying and trading services rendered through the date of termination, cancellation or Stop Serving setting, regardless of the number of impressions served. If Customer uses any Services for which the Fees are not specified in an Order, then the Fees for such Services will be Sizmek’s then applicable standard rates. Terms with initial capital letters in this Section 9.2 have the meanings ascribed to them within the Platform settings.

2. If Customer fails to pay any amount payable by it under this Agreement in accordance with the Payment Terms, Sizmek may charge Customer interest on the overdue amount (payable by Customer immediately on demand) from the due date up to the date of actual payment, after as well as before judgment, at the rate of 1.5% per month or the highest rate allowed by law, whichever is less. Such interest will accrue on a daily basis and be compounded on a monthly basis. Customer will also be responsible for payment of all reasonable expenses (including attorneys’ fees and costs) incurred by Sizmek in collecting any overdue amounts from Customer.

10. DISCLAIMER. EXCEPT AS EXPRESSLY SET OUT IN THIS AGREEMENT, THE PLATFORM, AND THE SERVICES ARE PROVIDED “AS IS” AND ON AN “AS AVAILABLE” BASIS AND SIZMEK DOES NOT MAKE OR GIVE ANY REPRESENTATION, WARRANTY, CONDITION OR OTHER TERM (COLLECTIVELY, “PROMISES”) OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE WITH RESPECT TO THE PLATFORM OR THE SERVICES AND EXCEPT TO THE EXTENT PROHIBITED BY APPLICABLE LAW, SIZMEK DISCLAIMS ALL IMPLIED PROMISES WITH RESPECT TO THE PLATFORM AND THE SERVICES, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED PROMISES OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OR QUIET ENJOYMENT, AND ANY PROMISES ARISING OUT OF ANY COURSE OF DEALING, PERFORMANCE, OR TRADE USAGE. SIZMEK WILL NOT BE HELD RESPONSIBLE FOR: (A) ANY ERRORS OR INACCURACIES IN ANY CUSTOMER MATERIAL(S) OR SITE(S) CONTENT; (B) SERVICE INTERRUPTIONS DUE TO FACTORS REPRESENTING INHERENT RISKS-associated WITH THE USE OF ELECTRONIC COMMUNICATIONS, INCLUDING NETWORK INTERRUPTIONS (INCLUDING THE INTERNET), COMMUNICATIONS FAILURES, THIRD PARTY SERVER DOWNTIME, POWER OUTAGES OR SYSTEM FAILURES; OR (C) ANY UNAUTHORIZED ACCESS TO, USE OF, ALTERATION OF OR DELETION, DESTRUCTION, DAMAGE OR LOSS OF CUSTOMER’S OR ANY THIRD PARTY USER(S)’ CUSTOMER MATERIAL(S), SITE(S) CONTENT OR OTHER MATERIALS, DATA, IMAGES, SOUNDS, TEXT INFORMATION OR CONTENT. SIZMEK MAY DISCONTINUE ANY ASPECT OF THE PLATFORM OR THE SERVICES, OR MAY CHANGE THE NATURE, FEATURES, FUNCTIONS, SCOPE OR OPERATION OF THE PLATFORM OR THE SERVICES, AT ANY TIME. SIZMEK ALSO DOES NOT IN ANY WAY MAKE ANY PROMISES THAT THE PLATFORM OR THE SERVICES WILL BE PROVIDED IN AN UNINTERRUPTED MANNER, ERROR-FREE OR FREE FROM HARMFUL COMPONENTS. IN ADDITION, SIZMEK MAKES NO PROMISES THAT THE PLATFORM OR THE SERVICES WILL MEET CUSTOMER’S REQUIREMENTS OR EXPECTATIONS OR THAT
CUSTOMER WILL ACHIEVE ANY PARTICULAR RESULT FROM USING THE PLATFORM OR THE SERVICES. CUSTOMER ACKNOWLEDGES AND AGREES THAT NEITHER CUSTOMER NOR ITS THIRD PARTY USER(S) HAVE ENTERED INTO THIS AGREEMENT IN RELIANCE ON ANY PROMISES (WHETHER INNOCENT OR NEGLIGENT) EXCEPT AS EXPRESSLY SET OUT IN THIS AGREEMENT.

11. **Limitation of Liability**

0. Except as expressly set out in Section 11.3 below, in no event (excluding the event of breach of Section 4, 6 or 7 above by Customer or the breach of Section 5 above by either party) will either party on behalf of itself and its affiliate(s) be liable for any losses or damages that may be suffered by the other party, whether the same are suffered indirectly or are consequential, and whether the same arise in contract, tort (including negligence) or otherwise howsoever, that fall within any of the following categories: (i) special damages even if the relevant party was aware of the circumstances in which such special damages could arise; (ii) loss of profits; (iii) loss of anticipated savings; (iv) loss of business opportunity; (v) loss of goodwill; or (vi) loss or corruption of data.

1. In no event will SIZMEK’S LIABILITY UNDER THIS AGREEMENT, WHETHER ARISING IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, EXCEED THE TOTAL AMOUNT ACTUALLY PAID TO SIZMEK BY CUSTOMER UNDER THIS AGREEMENT DURING THE SIX (6) MONTHS IMMEDIATELY PRECEDING THE DATE ON WHICH THE FIRST OF ANY CLAIMS IS MADE IN CONNECTION WITH THIS AGREEMENT.

2. The exclusions and limitations set out in this Section 11 and elsewhere in this Agreement will apply to the fullest extent permissible at law, but neither party will exclude or limit liability for: (A) death or personal injury caused by its negligence or that of its officers, employees, contractors or agents acting in the course of their duties; (B) fraud or fraudulent misrepresentation; or (C) any other liability which may not be excluded or limited by law.

12. **Term and Termination**. The term of this Agreement will be as set out in the Order unless: (i) terminated earlier in accordance with this Section 12; or (ii) the Services continue to be used by Customer after the expiration of the term as set out in the Order, in which case the term will thereafter renew on a month-to-month basis until a party terminates the Order by thirty (30) days prior written notice to the other party.

Either party may terminate this Agreement immediately if: (i) the other party is in material breach hereunder and fails to cure such breach within ten (10) calendar days of written notice being provided by the party seeking to terminate; or (ii) the other party becomes insolvent or seeks protection under any bankruptcy, receivership, trust deed, creditors arrangement, composition or comparable proceeding, or if any such proceeding is instituted against the other party (and not dismissed within ninety (90) days). Unless otherwise provided in an Order, Sizmek may terminate this Agreement for any reason upon thirty (30) days prior written notice to Customer. The requirement to make any payment that has become due in addition to Sections 4 to 8, and 10 to 15 will survive the completion, expiration, termination or cancellation of this Agreement for any reason, as well as any other provision of this Agreement, which, in accordance with its terms, is intended to survive such termination.

13. **Force Majeure**. Neither party will be responsible for delay or failure in performing obligations under this Agreement resulting from the occurrence of an event beyond the control of such party. Such force majeure events include lightning, flood, hurricane, tornado, fire, war, terrorism, strikes, lockouts or other labor disputes, decisions or omissions of authorities and new legislation. Any party that wishes to invoke an event as set out above will notify the other party of the occurrence of the force majeure event. Should the force majeure event continue for more than thirty (30) days, the party claiming the force majeure event will
14. **General.** This Agreement represents the entire understanding between the parties and supersedes all prior written and all prior and contemporaneous oral agreements relating to the subject matter hereof. The parties may not amend this Agreement or any Order except by a written agreement of the parties that identifies itself as an amendment to this Agreement or such Order. The terms in this Agreement will apply to all Orders submitted in connection with this Agreement, and any preprinted, additional or supplemental terms in, on or associated with any Customer-submitted ordering documents, including insertion orders, will not apply. Sizmek may provide notices to Customer, at Sizmek’s option, by email to the email address provided by Customer to Sizmek, by mail to the postal address provided by Customer to Sizmek, or by posting on the Platform or any Sizmek website to which Customer has access in connection with this Agreement. It is Customer’s responsibility to ensure that the email address and any other contact information it provides to Sizmek is updated and correct at all times during the term of this Agreement. Changes to Customer’s contact information should be sent to its designated Sizmek service representative or via email to clientintegrations@sizmek.com. Customer and Sizmek are independent contractors and nothing in this Agreement will give Customer the right, power or authority to create any obligation or responsibility on behalf of Sizmek. Except as otherwise set out in this Agreement, neither Customer nor Sizmek will have any right, power, or authority to create any obligation or responsibility on behalf of the other and this Agreement is not intended to benefit, nor will it be deemed to give rise to any rights in, any third party. Notwithstanding the foregoing, Customer acknowledges and agrees that Sizmek’s Affiliates will be third-party beneficiaries of this Agreement and will be entitled to directly enforce, and rely upon, any provision in this Agreement that confers a benefit on, or rights in favor of, Sizmek or any of its Affiliates. Customer may not assign, sublicense, or transfer this Agreement or any right or duty under this Agreement. Any assignment, transfer, or attempted assignment or transfer in violation of this Section 14 will be void and of no force or effect. Sizmek and its subsequent assignees may assign, delegate, sublicense, or otherwise transfer from time to time this Agreement, or the rights or obligations hereunder, in whole or in part, to any person or entity, such as to Sizmek Affiliates. No waiver of any right, power, condition or remedy is effective unless given in writing and signed by the party waiving such right or condition. No failure or delay on the part of a party in exercising any right, power, condition or remedy under this Agreement will operate as a waiver, nor will any single or partial exercise of any such right, power, condition or remedy preclude any other or further exercise or the exercise of any other right, power, condition or remedy. Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective only to the minimum extent necessary without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of any provision in any other jurisdiction. Any claim against Sizmek and/or its Affiliates will be adjudicated on an individual basis and will not be consolidated in any proceeding with any claim or controversy of any other party. Sizmek may modify this Agreement at any time by posting such modification on the Platform or applicable Sizmek website or by notifying Customer by email, and such revised Agreement will supersede and replace all earlier versions. If Customer does not agree to any such modification, its sole remedy is to terminate this Agreement upon written notice to Sizmek. Customer’s and its Third Party User(s)’ continued use of the Platform or any portion of the Services will be deemed to be acceptance by Customer and its Third Party User(s) of any such modified version of this Agreement. Notwithstanding the foregoing, if Customer has an existing agreement in force with Sizmek that specifically overrides a previous version of the Sizmek Terms of Use, then such existing agreement will remain in full force and effect until expiration or termination of the same and without modification by the terms and conditions of this Agreement. As used in this Agreement, the word “including” is a term of enlargement meaning “including without limitation” and does not denote exclusivity. The defined terms herein will apply equally to both the singular and plural forms of the terms defined. Whenever the context may require, any pronoun will include the corresponding masculine, feminine and neuter forms. All references herein to “Sections” will be deemed to
be references to the corresponding Section of this Agreement unless the context will otherwise require. The section headings and subheadings contained in this Agreement are included for convenience only, and will not limit or otherwise affect this Agreement. This Agreement and every part of this Agreement is controlled by the English language and if the terms of this Agreement or any part thereof are translated into any language, for convenience or any other reason, the English language version will control and the English language interpretation will prevail with respect to any conflicts of interpretation.

15. Sizmek Entity You Are Contracting With in Your Territory of Domicile, Governing Laws, Jurisdiction, Venue, Notices. The Sizmek legal entity signing the Order, the laws governing the interpretation of this Agreement, and the jurisdiction and venue for all disputes hereunder will be determined as follows: This Agreement is between you and the Sizmek Contracting Entity that corresponds with your Territory of Domicile as set out below at Table A, and the Governing Laws and Jurisdiction and Venue corresponding to your Territory of Domicile shall apply, each as specified in Table A. This Agreement will be governed by the applicable Governing Laws, without regard to conflict of laws rules or principles. You and Sizmek consent to personal jurisdiction and venue in those courts having jurisdiction, and each party hereby expressly waives any objection or defense thereto. Any judgment rendered by such court against Customer may be enforced in the Territory of Domicile. Notices: All notices to Sizmek will be made in writing to the applicable Sizmek Contracting Entity at the corresponding address set out below at Table A, with a copy to: Sizmek Technologies, Inc., ATTN: Legal Department, 500 W. 5th Street, Suite 900, Austin, TX 78701, and will be sent by registered or certified first-class mail, return receipt requested, nationally recognized courier service or personal delivery, and will be deemed received upon delivery.

<table>
<thead>
<tr>
<th>Sizmek Contracting Entity</th>
<th>Corporate Offices</th>
<th>Territory of Domicile</th>
<th>Governing Laws</th>
<th>Jurisdiction and Venue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sizmek Technologies, Inc.</td>
<td>401 Park Avenue South, Suite 500, New York, NY, 1006</td>
<td>North America and Canada, LATAM</td>
<td>Laws of the State of New York and controlling United States federal law</td>
<td>The courts of New York State in New York County or the United States District Court for the Southern District of New York, and the appellate courts having jurisdiction of appeals in such courts</td>
</tr>
<tr>
<td>Sizmek Technologies Ltd. (UK)</td>
<td>50 Great Sutton Street, London, EC1V 0DE, United Kingdom Office 208, 209 &amp; 210 3rd Floor</td>
<td>Europe, Middle East, APAC, Southern Cone, Japan</td>
<td>Laws of England and Wales</td>
<td>The courts of England and Wales located in London, England</td>
</tr>
<tr>
<td>MediaMind Technologies (Shanghai) Ltd.</td>
<td>50 58 Taicang Road Huangpu District Shanghai, P.R. China</td>
<td>China</td>
<td>Laws of the People’s Republic of China (PRC)</td>
<td>The courts of PRC in Shanghai</td>
</tr>
</tbody>
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