

# **LeadSmart Solutions Professional Services Agreement**

PLEASE READ THIS AGREEMENT CAREFULLY.

Capitalized terms shall have the meanings set forth below or in the Section in which they first appear in these Terms of Service.

## **1. SCOPE OF SERVICES.**

LeadSmart Solutions ("LeadSmart") will provide services in accordance with separate Statement of Works ("SOW") that will be created on a project by project basis and will be governed by this Agreement. Project work will be carried out according to the time schedule defined in each SOW. Should there be any difference of opinion between the Customer and LeadSmart concerning the interpretation of an SOW, LeadSmart and the Customer shall agree to work together in good faith to reach a mutually agreeable decision.

## **2. COST AND INVOICES.**

Costs and fees to be paid by the Customer to LeadSmart are listed in each SOW. The SOW also specifies payment terms for that SOW.

Spark Interactive and the client both acknowledge that it may acquire information and materials from each other in connection with performing the services outline in Attachment 1, including, but not limited to, access to financial and marketing information, computer code, processes and project information which is confidential to either Spark Interactive or the client, or to another company with whom Spark Interactive or client has an obligation of nondisclosure. For convenience, all such nonpublic information will be referred to as "Confidential Information." Both Spark Interactive and the client agree to treat all software, documentation, training materials and information furnished under this Agreement as Confidential Information, both during and after the term of this Agreement.

## **3. CONFIDENTIALITY.**

Both LeadSmart and the Customer will not duplicate Confidential Information provided hereunder unless such duplication is necessary to implement this Agreement. Both LeadSmart and the Customer agrees that it will not disclose or distribute any Confidential Information to any third party, except as specifically authorized in writing, and that it will not use any Confidential Information for any purpose other than the implementation of this Agreement. Both LeadSmart and the Customer further agrees that all confidential materials, and all copies thereof, shall be returned to their respective owner upon expiration or termination of this Agreement.

In order to protect LeadSmart's confidential proprietary rights, the Customer agrees not solicit for hire or hire LeadSmart's personnel to perform the services to be provided under the terms of this Agreement until one year after the date such services are last performed.

#### **4. PROPRIETARY RIGHTS.**

1. LeadSmart's Product-related Customizations: Part of LeadSmart's business is the creation and marketing of products and materials that are proprietary to LeadSmart ("LeadSmart's Products"). LeadSmart may have licensed one or more of its products to the Customer. Concerning the Customer's present or future use of LeadSmart's product(s), the Customer may wish to employ LeadSmart to carry out the work for the Customer described in this Agreement which includes one or more of the following activities related to LeadSmart's Products: consulting, requirements specification, training, developing certain custom programs, modification of existing product(s) and/or other similar activities. Nothing in this Agreement or in the work carried out as part of this Agreement shall in any way have any effect on, and LeadSmart shall remain the exclusive owner of, the copyright to and all proprietary rights of the products developed for the client that associated with or related to LeadSmart's Products including but not limited to programs, computer codes, notes, work papers, diagrams, products, inventions, documents, prepared for or jointly with the client pursuant to this Agreement, and LeadSmart shall be entitled to all patents, copyrights, trademarks, and other such rights associated with and available to said material.
2. Other Work Products: Notwithstanding the above, all other work products not related to or associated with LeadSmart's Products developed under this Agreement shall remain the exclusive property of the Customer and the Customer shall remain the exclusive owner of any copyrights or other proprietary rights and the Customer shall be entitled to all patents, copyrights, trademarks, and other such rights associated with and available to said material.

#### **5. WARRANTY.**

LeadSmart represents and warrants that the services provided hereunder by LeadSmart shall: 1) conform to customarily accepted standards of care and practice appropriate to the nature of the services rendered, and 2) be performed in a professional manner by qualified personnel.

LeadSmart's liability for damages, regardless of the form of action, shall not exceed the charges paid by the client for the services specified in this Agreement.

The foregoing warranties are in lieu of all other warranties express or implied, including, but not limited to, any implied warranties of merchantability, or fitness for a particular purpose, or design. In no event will LeadSmart be liable for any loss of profit, incidental, indirect, special or consequential damages. The parties hereto acknowledge they have expressly bargained for the limitations of damages herein above.

#### **6. INDEMNIFICATION.**

LeadSmart and the Customer agree to indemnify and hold the other harmless against all liability arising out of, or resulting from, their own acts or omissions.

If one party's agents, employees or subcontractors enter upon premises occupied by or under the control of the other party, the visiting party shall indemnify and hold the hosting party harmless against all liabilities, losses, damages and expenses, for personal injuries, death or tangible property damage caused by the visiting party except in those instances when such liability, losses, damages or expenses are due solely and directly to the act or omission of the hosting party. Tangible property as defined here shall not include any loss or damage to any computer, computer equipment, computer software programs, computer network, or the data or information contained therein unless such property is damaged by gross negligence.

## **7. INSURANCE.**

With respect to LeadSmart personnel assigned to perform services under this Agreement LeadSmart will maintain, at its expense, comprehensive general liability insurance covering the use by such personnel of any owned, hired or non-owned automobile, and injury to, and death of, such personnel.

## **8. INDEPENDENT CONTRACTOR.**

LeadSmart is an independent contractor and nothing in this Agreement is intended to, nor shall be construed to create an employer-employee relationship or a joint venture relationship.

## **9. DEFAULT.**

Either party's default under the terms of this Agreement shall entitle the other party to all available legal and equitable remedies. The following events shall constitute default for purposes of this Agreement:

- 9.1 The Customer's failure to compensate LeadSmart for its services pursuant to the terms of this Agreement.
- 9.2 LeadSmart's failure to perform under the terms and conditions of this Agreement.
- 9.3 Material breach of a term of this Agreement.

## **10. TERMINATION.**

This Agreement may be terminated by either party upon thirty (30) days written notice of the occurrence of any event listed under the DEFAULT clause in this Agreement, and failure by the defaulting party to cure the default in five working days after receipt of written notification of such event. Section 3 shall survive termination of this Agreement.

## **11. PRECEDENCE.**

The Customer agrees that if any terms and conditions of any SOW or other instrument issued by the Customer in connection with this Agreement are inconsistent with the terms and conditions of this Agreement, then this Agreement shall take precedence.

## **12. COST OF REPLACEMENT SERVICES.**

No part of the Customer's damages for a breach of this Agreement by LeadSmart shall include costs incurred by the Customer for replacing, modifying, or correcting Spark Interactive's performance under this Agreement unless such damage is caused by LeadSmart's gross negligence.

## **13. SEVERABILITY.**

If any term or provision of this Agreement shall be found to be illegal or unenforceable then, notwithstanding, the balance of this Agreement shall remain in full force and effect and such term or provision shall be deemed stricken.

## **14. EXCUSABLE DELAYS.**

If either party shall be delayed or prevented from performing this Agreement due to any cause beyond its reasonable control, such delay shall be excused during the continuance of and to the extent of such cause, and the period of performance shall be extended to such extent as may be necessary to enable the party to perform after the cause of delay has been removed.

## **15. NOTICES.**

Notices hereunder shall be effective if and when personally delivered, delivered by messenger service or deposited in the United States Mail, postage prepaid, and addressed as follows:

LeadSmart Technologies, Inc.

81 David Love Place, Suite 116

Santa Barbara, California 93117

Attention: Contracts Manager

## **16. LEGAL JURISDICTION.**

This Agreement shall be binding when accepted by LeadSmart at Santa Barbara County, California, and shall be governed by the laws of the State of California.

## **17. LIMITATION OF LIABILITY.**

1. Both parties agree that the activities intended by this Agreement may not be successfully completed, the results achieved may not be as anticipated upon the execution of this Agreement, and that these activities may not lead to an announced product or generally available solution.

2. Neither party warrants or assumes any liabilities in connection with the accomplishment or completion of any activities undertaken under this Agreement. Neither party warrants or assumes any liabilities that the materials created hereunder will be error free.
3. Notwithstanding anything else within this Agreement to the contrary, except for sums due for work performed, or for licenses granted, hereunder; the maximum liability of each party to the other shall not exceed \$1,000 under any cause of action whatsoever in any way related to the subject matter of this Agreement.
4. In no event will either party be liable for any lost profits, lost savings, incidental damages, or other economic consequential damages, even if advised of the possibility of such damages. In addition, neither party will be liable for any damages claimed by the other party based on any third party claim.

## **18. GENERAL.**

This Agreement may not be waived, altered, or modified except by written agreement of the parties. No agent, employee or representative of LeadSmart has any authority to bind LeadSmart to any affirmation, representation or warranty, and unless such is specifically included within this written Agreement, it shall not be enforceable by the Customer. The Customer's remedies in this Agreement are exclusive.