

Co-Branding Agreement

This Co-Branding Agreement (the "Agreement") is made and entered into on the ____ day of _____, _____ (the "Effective Date") by and between _____, (the "Online Business"), and _____ (the "Strategic Partner").

Background Information

- A. The Online Business is in the business of offering products and services as described in Exhibit "A" through it's online site on the World Wide Web which is located at www_____.com (the "Business Services").
- B. Strategic Partner is in the business of offering products and service to the general public and does not currently have a presence on the World Wide Web that enables customers to purchase its products and services online.
- C. The parties wish to enter into a mutually beneficial business relationship whereby Strategic Partner's customers can have access to the online Business Services provided by the Online Business through the creation of a co-branded Internet Site (the "Co-Branded Site") to be located on the server currently utilized by the Online Business in connection with it's current Web Site.
- D. The parties wish to agree upon and register a unique Internet domain name for the location of the Co-Branded Site.

NOW, THEREFORE, for good and valuable consideration, including the mutual promises and agreements set forth herein, the parties hereby agree as follows:

ARTICLE I CREATION OF CO-BRANDED SITE

- 1.1 The Online Business shall be responsible for the development of a version of the Online Business' current Web Site which is co-branded and contains reference to both the Online Business and the Strategic Partner. The Co-Branded Site shall prominently display the identification of affiliation with the Strategic Partner including the prominent display of the logo and trademark of the Strategic Partner. The Co-Branded Site shall be functionally equivalent to the Online Business' current Web Site except it shall contain the co-branding aspects and features identified in this Agreement.
- 1.2 Strategic Partner shall fully cooperate with the Online Business in the creation of the Co-Branded Site and shall promptly upon execution hereof deliver to the Online business graphical images and text files on Zip disc which shall include the Strategic Partner's logo in GIF or JPG format and any textual content necessary for the creation of the co-branding aspects of the Co-Branded Site.
- 1.3 The Online Business shall use its reasonable efforts, with full cooperation from the Strategic Partner, to create the Co-Branded Site and have it fully functional online within ____ days following the effective date hereof.
- 1.4 The parties agree that they shall register the domain name _____ for use in connection with the Co-Branded Site. Online business shall be responsible for registering such domain name. The parties acknowledge that they have mutually checked for availability of such domain name as of the effective date hereof and that such domain name is available.

ARTICLE II Promotion of Co-Branded Site

- 2.1 The parties shall issue a joint press release announcing the affiliation created by this Agreement and the launching of the Co-Branded Site. Such press release shall be in mutually satisfactory form and content and

shall be released through such services and agencies that are mutually agreed by the parties. The cost of the press release shall be equally shared by the parties.

- 2.2 Strategic Partner represents, warrants, and agrees that it is in the mutual interest of both Strategic Partner and Online Business that Strategic Partner uses all efforts necessary to market and channel business through the Co-Branded Site. To that end, Strategic Partner shall use all reasonable commercial efforts to maximize the total number of Internet users who gain access to the Co-Branded Site. Strategic Partner shall assure that the Co-Branded site is listed in all available search engines and appears in the appropriate categories and shall make all reasonable efforts to maximize search engine result placement. Strategic Partner shall establish linking arrangements and banner advertising arrangements to promote the Co-Branded Site. Strategic Partner shall place prominent links to the co-Branded Site in any other internet sites that the Strategic Partner creates promoting its business and services.
- 2.3 Strategic Partner agrees to promote the Co-Branded Site in connection with its offline promotions and part of its normal advertising activities. Strategic Partner shall promote the co-Branded Site in all of its printed promotional materials, and television advertising it may place, at tradeshow and conventions, and through print and broadcast new media. Strategic Partner further agrees to promote the Co-Branded Site through its existing customer base through an Email newsletter and through direct mail promotions.
- 2.4 Strategic Partner agrees to develop and maintain an Internet site promoting its general services and to promote the Co-Branded Site on that site.

ARTICLE III

Technical Support and Consultation By Online Business

- 3.1 Online Business shall serve as Internet contact for users of the Co-Branded Site and shall provide technical assistance to users who direct Email technical questions relative to the Co-Branded Site. The Co-Branded Site shall contain a link permitting users to direct Email questions to an Email address specifically created by Online business for technical support relative to the Co-Branded Site. Online business shall use reasonable efforts to promptly respond to all such bona fide and reasonable user questions regarding the Co-Branded Site. Technical support need only be provided during Online businesses normal "offline" business hours.
- 3.2 Online Business representatives shall be reasonably available via email to provide consultation to Strategic Partner relative to the Co-Branded Site and the Strategic Partner's marketing of the Co-Branded Site.

ARTICLE IV

Proprietary Rights

- 4.1 Online Business shall retain all right, title and interest in and to all of its trademarks, service marks, copyrights, patents, trade secrets and confidential information. Strategic Partner shall not gain any rights in and to the same by virtue of this Agreement or otherwise except as specifically provided in this Agreement and subject to all of the terms and conditions contained in this Agreement.
- 4.2 Strategic Partner shall have a non-exclusive, worldwide license to use only such trademarks as are provided by the Online Business for use in connection with the promotion of the Co-Branding Site. Such license shall only be for the period of this Agreement. Such materials shall only be used by the Strategic Partner in connection with the promotion of the Co-Branded Site and shall only be used in the form that is delivered to Strategic Partner by the Online Business. All advertising and promotional materials that integrate the trademarks of the Online Business shall first be presented to the Online business for review and approval in its discretion.
- 4.3 Strategic Partner shall retain all right, title and interest in and to all of its trademarks, service marks, copyrights, patents, trade secrets and confidential information. Online Business shall not gain any rights in and to the same by virtue of this Agreement or otherwise except as specifically provided in this Agreement and subject to all of the terms and conditions contained in this Agreement.

- 4.4 Online Business shall have a non-exclusive, worldwide license to use only such trademarks as are provided by the Strategic Partner for use in connection with the promotion of the Co-Branding Site. Such license shall only be for the period of this Agreement. Such materials shall only be used by the Online Business in connection with the promotion of the Co-Branded Site and shall only be used in the form that is delivered to Online Business by the Strategic Partner. All advertising and promotional materials that integrate the trademarks of the Strategic Partner shall first be presented to the Strategic Partner for review and approval in its discretion.
- 4.5 Online Business shall own all Proprietary Rights in and to the Co-Branded Site except for the right to use the trademarks of the Strategic Partner. Proprietary Rights shall mean and include the right in and to the internet domain name selected for use by the parties in connection with the Co-Branded Site, all patents, copyrights, service marks, trademarks, trade dress, trade secrets and other intangible rights used or developed in connection with the Co-Branded Site.

ARTICLE V
Restrictive Covenant

- 5.1 Strategic Partner agrees that during the term of this Agreement and for a period of 24 months thereafter, Strategic Partner shall not enter into any Co-Branding or other similar relationship with any other party that competes, directly or indirectly, with the products or services of the Online Business the business conducted by or through the Co-Branded Site.
- 5.2 The parties acknowledge and agree that any and all information provided to the by the other party which is deemed to be Confidential Information (as defined below) by the disclosing party shall be held in the strictest of confidence by the receiving party and such receiving party shall not disclose or use any such Confidential Information for its own purposes or for the purposes of any other party, except as specifically permitted pursuant to the terms of this Agreement.
- 5.3 As defined herein, Confidential Information shall include, but shall not be limited to this Agreement and any terms contained herein, any other information identified in writing or orally as being confidential and proprietary, any and all business plans, customer lists, software, data, usage statistics, marketing plans, business structure, financial plans or other financial information, earnings, or any other information deemed by the delivering party to be confidential and proprietary.
- 5.4 Each party shall take affirmative steps to protect from disclosure any and all Confidential Information of the other party and shall take the same actions to protect such information that it takes to protect its own Confidential Information.
- 5.5 Notwithstanding the above, neither party shall have any obligation with respect to information which (i) was rightfully in possession of or known to the receiving party without any obligation of confidentiality prior to receiving it from the disclosing party; (ii) is, or subsequently becomes, legally and publicly available without breach of this Agreement; (iii) is rightfully obtained by the receiving party from a source other than the disclosing party without any obligation of confidentiality; (iv) is disclosed by the receiving party under a valid order created by a court or government agency, provided that the receiving party provides prior written notice to the disclosing party of such obligation and the opportunity to oppose such disclosure. Upon written demand of the disclosing party, the receiving party shall return the Confidential Information and all copies, notes or extracts thereof to the disclosing party within five (5) days of receipt of notice.
- 5.6 Each party acknowledges and agrees that a breach by the other party of any of the restrictive covenants contain herein will cause the non-breaching party irreparable damage, for which the award of damages would not be adequate compensation. As such, the non-breaching party shall be entitled to temporary and permanent injunctions and other equitable remedies in the event of any breach hereof.

ARTICLE IX
Mutual Hold Harmless

- 9.1 Each of the parties hereby indemnifies, protects and holds harmless the other party from and against any and all claims, suits, threats, demands. Actions, causes of action, liabilities, damages and all costs, expenses and attorney fees related to (i) any representation and warranty made by the other party pursuant to this Agreement, (ii) any claim arising out of the proprietary rights of any third party related to items that are the responsibility of the indemnifying party pursuant to the terms of this Agreement, (iii) any claim arising from the use of the trademarks and logos of the indemnifying party, (iv) arising out of the responsibilities of or involvement of the other party with respect to the Co-Branded Site.

ARTICLE VI Compensation

- 6.1 Strategic Partner shall be paid an amount equal to \$_____ for its services in creating the Co-Branded Site. Such amount shall be paid as follows:
- A. An amount equal to \$_____ on or before the Effective Date of this Agreement
 - B. An amount equal to \$_____ on or before _____.
 - C. An amount equal to \$_____ on or before the date that the Co-Branded Site is launched.
- 6.2 Online Business shall pay to the Strategic Partner, on a quarterly basis, an amount calculated based upon a percentage of the total advertising revenues received by Online Business for advertising on the Online Business' Web Site. The percentage of advertising revenues shall be based upon a fraction, the numerator of which shall be the total number of Impressions on the Online Business' Web relative to internet users who arrive at the Online Business' Web through the Co-Branded Site or the Strategic Partner's Web Site. The resulting percentage for the relevant calendar quarter shall be multiplied by the total advertising revenues received by Online Business for advertising on Online Business' Web Site during the applicable calendar quarter to arrive at the amount of the quarterly payment to be made to the Strategic Partner.
- 6.3 Strategic Partner shall pay to Online Business, on a quarterly basis, an amount calculated based upon a percentage of total advertising revenues received by Strategic Partner for advertising on the Strategic Partner's Web Site. The percentage of advertising revenues shall be based upon a fraction, the numerator of which shall be the total number of Impressions on the Strategic Partner's Web Site relative to internet users who arrive at the Strategic Partner's Web Site through the Co-Branded Site or the Online Business' Web Site. The resulting percentage for the relevant calendar quarter shall be multiplied by the total advertising revenues received by Strategic Partner for advertising on Online Business' Web Site during the applicable calendar quarter to arrive at the amount of the quarterly payment to be made to the Strategic Partner.
- 6.4 Total advertising revenues for each of the above calculations shall be reduced by commissions payable on such advertising revenues.
- 6.5 Each party shall be obligated to pay all taxes relative to the advertising revenues that it receives for advertising on its Web Site.
- 6.6 Each party shall be responsible for tracking Impressions on its site that result from users accessing their respective Web Sites from the Co-Branded Site and the Web Site of the other party. Each party shall be responsible for keeping true and accurate records regarding the total advertising revenues that they receive from their respective sites and any deductions for commissions to be paid with respect to such advertising revenues. Within thirty (30) days after the end of each calendar quarter, each of the parties shall provide the other party with a detailed report regarding the calculations of the amounts payable by the other for the preceding calendar quarter. Such report shall be delivered to the other party together with an invoice for the amount due to such party as a result of such calculation. The amounts shown as due on such invoice shall be due and payable within fifteen (15) days after receipt of such invoice.
- 6.7 In the event that there is any dispute with regard to the calculation of the amount due by or to either of the parties, the disputing party shall notify the other in writing within ten (10) days after receipt of the invoice and

report and the calculations shall be resolved by an independent accountant that is agreed to by the parties and who has not represented either of the parties. If the parties are not able to agree on the identity the independent accountant to perform such review, the parties shall each select and account of their own who shall select the independent account to perform such review. The recommendations of the reviewing accountant shall be final and binding on the parties.

ARTICLE VII
Representations And Warranties of the Parties

Each of the parties makes the following representations and warranties to the other party hereto:

- 7.1 The representing party has the full power and unrestricted authority to enter into this Agreement. Entering this Agreement and performing the obligations hereunder does not conflict with and is not prohibited under the terms of any other agreement, document, law, rule, regulation or court order to which the representing party is subject.
- 7.2 Each of the parties have the full power and unrestricted authority to grant the licenses that are granted herein. The granting of such licenses does not interfere with the rights of any third party. Each party has the full rights in and to all of its Proprietary Rights and such Proprietary Rights do not infringe upon the rights of any other party.
- 7.3 THE SERVICES OF THE ONLINE BUSINESS IN CREATING THE CO-BRANDED SITE AND IN PERFORMING ANY AND ALL OTHER SERVICES HEREUNDER ARE ON AN "AS IS" BASIS AND THE ONLINE BUSINESS HEREBY DISCLAIMS ANY AND ALL WARRANTIES WITH RESPECT TO SUCH ITEMS, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. ONLINE BUSINESS DOES NOT REPRESENT OR WARRANT THAT ANY COMPONENT OF THE CO-BRANDED SITE AND OTHER DELIVERABLES WILL BE FREE FROM ERROR OR WILL MEET ANY PARTICULAR NEEDS OR DESIRES OF USERS WHO ACCESS THE CO-BRANDING SITE. FURTHERMORE, ONLINE BUSINESS SHALL NOT BE LIABLE FOR AN INCIDENTAL, CONSEQUENTIAL OR SPECIAL DAMAGES OF ANY KIND.

ARTICLE VIII
Term and Termination

- 8.1 This Agreement shall be effective between the parties on the ____ day of _____, _____. The initial term shall be for a period of _____ years. Thereafter, this Agreement shall automatically renew for successive periods of one (1) year each unless it is sooner terminated pursuant to the terms hereof or unless either party gives written notice that it does not wish to renew the term of this Agreement at least 90 days and no more than 120 days prior to the expiration of the then existing term or renewal term.
- 8.2 Notwithstanding the above, either party may terminate this Agreement, with or without cause, upon delivering 30 days advanced written notice of its intention to terminate this Agreement. Thereafter, this Agreement shall terminate 30 days from the date of such written notice.
- 8.3 Either party may immediately terminate this Agreement upon written notice to the other party upon the occurrence of any of the following events: (i) the other party files a petition for bankruptcy, voluntary or involuntary, (ii) the other party has a receiver appointed or makes an assignment for the benefit of its creditors, (iii) either party dissolves or ceases to actively engage in business, (iv) either party defaults under or substantially breaches any obligation hereunder and the same is not substantially cured within thirty (30) days after written notice from the other party.
- 8.4 Upon the termination of this Agreement as provided above, the parties shall be released from further obligations hereunder except for accounting and payment of any fees or compensation accrued as of the date of termination of this Agreement, the provisions relative to confidentiality, any restrictive covenant contained

herein, and any damage or liability resulting from the breach of any representation and warranty made herein. Within ten (10) days from the terminations date, each party shall deliver to the other any and all items designated as Confidential Information of the other party and all materials containing any Proprietary Information of the other. The Co-Branded Site shall be taken off line effective on the date of termination hereof.

ARTICLE IX Miscellaneous Clauses

- 9.1 This Agreement contains the entire understanding and agreement between the parties with respect to the subject matter hereof. Any previous written or oral statements, representations, communications or agreements of every nature shall be merged into the terms of this Agreement. This Agreement may be modified or amended only in a written amendment, duly executed by authorized representatives of both of the parties.
- 9.2 This Agreement shall be interpreted under the laws of the State of _____. Any and all legal actions relative hereto shall be in the courts of _____ County, State of _____.
- 9.3 Neither party shall be liable for delays or failures in performance resulting from causes beyond the reasonable control of that party, including, but not limited to, acts of God, labor disputes or disturbances, material shortages or rationing, riots, acts of war, power outages, natural disaster, governmental regulations, communication or utility failures, or casualties.
- 9.4 The parties agree that their relationship shall be that of independent contractors and nothing in this Agreement or the relationship between the parties shall be construed as making them joint venturers, partners, employer/employees, franchisor/franchisee, master/servant, or any legal relationship other than independent contracting parties. Each party shall be responsible for their own income taxes and any withholding thereof. Neither party shall have the authority, express or implied, to act on behalf of the other or to bind the other to any contract, obligation, debt, responsibility or obligation of any nature or kind.
- 9.5 Neither party may assign the benefits or obligations under this Agreement and any attempt to do so shall be void and of no legal effect. Each of the parties recognizes and agrees that the other party is relying upon the identity of the other party and the owner and principals of the other party in entering into this Agreement. Neither party shall be permitted to subcontract any obligations contained herein to another party without the advanced written notice from the other party. The parties specifically agree that there shall be no third party beneficiaries to this Agreement.
- 9.6 In any legal action between the parties relating to the subject matter hereof, the prevailing party shall be entitled to an award of all costs and reasonable attorney fees related to such action.
- 9.7 All notice, except for notices of termination, shall be transmitted via Email to the relevant party at the Email address indicated below or at such other Email address provided by the other party in writing. Notices of termination shall be in writing and shall be personally delivered or sent by a reputable overnight mail service (e.g., Federal Express), or by first class mail (certified or registered), or by facsimile confirmed by first class mail (registered or certified), to the party at the address indicated above. Notices will be deemed effective (i) upon transmission, provided such transmission is not returned as undeliverable, when such notice may be given via Email, (ii) five (5) working days after deposit, postage prepaid, if mailed, (iii) the next day if sent by overnight mail, or (iv) the same day if sent by facsimile and confirmed as set forth above.
- 9.8 Failure by either party to enforce any provision of this Agreement will not be deemed a waiver of future enforcement of that or any other provision. Any waiver, amendment or other modification of any provision of this Agreement will be effective only if in writing and signed by the parties.
- 9.9 If for any reason a court of competent jurisdiction finds any provision of this Agreement to be unenforceable, that provision of the Agreement will be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remainder of this Agreement will continue in full force and effect.

Sample Preview

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