

**STATE OF FLORIDA
OFFICE OF THE ATTORNEY GENERAL**

IN THE MATTER OF:

Case No. L07-3-1044

AZOOGLEADS US, INC.

_____ /

ASSURANCE OF VOLUNTARY COMPLIANCE

A. INTRODUCTION

PURSUANT to the provisions of Chapter 501, Part II, Florida Statutes, the OFFICE OF THE ATTORNEY GENERAL, hereinafter referred to as the OAG, caused an inquiry to be made into the advertising and business practices of AZOOGLEADS US, INC., d/b/a AZOOGLE, pertaining to third-party wireless content, hereinafter referred to as “Azoogle” or “Respondent,” with a principal business address of 512 7th Avenue, 12th Floor, New York, New York 10018.

RESPONDENT has fully cooperated with the Attorney General in its investigation and has stated its intention to work with this Office to set new standards in the industry as to internet marketing and advertising.

IT IS AGREED that this Assurance of Voluntary Compliance (“AVC”) does not constitute any evidence or admission of any kind. This AVC does not constitute a finding of law or fact by any court or agency that Respondent has engaged in any act or practice declared unlawful by any laws, rules or regulations of the State of Florida. Respondent is prepared to enter into this AVC for the purpose of resolution and cooperation, and the Attorney General, being in agreement, does in this matter accept this

AVC in termination of this investigation with prejudice, pursuant to Section 501.207(6), Florida Statutes, and by virtue of the authority vested in the OAG by said statute. The parties intend that this AVC not be used as evidence in any third party action or proceeding. The OAG and Respondent hereby agree and stipulate to the following:

B. JURISDICTION AND VENUE

1. Azoogole is an online Advertising network that provides a distribution platform for third party advertising of third party ringtone products and/or services to consumers.
2. **IT IS AGREED** by the parties that the State of Florida has jurisdiction over Respondent solely for the purpose of entering into this AVC and in any enforcement or investigative actions arising out of this AVC.
3. **IT IS FURTHER AGREED** by the parties that venue for any matter relating to or arising out of this AVC shall lie solely in Leon County, Florida.

C. DEFINITIONS

1. "Advertising" (including "advertisement" and "advertise") as used herein means any message created, published and/or distributed by or under the direction or control of Azoogole directly to the general public or any segment thereof, that promotes or is likely to promote directly or indirectly third party wireless content.
2. "Clear and conspicuous" or "clearly and conspicuously" means that a statement, representation, claim or term being conveyed is readily noticeable and reasonably understandable by the persons to whom it is directed. The following, without limitation, shall be considered as factors in determining whether a statement, representation, claim or term, is clearly and conspicuously disclosed:

- a. whether it is of sufficient prominence in terms of size, placement, color, contrast, duration of appearance, sound and speed, as to be readily noticeable and reasonably understandable by a person to whom it is directed;
- b. whether it is presented to the person(s) to whom it is directed in a coherent and meaningful sequence with respect to other representations, statements, claims, or terms conveyed;
- c. whether it is contradictory to any representations, statements, claims, or terms it purports to clarify, modify, or explain, or otherwise contradictory or confusing in relation to any other representations, statement, claim, or term being conveyed;
- d. whether abbreviations are being used and if so whether they are commonly understood by consumers acting reasonably under the circumstances;
- e. whether the language and terms used are free of technical or legal jargon and are commonly understood by consumers acting reasonably under the circumstances;
- f. whether, in print or electronic media or orally represented, it is in close proximity to the representations, statements, claims, or terms it clarifies, modifies, explains, or to which it otherwise relates;
- g. whether it is presented in a place where consumers cannot miss seeing it;

- h. whether it is presented in such a way as to be free of distractions, including but not limited to sound, graphics, or text, that compete for the attention of the consumer.
 - i. whether the viewer is encouraged to scroll down within the frame of the page or within a scroll box in order to read such disclosure.
- 4. “Consumer” as used herein means a consumer who is a resident of the State of Florida.
- 5. “Initial Representation” as used herein shall include all sponsored links, email subject lines, banner ads, pop-ups, and any and all other primary impressions created or presented by Azoogole or any of its contract publishers.
- 6. “Immediate proximity” as used herein means adjacent to.
- 7. “Negative option plan” as used herein shall mean when a seller presents a consumer with an opportunity to consent in advance to continue to receive products or services in the future until cancelled. The seller interprets the consumer’s silence or failure to take an affirmative action to reject goods or services, or to cancel the sales agreement, as an agreement to continue to receive the offer.
- 8. “Order path” as used herein shall mean the sequence of impressions, generally beginning with an initial representation via an online display advertisement (e.g., banner advertisement), search engine title and descriptions, or email advertisement, and including one or more web pages (for example, “landing” and “jump” pages), that together constitute the Advertisement.
- 9. “Person” as used herein shall mean a natural person or entity.

10. "Publisher" as used herein shall mean any third party independent entity, whether natural person, corporation, partnership, proprietorship, limited liability company, or other organization or legal entity, that applies to be and is accepted to do business with Azoogle as a distributor of Advertising as defined above, for Third Party Wireless Content Providers, and that agrees to abide by the Azoogle Terms and Conditions of service.
11. "Third Party Wireless Content Provider" as used herein shall mean any third party independent entity, whether natural person, corporation, partnership, proprietorship, limited liability company, or other organization or legal entity, that enters into a contract with Azoogle to advertise wireless content products and/or services which it substantially provides to consumers, and where compensation is paid in any form (cost per acquisition, cost per click, cost per impression, revenue share agreement or other form of compensation) by such entity to Azoogle for its services.

D. AGREEMENT OF COMPLIANCE

1. **IT IS AGREED** by the parties that this AVC applies to Respondent, acting directly, or through any entity that any Respondent directs or controls, in connection with the advertising, promoting and/or distribution of advertising or promotions for Third Party Wireless Content Providers.
2. **IT IS FURTHER AGREED** by the parties that, in the course and conduct of the business of advertising, promoting and/or distribution of advertising or promotions for Third Party Wireless Content Providers, Respondent, in any advertising it creates

or directly controls and as a provision in all contracts entered into with any third party wireless content provider and/or publisher shall not:

- a. Permit the use of the terms “free,” “complimentary,” “no charge,” “without charge,” or any other term that reasonably leads a consumer to believe that he or she may receive something of value, entirely or in part without a requirement of compensation in any form, or that tends to convey the impression to the consuming public that an article of merchandise or service is “free,” unless the Initial Representation shall also clearly and conspicuously state that the free item may be received by a consumer pursuant to his or her authorization of billing for a paid subscription plan, the price of the plan, and its term. For instance, a free ringtone offer requiring a consumer to subscribe to a monthly subscription plan at a cost of \$9.99 per month shall say, “Free ringtone with paid monthly subscription of \$9.99/month.”
- b. Permit the advertisement or promotion of any content that is available only through certain wireless carriers, unless the Advertisement clearly and conspicuously discloses that the content is not available through all carriers and clearly and conspicuously disclose for each type of content, the carriers that support each type of content being advertised.
- c. Permit the advertisement or promotion of any content that is available only on certain makes or models of mobile devices unless the Advertisement clearly and conspicuously discloses that the content is not

available on all phones and discloses in close proximity thereto the specific makes and models for which the content is available.

- d. Permit the inclusion in any offer a term or condition to its acceptance whereby the consumer agrees to accept advertising or promotional messages delivered electronically to cell phones via text messaging, e-mail or otherwise, that are unrelated to the current offer, unless expressly and specifically consented to by the consumer.
- e. Permit the placement of prechecked boxes in an offer intended to be used for acceptance of a term(s) or condition(s) of the offer.

3. **IT IS FURTHER AGREED** by the parties that, in the course and conduct of the business of advertising, promoting and/or distribution of advertising or promotions for Third Party Wireless Content Providers, Respondent, in any advertising it creates or directly controls and as a provision in all contracts entered into with any third party wireless content provider and/or publisher shall;

- a. clearly and conspicuously (see definition) disclose the price and billing period of the recurring charge of the third party wireless content immediately adjacent to the cell phone submit field and the P.I.N. code submit field, e.g., "\$9.99 per month;"
- b. clearly and conspicuously disclose on the cellphone number submit web page and the PIN Code submit web page the following material terms and conditions:
 - i. the initial and recurring charge for content, goods or services,
 - ii. whether other charges may apply,

- iii. if the offer is for a recurring subscription plan; that the consumer will be charged automatically with no further action on the part of the consumer; the frequency with which the charge will automatically be made to the account in the absence of cancellation of the plan; and that the consumer will continue to receive the charges until the consumer cancels the plan,
 - iv. how to cancel the plan, and
 - v. the mechanism for charging the consumer, e.g., “on your cellphone bill or deducted from your prepaid balance on your cellphone account.”
 - vi. that the purchaser of the mobile content must be 18 years of age or older.
- c. require that a hyperlink to the terms and conditions of the offer is placed on every cellphone submit page and PIN Code submit page in the order path.

E. CONTRIBUTION

1. Upon execution of this AVC by Respondent, Respondent shall make a contribution to the OAG of \$1,000,000.00 (one million dollars) payable to the Department of Legal Affairs’ Revolving Trust Fund to cover attorneys’ fees and costs associated with the matters resolved herein and to assist with the costs of future investigation and enforcement efforts related to the third-party wireless content industry. The contribution to the Legal Affairs’ Revolving Trust Fund shall be made by check or wire transfer within seven(7) days from the date of execution of this AVC, payable to

the Department of Legal Affairs' Revolving Trust Fund, and shall be delivered to Will Haselden, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050.

F. REPORTING REQUIREMENTS

1. Within thirty (30) days of the date of execution of this AVC, Respondent shall use its best efforts to produce an excel spreadsheet of Azoogole's Third Party Wireless Content Providers for ringtones who were Third Party Wireless Content Providers at any time since Respondent and its Publishers began promoting ringtones, including, to the extent available, the Third Party Ringtone Service Provider's name, physical address and the name and address of the advertiser's contact person.

G. COOPERATION IN INVESTIGATIONS AND PROCEEDINGS

1. Respondent agrees to continue to cooperate with the OAG with respect to its future investigation of internet marketing. Wherefore, it is agreed by the parties that for a period of twelve (12) months following entry of this AVC, Respondent shall, following fourteen (14) days written notice to Azoogole's general counsel, David Graff, Esquire, and an opportunity to object, reasonably cooperate with the OAG with regard to the matters that are the subject of the investigation of Azoogole and this resulting AVC, and related investigations, proceedings and actions concerning any other person, including but not limited to Azoogole's current and former publishers. Respondent shall use reasonable efforts to ensure that Azoogole's officers, directors and employees also cooperate with the OAG in such investigations, proceedings and

actions. Except where prohibited by law, the parties agree that such cooperation shall include:

- a. Without the necessity of a subpoena, using reasonable efforts to have Azoogole officers, directors and employees attend any interviews and other proceedings at which the presence of any such persons is requested by the OAG and using reasonable efforts to have such persons answer any inquiries made by the representatives of the OAG to any of them at any interviews or other proceedings or actions. Wherever possible, all such inquiries shall be made by telephone or, if necessary, during an in-person interview conducted in New York, New York;
- b. Production, without the necessity of a subpoena, of non-privileged information and documents or other tangible evidence reasonably requested by the OAG, and any compilations or summaries of information or data that the OAG reasonably requests to be prepared. Respondent may move for a protective order as to those materials requested. Any such motion shall be filed in the Circuit Court of Leon County, Florida.
- c. Upon request by the OAG, notifying a Publisher, advertiser, wireless carrier, aggregator, or consultant, in writing, that Respondent does not object to, such person cooperating with the OAG by responding to OAG requests for interviews or documents and that Respondent shall not take any action to the detriment of, or otherwise impose any consequences upon, the Publisher for cooperating with the OAG;

- d. Taking no action to the detriment of, or impose any consequences on, any person who cooperates with, or provides information or documents to the OAG;
 - e. In the event that Respondent withholds or redacts any document under a claim that the document sought is privileged and on that basis not subject to disclosure or subject to disclosure only under a protective order, Respondent shall state, in writing: the type of document; the date of the document; the author and recipient of the document; the general subject matter of the document; the reason for withholding the document; and the Bates number or range of the document. The OAG may challenge such claims in the circuit court of Leon County, Florida in a proceeding for an order compelling production.
2. **IT IS FURTHER AGREED** by the parties that a period of two (2) years from the date of the execution of the AVC, Respondent shall promptly notify the OAG of any changes in corporate structure that may affect compliance obligations arising under the AVC, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity, the creation or dissolution of a subsidiary, parent, or affiliate entity that engages in any acts or practices subject to this AVC, the filing of any bankruptcy petition, or a change in the corporate name or address.
3. For the purposes of this AVC, Respondent shall, unless otherwise directed by OAG representatives, mail all written notifications to the OAG, identifying all written communications as in reference to OAG Case No.

L07-3-1044, and sent to:

Economic Crimes Division/Tallahassee
Office of Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050.

H. NO ADMISSION OF LIABILITY OR WAIVER OF DEFENSES

1. This AVC is not and shall not in any event be construed, deemed to be, and/or used as: (a) an admission or evidence of the validity of any claim that the OAG has or could assert against Respondent, or an admission of any alleged wrongdoing or liability by Respondent; and/or (b) an admission or evidence of any fault, fact, act, or omission by Respondent in any civil, criminal, or administrative proceeding in any court, administrative agency or other tribunal, other than such proceedings as may be necessary by the OAG to consummate or enforce this AVC. Moreover, by entering into this AVC and agreeing to the terms and conditions provided herein, Respondent does not intend to waive and does not waive any defenses it may have in any other action or proceeding that has been or may be brought against it by any person, entity, and/or agency arising from advertising or promoting content.

I. APPLICATION, EFFECT AND OTHER TERMS

1. **IT IS FURTHER AGREED** by the parties that this AVC shall become effective upon its acceptance by the Attorney General, by and through a Deputy Attorney General who may refuse to accept it at his discretion. The receipt or deposit by the OAG of the monies called for in Section E of this Agreement does not constitute acceptance by the OAG, and such monies received will be immediately returned if the Attorney General does not accept this Agreement.

2. Respondent will implement the terms of this AVC within sixty (60) days following the effective date of the AVC.
3. No waiver, modification or amendment of the terms of this AVC shall be valid or binding unless made in writing, signed by the parties and then only to the extent set forth in such written waiver, modification, or amendment.
4. This AVC shall be governed by, construed and enforced exclusively in accordance with and subject to the laws of the State of Florida, including, but not limited to, its choice of law principles.
5. No waiver of any term, provision, or condition of this AVC, whether by conduct or otherwise, in any one or more instances, shall be deemed to be, or shall constitute, a waiver of any other provision hereof, whether or not similar, nor shall such waiver constitute a continuing waiver, and no waiver shall be binding unless executed in writing by the party making the waiver.
6. If any clause, provision, or section of the AVC shall, for any reason, be held illegal, invalid, or unenforceable, such illegality, invalidity, or unenforceability shall not affect any other clause, provision, or section of this AVC, and this AVC shall be construed and enforced as if such illegal, invalid, or unenforceable clause, section, or other provision had not been contained herein.
7. Respondent shall be responsible for delivering a copy of this AVC to all of their officers, directors, and managers within 10 days of the date of the execution of this AVC. Respondent must also deliver a summary of paragraph D. of this AVC to Publishers and Third Party Wireless Content Providers in the manner set forth in that paragraph.

8. Respondent shall not effect any change in the form of doing business or their organizational identity for the purpose of avoiding the terms and conditions set forth in this AVC.
9. Violations of this AVC shall subject Respondent to civil penalties and sanctions provided by law, and payment of attorney's fees and costs incurred in enforcing the provisions of this AVC.
10. This AVC shall become effective upon its execution by all parties.

IN WITNESS WHEREOF, Respondent has caused this Assurance of Voluntary Compliance to be executed by David Graff, as General Counsel of AzoogLeAds, as a true act and deed, in _____ County, _____, this 6th day of November, 2007.

By my signature I hereby affirm that I am acting in my capacity and within my authority General Counsel and Officer of AzoogLeAds Us Inc., and that by my signature I am binding the corporation to this agreement.

By: David Graff, General Counsel

STATE OF _____
COUNTY OF _____

BEFORE ME, an officer duly authorized to take acknowledgments in the State of New York, personally appeared _____, as _____ of _____, and acknowledged before me that he executed the foregoing instrument for the purposes therein stated, on this ____ day of _____, 2007.

Sworn to and subscribed before me
this ____ day of _____, 2007.

_____(print name)
NOTARY PUBLIC

(Print, type or stamp commissioned
name of Notary Public)

Personally known ____ or Produced
Identification ____ (check one)

Type of Identification Produced:

Accepted this ____ day
of _____, 2007.

ROBERT A. HANNAH
Deputy Attorney General, State of Florida
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The Capitol, PL-01
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