

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

**IN THE MATTER OF:**

**Case No. L08-3-1166**

**MOBILEFUNSTER, INC. d/b/a FUNMOBILE**  
\_\_\_\_\_ /

**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,” has entered into this Assurance of Voluntary Compliance (“AVC”) regarding the advertising and business practices of **MOBILEFUNSTER, INC. d/b/a FUNMOBILE**, hereinafter referred to as “Funmobile” or “Respondent,” with a principal business address of 15/F, Tower 1, Grand Central Plaza, 138 Shatin Rural Committee Road, Shatin, Hong Kong, and a principal United States address of 1155 Chess Drive, Suite 122, Foster City, California 94404.

**RESPONDENT**, without having received any prior inquiry from the Attorney General, approached the Attorney General to volunteer its compliance with this AVC and its cooperation with the Attorney General’s ongoing investigation of the third party wireless content industry and has fully and voluntarily cooperated with the Attorney General in its investigation of the third party wireless content industry.

**IT IS AGREED** that this 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 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. Funmobile is a third party wireless content provider that is in the business of delivering wireless content to consumers' cell phones.
2. **IT IS AGREED** by the parties that Funmobile will not contest 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 by the OAG arising out of this AVC.
3. **IT IS FURTHER AGREED** by the parties that the venue for any matter or dispute between Funmobile and the OAG 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 (a) by or under the direction or control of Funmobile directly or (b) by a Third Party Advertiser pursuant to a contract with Funmobile 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.
3. "Consumer" as used herein means a consumer who is a resident of the State of Florida.
4. "Initial Representation" as used herein shall include all sponsored links, organic links, email subject lines, banner ads, pop-ups, and any and all other primary impressions created or presented by Funmobile or any Third Party Advertiser.
5. "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.
6. "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.
7. "Person" as used herein shall mean a natural person or entity.
8. "Third Party Advertiser" 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 Funmobile to advertise its wireless content products and 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 Funmobile to such an entity.

#### **D. AGREEMENT OF COMPLIANCE**

1. **IT IS AGREED** by the parties that this AVC applies to Respondent in connection with the advertising, promoting and/or distribution of advertising or promotions of Funmobile products and services to United States consumers.
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 of Funmobile products and services, Respondent, in any advertising it creates or directly controls and as a provision in all contracts entered into with any Third Party Advertiser 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,” or words of similar effect.
  - 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 discloses for each type of content the carriers that support each type of content being advertised.

- c. 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.
- d. 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 Funmobile products and services, Respondent, in any advertising it creates or directly controls and as a provision in all contracts entered into with any Third Party Advertiser shall:

- a) use a minimum of 12 point font size (in conformity with web standard font size equivalents), a minimum color contrast value of 125 (see Exhibit A) for all pricing disclosures, place all disclosures within the initial viewing area of the consumer (i.e., not requiring the consumer to scroll), and ensure that all disclosures are visible at all times (e.g. no “disappearing” terms and conditions); and
- b) in addition to the above, shall
  - i. disclose the price and billing period of the recurring charge of the third party wireless content entirely within 125 pixels above, below, to the left, or to the right of the cell submit field and P.I.N. submit field. Price point must

be disclosed in numerical format “0-9” and include dollar sign “\$.” Price and term must not contain any other text. One example of an acceptable price disclosure is, “For \$9.99 per month.”

- ii. disclose the alternative wireless content available, if any, in a font no smaller than one half the font size of the primary offer description. This disclosure must be no further than 20 pixels from the primary offer description. For example, “Get 10 Ringtones [50 point font size] or a Cool Text Service [minimum of 25 point font size].” In no event however, and notwithstanding sub paragraph (a) above, shall the disclosure of the alternative content be made in a font size smaller than 20 point.
- iii. disclose above the fold, that in the State of Florida a user must be 18 years old or older to participate in the offer.
- iv. disclose on the Cell submit page and P.I.N. code submit page, with a minimum of three lines of text above the fold, of the following terms and conditions:
  - 1. whether other charges may apply,
  - 2. 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 absence of cancellation of the plan, and that the consumer will continue to receive the charges until the consumer cancels the plan,
  - 3. how to cancel the plan,
  - 4. the mechanism for charging the consumer, e.g., “charges shall appear

on your cellphone bill” or “payment will be deducted from your prepaid balance on your cellphone account,” and

5. include a hyperlink to the full terms and conditions of the offer.

#### **E. CONTRIBUTION**

Upon execution of this AVC by Respondent, Respondent shall make a contribution to the OAG of \$1,000,000.00 (one million dollars), which shall be calculated as follows: (i) \$500,000 (five hundred thousand dollars) payable to the Department of Legal Affairs Revolving Trust Fund for expended attorney’s fees and costs and other costs and expenses, including but not limited to non-attorney employee costs, management fees, administrative expenses and overhead associated with the matters resolved herein and to cover the OAG for the costs of future compliance with this AVC by Respondent; and (ii) \$500,000 (five hundred thousand dollars) to be used by the Attorney General for consumer education and public awareness regarding safety on the internet, to be made payable to the State of Florida and sent to Will Haselden, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, PL-01, The Capitol, Tallahassee, Florida 32399-1050, pursuant to Section 501.207(6), Florida Statutes (2007).

1. Both contributions shall be made by check or wire transfer as follows: \$500,000 (five hundred thousand dollars) to be paid within seven (7) days of the Attorney General’s execution of the AVC, and \$500,000 (five hundred thousand dollars) to be paid on or before sixty (60) days after the Attorney General’s execution of the AVC. Both payments, to the Department of Legal Affairs Revolving Trust Fund and to the State of Florida, shall be timely 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 produce an excel spreadsheet of Funmobile's Third Party Advertisers who advertised for Funmobile products and services at any time since Respondent began selling third party wireless content, including the Third Party Advertiser's name, physical address and all monies paid to each Third Party Advertiser.

## **G. COOPERATION IN INVESTIGATIONS AND PROCEEDINGS**

1. Respondent agrees to continue to cooperate with the OAG with respect to its future investigation of the third party wireless content Industry. 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 Funmobile and Funmobile's counsel, and an opportunity to object, reasonably cooperate with the OAG with regard to the matters that are the subject of this AVC, and related investigations, proceedings and actions concerning any other person. Respondent shall use reasonable efforts to ensure that Funmobile's officers, directors and employees also cooperate with the OAG in such investigations, proceedings and actions. The parties agree that such reasonable cooperation may include, for example:
  - a. Without the necessity of a subpoena, using reasonable efforts to have Funmobile officers, directors and employees attend any interviews and other proceedings at which the presence of any such person 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. Counsel for Funmobile may attend any such interviews and other proceedings and shall have the right to object to protect Funmobile's interests.

- 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. A "reasonable request," for purposes of this subparagraph, means a volume of documents under 5,000 pages in total and/or a compilation or summary requiring less than ten hours preparation. All information, documents, and other material provided by Funmobile shall be treated as confidential unless the parties agree otherwise in writing. Respondent may move for a protective order as to those materials requested.
- c. 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.
- d. 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 under 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 for a period of two (2) years from the date of the execution of the AVC, Respondent shall 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. Respondent shall provide such notice within thirty (30) days after the completion of any such change in corporate structure.
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. L08-3-1166 and sent to:

Economic Crimes Division /Tallahassee  
Office of the 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 or evidence of any alleged fault, wrongdoing or liability by Respondent; and/or (b) an admission or evidence of any fault, liability, or wrongdoing by Respondent in any civil, criminal, or administrative proceedings, except 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 Funmobile products and services.

**I. APPLICATION, RELEASE, 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 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. Based on the results of its investigation and in light of Funmobile's compliance with the terms of this AVC, the OAG hereby terminates any investigation of Funmobile, with prejudice, pursuant to Section 501.207(6), Florida Statutes.
3. Based on the results of its investigation and in light of Funmobile's compliance with the terms of this AVC, OAG hereby releases with prejudice any and all claims or causes of action that it may have against Funmobile, through the date of this AVC, with regard to Funmobile's advertising or provision of third party wireless content to Florida consumers.
4. To the extent it has not already done so, Respondent will implement the terms of this AVC within sixty (60) days following the effective date of the AVC.
5. 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.

6. 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.
7. 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.
8. 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.
9. Respondent shall be responsible for delivering a copy of this AVC to all of their officers, directors, and managers within 10 (ten) days of the date of the execution of this AVC. Respondent must also deliver a summary or copy of paragraph D of this AVC to the Third Party Advertisers.
10. 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.
11. In the event that OAG becomes aware of any action by a Third Party Advertiser that is in violation of the terms of this AVC, OAG shall notify Funmobile in writing so that Funmobile may take appropriate action under the terms of its contract with that Third Party Advertiser.

12. In the event that OAG becomes aware of any action by Funmobile that is in violation of the terms of this AVC, OAG shall notify Funmobile in writing. Funmobile shall have sixty (60) days from receipt of that written notification to cure the violation or respond with an explanation as to why its action is in compliance with the AVC.

13. For the purposes of this AVC, OAG shall provide written notification to Funmobile as follows:

VIA FEDERAL EXPRESS and EMAIL  
Christian K-L Y Heilesen  
15/F Tower One  
138 Shatin Rural Committee Road  
Shatin, Hong Kong  
chris@funmobile.com

with a copy to:

VIA FEDERAL EXPRESS and EMAIL  
Michael S. Doluisio  
Dechert LLP  
Cira Centre  
2929 Arch Street  
Philadelphia, PA 19104-2808  
215.994.4000  
Michael.doluisio@dechert.com

14. Uncured violations of this AVC by Funmobile 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.

15. This AVC shall become effective upon its execution by all parties.

**IN WITNESS WHEREOF**, Mobilefunster, Inc. d/b/a Funmobile, has caused this Assurance of Voluntary Compliance to be executed by \_\_\_\_\_, as \_\_\_\_\_ of \_\_\_\_\_, as a true act and deed, in \_\_\_\_\_, this \_\_\_\_ day of \_\_\_\_\_, 2008.

By my signature I hereby affirm that I am acting in my capacity and within my authority as \_\_\_\_\_ of \_\_\_\_\_, and that by my signature I am binding the corporation to this agreement.

\_\_\_\_\_  
By: Christian Kwok-Leun Yau Heilesen, Chief Executive Officer

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

BEFORE ME, an officer duly authorized to take acknowledgments in the State of \_\_\_\_\_, personally appeared \_\_\_\_\_, as \_\_\_\_\_ of \_\_\_\_\_, and acknowledged before me that he executed the foregoing instrument for the purposes therein stated, on this \_\_\_\_ day of \_\_\_\_\_, 2008.

Sworn to and subscribed before me  
this \_\_\_\_ day of \_\_\_\_\_, 2008.

\_\_\_\_\_  
\_\_\_\_\_  
(print name)  
NOTARY PUBLIC

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

Personally known \_\_\_\_\_ or Produced  
Identification \_\_\_\_\_ (check one)

Type of Identification Produced:  
\_\_\_\_\_

\_\_\_\_\_  
WILLIAM M. HASELDEN  
ASSISTANT ATTORNEY GENERAL

Accepted this \_\_\_\_\_ day  
of \_\_\_\_\_, 2008.

\_\_\_\_\_  
Robert A. Hannah  
Deputy Attorney General  
OFFICE OF THE ATTORNEY GENERAL  
The Capitol, PL-01  
Tallahassee, Florida 32399-1050  
(850) 245-0184