

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

**IN THE MATTER OF:**

**Case No. L07-3-1044**

**M-QUBE, INC.**  
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**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 of third parties for which **M-QUBE INC.**, d/b/a **M-QUBE**, hereinafter referred to as “**M-Qube**” or “**Respondent**,” with a principal business address of 311 Arsenal St., Watertown MA 02472, provides aggregation and automated transmission of text messages and billing message services.

**IT IS AGREED** that this Assurance of Voluntary Compliance (“**AVC**”) does not constitute any evidence or admission of any kind. Respondent has cooperated with the Attorney General in its investigation and has stated its intention to work with the **OAG** in its effort to set new standards in the industry as to internet billing, marketing, and advertising compliance and enforcement. Correspondingly, this **AVC** does not constitute a finding 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 and, instead, reflects the cooperation of m-Qube with the State of Florida. Respondent is prepared to enter into this **AVC** 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 OAG and Respondent hereby agree and stipulate to the following:

**B. JURISDICTION AND VENUE**

1. M-Qube is an aggregator and infrastructure provider for the automated transmission of text messages and billing message information to and from Mobile Content Providers to wireless carriers. In this role, m-Qube sometimes communicates with both Mobile Content Providers (as defined below) and wireless carriers concerning the business relationship between the Mobile Content Providers and carriers.
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 directly to the general public or any segment thereof, that promotes or is likely to promote directly or indirectly mobile content. Advertising as used herein does not include text messages sent to individual consumers after they have subscribed to a service.
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 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 should see it;

- h. whether it is presented in such a way as to be reasonably free from distractions, including but not limited to excessive 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 and possesses a mobile telephone number with one of the following area codes: 386, 352, 407, 321, 727, 813, 863, 941, 772, 561, 954, 754, 239, 305, 786, 850, 904, and any new Florida codes as added.
- 4. "Initial Representation" as used herein shall mean the initial impressions encountered by consumers regarding Mobile Content (defined below), including the webpages, emails, banner ads, sponsored links, and pop ups that constitute a sponsored invitation to sign up for the Mobile Content (sometimes called a "call to action").
- 5. "Immediate proximity" as used herein means adjacent to.
- 6. "Investigate" as used herein means to research and review internal (M-Qube) and external (Mobile Content Provider) data and information available to M-Qube. .
- 7. "Negative Option plan" as used herein and only for purposes of this AVC shall mean when a Mobile Content Provider presents a consumer with an opportunity to consent in advance to receive products or services in the future, which the consumer accepts, pursuant to which the Mobile Content Provider interprets the consumer's silence or failure to take an affirmative action to

reject goods or services, or to cancel the sales agreement, as continued acceptance of the plan.

8. "Order path" shall mean the sequence of steps that, together, constitute the Advertisement.
9. "Person" as used herein shall mean a natural person or entity.
10. "Mobile 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 is the end provider of, and that advertises for, ringtones, joke-a-day or comparable products (the "Mobile Content") for wireless phones which it substantially provides to consumers.

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

1. **IT IS AGREED** by the parties that this AVC applies to Respondent, acting directly, or through any entity in which Respondent has a controlling interest, in connection with the billing aggregation and automated transmission of text messages and billing message information for Mobile Content Providers.
2. **IT IS FURTHER AGREED** by the parties that, in the course and conduct of the business of aggregation and automated transmission of text messages and billing message information for Mobile Content, in connection with any Internet-based purchase of third-party Mobile Content subscriptions by a Consumer, Respondent shall include provisions in all contracts entered into, or when renewed as permitted by existing terms, with any Mobile Content Provider that such provider represent and warrant that they shall:

- a. Not use 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. Not use promotions for the marketing of their content unless they:
  - i. clearly and conspicuously disclose the price and billing period of any recurring charge for the third-party wireless content adjacent to the cell phone submit field and the P.I.N. code submit field, e.g., “\$9.99 per month”;
  - ii. clearly and conspicuously disclose on the cell phone number submit webpage and the P.I.N. code submit webpage the following material terms and conditions:
    1. The initial and recurring charge for content, goods or services.
    2. Whether other carrier charges may apply.

3. 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.
  4. How to cancel the plan.
  5. The mechanism for charging the consumer, e.g., “on your cell phone bill or deducted from your prepaid balance on your cell phone account.”
- iii. have a hyperlink to the terms and conditions of the offer on every cell phone submit webpage and PIN code submit webpage in the order path.
- c. In a manner consistent with the Mobile Marketing Association (“MMA”) guidelines, where content is available only through certain carriers, clearly and conspicuously disclose 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.
  - d. In a manner consistent with the MMA guidelines, where content is only available on certain makes or models of mobile devices, clearly and conspicuously disclose that the content is not available on all phones.

3. **IT IS FURTHER AGREED** by the parties that Respondent shall not knowingly provide aggregation and automated transmission of text messages and billing message services for any Mobile Content Provider that violates the provisions set forth in Section 2 above; provided, however, that Respondent shall be permitted to provide notice and a reasonable opportunity to cure to a Mobile Content Provider found to have violated Section 2.

4. **IT IS FURTHER AGREED** by the parties that Respondent shall monitor the practices of Mobile Content Providers for whom it provides aggregation and automated transmission of text messages and billing message information services, as follows:

- a. Cease providing billing services for any Mobile Content Provider that Respondent knows or should know does not (i) maintain live customer service phone lines and timely investigate and reply to consumer complaints, however received, or (ii) make adequate alternative arrangements for such customer service, such as through the wireless carrier itself;
- b. Investigate and reply to Consumer complaints received by it directly; and,
- c. In conjunction with subsection (b.), above, create and maintain an enforceable model enabling Respondent to take action with respect to any and all Mobile Content Provider(s) for whom the level of Consumer complaints it receives for violations of the requirements of section 2 above exceeds the amount specified below: (1) in the

event such complaints exceed 2% of total Consumer transactions for that Provider during a reasonable period, Respondent shall investigate and address the complaints with the Mobile Content Provider; (2) in the event such complaints exceed 5% of total Consumer transactions for that Provider during a reasonable period, Respondent shall suspend service to the Mobile Content Provider.

**E. ATTORNEY'S FEES AND COSTS**

1. Upon execution of this AVC by Respondent, Respondent shall make a contribution to the OAG of \$250,000.00 ( two hundred-fifty thousand dollars) to cover attorneys' fees and costs associated with the matters resolved herein and costs of future investigation and enforcement efforts related to the internet marketing industry. This contribution, to the Legal Affairs' Revolving Trust Fund, shall be made by check 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. In addition, Respondent shall contribute the sum of \$250,000.00 (two hundred-fifty 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).

## **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 M-Qube's Mobile Content Providers for wireless mobile content who were Mobile Content Providers at any time since Respondent began billing for mobile content, including, to the extent available, the Mobile Content Provider's name, physical address and the name and address of the advertiser's contact person.
2. On a date 180 days (one hundred and eighty days) after execution of this AVC, Respondent shall provide the OAG with a written report that details compliance with the requirements herein. The report shall (i) identify any Content Provider among m-Qube's largest twenty Content Providers (by revenue to m-Qube) for which the level of consumer complaints m-Qube received exceeded the limit specified in section D.4.c above, and (ii) any action by m-Qube in response thereto, including any suspension the Content Provider.

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

1. Respondent agrees to continue cooperating with the OAG with respect to its investigation of the marketing, sale, and billing for third-party internet-marketed Mobile Content and services. 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 M-Qube's Litigation Counsel or his designate, and an additional reasonable time to make any objection (if any), reasonably cooperate with the OAG with regard to the matters that are the subject of

the investigation of M-Qube and this resulting AVC, and related investigations, proceedings and actions concerning any other person, including but not limited to M-Qube's current and former employees, concerning the mobile content industries. Respondent shall use reasonable efforts to ensure that M-Qube's officers, directors and employees also reasonably 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 M-Qube officers, directors and employees attend no more than six interviews and/or 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;
- b. Production, without the necessity of a subpoena, of 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, consistent with any contractual obligations to third parties or applicable privileges, provided such production is not overly burdensome and is subject to the Protective Order previously entered in *State of Florida, Office of Attorney General, Department of Legal Affairs v. m-Qube, Inc.*, Case No. 2006-CA-3015 in the Circuit Court of the Second Judicial Circuit in and for 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, consistent with any contractual or other legal obligations of Respondent to third parties or applicable privileges and the AVC;
- 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, consistent with any contractual or other legal obligations of Respondents to third parties or applicable privileges and the AVC;
- 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, 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 three (3) 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; a change in the corporate name or address.

1. 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.

2. For the purposes of this AVC, the OAG shall, unless otherwise directed by Respondent, mail all written notifications to Respondent to:

Litigation Counsel  
c/o VeriSign  
21351 Ridgetop Circle  
Dulles, VA 20166

#### **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 of omission of Respondent in any civil, criminal, or administrative proceeding in any court, administrative agency or other tribunal, other than such proceedings as may be

necessary 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 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 and after notice to Respondent. 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. The scope of this AVC is for activities relating to Florida Consumers.
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 making the substantive terms and conditions of this AVC known to Respondents' officers, directors, successors, and managers. Respondent must also deliver a summary (to be agreed upon by the Respondent and the OAG) of this AVC to their employees, affiliate entities, and Mobile Content Providers with whom they do business, to the extent such persons engage in conduct related to the subject matter of this AVC.
8. Respondent shall not effect any change in the form of doing business or its organizational identity for the sole purpose of defeating the purposes of the parties in entering into 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. If the OAG believes that Respondent has failed to satisfy any of the terms of this AVC, OAG will notify Respondent and provide Respondent with a reasonable opportunity to cure; OAG will not seek any civil penalties or sanctions and no action

will be filed against Respondent until after a reasonable opportunity to cure has been provided and Respondent has failed to cure.

11. The parties anticipate that there will be changes in the MMA, the services provided and the market in which it competes, the requirements and practices of wireless service providers, and related technologies that may affect the reasonableness of these terms. In the event such changes unreasonably and adversely affect Respondent's competitive position or business, the parties agree to engage in good faith negotiations to revise the terms hereof in a way that will preserve the underlying principles reflected in this AVC while limiting any such unreasonable and adverse affects on Respondent's competitive position or business.

12. The Attorney General on behalf of the State of Florida and its citizens, hereby releases, acquits, and forever discharges Respondent from any and all actions, causes of actions, obligations, liabilities, claims or demand for damages, civil penalties, claims for relief, or demand whatsoever in law or in equity, civil or administrative, which were asserted or maintained, could have been asserted or maintained, or which could in the future be asserted or maintained against Respondent in any civil, enforcement action or administrative action, or proceeding, based upon, arising out of, related to, or connected with directly or indirectly, the investigation and any matters related thereto. It is agreed that the Attorney General will not reopen the Investigation except to the extent it investigates an alleged breach of this AVC.

13. This AVC, any action taken to reach, effectuate, or further this AVC, and the terms set forth herein, shall not be construed or used as an admission by or against Respondent of any fault, wrongdoing, or liability whatsoever, or as a waiver or

limitation of any defenses otherwise available to Respondent. Entering into or carrying out this AVC, or any negotiations or proceedings related thereto, shall not in any event be construed as, or deemed to be evidence of, any admission or concession by either party, or to be a waiver of any applicable defense. However, nothing in this AVC, including this paragraph, shall be construed to limit or to restrict Respondent's right to use the AVC, or payments made hereunder, to assert and maintain the defenses or res judicata, collateral estoppel, payment, compromise and settlement, accord and satisfaction, or any other legal or equitable defenses in any pending or future legal or administrative action of proceeding.

**IN WITNESS WHEREOF**, Respondent has caused this Assurance of Voluntary Compliance to be executed by Richard H. Goshorn, as Secretary of M-Qube, Inc. as a true act and deed, in Loudoun County, Virginia, this 25<sup>th</sup> day of August, 2008.

By my signature I hereby affirm that I am acting in my capacity and within my authority as Secretary of M-Qube, Inc. and that by my signature I am binding the corporation to this agreement.

By: Richard H. Goshorn

STATE OF Virginia  
COUNTY OF Loudoun

BEFORE ME, an officer duly authorized to take acknowledgments in the State of Va., personally appeared Richard H. Goshorn, as Secy of M-Qube, Inc., and acknowledged before me that he executed the foregoing instrument for the purposes therein stated, on this 25<sup>th</sup> day of August, 2008. Sworn to and subscribed before me this 25<sup>th</sup> day of August, 2008.

My Commission Expires  
May 31, 2012.

Nancy I. Krakover  
Nancy I. Krakover (print name)  
NOTARY PUBLIC

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

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BILL McCOLLUM  
Attorney General, State of Florida  
OFFICE OF THE ATTORNEY GENERAL  
The Capitol, PL-01  
Tallahassee, Florida 32399-1050  
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