



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

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Sep-26-2017 4:02 pm

Case Number: CGC-17-561546

Filing Date: Sep-26-2017 3:53

Filed by: ROSSALY DELAVEGA

Image: 06041303

COMPLAINT

PHUNWARE INC. VS. UBER TECHNOLOGIES, INC.

001C06041303

Instructions:

Please place this sheet on top of the document to be scanned.

**SUMMONS
(CITACION JUDICIAL)**

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

**NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):**
UBER TECHNOLOGIES, INC.,

**YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):**
PHUNWARE, INC.,

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **¡AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es):
Superior Court of California, County of San Francisco
400 McAllister Street, San Francisco, CA 94102

CASE NUMBER:
(Número del Caso):

CGC-17-561546

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Dylan J. Liddiard
Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, Ca 94304
Tel.: 650-493-9300

DATE: September 26, 2017
(Fecha)

SEP 26 2017

CLERK OF THE COURT

Clerk by
(Secretario)

DE LA VEGA-NAVARRO, Rossaly

Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

[SEAL]



NOTICE TO THE PERSON SERVED: You are served

1. as an individual defendant.
2. as the person sued under the fictitious name of (specify):
3. on behalf of (specify):
under:

<input type="checkbox"/> CCP 416.10 (corporation)	<input type="checkbox"/> CCP 416.60 (minor)
<input type="checkbox"/> CCP 416.20 (defunct corporation)	<input type="checkbox"/> CCP 416.70 (conservatee)
<input type="checkbox"/> CCP 416.40 (association or partnership)	<input type="checkbox"/> CCP 416.90 (authorized person)
<input type="checkbox"/> other (specify):	
4. by personal delivery on (date):

ORIGINAL

1 DYLAN J. LIDDIARD, State Bar No. 203055
2 WILSON SONSINI GOODRICH & ROSATI
3 Professional Corporation
4 650 Page Mill Road
5 Palo Alto, CA 94304-1050
6 Telephone: (650) 493-9300
7 Facsimile: (650) 565-5100
8 Email: dliddiard@wsgr.com

9 Attorneys for Plaintiff Phunware, Inc.

FILED
San Francisco County Superior Court
SEP 20 2017
CLERK OF THE COURT
BY: *[Signature]*
Deputy Clerk

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

12 Phunware, Inc.,
13 Plaintiff,
14 vs.
15 Uber Technologies, Inc.,
16 Defendant

17 Case No. **CGC-17-561546**
18 **Complaint for:**
19 **Breach of Contract**
20
21 **Jury Trial Demanded**

1 **INTRODUCTION**

2 1. Plaintiff Phunware, Inc. (“Phunware”) was hired by Uber Technologies, Inc.
3 (“Uber”) to conduct certain advertising campaigns beginning on January 1, 2017. Phunware did
4 so, but Phunware has not been paid accordingly what it was promised. Thus, Phunware hereby
5 seeks recovery of the unpaid balance, which is, at base, \$3,089,359.85.

6 **PARTIES**

7 2. Uber is a Delaware corporation with its principal place of business in San
8 Francisco, California.

9 3. Phunware is a Delaware corporation with its principal place of business in Austin,
10 Texas.

11 **JURISDICTION AND VENUE**

12 4. This Court has original jurisdiction pursuant to the California Constitution,
13 Article VI § 10 and California Code of Civil Procedure § 410.

14 5. Venue is proper in this Court under California Code of Civil Procedure §§ 395.5
15 because Uber’s principal place of business is in San Francisco, California.

16 **CAUSE OF ACTION**

17 **(Breach of Contract)**

18 6. Phunware is informed that prior to December 29, 2016, Uber hired Fetch Media,
19 Ltd. (“Fetch”) to act as Uber’s agent regarding certain advertising campaigns.

20 7. In a contract dated December 29, 2016, attached as Exhibit A (the “Insertion
21 Order”), Fetch hired Phunware to conduct certain advertising campaigns for Uber beginning on
22 January 1, 2017, and ending on March 31, 2017.

23 8. By e-mail dated April 4, 2017, Fetch directed Phunware as follows: “Please
24 continue to run your Uber campaigns as we enter Q2. We will send out IOs [Insertion Orders]
25 soon, but in the meantime please consider this e-mail as official notice to stay active in LATAM.
26 Thank you!” (the “E-mail Notice”).

27 9. The Insertion Order states that it “shall be governed by the AAA/IAB Standard
28 Terms and Conditions for Internet Advertising for Media Buys One Year or Less v3.0

1 “IAB3.0”),” with certain amendments. The referenced IAB Standard Terms and Conditions are
2 attached as Exhibit B (“IAB Standard Terms”).

3 10. The Insertion Order states that “payment must be received within 30 days of
4 invoice date.”

5 11. The IAB Standard Terms, Section III.c, states: “For sums not cleared to Agency
6 [Fetch], Media Company [Phunware] agrees to hold Advertiser [Uber] solely liable. Media
7 Company understands that Advertiser is Agency’s disclosed principal and Agency, as agent, has
8 no obligations relating to such payments[.]”

9 12. Phunware performed all obligations required of it pursuant to the Insertion Order
10 and E-mail Notice.

11 13. Between February 28, 2017 and April 30, 2017, Phunware sent five invoices to
12 Fetch pursuant to the Insertion Order and E-mail Notice, all of which remain unpaid. The total
13 unpaid amount of these five invoices, at base, is \$3,089,359.85. These unpaid invoices are
14 assembled as Exhibit C.

15 14. By various communications, including a letter dated June 21, 2017, Fetch advised
16 Phunware that Uber has not paid Fetch any amount regarding the five invoices referenced above.
17 Nor has Uber paid Phunware directly for these invoices.

18 15. Uber’s failure to pay the five invoices at issue, as required by the terms of the
19 Insertion Order and IAB Standard Terms, constitutes breach of contract.

20 16. Pursuant to at least California Civil Code § 3287(a), Phunware is entitled to
21 recover “damages certain” in the amount of \$3,089,359.85, as well as interest accruing beginning
22 30 days after the date of each respective unpaid invoice.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Phunware prays for judgment against Uber as follows:

- 25 a. Damages in the amount of \$3,089,359.85, plus applicable interest; and
26 b. Such other relief as this Court deems just and equitable.

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DEMAND FOR JURY TRIAL

Phunware hereby demands a trial by jury.

Dated: September 26, 2017

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: *Dylan J. Liddiard*
Dylan J. Liddiard

Attorneys for Plaintiff Phunware, Inc.



Insertion Order

IO Number
Date

IO Number: 0175
12/29/16

Client Account Details:	Uber Account Email: ubertglobal@wearfetch.com Account Manager: Ashleigh Rankin Email: ashleigh.rankin@wearfetch.com	Accounts Payable:	Send Invoices to: accounts@wearfetch.com Address: Fetch, Tea Building, Unit 3.09, 56 Shoreditch High Street, London E1 6JU Payment Terms: Net 30
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Primary Details:	Name: Phunware Contact: Derek Mohl Email: dmohl@phunware.com	Reporting:	Send reports to: sf_data@wearfetch.com 3rd Party tracking: Tune Billing: Tune Figures Discount: 0%
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Region	Device	Format	Start Date	End Date	Start/End	CPM	Total
APAC	iPhone/Android	CPI	Varies	1/1/17	3/31/17	\$	1,100,000.00
EMEA	iPhone/Android	CPI	Varies	1/1/17	3/31/17	\$	0
India	iPhone/Android	CPI	Varies	1/1/17	3/31/17	\$	750,000.00
LATAM	iPhone/Android	CPI	Varies	1/1/17	3/31/17	\$	1,300,000.00
NA	iPhone/Android	CPI	Varies	1/1/17	3/31/17	\$	1,000,000.00

Total Gross Budget		\$	4,150,000.00
Total Discount		\$	
Total Net Invoice (-33%)		\$	4,150,000.00

Restrictions:	Third Party sources: Forbidden Adult: Forbidden Exchange: Allowed Emailing: Forbidden
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Reporting: If running a CPC / CPM campaign daily impression/spend reports must be sent to Fetch by 10am Monday to Friday in the format as designated in the trafficking document. Continued failure to send will result in campaign pausing.
Transparency: Uber require full transparency via a site link and app name/site name passback in the IAB URL. Failure to comply will result in campaign pausing. (See below for additional information)
Tracking: Vendor is responsible for the correct set up of the campaign and testing/trouble-shooting links. Fetch is not responsible for any spend from campaigns that were set up incorrectly.
48 hour cancellation clause: Any clicks, installs, trips that come in after 48hrs notice of pausing will not be considered valid and Fetch will not be liable to pay for this activity.
No re-bidding: If it comes to the attention of Fetch that ads have been rebid to incentivised or forbidden sources Fetch will not be liable to pay for that activity.
Geo-Validation: Installs outside of a reasonable margin of error for geo-targeting will be considered invalid and will not be paid for. An acceptable range is <100km from intended city center. Geo-targeting accuracy should be 80% (industry average) therefore Fetch/Uber will not be liable to pay for installs outside of that margin of error unless there are extenuating circumstances and unless otherwise agreed on by both parties.
Privacy: No reselling or using Uber's data, in any way other than for optimising this media buy for the sole benefit of Uber.
Vendor instructions: Failure to comply with the instructions below will lead to non-payment for campaigns and/or full pause of campaigns.

This IO shall be governed by the AAA/IAB Standard Terms and Conditions for Internet Advertising for Media Buys One Year or Less v3.0 ("IAB3.0"), as amended below:

Parties: For purposes of clarity, in IAB3.0, "Advertiser" shall refer to party listed under "Client" and "Agency" shall refer to Fetch Media Ltd. and "Media Company" shall refer to the party listed above under "Vendor".

Cancellation and Termination: In addition to the rights provided under IAB3.0, either Party may terminate this contract, for any or no reason, by giving the other Party 48 hours' notice.

Billing and Payment: Invoices will be received within 30 days of IO end date and payment must be received within 30 days of Invoice date.

IP: For purposes of clarity, this agreement does not grant Vendor or Affiliate any rights to any software, hardware, trademarks, service marks, logos, techniques, know-how, methods, processes, designs, databases, specifications, content, inventions (whether or not patentable) and other technology of Advertiser or Fetch.

Vendor Instructions:

Modification of Trafficking Links:
 - There must be NO modifications made to the trafficking links we send you unless email approval is provided by the Account Manager and myself and this will only be provided for exceptional circumstances.
 - If for some reason you need to modify your links to add parameters etc. please notify us ASAP and we can modify them in our internal system so that you can use them exactly as we send for any future campaigns.
 - If something is trafficked incorrectly i.e. if the link is missing agency_id=008, & sub_campaign, & sub_adgroup, & sub_ad both Fetch and Uber will not be able to appropriately ingest the data from Tune and we will not be liable to pay for installs that come from any links of this nature. This is non-negotiable.
 Initial here: ___MK___

New Creative Launcher / Creative Refreshes / Creative Pauses:
 - When launching new creatives please rotate them in as soon as possible, please always keep the top 2 performing concepts from the previous set live and pause everything else i.e. there should never be overlap between more than 2 sets of creatives unless otherwise specified by the team.
 - NO SHORTCUTS: When we send new creatives and links please USE THEM. Each link is completely unique and identifies multiple different things - city, partner, creative, creative size and each has a unique scheme. Please DO NOT attempt to modify existing tracking links by simply changing the internal parameters.
 - Please ensure the creative name in the link corresponds to the creative file name in the dropbox link. There must be no swapping in creatives to existing links as this will entirely disrupt our creative reporting and limit the reliability of any creative analysis we do.
 - If we ask explicitly for creatives to be paused please ensure they are paused ASAP. Fetch will zero out spend for creatives that need to be paused 48h after sending the pause notice.
 Initial here: ___MK___

Strict Weekly Caps:
 - Please adhere to your spend caps per city/campaign. We are held to these caps by Uber and do not get paid more than what we allocate. Any additional spend you incur cannot be billed to Fetch if it is over your allocated weekly cap.
 - All Caps and CPIs sent to you are in GROSS.
 - Please work to pace spend 50% Mon-Thurs and 50% Fri-Sun. This pacing model allows flexibility for mid-week budget changes i.e. 80% of budget should not be spent by Wednesday afternoon. We cannot be liable to pay for unreasonable pacing on your end.
 Initial here: ___MK___

Spend Reports:
 - If you do not bill on a CPI and you send spend reports these MUST be with our team by 10am in the format of the attached template.
 - Please include sf_data@wearfetch.com on all spend reports.
 Initial here: ___MK___

Transparency:
 - Please ensure all of your links are set up so that Site Name is being passed back under the "sub_placement" parameter. It needs to be this exact and specific parameter so we receive these names in a consistent fashion for all partners. If this is not the case currently please notify us so that we can make this change moving forward.
 - If sub_placement=YOURNAME(CO) is not currently included in the links we send you please notify us so we can make this change to the base URLs and you will have this parameter included in all URLs moving forward.
 - For any additional data that we request on a Monday please ensure to have answers with us by Thursday at noon at the absolute latest. If there are any issues please inform us in a timely manner so we can provide feedback to the client.
 - For site pauses, for any reason, spend will not be counted for installs coming from that site 48h after the pause.
 - For continued overall issues/problems with transparency we will not hesitate to pause campaigns entirely until issues are resolved.
 - There will be a zero tolerance policy for publishers who do not pass back site names. Any blanks or indecipherable names that get passed back through the sub_placement parameter will not be paid for.
 Initial here: ___MK___

Unauthorized Sources:
 - If it comes to the attention of Fetch or Uber that partners are running on any sources that are forbidden/unauthorised then Fetch/Uber is not liable to pay for that traffic. Attached is the blacklist for your reference. This comprises partners we run with currently, partners we don't want to run with & overall sources that are forbidden for various reasons.
 Initial here: ___MK___

Reporting and Billing:
 - All reports on clicks, installs, first trips are pulled in PST time and billing for the month will be for events that happen in PST.
 - All billing will be in USD
 Initial here: ___MK___

Fetchmedia, Ltd.	Phunware
Name: Ashleigh Rankin Title: Global Account Director Date: 31/29/16	Name: Mike Ketchum Title: Vice President, Americas Date: 12/29/16
Signature:	Signature: _____

**STANDARD TERMS AND CONDITIONS FOR INTERNET ADVERTISING
FOR MEDIA BUYS ONE YEAR OR LESS**

These Standard Terms and Conditions for Internet Advertising for Media Buys One Year or Less, Version 3.0, are intended to offer media companies and advertising agencies a standard for conducting business in a manner acceptable to both. This document, when incorporated into an insertion order, represents the parties' common understanding for doing business. This document may not fully cover sponsorships and other arrangements involving content association or integration, and/or special production, but may be used as the basis for the media components of such contracts. This document is not meant to cover the relationship between a publisher and a network, or direct advertiser buys with publishers.

DEFINITIONS

“**Ad**” means any advertisement provided by Agency on behalf of an Advertiser.

“**Advertiser**” means the advertiser for which Agency is the agent under an applicable IO.

“**Advertising Materials**” means artwork, copy, or active URLs for Ads.

“**Affiliate**” means, as to an entity, any other entity directly or indirectly controlling, controlled by, or under common control with, such entity.

“**Agency**” means the advertising agency listed on the applicable IO.

“**CPA Deliverables**” means Deliverables sold on a cost per acquisition basis.

“**CPC Deliverables**” means Deliverables sold on a cost per click basis.

“**CPL Deliverables**” means Deliverables sold on a cost per lead basis.

“**CPM Deliverables**” means Deliverables sold on a cost per thousand impression basis.

“**Deliverable**” or “**Deliverables**” means the inventory delivered by Media Company (e.g., impressions, clicks, or other desired actions).

“**IO**” means a mutually agreed insertion order that incorporates these Terms, under which Media Company will deliver Ads on Sites for the benefit of Agency or Advertiser.

“**Media Company**” means the publisher listed on the applicable IO.

“**Media Company Properties**” are websites specified on an IO that are owned, operated, or controlled by Media Company.

“**Network Properties**” means websites specified on an IO that are not owned, operated, or controlled by Media Company, but on which Media Company has a contractual right to serve Ads.

“**Policies**” means advertising criteria or specifications made conspicuously available, including content limitations, technical specifications, privacy policies, user experience policies, policies regarding consistency with Media Company's public image, community standards regarding obscenity or indecency (taking into consideration the portion(s) of the Site on which the Ads are to appear), other editorial or advertising policies, and Advertising Materials due dates.

“**Representative**” means, as to an entity and/or its Affiliate(s), any director, officer, employee, consultant, contractor, agent, and/or attorney.

“**Site**” or “**Sites**” means Media Company Properties and Network Properties.

“**Terms**” means these Standard Terms and Conditions for Internet Advertising for Media Buys One Year or Less, Version 3.0.

“**Third Party**” means an entity or person that is not a party to an IO; for purposes of clarity, Media Company, Agency, Advertiser, and any Affiliates or Representatives of the foregoing are not Third Parties.

“**Third Party Ad Server**” means a Third Party that will serve and/or track Ads.

I. INSERTION ORDERS AND INVENTORY AVAILABILITY

- a. **IO Details.** From time to time, Media Company and Agency may execute IOs that will be accepted as set forth in Section I(b). As applicable, each IO will specify: (i) the type(s) and amount(s) of Deliverables, (ii) the price(s) for such Deliverables, (iii) the maximum amount of money to be spent pursuant to the IO, (iv) the start and end dates of the campaign, and (v) the identity of and contact information for any Third Party Ad Server. Other items that may be included are, but are not limited to, reporting requirements, any special Ad delivery scheduling and/or Ad placement requirements, and specifications concerning ownership of data collected.
- b. **Availability; Acceptance.** Media Company will make commercially reasonable efforts to notify Agency within two (2) business days of receipt of an IO signed by Agency if the specified inventory is not available. Acceptance of the IO and these Terms will be deemed the earlier of (i) written (which, unless otherwise specified, for purposes of these Terms, will include paper, fax, or e-mail communication) approval of the IO by Media Company and Agency, or (ii) the display of the first Ad impression by Media Company, unless otherwise agreed on the IO. Notwithstanding the foregoing, modifications to the originally submitted IO will not be binding unless approved in writing by both Media Company and Agency.
- c. **Revisions.** Revisions to accepted IOs will be made in writing and acknowledged by the other party in writing.

II. AD PLACEMENT AND POSITIONING

- a. **Compliance with IO.** Media Company will comply with the IO, including all Ad placement restrictions, and, except as set forth in Section VI(c), will create a reasonably balanced delivery schedule. Media Company will provide, within the scope of the IO, an Ad to the Site specified on the IO when such Site is visited by an Internet user. Any exceptions will be approved by Agency in writing.
- b. **Changes to Site.** Media Company will use commercially reasonable efforts to provide Agency at least 10 business days prior notification of any material changes to the Site that would materially change the target audience or materially affect the size or placement of the Ad specified on the applicable IO. Should such a modification occur with or without notice, as Agency's and Advertiser's sole remedy for such change, Agency may cancel the remainder of the affected placement without penalty within the 10-day notice period. If Media Company has failed to provide such notification, Agency may cancel the remainder of the affected placement within 30 days of such modification and, in such case, will not be charged for any affected Ads delivered after such modification.
- c. **Technical Specifications.** Media Company will submit or otherwise make electronically accessible to Agency final technical specifications within two (2) business days of the acceptance of an IO. Changes by Media Company to the specifications of already-purchased Ads after that two (2) business day period will allow Advertiser to suspend delivery of the affected Ad for a reasonable time (without impacting the end date, unless otherwise agreed by the parties) in order to (i) send revised Advertising Materials; (ii) request that Media Company resize the Ad at Media Company's cost, and with final creative approval of Agency, within a reasonable time period to fulfill the guaranteed levels of the IO; (iii) accept a comparable replacement; or (iv) if the parties are unable to negotiate an alternate or comparable replacement in good faith within five (5) business days, immediately cancel the remainder of the affected placement without penalty.

- d. **Editorial Adjacencies.** Media Company acknowledges that certain Advertisers may not want their Ads placed adjacent to content that promotes pornography, violence, or the use of firearms, contains obscene language, or falls within another category stated on the IO ("**Editorial Adjacency Guidelines**"). Media Company will use commercially reasonable efforts to comply with the Editorial Adjacency Guidelines with respect to Ads that appear on Media Company Properties, although Media Company will at all times retain editorial control over the Media Company Properties. For Ads shown on Network Properties, Media Company and Agency agree that Media Company's sole responsibilities with respect to compliance with these Editorial Adjacency Guidelines will be to obtain contractual representations from its participating network publishers that such publishers will comply with Editorial Adjacency Guidelines on all Network Properties and to provide the remedy specified below to Agency with respect to violations of Editorial Adjacency Guidelines on Network Properties. Should Ads appear in violation of the Editorial Adjacency Guidelines, Advertiser's sole and exclusive remedy is to request in writing that Media Company remove the Ads and provide makegoods or, if no makegood can be agreed upon, issue a credit to Advertiser equal to the value of such Ads, or not bill Agency for such Ads. In cases where a makegood and a credit can be shown to be commercially infeasible for the Advertiser, Agency and Media Company will negotiate an alternate solution. After Agency notifies Media Company that specific Ads are in violation of the Editorial Adjacency Guidelines, Media Company will make commercially reasonable efforts to correct such violation within 24 hours. If such correction materially and adversely impacts such IO, Agency and Media Company will negotiate in good faith mutually agreed changes to such IO to address such impacts. Notwithstanding the foregoing, Agency and Advertiser each acknowledge and agree that no Advertiser will be entitled to any remedy for any violation of the Editorial Adjacency Guidelines resulting from: (i) Ads placed at locations other than the Sites, or (ii) Ads displayed on properties that Agency or Advertiser is aware, or should be aware, may contain content in potential violation of the Editorial Adjacency Guidelines.

For any page on the Site that primarily consists of user-generated content, the preceding paragraph will not apply. Instead, Media Company will make commercially reasonable efforts to ensure that Ads are not placed adjacent to content that violates the Site's terms of use. Advertiser's and Agency's sole remedy for Media Company's breach of such obligation will be to submit written complaints to Media Company, which will review such complaints and remove user-generated content that Media Company, in its sole discretion, determines is objectionable or in violation of such Site's terms of use.

III. PAYMENT AND PAYMENT LIABILITY

- a. **Invoices.** The initial invoice will be sent by Media Company upon completion of the first month's delivery, or within 30 days of completion of the IO, whichever is earlier. Invoices will be sent to Agency's billing address as set forth on the IO and will include information reasonably specified by Agency, such as the IO number, Advertiser name, brand name or campaign name, and any number or other identifiable reference stated as required for invoicing on the IO. All invoices (other than corrections of previously provided invoices) pursuant to the IO will be sent within 90 days of delivery of all Deliverables. Media Company acknowledges that failure by Media Company to send an invoice within such period may cause Agency to be contractually unable to collect payment from the Advertiser. If Media Company sends the invoice after the 90-day period and the Agency either has not received the applicable funds from the Advertiser or does not have the Advertiser's consent to dispense such funds, Agency will use commercially reasonable efforts to assist Media Company in collecting payment from the Advertiser or obtaining Advertiser's consent to dispense funds.

Upon request from the Agency, Media Company should provide proof of performance for the invoiced period, which may include access to online or electronic reporting, as addressed in these Terms, subject to the notice and cure provisions of Section IV. Media Company should invoice

Agency for the services provided on a calendar-month basis with the net cost (*i.e.*, the cost after subtracting Agency commission, if any) based on actual delivery, flat-fee, or based on prorated distribution of delivery over the term of the IO, as specified on the applicable IO.

- b. **Payment Date.** Agency will make payment 30 days from its receipt of invoice, or as otherwise stated in a payment schedule set forth on the IO. Media Company may notify Agency that it has not received payment in such 30-day period and whether it intends to seek payment directly from Advertiser pursuant to Section III(c), below, and Media Company may do so five (5) business days after providing such notice.
- c. **Payment Liability.** Unless otherwise set forth by Agency on the IO, Media Company agrees to hold Agency liable for payments solely to the extent proceeds have cleared from Advertiser to Agency for Ads placed in accordance with the IO. For sums not cleared to Agency, Media Company agrees to hold Advertiser solely liable. Media Company understands that Advertiser is Agency's disclosed principal and Agency, as agent, has no obligations relating to such payments, either joint or several, except as specifically set forth in this Section III(c) and Section X(c).

Agency agrees to make every reasonable effort to collect and clear payment from Advertiser on a timely basis.

Agency's credit is established on a client-by-client basis.

If Advertiser proceeds have not cleared for the IO, other advertisers from Agency will not be prohibited from advertising on the Site due to such non-clearance if such other advertisers' credit is not in question.

Upon request, Agency will make available to Media Company written confirmation of the relationship between Agency and Advertiser. This confirmation should include, for example, Advertiser's acknowledgement that Agency is its agent and is authorized to act on its behalf in connection with the IO and these Terms. In addition, upon the request of Media Company, Agency will confirm whether Advertiser has paid to Agency in advance funds sufficient to make payments pursuant to the IO.

If Advertiser's or Agency's credit is or becomes impaired, Media Company may require payment in advance.

IV. REPORTING

- a. **Confirmation of Campaign Initiation.** Media Company will, within two (2) business days of the start date on the IO, provide confirmation to Agency, either electronically or in writing, stating whether the components of the IO have begun delivery.
- b. **Media Company Reporting.** If Media Company is serving the campaign, Media Company will make reporting available at least as often as weekly, either electronically or in writing, unless otherwise specified on the IO. Reports will be broken out by day and summarized by creative execution, content area (Ad placement), impressions, clicks, spend/cost, and other variables as may be defined on the IO (*e.g.*, keywords).

Once Media Company has provided the online or electronic report, it agrees that Agency and Advertiser are entitled to reasonably rely on it, subject to provision of Media Company's invoice for such period.

- c. **Makegoods for Reporting Failure.** If Media Company fails to deliver an accurate and complete report by the time specified, Agency may initiate makegood discussions pursuant to Section VI, below.

If Agency informs Media Company that Media Company has delivered an incomplete or inaccurate report, or no report at all, Media Company will cure such failure within five (5) business days of receipt of such notice. Failure to cure may result in nonpayment for all activity for which data is incomplete or missing until Media Company delivers reasonable evidence of performance; such report will be delivered within 30 days of Media Company's knowledge of such failure or, absent such knowledge, within 180 days of delivery of all Deliverables.

V. CANCELLATION AND TERMINATION

- a. **Without Cause.** Unless designated on the IO as non-cancelable, Advertiser may cancel the entire IO, or any portion thereof, as follows:
 - i. With 14 days' prior written notice to Media Company, without penalty, for any guaranteed Deliverable, including, but not limited to, CPM Deliverables. For clarity and by way of example, if Advertiser cancels the guaranteed portions of the IO eight (8) days prior to serving of the first impression, Advertiser will only be responsible for the first six (6) days of those Deliverables.
 - ii. With seven (7) days' prior written notice to Media Company, without penalty, for any non-guaranteed Deliverable, including, but not limited to, CPC Deliverables, CPL Deliverables, or CPA Deliverables, as well as some non-guaranteed CPM Deliverables.
 - iii. With 30 days' prior written notice to Media Company, without penalty, for any flat fee-based or fixed-placement Deliverable, including, but not limited to, roadblocks, time-based or share-of-voice buys, and some types of cancelable sponsorships.
 - iv. Advertiser will remain liable to Media Company for amounts due for any custom content or development ("**Custom Material**") provided to Advertiser or completed by Media Company or its third-party vendor prior to the effective date of termination. For IOs that contemplate the provision or creation of Custom Material, Media Company will specify the amounts due for such Custom Material as a separate line item. Advertiser will pay for such Custom Material within 30 days from receiving an invoice therefore.
- b. **For Cause.** Either Media Company or Agency may terminate an IO at any time if the other party is in material breach of its obligations hereunder, which breach is not cured within 10 days after receipt of written notice thereof from the non-breaching party, except as otherwise stated in these Terms with regard to specific breaches. Additionally, if Agency or Advertiser breaches its obligations by violating the same Policy three times (and such Policy was provided to Agency or Advertiser) and receives timely notice of each such breach, even if Agency or Advertiser cures such breaches, then Media Company may terminate the IO or placements associated with such breach upon written notice. If Agency or Advertiser does not cure a violation of a Policy within the applicable 10-day cure period after written notice, where such Policy had been provided by Media Company to Agency, then Media Company may terminate the IO and/or placements associated with such breach upon written notice.
- c. **Short Rates.** Short rates will apply to canceled buys to the degree stated on the IO.

VI. MAKEGOODS

- a. **Notification of Under-delivery.** Media Company will monitor delivery of the Ads, and will notify Agency either electronically or in writing as soon as possible (and no later than 14 days before the applicable IO end date unless the length of the campaign is less than 14 days) if Media Company believes that an under-delivery is likely. In the case of a probable or actual under-delivery, Agency and Media Company may arrange for a makegood consistent with these Terms.
- b. **Makegood Procedure.** If actual Deliverables for any campaign fall below guaranteed levels, as set forth on the IO, and/or if there is an omission of any Ad (placement or creative unit), Agency and Media Company will use commercially reasonable efforts to agree upon the conditions of a makegood flight, either on the IO or at the time of the shortfall. If no makegood can be agreed upon, Agency may execute a credit equal to the value of the under-delivered portion of the IO for

which it was charged. If Agency or Advertiser has made a cash prepayment to Media Company, specifically for the campaign IO for which under-delivery applies, then, if Agency and/or Advertiser is reasonably current on all amounts owed to Media Company under any other agreement for such Advertiser, Agency may elect to receive a refund for the under-delivery equal to the difference between the applicable pre-payment and the value of the delivered portion of the campaign. In no event will Media Company provide a makegood or extend any Ad beyond the period set forth on the IO without the prior written consent of Agency.

- c. Unguaranteed Deliverables. If an IO contains CPA Deliverables, CPL Deliverables, or CPC Deliverables, the predictability, forecasting, and conversions for such Deliverables may vary and guaranteed delivery, even delivery, and makegoods are not available.

VII. BONUS IMPRESSIONS

- a. With Third Party Ad Server. Where Agency uses a Third Party Ad Server, Media Company will not bonus more than 10% above the Deliverables specified on the IO without the prior written consent of Agency. Permanent or exclusive placements will run for the specified period of time regardless of over-delivery, unless the IO establishes an impression cap for Third Party Ad Server activity. Agency will not be charged by Media Company for any additional Deliverables above any level guaranteed or capped on the IO. If a Third Party Ad Server is being used and Agency notifies Media Company that the guaranteed or capped levels stated on the IO have been reached, Media Company will use commercially reasonable efforts to suspend delivery and, within 48 hours of receiving such notice, Media Company may either (i) serve any additional Ads itself or (ii) be held responsible for all applicable incremental Ad serving charges incurred by Advertiser but only (A) after such notice has been provided, and (B) to the extent such charges are associated with overdelivery by more than 10% above such guaranteed or capped levels.
- b. No Third Party Ad Server. Where Agency does not use a Third Party Ad Server, Media Company may bonus as many ad units as Media Company chooses unless otherwise indicated on the IO. Agency will not be charged by Media Company for any additional Deliverables above any level guaranteed on the IO.

VIII. FORCE MAJEURE

- a. Generally. Excluding payment obligations, neither Agency nor Media Company will be liable for delay or default in the performance of its respective obligations under these Terms if such delay or default is caused by conditions beyond its reasonable control, including, but not limited to, fire, flood, accident, earthquakes, telecommunications line failures, electrical outages, network failures, acts of God, or labor disputes ("**Force Majeure event**"). If Media Company suffers such a delay or default, Media Company will make reasonable efforts within five (5) business days to recommend a substitute transmission for the Ad or time period for the transmission. If no such substitute time period or makegood is reasonably acceptable to Agency, Media Company will allow Agency a pro rata reduction in the space, time, and/or program charges hereunder in the amount of money assigned to the space, time, and/or program charges at time of purchase. In addition, Agency will have the benefit of the same discounts that would have been earned had there been no default or delay.
- b. Related to Payment. If Agency's ability to transfer funds to third parties has been materially negatively impacted by an event beyond the Agency's reasonable control, including, but not limited to, failure of banking clearing systems or a state of emergency, then Agency will make every reasonable effort to make payments on a timely basis to Media Company, but any delays caused by such condition will be excused for the duration of such condition. Subject to the foregoing, such excuse for delay will not in any way relieve Agency from any of its obligations as to the amount of money that would have been due and paid without such condition.

- c. **Cancellation.** If a Force Majeure event has continued for five (5) business days, Media Company and/or Agency has the right to cancel the remainder of the IO without penalty.

IX. AD MATERIALS

- a. **Submission.** Agency will submit Advertising Materials pursuant to Section II(c) in accordance with Media Company's then-existing Policies. Media Company's sole remedies for a breach of this provision are set forth in Section V(c), above, Sections IX (c) and (d), below, and Sections X (b) and (c), below.
- b. **Late Creative.** If Advertising Materials are not received by the IO start date, Media Company will begin to charge the Advertiser on the IO start date on a pro rata basis based on the full IO, excluding portions consisting of performance-based, non-guaranteed inventory, for each full day the Advertising Materials are not received. If Advertising Materials are late based on the Policies, Media Company is not required to guarantee full delivery of the IO. Media Company and Agency will negotiate a resolution if Media Company has received all required Advertising Materials in accordance with Section IX(a) but fails to commence a campaign on the IO start date.
- c. **Compliance.** Media Company reserves the right within its discretion to reject or remove from its Site any Ads for which the Advertising Materials, software code associated with the Advertising Materials (e.g. pixels, tags, JavaScript), or the website to which the Ad is linked do not comply with its Policies, or that in Media Company's sole reasonable judgment, do not comply with any applicable law, regulation, or other judicial or administrative order. In addition, Media Company reserves the right within its discretion to reject or remove from its Site any Ads for which the Advertising Materials or the website to which the Ad is linked are, or may tend to bring, disparagement, ridicule, or scorn upon Media Company or any of its Affiliates (as defined below), provided that if Media Company has reviewed and approved such Ads prior to their use on the Site, Media Company will not immediately remove such Ads before making commercially reasonable efforts to acquire mutually acceptable alternative Advertising Materials from Agency.
- d. **Damaged Creative.** If Advertising Materials provided by Agency are damaged, not to Media Company's specifications, or otherwise unacceptable, Media Company will use commercially reasonable efforts to notify Agency within two (2) business days of its receipt of such Advertising Materials.
- e. **No Modification.** Media Company will not edit or modify the submitted Ads in any way, including, but not limited to, resizing the Ad, without Agency's approval. Media Company will use all Ads in strict compliance with these Terms and any written instructions provided on the IO.
- f. **Ad Tags.** When applicable, Third Party Ad Server tags will be implemented so that they are functional in all aspects.
- g. **Trademark Usage.** Media Company, on the one hand, and Agency and Advertiser, on the other, will not use the other's trade name, trademarks, logos, or Ads in any public announcement (including, but not limited to, in any press release) regarding the existence or content of these Terms or an IO without the other's prior written approval.

X. INDEMNIFICATION

- a. **By Media Company.** Media Company will defend, indemnify, and hold harmless Agency, Advertiser, and each of its Affiliates and Representatives from damages, liabilities, costs, and expenses (including reasonable attorneys' fees) (collectively, "**Losses**") resulting from any claim, judgment, or proceeding (collectively, "**Claims**") brought by a Third Party and resulting from (i) Media Company's alleged breach of Section XII or of Media Company's representations and

warranties in Section XIV(a), (ii) Media Company's display or delivery of any Ad in breach of Section II(a) or Section IX(e), or (iii) Advertising Materials provided by Media Company for an Ad (and not by Agency, Advertiser, and/or each of its Affiliates and/or Representatives) ("**Media Company Advertising Materials**") that: (A) violate any applicable law, regulation, judicial or administrative action, or the right of a Third Party; or (B) are defamatory or obscene. Notwithstanding the foregoing, Media Company will not be liable for any Losses resulting from Claims to the extent that such Claims result from (1) Media Company's customization of Ads or Advertising Materials based upon detailed specifications, materials, or information provided by the Advertiser, Agency, and/or each of its Affiliates and/or Representatives, or (2) a user viewing an Ad outside of the targeting set forth on the IO, which viewing is not directly attributable to Media Company's serving such Ad in breach of such targeting.

- b. By Advertiser. Advertiser will defend, indemnify, and hold harmless Media Company and each of its Affiliates and Representatives from Losses resulting from any Claims brought by a Third Party resulting from (i) Advertiser's alleged breach of Section XII or of Advertiser's representations and warranties in Section XIV(a), (ii) Advertiser's violation of Policies (to the extent the terms of such Policies have been provided (e.g., by making such Policies available by providing a URL) via email or other affirmative means, to Agency or Advertiser at least 14 days prior to the violation giving rise to the Claim), or (iii) the content or subject matter of any Ad or Advertising Materials to the extent used by Media Company in accordance with these Terms or an IO.
- c. By Agency. Agency represents and warrants that it has the authority as Advertiser's agent to bind Advertiser to these Terms and each IO, and that all of Agency's actions related to these Terms and each IO will be within the scope of such agency. Agency will defend, indemnify, and hold harmless Media Company and each of its Affiliates and Representatives from Losses resulting from (i) Agency's alleged breach of the foregoing sentence, or (ii) Claims brought by a Third Party alleging that Agency has breached its express, Agency-specific obligations under Section XII.
- d. Procedure. The indemnified party(s) will promptly notify the indemnifying party of all Claims of which it becomes aware (provided that a failure or delay in providing such notice will not relieve the indemnifying party's obligations except to the extent such party is prejudiced by such failure or delay), and will: (i) provide reasonable cooperation to the indemnifying party at the indemnifying party's expense in connection with the defense or settlement of all Claims; and (ii) be entitled to participate at its own expense in the defense of all Claims. The indemnified party(s) agrees that the indemnifying party will have sole and exclusive control over the defense and settlement of all Claims; provided, however, the indemnifying party will not acquiesce to any judgment or enter into any settlement, either of which imposes any obligation or liability on an indemnified party(s) without its prior written consent.

XI. LIMITATION OF LIABILITY

Excluding Agency's, Advertiser's, and Media Company's respective obligations under Section X, damages that result from a breach of Section XII, or intentional misconduct by Agency, Advertiser, or Media Company, in no event will any party be liable for any consequential, indirect, incidental, punitive, special, or exemplary damages whatsoever, including, but not limited to, damages for loss of profits, business interruption, loss of information, and the like, incurred by another party arising out of an IO, even if such party has been advised of the possibility of such damages.

XII: NON-DISCLOSURE, DATA USAGE AND OWNERSHIP, PRIVACY AND LAWS

- a. **Definitions and Obligations.** “**Confidential Information**” will include (i) all information marked as “Confidential,” “Proprietary,” or similar legend by the disclosing party (“**Discloser**”) when given to the receiving party (“**Recipient**”); and (ii) information and data provided by the Discloser, which under the circumstances surrounding the disclosure should be reasonably deemed confidential or proprietary. Without limiting the foregoing, Discloser and Recipient agree that each Discloser’s contribution to IO Details (as defined below) shall be considered such Discloser’s Confidential Information. Recipient will protect Confidential Information in the same manner that it protects its own information of a similar nature, but in no event with less than reasonable care. Recipient shall not disclose Confidential Information to anyone except an employee, agent, Affiliate, or third party who has a need to know same, and who is bound by confidentiality and non-use obligations at least as protective of Confidential Information as are those in this section. Recipient will not use Discloser’s Confidential Information other than as provided for on the IO.
- b. **Exceptions.** Notwithstanding anything contained herein to the contrary, the term “Confidential Information” will not include information which: (i) was previously known to Recipient; (ii) was or becomes generally available to the public through no fault of Recipient; (iii) was rightfully in Recipient’s possession free of any obligation of confidentiality at, or prior to, the time it was communicated to Recipient by Discloser; (iv) was developed by employees or agents of Recipient independently of, and without reference to, Confidential Information; or (v) was communicated by Discloser to an unaffiliated third party free of any obligation of confidentiality. Notwithstanding the foregoing, the Recipient may disclose Confidential Information of the Discloser in response to a valid order by a court or other governmental body, as otherwise required by law or the rules of any applicable securities exchange, or as necessary to establish the rights of either party under these Terms; provided, however, that both Discloser and Recipient will stipulate to any orders necessary to protect such information from public disclosure.
- c. **Additional Definitions.** As used herein the following terms shall have the following definitions:
 - i. “**User Volunteered Data**” is personally identifiable information collected from individual users by Media Company during delivery of an Ad pursuant to the IO, but only where it is expressly disclosed to such individual users that such collection is solely on behalf of Advertiser.
 - ii. “**IO Details**” are details set forth on the IO but only when expressly associated with the applicable Discloser, including, but not limited to, Ad pricing information, Ad description, Ad placement information, and Ad targeting information.
 - iii. “**Performance Data**” is data regarding a campaign gathered during delivery of an Ad pursuant to the IO (e.g., number of impressions, interactions, and header information), but excluding Site Data or IO Details.
 - iv. “**Site Data**” is any data that is (A) preexisting Media Company data used by Media Company pursuant to the IO; (B) gathered pursuant to the IO during delivery of an Ad that identifies or allows identification of Media Company, Media Company’s Site, brand, content, context, or users as such; or (C) entered by users on any Media Company Site other than User Volunteered Data.

- v. **“Collected Data”** consists of IO Details, Performance Data, and Site Data.
 - vi. **“Repurposing”** means retargeting a user or appending data to a non-public profile regarding a user for purposes other than performance of the IO.
 - vii. **“Aggregated”** means a form in which data gathered under an IO is combined with data from numerous campaigns of numerous Advertisers and precludes identification, directly or indirectly, of an Advertiser.
- d. Use of Collected Data.
- i. Unless otherwise authorized by Media Company, Advertiser will not: (A) use Collected Data for Repurposing; provided, however, that Performance Data may be used for Repurposing so long as it is not joined with any IO Details or Site Data; (B) disclose IO Details of Media Company or Site Data to any Affiliate or Third Party except as set forth in Section XII(d)(iii).
 - ii. Unless otherwise authorized by Agency or Advertiser, Media Company will not: (A) use or disclose IO Details of Advertiser, Performance Data, or a user’s recorded view or click of an Ad, each of the foregoing on a non-Aggregated basis, for Repurposing or any purpose other than performing under the IO, compensating data providers in a way that precludes identification of the Advertiser, or internal reporting or internal analysis; or (B) use or disclose any User Volunteered Data in any manner other than in performing under the IO.
 - iii. Advertiser, Agency, and Media Company (each a **“Transferring Party”**) will require any Third Party or Affiliate used by the Transferring Party in performance of the IO on behalf of such Transferring Party to be bound by confidentiality and non-use obligations at least as restrictive as those on the Transferring Party, unless otherwise set forth in the IO.
- e. User Volunteered Data. All User Volunteered Data is the property of Advertiser, is subject to the Advertiser’s posted privacy policy, and is considered Confidential Information of Advertiser. Any other use of such information will be set forth on the IO and signed by both parties.
- f. Privacy Policies. Agency, Advertiser, and Media Company will post on their respective Web sites their privacy policies and adhere to their privacy policies, which will abide by applicable laws. Failure by Media Company, on the one hand, or Agency or Advertiser, on the other, to continue to post a privacy policy, or non-adherence to such privacy policy, is grounds for immediate cancellation of the IO by the other party.
- g. Compliance with Law. Agency, Advertiser, and Media Company will at all times comply with all federal, state, and local laws, ordinances, regulations, and codes which are applicable to their performance of their respective obligations under the IO.
- h. Agency Use of Data. Agency will not: (i) use Collected Data unless Advertiser is permitted to use such Collected Data, nor (ii) use Collected Data in ways that Advertiser is not allowed to use such Collected Data. Notwithstanding the foregoing or anything to the contrary herein, the restrictions on Advertiser in Section XII(d)(i) shall not prohibit Agency from (A) using Collected Data on an Aggregated basis for internal media planning purposes only (but not for Repurposing),

or (B) disclosing qualitative evaluations of Aggregated Collected Data to its clients and potential clients, and Media Companies on behalf of such clients or potential clients, for the purpose of media planning.

XIII. THIRD PARTY AD SERVING AND TRACKING (Applicable if Third Party Ad Server is used)

- a. **Ad Serving and Tracking.** Media Company will track delivery through its ad server and, provided that Media Company has approved in writing a Third Party Ad Server to run on its properties, Agency will track delivery through such Third Party Ad Server. Agency may not substitute the specified Third Party Ad Server without Media Company's prior written consent.
- b. **Controlling Measurement.** If both parties are tracking delivery, the measurement used for invoicing advertising fees under an IO ("**Controlling Measurement**") will be determined as follows:
 - i. Except as specified in Section XIII(b)(iii), the Controlling Measurement will be taken from an ad server that is certified as compliant with the IAB/AAAA Ad Measurement Guidelines (the "**IAB/AAAA Guidelines**").
 - ii. If both ad servers are compliant with the IAB/AAAA Guidelines, the Controlling Measurement will be the Third Party Ad Server if such Third Party Ad Server provides an automated, daily reporting interface which allows for automated delivery of relevant and non-proprietary statistics to Media Company in an electronic form that is approved by Media Company; provided, however, that Media Company must receive access to such interface in the timeframe set forth in Section XIII(c), below.
 - iii. If neither party's ad server is compliant with the IAB/AAAA Guidelines or the requirements in subparagraph (ii), above, cannot be met, the Controlling Measurement will be based on Media Company's ad server, unless otherwise agreed by Agency and Media Company in writing.
- c. **Ad Server Reporting Access.** As available, the party responsible for the Controlling Measurement will provide the other party with online or automated access to relevant and non-proprietary statistics from the ad server within one (1) day after campaign launch. The other party will notify the party with Controlling Measurement if such party has not received such access. If such online or automated reporting is not available, the party responsible for the Controlling Measurement will provide placement-level activity reports to the other party in a timely manner, as mutually agreed to by the parties or as specified in Section IV(b), above, in the case of Ads being served by Media Company. If both parties have tracked the campaign from the beginning and the party responsible for the Controlling Measurement fails to provide such access or reports as described herein, then the other party may use or provide its ad server statistics as the basis of calculating campaign delivery for invoicing. Notification may be given that access, such as login credentials or automated reporting functionality integration, applies to all current and future IOs for one or more Advertisers, in which case new access for each IO is not necessary.
- d. **Discrepant Measurement.** If the difference between the Controlling Measurement and the other measurement exceeds 10% over the invoice period and the Controlling Measurement is lower, the parties will facilitate a reconciliation effort between Media Company and Third Party Ad Server measurements. If the discrepancy cannot be resolved and a good faith effort to facilitate the reconciliation has been made, Agency reserves the right to either:
 - i. Consider the discrepancy an under-delivery of the Deliverables as described in Section VI(b), whereupon the parties will act in accordance with that Section, including the requirement that Agency and Media Company make an effort to agree upon the conditions of a makegood flight and delivery of any makegood will be measured by the Third Party Ad Server, or

- ii. Pay invoice based on Controlling Measurement-reported data, plus a 10% upward adjustment to delivery.
- e. Measurement Methodology. Media Company will make reasonable efforts to publish, and Agency will make reasonable efforts to cause the Third Party Ad Server to publish, a disclosure in the form specified by the AAAA and IAB regarding their respective ad delivery measurement methodologies with regard to compliance with the IAB/AAAA Guidelines.
- f. Third Party Ad Server Malfunction. Where Agency is using a Third Party Ad Server and that Third Party Ad Server cannot serve the Ad, Agency will have a one-time right to temporarily suspend delivery under the IO for a period of up to 72 hours. Upon written notification by Agency of a non-functioning Third Party Ad Server, Media Company will have 24 hours to suspend delivery. Following that period, Agency will not be held liable for payment for any Ad that runs within the immediately following 72-hour period until Media Company is notified that the Third Party Ad Server is able to serve Ads. After the 72-hour period passes and Agency has not provided written notification that Media Company can resume delivery under the IO, Advertiser will pay for the Ads that would have run, or are run, after the 72-hour period but for the suspension, and can elect Media Company to serve Ads until the Third Party Ad Server is able to serve Ads. If Agency does not so elect for Media Company to serve the Ads until Third Party Ad Server is able to serve Ads, Media Company may use the inventory that would have been otherwise used for Media Company's own advertisements or advertisements provided by a Third Party.
- g. Third Party Ad Server Fixed. Upon notification that the Third Party Ad Server is functioning, Media Company will have 72 hours to resume delivery. Any delay in the resumption of delivery beyond this period, without reasonable explanation, will result in Media Company owing a makegood to Agency.

XIV. MISCELLANEOUS

- a. Necessary Rights. Media Company represents and warrants that Media Company has all necessary permits, licenses, and clearances to sell the Deliverables specified on the IO subject to these Terms. Advertiser represents and warrants that Advertiser has all necessary licenses and clearances to use the content contained in the Ads and Advertising Materials as specified on the IO and subject to these Terms, including any applicable Policies.
- b. Assignment. Neither Agency nor Advertiser may resell, assign, or transfer any of its rights or obligations hereunder, and any attempt to resell, assign, or transfer such rights or obligations without Media Company's prior written approval will be null and void. All terms and conditions in these Terms and each IO will be binding upon and inure to the benefit of the parties hereto and their respective permitted transferees, successors, and assigns.
- c. Entire Agreement. Each IO (including the Terms) will constitute the entire agreement of the parties with respect to the subject matter thereof and supersede all previous communications, representations, understandings, and agreements, either oral or written, between the parties with respect to the subject matter of the IO. The IO may be executed in counterparts, each of which will be an original, and all of which together will constitute one and the same document.
- d. Conflicts; Governing Law; Amendment. In the event of any inconsistency between the terms of an IO and these Terms, the terms of the IO will prevail. All IOs will be governed by the laws of the State of [_____]. Media Company and Agency (on behalf of itself and Advertiser) agree that any claims, legal proceedings, or litigation arising in connection with the IO (including these Terms) will be brought solely in [_____], and the parties consent to the jurisdiction of such courts. No modification of these Terms will be binding unless in writing and signed by both parties. If any provision herein is held to be unenforceable, the remaining provisions will remain in full force and effect. All rights and remedies hereunder are cumulative.

- e. Notice. Any notice required to be delivered hereunder will be deemed delivered three days after deposit, postage paid, in U.S. mail, return receipt requested, one business day if sent by overnight courier service, and immediately if sent electronically or by fax. All notices to Media Company and Agency will be sent to the contact as noted on the IO with a copy to the Legal Department. All notices to Advertiser will be sent to the address specified on the IO.

- f. Survival. Sections III, VI, X, XI, XII, and XIV will survive termination or expiration of these Terms, and Section IV will survive for 30 days after the termination or expiration of these Terms. In addition, each party will promptly return or destroy the other party's Confidential Information upon written request and remove Advertising Materials and Ad tags upon termination of these Terms.

- g. Headings. Section or paragraph headings used in these Terms are for reference purposes only, and should not be used in the interpretation hereof.



Invoice

#INV9818

02/28/2017

Phunware
Phunware, Inc.
7800 Shoal Creek Blvd
Suite 230 S.
Austin TX 78757

Bill To
Fetch Media Ltd.
56 Shoreditch High Street
Unit 3.09
London
E1 6JJ
United Kingdom

TOTAL

\$248,765.25

Due Date: 03/30/2017

Terms	Due Date	PO #
Net 30	03/30/2017	Uber US

Item	Amount
February 2017 - Uber US Service Period: February 1-28, 2017	\$248,765.25

Bridge Bank, N.A.
55 Almaden Blvd.
San Jose, CA 95113
Routing: 121143260
Account: 0102366481
Name: Phunware, Inc.
SWIFT Code: BBFXUS6S

Subtotal \$248,765.25

Tax Total (0%) \$0.00

Total \$248,765.25



INV9818



Invoice

#INV9819

02/28/2017

Phunware
Phunware, Inc.
7800 Shoal Creek Blvd
Suite 230 S.
Austin TX 78757

Bill To
Fetch Media Ltd.
56 Shoreditch High Street
Unit 3.09
London
E1 6JJ
United Kingdom

TOTAL

\$1,346,496.38

Due Date: 03/30/2017

Terms	Due Date	PO #
Net 30	03/30/2017	Uber Int'l

Item	Amount
February 2017 - Uber International Service Period: February 1-28, 2017	\$1,346,496.38

Bridge Bank, N.A.
55 Almaden Blvd.
San Jose, CA 95113
Routing: 121143260
Account: 0102366481
Name: Phunware, Inc.
SWIFT Code: BAFXUS6S

Subtotal \$1,346,496.38

Tax Total (0%) \$0.00

Total \$1,346,496.38



INV9819



Invoice

#INV9916

03/31/2017

Phunware
Phunware, Inc.
7800 Shoal Creek Blvd
Suite 230 S.
Austin TX 78757

Bill To
Fetch Media Ltd.
56 Shoreditch High Street
Unit 3.09
London
E1 6JJ
United Kingdom

TOTAL

\$19,933.91

Due Date: 04/30/2017

Terms	Due Date	PO #
Net 30	04/30/2017	Uber US

Item	Amount
March 2017 - Fetch Media - Uber US Service Period: March 1-31, 2017	\$19,933.91

Bridge Bank, N.A.
55 Almaden Blvd.
San Jose, CA 95113
Routing: 121143260
Account: 0102366481
Name: Phunware, Inc.
SWIFT Code: BBFXUS6S

Subtotal \$19,933.91

Tax Total (0%) \$0.00

Total \$19,933.91



INV9916



Invoice

#INV9917

03/31/2017

Phunware
Phunware, Inc.
7800 Shoal Creek Blvd
Suite 230 S.
Austin TX 78757

Bill To
Fetch Media Ltd.
56 Shoreditch High Street
Unit 3.09
London
E1 6JJ
United Kingdom

TOTAL

\$1,250,936.91

Due Date: 04/30/2017

Terms	Due Date	PO #
Net 30	04/30/2017	Uber Int'l

Item	Amount
March 2017 - Fetch Media - Uber International Service Period: March 1-31, 2017	\$1,250,936.91

Bridge Bank, N.A.
55 Almaden Blvd.
San Jose, CA 95113
Routing: 121143260
Account: 0102366481
Name: Phunware, Inc.
SWIFT Code: BBFXUS6S

Subtotal \$1,250,936.91

Tax Total (0%) \$0.00

Total \$1,250,936.91



INV9917



Invoice

#INV10034

04/30/2017

Phunware
Phunware, Inc.
7800 Shoal Creek Blvd
Suite 230 S.
Austin TX 78757

Bill To
Fetch Media Ltd.
56 Shoreditch High Street
Unit 3.09
London
E1 6JJ
United Kingdom

TOTAL

\$223,227.40

Due Date: 05/30/2017

Terms	Due Date	PO #
Net 30	05/30/2017	Uber Int'l

Item	Amount
Fetch Media - Uber International Service Month - April 2017	\$223,227.40

Bridge Bank, N.A.
55 Almaden Blvd.
San Jose, CA 95113
Routing: 121143260
Account: 0102366481
Name: Phunware, Inc.
SWIFT Code: BBFXUS6S

Subtotal \$223,227.40

Tax Total (0%) \$0.00

Total \$223,227.40



INV10034

ORIGINAL

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Dylan J. Liddiard, State Bar No. 203055
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road, Palo Alto, CA 94304
TELEPHONE NO.: 650-493-9300 FAX NO.: 650-493-6811
ATTORNEY FOR (Name): Plaintiff Phunware, Inc.

FOR COURT USE ONLY
FILED
San Francisco County Superior Court
SEP 26 2017
CLERK OF THE COURT
By: *[Signature]*
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF **San Francisco**
STREET ADDRESS: 400 McAllister Street
MAILING ADDRESS:
CITY AND ZIP CODE: San Francisco, CA 94102
BRANCH NAME:
CASE NAME: Phunware, Inc. v. Uber technologies, inc.

CIVIL CASE COVER SHEET
 Unlimited (Amount demanded exceeds \$25,000)
 Limited (Amount demanded is \$25,000 or less)

Complex Case Designation
 Counter **Joinder**
Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

CASE NUMBER: **CGC-17-561546**
JUDGE:
DEPT:

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort

- Auto (22)
- Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

- Asbestos (04)
- Product liability (24)
- Medical malpractice (45)
- Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort

- Business tort/unfair business practice (07)
- Civil rights (08)
- Defamation (13)
- Fraud (16)
- Intellectual property (19)
- Professional negligence (25)
- Other non-PI/PD/WD tort (35)

Employment

- Wrongful termination (36)
- Other employment (15)

Contract

- Breach of contract/warranty (06)
- Rule 3.740 collections (09)
- Other collections (09)
- Insurance coverage (18)
- Other contract (37)

Real Property

- Eminent domain/Inverse condemnation (14)
- Wrongful eviction (33)
- Other real property (26)

Unlawful Detainer

- Commercial (31)
- Residential (32)
- Drugs (38)

Judicial Review

- Asset forfeiture (05)
- Petition re: arbitration award (11)
- Writ of mandate (02)
- Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403)

- Antitrust/Trade regulation (03)
- Construction defect (10)
- Mass tort (40)
- Securities litigation (28)
- Environmental/Toxic tort (30)
- Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment

- Enforcement of judgment (20)

Miscellaneous Civil Complaint

- RICO (27)
- Other complaint (not specified above) (42)

Miscellaneous Civil Petition

- Partnership and corporate governance (21)
- Other petition (not specified above) (43)

2. This case is is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

- a. Large number of separately represented parties
- b. Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
- c. Substantial amount of documentary evidence
- d. Large number of witnesses
- e. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
- f. Substantial postjudgment judicial supervision

3. Remedies sought (check all that apply): a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive

4. Number of causes of action (specify): 1

5. This case is is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: September 26, 2017

Dylan J. Liddiard

(TYPE OR PRINT NAME)

[Signature]

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.