

DEVELOPER PROGRAM AGREEMENT

TERMS AND CONDITIONS

This Zipit Developer Program Agreement (“Agreement”) is made by Zipit Wireless, Inc., a Delaware corporation (“Zipit”), and Developer as identified above, who provides the information requested and clicks on the “I ACCEPT” button to accept the terms of this Agreement.

RECITALS

- A. Zipit is the developer and manufacturer of the Zipit Wireless Messenger 2 (the “Z2”), a software and hardware product for instant messaging and other personal electronic applications.
- B. Zipit wishes to make available to the developer community certain of the software, code and information to allow development by such community of applications for use either as a part of the Z2 or utilizing the Z2 hardware independently of the Z2 application software.
- C. Additionally, Zipit wishes to provide to the developer community a forum for accessing the software, code and information and for sharing their development efforts and information through a Zipit created and maintained website (the “Developer’s Exchange”).
- D. Zipit is willing to make available certain software, code and information and provide the Developer’s Exchange only upon the agreement of Developer to be bound by these terms and conditions.

AGREEMENT

1. Services and Licenses

a. *Services.* Subject to the terms and conditions set forth in this Agreement, Zipit agrees (i) to provide to Developer a non-transferable and non-exclusive account enabling Developer to access the Developer’s Exchange, (ii) to provide within the Developer’s Exchange a forum for accessing and sharing information on and related to application development for the Z2, and (iii) to provide access for the download of the software and code licensed under this Agreement (collectively, the “Services.”) The Services may be provided by Zipit or such third parties that Zipit designates.

b. *Software License.* The software provided through the Developer’s Exchange (the “Software”) is subject to one of two licenses. Certain of the code is subject to a public license (“Public Code”), such as the Free Software Foundation’s [GNU General Public License](#) (the “GPL”), a copy of which is available by clicking [here](#). Zipit cannot negotiate or change the terms of the GPL. As for all software identified as Zipit proprietary code (“Proprietary Code”), Zipit grants Developer a limited, non-transferable, non-exclusive license to use, copy and modify the Proprietary Code solely for non-commercial, internal purposes. Developer expressly is prohibited from any distribution or public display or broadcast of any Proprietary Code.

c. *Documentation License.* The information provided by Zipit through the Developer’s Exchange is the proprietary material of Zipit (the “Documentation”) and is protected by copyright. Zipit grants

Developer a limited, non-transferable, non-exclusive license to use the Documentation solely for non-commercial, internal purposes.

d. *Trademark License.* Zipit owns all rights and title in and to the Zipit trademark, logo and other associated trademarks used by Zipit (the “Marks”). If Developer wishes to denote any Developer Creations, as defined below, as being compatible with the Z2, Developer must submit the Developer Creation to Zipit for evaluation. If Zipit, through its evaluation, finds the Developer Creation to be compatible with the Z2 and to otherwise meet the Zipit’s standards, as determined by Zipit in its sole discretion, Zipit will grant Developer a limited, non-transferable, non-exclusive license to use the Marks solely to indicate that Developer Creations are compatible with the Z2.

e. *Retention of Rights.* All rights not granted herein are and remain the rights of Zipit.

2. Proprietary Rights

a. *Zipit’s Proprietary Rights.* Zipit retains all right, title and interest (including copyright and other proprietary or intellectual property rights) in the Proprietary Code, Documentation, Developer’s Exchange and all legally protectable elements thereto.

b. *Developer’s Proprietary Rights.* Such right to and title in and to any developments (“Developer Creations”) created by Developer shall be vested in Developer. Developer hereby agrees not to sell, market or otherwise distribute any Z2 hardware loaded with any Developer Creations without the consent of Zipit, which consent will be in Zipit’s sole discretion.

c. *Protection of Marks.* Developer agrees that the use of the Zipit’s Marks shall conform to the standards and be used in accordance with the [Trademark Usage Guidelines](#), set by, and revised from time to time by, Zipit and posted on the Developer’s Exchange, which Developer agrees to review from time to time. Developer agrees to exercise its best efforts to cooperate with Zipit in monitoring and controlling any use of Zipit’s Mark. Developer shall not use the Zipit’s Mark in such a way as to indicate that Developer is providing the goods or services of Zipit or in any manner that may harm the reputation of Zipit. Upon termination of this Agreement, Developer shall immediately cease all use of Zipit’s Marks and return all electronic copies of Zipit’s Marks to Zipit.

d. *Intellectual Property Rights of Third Parties.* Developer posting material on or through the Service or obtaining material from sources other than Provider on or through the Service, shall not do so in any manner that infringes the copyrights or other intellectual property rights of third parties. Should Zipit obtain actual knowledge of such violations, Zipit will remove or disable connections to the violating material. Zipit has the right to terminate Developer’s access to the Developer’s Exchange, in whole or part, and to terminate this Agreement if, in the opinion of Zipit, Developer is an abuser of third parties’ copyrights or other intellectual property rights. Furthermore, if Zipit is subject to liability or incurs costs in defending any allegation of liability resulting from Developer’s postings, Developer shall indemnify and make Zipit whole, including paying reasonable attorney’s fees.

3. Limitations

a. *Accessibility.* Developer understands that from time to time the Services may be inaccessible or inoperable for any reason, including, without limitation: (i) equipment malfunctions; (ii) periodic

maintenance procedures or repairs which Zipit may undertake from time to time; or (iii) causes beyond the control of Zipit or which are not reasonably foreseeable by Zipit, including, without limitation, interruption or failure of telecommunication or digital transmission links, hostile network attacks, network congestion or other failures. Developer agrees that Zipit has no control of availability of Services on a continuous or uninterrupted basis.

b. *Security.* Access to Developer's Exchange requires a valid user ID and password (the "Access Codes"). It is Developer's responsibility to keep secure its own Access Codes and monitor use of the Access Codes.

c. *Privacy.* See Zipit's [Privacy Policy](#) outlining Zipit's privacy practices.

d. *Links.* For User's convenience, the Developer's Exchange may contain links to third party sites that Zipit does not own or maintain. With respect to those sites, Zipit assumes no liability, and does not endorse or make any representations about any information, products, or services associated with those sites, or any results that may be obtained from using such sites. Developer's access and use of such third party sites, and use of any information obtained as a result of that access, is at Developer's sole risk.

4. Developer's Representations and Covenants

a. *Representations.* Developer represents and warrants to Zipit that: (a) Developer has the power and authority to enter into and perform its obligations under this Agreement; (b) Developer, and Developer's employees and agents who use the Software, Documentation or Services, shall comply with all terms and conditions of this Agreement; (c) Developer has advised and notified each of its employees and agents in writing of all terms, conditions, duties and obligations under this Agreement, and all employees and agents agree to all such terms, conditions, duties and obligations applicable to each under this Agreement; and (d) the undersigned representative of Developer is authorized to execute this Agreement on behalf of Developer.

b. *Confidentiality.* Developer agrees that all information disclosed by Zipit through the Developer's Exchange that relates to Zipit's products, designs, business plans, business opportunities, finances, research, development, know-how, personnel, or third party confidential information, will be considered and referred to collectively as "Confidential Information." Confidential Information, however, does not include: (i) information that Zipit makes generally available to the public; (ii) information that Developer can demonstrate to have had rightfully in its possession prior to disclosure to Developer by Zipit; (iii) information that is independently developed by Developer without the use of any Confidential Information; (iv) information that Developer rightfully obtains from a third party who has been given the right to transfer or disclose it by Zipit; or (v) any third party software or documentation provided by Zipit and accompanied by licensing terms that do not impose confidentiality obligation on the use or disclosure of such software and documentation, for example, software governed by the GPL. Developer agrees not to disclose, publish, or disseminate Confidential Information to any third party and to take reasonable precautions to prevent any unauthorized use, disclosure, publication or dissemination of Confidential Information. Developer agrees not to use Confidential Information other than as provided in this Agreement.

c. *Coordination with Zipit Provided Services.* If Developer desires to offer or provide any Developer Creations to third parties for a fee, royalty payment or other consideration ("Commercial

Applications”) and such Commercial Applications are to provide any services that are the same as or similar to the Zipit Provided Services, Developer agrees that it shall utilize only Zipit Provided Services in its Commercial Applications for the services of its Commercial Applications that are to be the same as or similar to the Zipit Provided Services. The terms for utilization of the Zipit Provided Services by Developer shall be mutually determined and agreed to by Zipit and Developer, both acting in good faith. “Zipit Provided Services” mean services provided by Zipit currently (including but not limited to instant messaging, texting and customizable backgrounds, themes, fonts and ringtones) and in the future, where such future services shall become part of the Zipit Provided Services only when made commercially available by Zipit.

d. *Reseller of Hardware.* If Developer desires to offer, provide or sell to third parties Developer Content load onto or otherwise coupled with any Z2, Developer agrees to offer such bundled Z2 and Developer Content only with the prior approval and consent of Zipit.

5. Prohibited Uses

Developer is solely responsible for any and all acts and omissions that occur under Developer’s account or password, and Developer agrees not to engage in unacceptable use of the Service, which includes, without limitation, use by the Developer to: (a) disseminate, store, post, provide or transmit files, graphics, software or other material that actually or potentially infringes the copyright, trademark, patent, trade secret or other intellectual property right of any person; or (b) engage in any other activity deemed by Zipit to be in conflict with the spirit or intent of this Agreement. In the event Developer engages in any actions that violate the provisions of this Section 5, as determined by Zipit in its sole discretion, in addition to Zipit’s rights under Section 6, Zipit shall have the right to remove or block any content posted or otherwise provided by Developer to or through the Developer’s Exchange.

6. Term and Termination

This Agreement is effective upon Developer’s acceptance as set forth herein and shall continue in full force until terminated. Zipit reserves the right, in its sole discretion and without notice, at any time and for any reason, to: (a) remove or disable access to all or any portion of the Service; (b) suspend Developer’s access to or use of all or any portion of the Service; and (c) terminate this Agreement. Upon termination of this Agreement, Developer shall immediately cease all use of the Services, Software, Documentation and Marks and shall return to Zipit or destroy any and all copies of the Software, Documentation and Marks then in Developer’s possession and certify to Zipit that all such copies have been returned or destroyed.

7. Disclaimer of Warranty

THE SERVICES, SOFTWARE AND DOCUMENTATION ARE PROVIDED “AS IS” WITHOUT WARRANTY OF ANY KIND, EXPRESS OR IMPLIED. USE OF THE SERVICES, SOFTWARE AND DOCUMENTATION ARE AT DEVELOPER’S SOLE RISK. ZIPIT DOES NOT WARRANT THAT THE SERVICES, SOFTWARE, DOCUMENTATION OR ANY DATA CONTAINED IN OR RECEIVED THROUGH THE SERVICES, WILL BE UNINTERRUPTED OR ERROR FREE, NOR DOES ZIPIT MAKE ANY WARRANTY AS TO ANY RESULTS THAT MAY BE OBTAINED BY USE OF THE SERVICES, SOFTWARE OR DOCUMENTATION. ZIPIT MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED

WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, IN RELATION TO THE SERVICES.

8. Limitation of Liability

UNDER NO CIRCUMSTANCES SHALL ZIPIT BE LIABLE TO DEVELOPER OR ANY OTHER PERSON FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR PUNITIVE DAMAGES FOR ANY MATTER ARISING FROM OR RELATING TO THIS AGREEMENT, THE SERVICES OR THE INTERNET GENERALLY, INCLUDING, WITHOUT LIMITATION, DEVELOPER'S USE OR INABILITY TO USE THE SERVICES, ANY CHANGES TO OR INACCESSIBILITY OF THE SERVICES, DELAY, FAILURE, OR ANY DATA OR MATERIAL FROM A THIRD PERSON ACCESSED ON OR THROUGH THE SERVICES, WHETHER SUCH LIABILITY IS ASSERTED ON THE BASIS OF CONTRACT, TORT OR OTHERWISE. IN NO EVENT SHALL ZIPIT'S LIABILITY FOR ANY DIRECT DAMAGES ARISING FROM OR RELATING TO THIS AGREEMENT, THE SERVICES OR THE INTERNET GENERALLY EXCEED \$100. SOME STATES PROHIBIT THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, THUS THIS LIMITATION OF LIABILITY MAY NOT APPLY TO DEVELOPER. IF DEVELOPER IS DISSATISFIED WITH THE SERVICES, DEVELOPER'S SOLE AND EXCLUSIVE REMEDY SHALL BE FOR DEVELOPER TO DISCONTINUE USE OF THE SERVICES.

9. Indemnification

Developer agrees to indemnify, hold harmless and defend Zipit and its directors, officers, employees and agents from and against any action, claim, demand or liability, including reasonable attorney's fees and costs, arising from or relating to (i) infringement of third party intellectual property or other proprietary rights by any Developer Creations or on account of information provided by Developer through the Services; or (ii) use, negligent use or fraudulent use of the Services by Developer, or any other authorized or unauthorized third party.

10. Miscellaneous

a. *Independent Contractors.* The parties and their respective personnel are and shall be independent contractors and neither party by virtue of this Agreement shall have any right, power or authority to act or create any obligation, express or implied, on behalf of the other party.

b. *Waiver.* No waiver of any provision hereof or of any right or remedy hereunder shall be effective unless in writing and signed by the party against whom such waiver is sought to be enforced. No delay in exercising, no course of dealing with respect to, or no partial exercise of any right or remedy hereunder shall constitute a waiver of any other right or remedy, or future exercise thereof.

c. *Severability.* If any provision of this Agreement is determined to be invalid under any applicable statute or rule of law, it is to that extent to be deemed omitted, and the balance of the Agreement shall remain enforceable.

d. *Notice.* All notices shall be in writing and shall be deemed to be delivered when sent by first-class mail, postage prepaid, or when sent by facsimile or e-mail to either parties' last known street,

facsimile or e-mail address, respectively. Developer hereby consents to notice by email. All notices shall be directed to the parties at the respective addresses given simultaneous with the execution of this Agreement or to such other address as either party may, from time to time, provide to the other party.

e. *Amendment.* Zipit shall have the right, at any time and without notice, to add to or modify the terms of this Agreement, simply by delivering such amended terms to Developer by email at the address provided to Developer by Zipit. Developer's access to or use of the Services after the date such amended terms are delivered to Developer shall be deemed to constitute acceptance of such amended terms.

f. *Governing Law.* This Agreement shall be governed in all respects by the laws of the State of South Carolina without regard to its conflict of laws provisions. The parties to this Agreement expressly waive any right they may have to a jury trial. The parties agree that any litigation arising out of this Agreement, including any litigation requiring the construction or interpretation of this Agreement, shall be heard exclusively in the federal or state courts located in Greenville County, South Carolina. All parties consent to the jurisdiction of such courts, and waive any right to have any proceeding transferred from such courts on the ground of improper venue or inconvenient forum.

g. *Survival.* All provisions that by their nature are intended to survive termination shall survive any termination or expiration of this Agreement.

h. *Force Majeure.* If the performance of any part of this Agreement by either party is prevented, hindered, delayed or otherwise made impracticable by reason of any flood, riot, fire, judicial or governmental action, labor disputes, act of God or any other causes beyond the control of either party, that party shall be excused from such to the extent that it is prevented, hindered or delayed by such causes.

i. *Dispute Resolution.* The parties agree to use their best efforts to resolve any dispute that may arise under this Agreement through good faith negotiations. No party shall commence any litigation in relation to this Agreement until the chief executives of both parties have met for the purpose of endeavoring to resolve the dispute on mutually acceptable terms. Litigation may commence if the two chief executives can not agree on a date to meet within 30 days of the first attempt by either party to establish said meeting.

j. *Costs and Fees.* If any litigation shall ever occur between the parties arising from or related to this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs from the non-prevailing party. This includes, without limitation, the recovery of any reasonable attorneys' fees and costs incurred in addressing violations of this Agreement prior to litigation.

k. *Entire Agreement.* This Agreement constitutes the complete and exclusive statement of all mutual understandings between the parties with respect to the subject matter hereof, superseding all prior or contemporaneous proposals, communications and understandings, oral or written.

YOU AGREE THAT YOU HAVE READ, UNDERSTOOD AND ACCEPTED THE TERMS AND CONDITIONS OF THIS AGREEMENT AND CERTIFY THAT YOU HAVE THE AUTHORIZATION TO EXECUTE THIS AGREEMENT ON BEHALF OF THE DEVELOPER.