

SmartDeskCRM (SmartDesk) Affiliate Partner Program Terms and Conditions



This agreement, including the appendices attached hereto, (collectively the “Agreement”) is made and entered into by and between **SmartDeskCRM Inc.**, an Ontario corporation located at Suite 200, 601 Dundas Street South, Whitby, Ontario, Canada, L1N 4L1 (“**SMARTDESK**”) and you or your company (“**Company**”).

1. PARTNER

1.1. Resale Rights Granted.

1.1.1. **Company Appointment.** Subject to and in accordance with the terms and conditions of this Agreement, SMARTDESK hereby appoints Company as a nonexclusive reseller of the SmartDesk Services to clients and grants to Company a nonexclusive, nontransferable right to market and otherwise promote the SmartDesk Services to clients, solicit orders from interested clients for SmartDesk Services, and refer such clients to SMARTDESK for potential enrollment in one or more SmartDesk Service.

1.1.2. **Sales and Referral Efforts.** Company shall use its best efforts to refer to SMARTDESK, and solicit orders from, Clients interested in purchasing any of the SmartDesk Services. SMARTDESK reserves the right to refuse to provide the SmartDesk Services to any Client referred to SMARTDESK by Company.

1.1.3. **No Unauthorized Warranties.** Company shall accurately describe SMARTDESK, its company, and the SmartDesk Services to each Client. Without limiting the generality of the foregoing, Company will make no representation, warranty or description regarding the performance, functional characteristics or other aspects of any SmartDesk Service that is beyond those stated in SMARTDESK’s then-current and officially approved marketing and promotional materials for the applicable SmartDesk Service. Company is not authorized to, and will not, make any representation or warranty on behalf of SmartDesk except as SMARTDESK may expressly consent to in writing.

1.1.4. **Client Fees.** Company shall not surcharge, bill or collect any fees from Approved Clients for their enrollment in or use of the SmartDesk Services. SMARTDESK shall quote the amount of each SmartDesk fee to interested Clients, unless as agreed and Company will use SMARTDESK authorized materials in their proposal.

1.1.5.C. SMARTDESK’s Obligations.

1.1.5.1. **Email to Clients.** Upon SMARTDESK’s receipt of all information that is required to activate SmartDesk Services, it shall send an email message to client at the email address provided to SMARTDESK instructing client on the steps it needs to take to activate the applicable services.

1.1.5.2. **Billing Obligations.** SMARTDESK shall bill Approved Clients for all SmartDesk Services, as applicable. Billing shall be accordance with the terms of the Agreement between it and an Approved Client.

1.1.5.3. **Customer Service.** During the respective term of the Client Service Agreement, if the Approved Client is current in payment of all fees owing to SMARTDESK and is otherwise not in default under such agreement, SMARTDESK and/or its Suppliers shall provide customer service to such Approved Client via telephone and email.

1.1.5.4. **Technical Assistance.** SMARTDESK will provide reasonable technical assistance to Company as may be necessary and appropriate to assist Company in effectively carrying out its obligations under this Agreement.

1.1.5.5. **Marketing Assistance.** SMARTDESK will provide marketing assistance to Company as may be necessary and appropriate to assist Company in effectively marketing SMARTDESK services under this Agreement.

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1.1.5.6. **SmartDesk Services.** SMARTDESK reserves the right to refuse to provide SmartDesk Service to any client. In accordance with the terms and conditions contained herein, SMARTDESK will host all the SmartDesk Services on servers maintained by or on behalf of SMARTDESK or one or more of its Companies. Subject to the terms hereof, SMARTDESK will use commercially reasonable efforts to provide the SmartDesk Services to Approved Clients and maintain the same in an uninterrupted and error-free fashion consistent with its practices in effect as of the Effective Date, provided that the applicable Approved Client is not in default of its obligations to SMARTDESK pursuant to the Agreement.

1.2. Commissions and Cost of Performance.

1.2.1. **Commissions.** In months when Company earns a Commission payment, SMARTDESK will pay Commissions to Company in the amounts and as set forth in the current Affiliate Program offering (subject to change from time to time with advance notice by SMARTDESK).

1.2.2. **Payments; Domestic and International.** Payments to Companies will be deposited into Company's bank account, the details of which Company will provide to SMARTDESK. If Company's bank account number and/or federal HST number changes, Company shall promptly provide SMARTDESK with written notice of the change and the new number(s). Payments paid via cheque is discouraged but where provided, however, payments will not be made via paper check until the Commissions payable to Company exceed \$100. SMARTDESK will pay Commissions to Company only if the applicable fees are collected from the Approved Client by the 15th day of the month and based on the **third month** in which SMARTDESK billed such Approved Client for such fees. Commissions generated by Approved Clients will not be paid to Company where payments owing from such Approved Clients are overdue and require collection efforts by SMARTDESK or in instances where the Approved Client engages a new Client service provider. SMARTDESK reserves the right to terminate the accrual and payment of Commissions to Company if Company is in breach of this Agreement.

1.2.3. **Taxes.** All Commissions and any other payments stated herein exclude, and Company will pay, any taxes, levies, fees, charges or other assessments, including, without limitations, excise, property, sales, use, ad valorem, transfer, franchise, profits, license, withholding or other taxes imposed by any level of government or any agency, subdivision or instrumentality thereof, and any interest, fines and any and all penalties or additions relating to such taxes, charges, fees, levies or other assessments related to the Parties' performance of their obligations or exercise of their rights under this agreement and any related duties, tariffs, imposts and similar charges, excluding only those taxes based upon SMARTDESK's net income or gross receipts.

1.2.4. **Cost of Performance.** Unless otherwise expressly provided herein, each Party shall be solely responsible for the costs of its own performance hereunder, and will not be entitled to any reimbursement from the other Party for such costs.

2. CERTIFICATION

2.1. Solution and Developer Certification

2.1.1. **Certification Program Description.** SMARTDESK offers two types of certifications: (i) Certified SmartDesk Partner, designed for companies that provide/refer marketing automation solutions for Clients; and (ii) Certified SmartDesk Solutions Partner, for developers, integrators and value-added resellers that develop custom website and/or marketing solutions for Clients.

2.1.2. **Enrollment.** Subject to Company's compliance with the terms and conditions of this Agreement and achieving compliance with the applicable certification requirements, SMARTDESK will, in its sole discretion, certify Company and/or its solution. Initial and continued certification shall be governed by the terms of this Agreement and applicable solution and developer requirements and as may be developed over time.

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- 2.1.3. **Company Obligations.** Upon certification, Company agrees to: (i) display the “SmartDesk Certified” and/or “SmartDesk Partner” logo (“Logo”) without alteration, modification, or misrepresentation and in accordance with the Logo Usage Guidelines; (ii) upgrade its solutions to comply with future versions of SMARTDESK’s API; (iii) maintain accurate, up-to-date contact information with SMARTDESK; and (iv) abide by and maintain the applicable Certification Requirements.
- 2.1.4. **SMARTDESK Undertakings.** Subsequent to certification, SMARTDESK shall: (i) deliver notice of Company’s certification via electronic mail; (ii) list Company in an online directory of certified SmartDesk solutions and/or developers hosted by SMARTDESK or a third party; (iii) grant Company rights to display the Logo; and (iv) provide advance notification of system upgrades, new or improved features, functions and change in pricing or packaging.

3. TERMS AND CONDITIONS

3.1. Term and Termination.

- 3.1.1. **Term.** The term of this Agreement (the “Term”) shall commence on the Effective Date and, unless earlier terminated in accordance with this Agreement, continue thereafter unless and until either Party provides the other Party with at least thirty (30) days written notice of its intent to terminate this Agreement.
- 3.1.2. **Termination by SMARTDESK.** SMARTDESK may terminate this Agreement immediately and without advance notice if: (a) Company is in breach or default of any other obligation set forth in of this Agreement; (b) SMARTDESK determines, in its sole discretion, that Company’s business practices are detrimental to the achievement of SMARTDESK business objectives; (c) SMARTDESK has reason to believe that there is an alleged or actual violation by Company of any laws, policies, guidelines, regulations, ordinances, rules and/or orders of any governmental authority or regulatory body having jurisdiction over the subject matter hereof; (d) Company violates SMARTDESK’s Acceptable Use Policy; (e) Company does not establish a new Client account for a period of twelve (12) months or greater; (f) any Person that SMARTDESK reasonably determines to be a competitor or prospective competitor of SMARTDESK or any of its Companies acquires the power or ability, directly or indirectly, to exercise any controlling influence over Company or Company’s management, operations or policies (either alone or pursuant to an arrangement or understanding with one or more Persons); or (g) Company (i) makes a general assignment for the benefit of creditors, (ii) files a voluntary petition of bankruptcy, suffers or permits the appointment of a receiver for its business or assets, (iii) becomes subject to any proceedings under any bankruptcy or insolvency law where such proceeding has not been dismissed within sixty (60) days, or (iv) has wound up or liquidated, voluntarily or otherwise.
- 3.1.3. **Effect of Termination.** In the event of termination in accordance with this Section 3, SMARTDESK shall pay Company, within sixty (60) days of the effective termination date, only the Commissions owing to Company as of the effective termination date. Upon expiration or termination of this Agreement for any reason: (i) Company shall promptly return to SMARTDESK all equipment, sales literature, documentation and materials supplied by SMARTDESK, (ii) SMARTDESK may continue to provide the SmartDesk Services to any and all Approved Clients and assume sole responsibility for such Approved Clients for purposes of this Agreement; and (iii) Company’s right to earn Commissions shall terminate.

3.2. Representations and Warranties.

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- 3.2.1. **Company.** Company represents and warrants to SMARTDESK that: (a) Company will conduct its business at all times in a manner that reflects favorably on the goodwill and reputation of SMARTDESK and its Supplier(s) and will not engage in any illegal or unethical business practices; and (b) all representations and statements made by Company in this Agreement, or in any other document relating hereto by Company or on Company's behalf, are true, accurate and complete in all material respects. Company hereby authorizes SMARTDESK to investigate and confirm the information submitted by Company herein. For this purpose, SMARTDESK may utilize credit bureau/reporting agencies and/or its own agents.
- 3.2.2. **Mutual.** Each Party represents and warrants to the other that (a) it has full power and legal right to execute and deliver this Agreement and to perform its obligations under this Agreement, (b) no authorization or approval from any third Party is required in connection with such Party's execution, delivery or performance of this Agreement, (c) this Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with its terms, and (d) it has all right, title or interest, or valid license to use, its respective Trademarks, and that its grant of rights associated therewith do not violate any Proprietary Rights of any third Party.
- 3.2.3. **Indemnification.** Company shall defend, indemnify, and hold SMARTDESK, its Companies, and any of their officers, directors, agents and employees harmless from and against any action, claim or suit brought against SMARTDESK or its Companies, including any and all losses, damages, costs, and expenses (including reasonable attorneys' fees) arising from or out of: (a) any breach or alleged breach by Company of any representation, warranty or other obligation of Company under this Agreement; (b) any alleged or actual violation by Company of any laws, policies, guidelines, regulations, ordinances, rules and/or orders of any governmental authority or regulatory body having jurisdiction over Company and the subject matter hereof; (c) the negligence or willful misconduct of Company, its employees or agents; (d) any violation of SMARTDESK's Acceptable Use Policy; (e) Company's advertising, marketing, promotion, sale, or distribution of any of the SmartDesk Services; or (f) the inaccuracy of information provided to SMARTDESK by Company regarding a client. In the event Company causes fines and/or penalties to be charged to SMARTDESK for its violation of Payment rules, Company agrees to immediately reimburse SMARTDESK for said fines or penalties.
- 3.3. **Ownership and Use of Enrollment Data.** To the extent permissible and in compliance with applicable law, and as between the Parties, SMARTDESK shall retain full ownership of all data submitted by Company and/or client in connection with client's enrollment for and use of the SmartDesk Services and hosted or stored on SMARTDESK servers, including but not limited to: name, mailing and shipping address, email address, phone number. SMARTDESK agrees to use such data only as necessary to perform hereunder and for no other purpose, and hereby grants Company a royalty-free, fully paid up right, during the Term, to use such data only as necessary to perform its rights and obligations hereunder and for no other purpose. Nothing in this Agreement shall prevent or restrict Company from using any information it collects or receives independent of its performance under this Agreement.
- 3.4. Intellectual Property.**
- 3.4.1. **SMARTDESK.** The Parties agree that SMARTDESK owns and retains all right, title and interest in and to the SMARTDESK trademarks, Website, the SmartDesk Services, all content and documentation furnished to Company by SMARTDESK hereunder, and the SmartDesk technology. No title to or ownership of any of the foregoing is granted or otherwise transferred to Company or any other entity or person under this Agreement. Company shall not reverse engineer, disassemble, decompile or otherwise attempt to discover the source code or trade secrets for any of the SmartDesk Services or related technology.
- 3.4.2. **Services Documentation License.** Subject to the terms of this Agreement, SMARTDESK hereby grants to Company and Company hereby accepts from SMARTDESK a personal, limited, non-exclusive, non-transferable license and right to the SmartDesk Services Documentation for the following purposes:

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- 3.4.2.1. use the accompanying Services Documentation solely for the purpose of using the SmartDesk APIs and providing access to the Services and/or using Services on behalf of Approved Client(s); and
- 3.4.2.2. create a reasonable number of copies of the SmartDesk Services Documentation, with all copyright notices intact, for archival purposes only.

3.4.3. **Company.** The Parties agree that Company owns and retains all right, title and interest in and to the Company trademarks and Company reserves all rights in the foregoing.

3.4.4. **Use of Trademarks.** Each Party hereby grants to the other Party the right to use, reproduce, publish, perform and display the other Party's Trademarks in promotional and marketing materials and electronic and printed advertising, publicity, press releases, newsletters and mailings about or related to the SmartDesk Services. Each Party shall strictly comply with all standards with respect to the other Party's Trademarks contained herein or which may be furnished by such Party from time to time. All uses of the other Party's Trademarks shall inure to the benefit of the Party owning such Trademark. Neither Party shall create a combination mark consisting of one or more Trademarks of each Party. Either Party may update or change the list of Trademarks usable by the other Party hereunder at any time by written notice to the other Party.

3.5. Confidentiality and Nondisclosure.

3.5.1. **Use of Confidential Information.** Each Party that receives information (the "Receiving Party") from the other Party (the "Disclosing Party") agrees to use reasonable best efforts to protect all non-public information and know-how of the Disclosing Party that is either designated as proprietary and/or confidential or that, by the nature of the circumstances surrounding disclosure, ought in good faith to be treated as proprietary and/or confidential ("Confidential Information"), and in any event, to take precautions at least as great as those taken to protect its own Confidential Information of a similar nature. Each Party agrees that the terms and conditions of this Agreement will be Confidential Information, provided that each Party may disclose the terms and conditions of this Agreement to its immediate legal and financial consultants in the ordinary course of its business.

3.5.2. **Exclusions.** The foregoing restrictions will not apply to any information that: (a) the Receiving Party can document it had in its possession prior to disclosure by the Disclosing Party, (b) was in or entered the public domain through no fault of the Receiving Party, (c) is disclosed to the Receiving Party by a third party legally entitled to make such disclosure without violation of any obligation of confidentiality, (d) is required to be disclosed by governmental or judicial order, requested in response to legal or governmental inquiries, or disclosed in connection with judicial and/or arbitral proceedings between the Parties, in which case the Party so requested shall give the other Party prompt written notice and use commercially reasonable efforts to ensure that such disclosure is accorded confidential treatment or (e) the Receiving Party can document was independently developed by the Receiving Party without reference to any Confidential Information of the Disclosing Party. Upon request of the Disclosing Party, the Receiving Party will return to the other all materials, in any medium, that contain, embody, reflect or reference all or any part of any Confidential Information of the other Party. Each Party acknowledges that breach of this provision by it may result in irreparable harm to the other Party, for which money damages may be an insufficient remedy, and therefore that the other Party will be entitled to seek injunctive relief to enforce the provisions of this section.

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3.6. **Compliance with Law and SMARTDESK and SmartDesk Guidelines.** Company will comply, at its own expense, with all laws, policies, guidelines, regulations, ordinances, rules applicable to Company, its business and/or orders of any governmental authority or regulatory body having jurisdiction over the subject matter hereof. Company acknowledges that client and Company, and not SMARTDESK, is responsible for the security of any regulated data (such as credit card data, personal information or other data) while in Company's possession. At all times during the term of the Agreement, Company will comply with all applicable laws, regulations and rules, including, without limitation. In addition, Company shall comply with all the current policies, procedures and guidelines of SMARTDESK governing the SmartDesk Services. Company shall not use the SmartDesk Services in any manner, or in furtherance of any activity that may cause SMARTDESK to be subject to investigation, prosecution, or legal action.

3.7. General Provisions.

3.7.1. **Publicity.** The Parties may work together to issue publicity and general marketing communications concerning their relationship and other mutually agreed-upon matters, provided, however, that neither Party will have any obligation to do so. In addition, neither Party will issue such publicity and general marketing communications concerning this relationship without the prior written consent of the other Party.

3.7.2. **Non-exclusivity.** This Agreement does not confer on either Party any rights that are exclusive. Each Party is free to contract with others with respect to the subject matter of this Agreement.

3.7.3. **Relationship of the Parties.** The Parties are independent contractors and nothing in this Agreement shall make them joint ventures, Companies, employees, agents or other representatives of the other Party. Neither Party shall make any representation that suggests otherwise.

3.7.4. **Non-solicitation.** Company shall not directly or indirectly, whether or not for compensation, engage in any business activity (whether as an employee, proprietor, officer, director, agent, trustee, Company or creditor lending money for the purpose of establishing or operating any such business) that (a) induces or attempts to induce, directly or indirectly, any Client to modify or terminate such Client's business association with SMARTDESK or (b) interferes with, disrupts or attempts to disrupt any present business relationship, contractual or otherwise, between SMARTDESK and any Client, client, supplier, consultant, agent or employee of SMARTDESK. The Parties acknowledge that any breach of these non-solicitation provisions will cause immediate, irreparable and continuing damage to SMARTDESK for which there is no adequate remedy at law and that in the event of any breach or violation or threatened breach or violation of these non-solicitation provisions, SMARTDESK be entitled to temporary, preliminary and permanent injunctive relief and such other legal and equitable remedies as may be provided by applicable law (without the necessity of posting any bond or other security), including damages, costs of suit and attorney's fees.

3.7.5. **Notices.** All legal notices to Company shall be given electronically, sent to the electronic mail address provided in the Company Reseller Application and/or posted in the Announcement section of Company's SmartDesk account. All notices to SMARTDESK shall be in writing and sent to SMARTDESK at Suite 200, 601 Dundas Street South, Whitby, Ontario, Canada, L1N 4L1, or to info@smartdeskcrm.com Attention: Contracts Manager. Such written notice will be deemed given upon personal delivery, upon confirmation of receipt if sent by email, or three (3) days after the date of mailing if sent by certified or registered mail, postage prepaid.

3.7.6. **Amendment.** SMARTDESK may amend this Agreement at any time upon notice to Company of not less than ten (10) days prior to the effective date of such amendment, provided that any amendment for any fee increase may become effective upon not less than thirty (30) days' notice. No other amendment, modification or waiver of any of the provisions of this Agreement will be valid unless set forth in a written instrument signed by both Parties.

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- 3.7.7. **Governing Law; Jurisdiction.** This Agreement and performance under it will be interpreted, construed and enforced in all respects in accordance with the laws of the Province of Ontario.
- 3.7.8. **Force Majeure.** Neither Party will be liable for any losses arising out of the delay or interruption of its performance of obligations under the Agreement due to any acts of God, acts of civil or military authorities, civil disturbances, wars, strikes or other labor disputes, fires, transportation contingencies, interruptions in telecommunications, utility, Internet services or network provider services, acts or omissions of a third party, infiltration or disruption of the SmartDesk Services by a third party by any means, including without limitation, DDoS attacks, software viruses, Trojan horses, worms, time bombs or any other software program or technology designed to disrupt or delay the SmartDesk Services, or other catastrophes or any other occurrences which are beyond such Parties' reasonable control (each a "Force Majeure Event"), provided that the Party delayed will provide the other Party notice of any such delay or interruption as soon as reasonably practicable, will use commercially reasonable efforts to minimize any delays or interruptions resulting from the Force Majeure Event and in no event will any failure to pay any monetary sum due under this Agreement be excused for any Force Majeure Event.
- 3.7.9. **Electronic Signature; Counterparts.** Company will acknowledge its consent to this Agreement via electronic signature.
- 3.7.10. **Interpretation.** The words and phrases used herein shall have the meaning generally understood in the payment processing industry. This Agreement shall be construed in accordance with its fair meaning and not for or against either Party on account of which Party drafted this Agreement.
- 3.7.11. **Entire Agreement.** This Agreement sets forth the entire understanding and agreement of the Parties, and supersedes any and all prior or contemporaneous oral or written agreements or understandings between the Parties, as to the subject matter of this Agreement.

By executing this Agreement, Company acknowledges and agrees, on behalf of its company and for itself, that it has reviewed and understands the Agreement and agrees to be legally bound by all of its terms and conditions