



## 3PMobile™ Performance Measurement by 5o9® PRIVATE BETA USE AGREEMENT

BY SIGNING UP FOR A 3PMOBILE PERFORMANCE MEASUREMENT SERVICE PRIVATE BETA ACCOUNT, YOU AGREE TO THE FOLLOWING TERMS AND CONDITIONS:

**1. Consideration.** In consideration of the mutual promises set forth hereinafter, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and not subject to further proof, 5o9, Inc. ("5o9") and Customer agree as follows:

### **2. Service.**

**2.1 Definition.** "Service", as used in this Agreement, shall mean the 3PMobile™ Performance Measurement Service by 5o9, which includes both a software application and Web application which are designed to measure mobile website performance from the user's perspective (in the browser).

**2.2 Subscription.** Subject to the terms and conditions of this Agreement, 5o9 hereby grants Customer a limited, revocable, non-exclusive, non-transferable and non-licensable evaluation subscription for the sole purpose of evaluating and testing 5o9's early-stage iteration ("**beta**" testing) of the 3PMobile™ Performance Measurement Service.

**2.3 Subscription Restrictions.** The Service, and any included software or application (as defined in Section 2.1. above), shall be utilized for the following purposes only:

- (a) As a mechanism to assist Customer in evaluating Customer's own website performance; and
- (b) As a mechanism to assist 5o9 to evaluate and assess the performance-testing functionality of its Service. Customer explicitly understands and acknowledges that 5o9 desires to test its Service in multiple "real-world" scenarios, and that the express purpose of such beta-testing is to locate and identify potential software errors ("**bugs**") which have not heretofore been identified. No liability of any kind will attach to 5o9 in the event such bugs exist.

Any use of the Service not expressly permitted in this Agreement is prohibited. Except as expressly permitted in this Agreement, Customer shall not for itself, nor allow or authorize any third party to: (i) allow use of or access to the Service, or sublicense, lease, transfer or assign its rights to access and use the Service, in whole or in part, to a third party; (ii) alter, enhance or otherwise modify the Service; (iii) remove or destroy any proprietary markings, confidential legends or any trademarks, trade names or brand names of 5o9 placed upon or contained within the Service; or (iv) use the Service for commercial purposes, or in a production environment, as a substitute for a paid subscription. It is fully understood and agreed that 5o9 has no obligation under this Agreement to provide support or maintenance services to Customer for the Service.

**2.4 Feedback.** Customer will provide feedback to 5o9, including an evaluation of the Service from time to time during the Term, as reasonably requested by 5o9. Such feedback and evaluation may be accomplished via the support links provided to Customer, and/or other methods approved by 5o9. Feedback shall include, but not be limited to, an assessment of the commercial value of existing features, discussion of any missing features and the reporting of any bugs. Customer is also encouraged to provide contact information related to other potential "beta"-users for additional testing.

**3. Term and Termination.** The "**Term**" shall commence on the Effective Date (which shall be the date Customer accepts the terms of this Agreement by so-indicating with the "radio" button provided at the bottom of the Agreement) and continue for up to 30 days (the "**Term**"). 5o9 reserves the right, in its sole and unfettered discretion, to immediately terminate access to the Service upon a breach of this Agreement by Customer. In the event of such breach, this Agreement shall also immediately terminate. Upon expiration of this Agreement, all subscription rights granted hereunder shall end, and Customer shall promptly cease use of the Service. Sections 2 and 4 through 8 shall survive termination or expiration of this Agreement.

**4. Ownership. "5o9 Property"** means (a) the Service, including structure, design and all related software, documentation, ideas, methods, methodologies and (b) any and all derivative works, enhancements or other modifications to any of the above. Subject only to the rights granted in this Agreement, as between 5o9 and Customer, 5o9 shall be the sole owner of the 5o9 Property and all intellectual property rights in and to the 5o9 Property. The Service utilizes software that is protected by U.S. Patent No. 7,873,710. 5o9 may utilize all suggestions, feedback, improvements or the like that Customer provides to 5o9, or otherwise makes with respect to the 5o9 Property without any obligation or recompense to Customer. Customer hereby disclaims any rights (other than the subscription and testing rights granted herein) to the 5o9 3P Mobile Software or Services, and agrees to protect, enforce and maintain the rights of 5o9 and 3P Mobile.

**5. Confidentiality. "Confidential Information"** means (a) any business or technical nonpublic information of Customer or 5o9, including but not limited to any information relating to either party's products, services, product plans, product prices, marketing plans, business opportunities or personnel, (b) any other information of Customer or 5o9 that is specifically designated by the disclosing party as confidential or proprietary, and (c) the terms and conditions of this Agreement, except that the definition of Confidential Information shall not include information that (i) is in or enters the public domain without

breach of this Agreement through no fault of the receiving party, (ii) the receiving party was demonstrably in possession of prior to first receiving it from the disclosing party, (iii) the receiving party can demonstrate was developed by the receiving party independently and without use of or reference to the disclosing party's Confidential Information, or (iv) the receiving party receives from a third party without restriction on disclosure and without breach of a nondisclosure obligation. Each party shall maintain the Confidential Information of the other party in strict confidence until it falls under one of the exceptions (i) – (iv) listed above, and shall exercise no less than reasonable care with respect to the handling and protection of such Confidential Information. Each party shall use the Confidential Information of the other party only during the Term of the Agreement and as expressly permitted herein, and shall disclose such Confidential Information only to its employees and independent contractors as is reasonably required in connection with the exercise of its rights and obligations under this Agreement (and only subject to binding use and disclosure restrictions at least as protective as those set forth herein executed in writing by such employees or independent contractors). Notwithstanding the above, the receiving party may disclose Confidential Information of the disclosing party pursuant to the valid order or requirement of a court or administrative agency, provided that the receiving party first gives reasonable notice to the disclosing party to contest such order or requirement. Any such disclosure by the receiving party of the Confidential Information of the disclosing party, shall, in no way, be deemed to change, affect or diminish the confidential and proprietary status of such Confidential Information. 5o9 hereby designates all feedback regarding the 5o9 and 3PMobile Property and beta Service (including, without limitation, its proprietary computer algorithms, and technical and business methods and plans) as 5o9 Confidential Information. The terms and conditions of this Agreement shall be deemed Confidential Information of both parties.

**6. Warranties and Disclaimers.** THE SERVICE, AND ANY ACCOMPANYING DOCUMENTATION, ARE PROVIDED TO CUSTOMER STRICTLY "AS IS," AND 5O9 EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES AND REPRESENTATIONS OF ANY KIND WITH REGARD TO ANY SUBJECT MATTER OF THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF NON-INFRINGEMENT, TITLE, FITNESS FOR A PARTICULAR PURPOSE, FUNCTIONALITY OR MERCHANTABILITY, WHETHER EXPRESS, IMPLIED OR STATUTORY. 5O9 MAKES NO WARRANTY THAT THE PRODUCTS OR USE THEREOF WILL BE UNINTERRUPTED, ERROR-FREE, VIRUS-FREE, OR WILL OPERATE IN SUCH A MANNER AS TO AVOID DAMAGE TO CUSTOMER'S COMPUTER SYSTEM, PERIPHERALS, MOBILE DEVICES OR ANY DATA OR OTHER INFORMATION STORED THEREIN .

**7. Limitation Of Liability.** EXCEPT FOR BREACHES OF SECTIONS 4 AND 5, IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY INDIRECT, SPECIAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES OF ANY KIND OR NATURE WHATSOEVER, SUFFERED BY THE OTHER PARTY OR ANY THIRD PARTY, INCLUDING, WITHOUT LIMITATION, LOST PROFITS, BUSINESS INTERRUPTIONS OR OTHER ECONOMIC LOSS ARISING OUT OF OR RELATED TO THIS AGREEMENT OR ANY USE OF OR FAILURE TO BE ABLE TO USE THE SERVICE. 5o9's total aggregate liability for any damages arising out of or related to this Agreement will not exceed \$100. The existence of one or more claims will not enlarge this limit.

## **8. General Terms.**

**8.1 Miscellaneous.** This Agreement sets forth the entire agreement between the parties and supersedes any and all prior agreements or representations, written or oral, of the parties with respect to the subject matter of this Agreement. This Agreement may not be modified, altered or amended, except by written instrument duly executed by both parties. No failure or delay by either party in exercising any right hereunder will operate as a waiver thereof. This Agreement will be binding on the parties, their successors and permitted assigns, if any. This Agreement will be construed under the laws of the State of Colorado, without regard to its conflicts of law principles. The parties hereby disclaim the application of the 1980 U.N. Convention on Contracts for the International Sale of Goods. Any unresolved disputes between the parties relating to this Agreement shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "AAA Rules") before a single neutral arbitrator selected in accordance with the AAA Rules. Such arbitration shall be held in Denver, Colorado. The cost and expense of arbitration shall be shared equally by the parties to the arbitration, regardless of which party or parties prevail. The arbitration shall be conducted in accordance with the following time schedule unless otherwise mutually agreed to in writing by the parties: (i) no later than thirty (30) days after the appointment of the arbitrator, the arbitrator shall schedule a hearing on the dispute and (ii) within thirty (30) business days after the date of the hearing referenced in clause (i), the arbitrator shall render a decision. The decision or award of the arbitrator shall be final and binding upon the parties, and to the same extent and to the same degree as if the matter had been adjudicated by a court of competent jurisdiction and shall be enforceable under the Federal Arbitration Act. However, the parties agree that any breach of a party's obligations under Sections 2, 4 and 5 will result in irreparable injury to the other party for which there is no adequate remedy at law. Therefore, in the event of any breach or threatened breach of such obligations, the nonbreaching party will be entitled to seek equitable relief in a court of competent jurisdiction, in addition to its other available legal and contractual remedies. If any provision of this Agreement is found invalid or unenforceable by an arbitrator or a court of competent jurisdiction, the remaining portions shall remain in full force and effect. All notices required by this Agreement shall be (i) addressed to the parties at the addresses set forth in the preamble above or at such other address as the parties shall designate in writing from time to time; and (ii) in writing and either served by personal delivery, certified or registered mail (return receipt requested) or facsimile (if confirmed by other means listed herein). This Agreement may be executed simultaneously in two or more counterparts (including facsimile copies), each of which will be considered an original, but all of which together will constitute one and the same instrument. Each person executing this Agreement on behalf of any entity hereby represents and warrants that he or she is duly authorized and has full authority to execute and deliver such document.