



Terms of Service

1. Introduction.
 - 1.1. Effective Date. The effective date of this Agreement is February 3, 2017.
 - 1.2. Agreement. Welcome to BirthDayte! BirthDayte LLC (“BirthDayte” or “**Company**”) recommends that you read the following terms and conditions carefully. By accessing or using the BirthDayte website, the BirthDayte Service, including any software applications made available by BirthDayte, such as the BirthDayte mobile device application (together, the “**Website**” or “**Service**”), however accessed or used, you agree to be bound by these terms (the “**Terms of Service**” or the “**Agreement**”). By clicking “I Agree”, you agree to be bound by this Agreement, constituting a legally binding agreement between BirthDayte and you concerning your use of the Service. We encourage you to print the Agreement or save it to your computer for reference.
 - 1.3. Separate Privacy Policy. By using the Service, you represent and warrant that you have read and understood, and agree to be bound by, this Agreement and BirthDayte LLC’s Privacy Policy (the “**Privacy Policy**”), which is incorporated into this Agreement by reference. The Privacy Policy is available at <https://birthdayte.com/privacy>.
 - 1.4. *No Permission Without Agreement.* *If you do not understand this Agreement, or do not agree to be bound by it or the Privacy Policy, you may not access or use the Service, and you must immediately cease accessing or using the Service.*
 - 1.5. *Arbitration and Remedies.* *These terms contain a mandatory arbitration of disputes provision that requires the use of arbitration on an individual basis to resolve disputes, rather than jury trials or class actions, and also limits the remedies available to you in the event of a dispute. See Section 23 (Dispute Resolution) for full details.*
2. Privacy Policy. By using the Service, you consent to the collection and use of certain information about you, as specified in the Privacy Policy discussed in Section 1.3 (Separate Privacy Policy). BirthDayte encourages users of the Service to frequently check the Privacy Policy for changes.
3. *Changes to Agreement and Privacy Policy.* *Internet technology and the applicable laws, rules, and regulations change frequently. BirthDayte reserves the right to change this Agreement and its Privacy Policy at any time upon notice to you (including by posting a new version, or sending you a change notice). It is your responsibility to review this Agreement and the Privacy Policy periodically. If at any time you find either this Agreement or the Privacy Policy unacceptable, you must immediately cease*

accessing the Service. Unless BirthDayte obtains your express consent, any revised Privacy Policy will apply only to information collected by BirthDayte after the revised Privacy Policy takes effect, and not to information collected under any earlier versions of the Privacy Policy.

4. Eligibility.

4.1. ***By accessing and/or using the Service, including by doing so after accessing this Agreement, you represent and warrant that you are at least 18 years old, and are otherwise legally qualified to enter into and form contracts under applicable law.***

4.2. Corporate Use. If you are using the Service on behalf of a company, you further represent and warrant that you are authorized to act and enter into contracts on behalf of that company.

4.3. Criminal History and Member Safety. To be eligible to use the Service, you must never have been convicted of a felony, and not be required to register as a sex offender with any government entity. Please see Section 9 (Interactions with Other Users) for additional safety information.

5. License. Subject to your compliance with these Terms of Service, Company grants you a non-exclusive, non-sublicensable, revocable as stated in this Agreement, non-transferable license to access the Company websites (located at the following URLs: <https://birthdayte.com/>), and to use the Service, including the mobile application. No part of the Service, including the Website or mobile application, may be reproduced, duplicated, copied, modified, sold, resold, distributed, transmitted, or otherwise exploited for any commercial purpose without the prior express written consent of Company. All rights not expressly granted in this Agreement are reserved by Company. Without limitation, this Agreement grants you no rights to the intellectual property of Company or any other party, except as expressly stated in this Agreement. The license granted in this section is conditioned on your compliance with this Agreement. Your rights under this section will immediately terminate if, in the sole judgment of Company, you have breached any provision of this Agreement.

6. No Reliance on Third Party Content.

6.1. Opinions, advice, statements, or other information made available through the Service by third parties are those of their respective authors, and should not necessarily be relied upon. Those authors are solely responsible for their content. Company does not: (i) guarantee the accuracy, completeness, or usefulness of any third-party information accessible on or through the Service; or (ii) adopt, endorse, or accept responsibility for the accuracy or reliability of any opinion, advice, or statement made by a third party through the Service. Under no circumstances will Company be responsible for any loss or damage resulting from your reliance on information or other content posted through the Service transmitted to or by any third party.

7. ***Assumption of Risk; Release. You knowingly and freely assume all risk when using the Service. You, on behalf of yourself, your personal representatives, and your heirs, voluntarily agree to release, waive, discharge, hold harmless, defend, and indemnify***

BirthDayte LLC and its stockholders, officers, directors, employees, agents, affiliates, consultants, representatives, sublicensees, successors, and assigns (collectively, the “Company Parties”) from any and all claims, actions, or losses for bodily injury, property damage, wrongful death, emotional distress, loss of privacy, or other damages or harm, whether to you or to third parties, that may result from your use of the Service.

8. User Account, Accuracy, and Security.

- 8.1. User Account. To use the Service, you must register and create a user account (“**Account**”). During the Account creation process, you will be asked to provide information that personally identifies you (“**Personal Information**”).
- 8.2. Profile Viewable By Members. All users of the Service have Profiles, which include some of the Personal Information provided during Account registration. These Profiles are accessible by other members who have registered with the Service and created Accounts; however, BirthDayte cannot guarantee that the Personal Information in your Profile will remain private to registered users of the Service.
- 8.3. Account Information Accuracy. You represent and warrant that all user information you provide in connection with your Account and your use of the Service is current, complete, and accurate, and you agree that you will update that information as necessary to maintain its completeness and accuracy by updating your personal Profile, or by submitting a message through the following webpage: <https://birthdayte.com/contact>. You agree that you will not submit any fake content (including without limitation any information required for Account registration) to willfully and credibly impersonate another person, whether actual or fictitious. As a non-exhaustive example, while you may use a fictional artistic profile image, you agree that you will not upload a Profile image of another real person that is not your likeness, or misrepresent your sex or sexual orientation to Company or to BirthDayte users. If Company believes in its sole discretion that the information you provide is inaccurate, Company has the right to refuse you access to the Service, or to terminate or suspend your access at any time, or both. For additional information, see the Section concerning “User Ability to Access, Update, and Correct Personal Information” in Company’s Privacy Policy.
- 8.4. Pseudonyms Policy. As an exception to Section 8.3 (Account Information Accuracy), BirthDayte allows you to use a pseudonym for your Profile name and in communications with other users through the Service. This policy is different than other websites, like Facebook. Company believes that allowing pseudonyms reduces harassment and promotes safety, especially for marginalized communities or minorities. However, because BirthDayte is a dating site and you may choose to meet other members, you should be especially mindful of safety. Please see Section 9 (Interactions with Other Users) for additional safety information. You must still register your true name with BirthDayte when you sign up. Any use of a pseudonym in account registration, other than for your Profile username, violates Section 8.3 (Account Information Accuracy) and is cause for immediate suspension or deletion of your Account.

- 8.5. Account Security. You will also be asked to provide a username, password, and possibly other information to secure your Account. You are entirely responsible for maintaining the confidentiality of this security information, including your password. You may not use the username or password of any other person, nor may you share your username and password, nor may you circumvent any authentication mechanism requiring the entry of usernames, passwords, or any other information to gain unauthorized access to the Service. You agree to notify Company immediately of any unauthorized use of your Account. Company shall not be liable for any loss that you incur because of someone else using your Account, either with or without your knowledge. You may be held liable for any losses incurred by Company, its affiliates, officers, directors, employees, consultants, agents, and representatives due to someone else's use of your Account.
9. ***Interactions with Other Users***. ***You are solely responsible for your interactions with other BirthDayte users. You acknowledge and understand that Company has not, and does not, in any way guarantee that it will: (a) screen its users; (b) inquire into the backgrounds of its users; or (c) review or verify the statements of its users. You agree to exercise reasonable caution in all interactions with other users, particularly if you decide to meet another user in person. Company does not represent, warrant, endorse, or guarantee the conduct of its users. In no event shall Company be liable for indirect, special, incidental, or consequential damages arising out of or relating to any user's conduct in connection with such user's use of the Service, including, without limitation, bodily injury, property damage, wrongful death, emotional distress, loss of privacy, or any other damages resulting from communications or meetings between users.***
10. Consent to Receive Electronic Communications from Company. By registering for the Service and providing your name, email, postal or residential address, and/or phone number through the Service, you expressly consent to receive electronic and other communications from Company, over the short term and periodically, including email communications. These communications will be about the Service, new product offers, promotions, and other matters. You may opt out of receiving electronic communications at any time by following the unsubscribe instructions contained in each communication, or by sending an email to unsubscribe@birthdayte.com. You agree that these electronic communications satisfy any legal requirements that communications or notices to you be in writing.
11. Consent to Receive Electronic Communications from Users. Without limitation, by registering for the Service and providing your name, email, postal or residential address, and/or phone number through the Service, you consent to receive electronic communications, including email, instant messages, video conferencing, and other personal messages from other users of the Service.
12. Consent to Receive Electronic Communications from Company Partner Marketers. Without limitation, by registering for the Service and/or by providing your name, email, postal or residential address, and/or phone number through the Service, you consent to receive, and openly and knowingly solicit, electronic communications, including email communications, from Company partner firms which may include third party marketing

companies, affiliates, advertising agencies, and data aggregation companies regarding their services, including offers, promotions, and other related matters. You may opt out of receiving electronic communications at any time by (a) following the unsubscribe instructions contained in each communication; or (b) sending an email to unsubscribe@birthdayte.com.

13. Fees.

13.1. Paid Goods and Services. Company may charge a fee for your use of the Service, such as digital goods, badges, and the removal of advertisements (collectively, “**Paid Goods and Services**”). All fees are payable in U.S. dollars. For those Paid Goods and Services with a recurring monthly fee, Company shall charge a base rate in U.S. dollars per month, which will be due and collected in full at the beginning of each month that users opt for the services. In all cases, fees for Paid Goods and Services are due and collected in full before the goods are delivered or the services are rendered.

13.2. Reservation to Charge Later. The Service is currently provided at no charge to you. Company may, upon at least 30 days prior notice to you, charge fees for your use of the Service. Furthermore, any applicable fees for the Service may be changed from time to time by Company at its discretion at any time upon at least 30 days prior notice to you. If you continue to use the Service after any new fees becomes effective, you agree to pay those fees, which Company discloses to you.

13.3. Reserved Rights for Company’s Fees.

13.3.1. You acknowledge and agree that Company reserves the right to charge for access to the Service, in accordance with the policies stated in this section, and subject to amendment as specified in this Agreement.

13.3.2. *Company reserves the right, in its sole discretion, to change the fees and charges in effect, or to add new fees and charges, by posting such changes or providing notice to you. All fees and charges are nonrefundable, and there are no refunds, nor are there credits for partially used membership periods.*

13.3.3. Company’s decision not to exercise any specific right or require performance of any specific obligation under this Agreement, including collecting regularly recurring fees from you, shall not affect Company’s later ability to exercise those rights or to require performance at any later time. Company’s waiver of your breach shall not constitute a waiver of any later breach by you, or by any other user of the Service. By using the Service, you authorize Company or its payment processor to charge Company’s fees to the payment method you provide, in addition to applicable sales and other taxes.

14. Third Party Websites. The Service is linked with the websites of third parties (“**Third Party Websites**”), some of whom may have established relationships with Company and some of whom may not. Company does not have control over the content and performance of Third Party Websites. Company has not reviewed, and cannot review or control, all of the material, including computer software or other goods or services, made

available on Third Party Websites. Accordingly, Company does not represent, warrant, or endorse any Third Party Websites, or the accuracy, currency, content, fitness, lawfulness, or quality of the information, material, goods, or services available through Third Party Websites. Company disclaims, and you agree to assume, all responsibility and liability for any damages or other harm, whether to you or to third parties, resulting from your use of Third Party Websites.

15. User Content.

- 15.1. User Content Defined. “**User Content**” is any content, material, or information, not including personally identifiable information (e.g., first and last name, address, phone number, email address, birth date, etc.), that you submit, upload, and/or post to, or transmit, display, perform, or distribute through the Service, whether in connection with your use of the Service or otherwise. This includes, without limitation, personal photos and videos, your information you add to your Profile, and messages you send to other users.
- 15.2. You Own Your User Content. Company does not claim ownership of any User Content. You retain all right, title, and interest, including without limitation all worldwide intellectual property rights, in and to your User Content.
- 15.3. License of User Content. *By submitting, uploading, or posting User Content in any form with, through, or to the Service, you grant the Company Parties a royalty-free, perpetual, non-exclusive, unrestricted, fully paid-up, worldwide, sublicensable, revocable (see Section 5 (License)), assignable license to copy or otherwise reproduce, modify, adapt, translate, distribute, enhance, transmit, publicly display or perform, reformat, and/or otherwise use User Content in connection with the operation of the Service, or any other similar or related business, in any medium now existing or later devised, including without limitation in advertising and publicity. You further agree that the Company Parties may publish or otherwise disclose your personal information in connection with their exercise of the license granted under this section. You agree to waive, and waive, any claims arising from or relating to the exercise by the Company Parties of the rights granted under this section, including without limitation any claims relating to your rights of personal privacy and publicity. You will not be compensated for any exercise of the license granted under this section.*
- 15.4. Your Representations About User Content. You represent and warrant that you: (a) own all rights, title, and interest in and to all User Content you submit, or are otherwise authorized to grant the rights provided the Company Parties under this section; or (b) have written consent, release, and/or permission of every identifiable individual person in any User Content you submit to use the name and likeness of every identifiable person in the User Content. You agree that you will not submit any User Content that does not fully comply with Company’s prohibitions against Objectionable Content, as detailed in Section 17 (Objectionable Content).
- 15.5. Company’s Right to Reject User Content. Company reserves the right, in its sole discretion, to reject any User Content for any reason. The categories specified in

Section 17 (Objectionable Content) and Section 18 (Prohibited Uses) are not exhaustive lists of content that Company reserves the right to remove or deny.

16. Your Responsibility for Defamatory Comments.

16.1. You agree and understand that you may be held legally responsible for damages suffered by other users or third parties as the result of your remarks, information, feedback, or other content posted or made available through the Service that is deemed defamatory or otherwise legally actionable. Under Section 230 of the Federal Communications Decency Act of 1996, Company is not legally responsible, nor can it be held liable for damages of any kind, arising out of or in connection to any defamatory or otherwise legally actionable remarks, information, feedback, or other content posted or made available through the Service.

16.2. If you raise or file any claim against Company for conduct that a Court of Competent Jurisdiction later finds to constitute an “exercise of a publisher’s traditional editorial functions,” or the legal equivalent, you agree to fully and immediately compensate Company for all losses, liability, damages, costs, and expenses, including without limitation all attorneys’ fees and expenses in defending the action and resolving the matter. If you fail to compensate Company for any such claim, you agree and authorize Company to report your Personal Information, including without limitation your unpaid claim, to consumer credit reporting services, collection agencies, and others.

17. Objectionable Content. You agree that you shall not use the Service to upload, post, transmit, display, perform, or distribute any content, information, or materials that: (a) are libelous, defamatory, abusive, threatening, excessively violent, harassing, obscene, lewd, lascivious, filthy, or pornographic; (b) constitute child pornography; (c) solicit personal information from or exploit in a sexual or violent manner anyone under the age of 18; (d) incite, encourage, or threaten physical harm against another; (e) promote or glorify racial intolerance, use hateful and/or racist terms, or signify hate toward any person or group of people; (f) glamorize the use of illegal substances and/or drugs; (g) advertise or otherwise solicit funds or constitute a solicitation for goods or services; (h) violate any provision of this Agreement or any other Company agreement or policy, including without limitation Company’s Privacy Policy; (i) disclose another’s personal, confidential, or proprietary information; (j) are false or fraudulent; (k) contains images or videos of individuals captured or posted without their consent; (l) promote self-destructive behavior (including without limitation eating disorders or suicide); or (m) are generally offensive, rude, mean-spirited, or in bad taste, as determined by Company in its sole discretion (collectively, “**Objectionable Content**”). Company disclaims any perceived, implied, or actual duty to monitor content made available through the Service, and specifically disclaims any responsibility or liability for information provided on the Service. Without limiting any of its other remedies, Company reserves the right to terminate your use of the Service or your uploading, posting, transmission, display, performance, or distribution of Objectionable Content. Company, in its sole discretion, may delete any Objectionable Content from its servers. Company intends to cooperate fully with any law enforcement officials or agencies in the investigation of any violation of this Agreement or of any applicable laws.

18. Prohibited Uses. Company imposes certain restrictions on your use of the Service. Any violation of this section may subject you to civil and/or criminal liability. The following are expressly prohibited:
- 18.1. harassing or stalking any person, or contacting any person who has requested not to be contacted
 - 18.2. providing false, misleading, or inaccurate information to Company or any other person in connection with the Service
 - 18.3. impersonating, or otherwise misrepresenting affiliation, connection, or association with, any person or entity
 - 18.4. modifying or changing the placement and location of any advertisement posted through the Service
 - 18.5. harvesting or otherwise collecting information about users, including email addresses and phone numbers
 - 18.6. without express written permission from Company, using or attempt to use any engine, software, tool, agent, or other device or mechanism (including without limitation browsers, spiders, robots, avatars, or intelligent agents) to harvest or otherwise collect information from the Service for any use, including without limitation use on Third Party Websites
 - 18.7. accessing content or data not intended for you, or logging into a server or account that you are not authorized to access
 - 18.8. attempting to probe, scan, or test the vulnerability of the Service, or any associated system or network, or breaching security or authentication measures without proper authorization
 - 18.9. interfering or attempt to interfere with the use of the Service by any other user, host, or network, including (without limitation) by submitting malware or exploiting software vulnerabilities
 - 18.10. using the Service to send unsolicited email, including without limitation promotions or advertisements for products or services
 - 18.11. forging, modifying, or falsifying any network packet or protocol header or metadata in any connection with, or transmission to, the Service (for example, SMTP email headers, HTTP headers, or Internet Protocol packet headers)
 - 18.12. while using the Service, using ad-blocking or other content-blocking software, browser extensions, or built-in browser options designed to hide, block, or prevent the proper display of online advertising
 - 18.13. attempting to modify, reverse-engineer, decompile, disassemble, or otherwise reduce or attempt to reduce to a human-perceivable form any of the source code used by the Company Parties in providing the Service, including without limitation any fraudulent effort to modify software or any other technological mechanism for measuring the number of impressions generated by individual content and/or the overall Service to determine and/or audit advertising revenues and payments, if applicable

18.14. creating additional accounts to promote your (or another's) business, or causing others to do so

18.15. paying anyone for interactions on the Service

19. Intellectual Property.

19.1. Compliance with Law.

19.1.1. You represent and warrant that, when using the Service, you will obey all applicable laws and respect the intellectual property rights of others. Your use of the Service is at all times governed by and subject to copyright and other intellectual property laws. You agree not to upload, post, transmit, display, perform, or distribute any content, information, or other materials in violation of any third party's copyrights, trademarks, or other intellectual property or proprietary rights.

19.1.2. *You represent and warrant that you are the sole and exclusive owner of any User Content that you submit through the Service. You shall be solely responsible for any violations of any laws and for any infringements of third-party rights caused by your use of the Service. BirthDayte users bear the sole burden of proving that content, information, or other materials do not violate any laws or third-party rights.*

19.2. Trademarks. BirthDayte and the BirthDayte logo (collectively, the “**Company Marks**”) are trademarks or registered trademarks of Company. Other trademarks, service marks, graphics, logos, and domain names appearing anywhere on, through, or in connection with the Service may be the trademarks of third parties. Neither your use of the Service nor this Agreement grant you any right, title, or interest in, or any license to reproduce or otherwise use, the Company Marks or any third-party trademarks, service marks, graphics, logos, or domain names. You agree that any goodwill in the Company Marks generated as a result of your use of the Service will inure to the benefit of Company, and you agree to assign, and do assign, all such goodwill to Company. You shall not at any time, nor shall you assist others to, challenge Company's right, title, or interest in, or the validity of, the Company Marks.

19.3. Copyrighted Materials; Copyright Notice. All content and other materials available through the Service, including without limitation the BirthDayte logo, design, text, graphics, and other files, and their selection, arrangement, and organization, are either owned by Company or are the property of Company's licensors and suppliers. Except as explicitly provided, neither your use of the Service nor this Agreement grant you any right, title, or interest in any such materials.

19.4. DMCA Policy.

19.4.1. As Company asks others to respect its intellectual property rights, Company respects the intellectual property rights of others. Company follows the notice and takedown procedures in the Digital Millennium Copyright Act (“**DMCA**”).

- 19.4.2. If you believe content located on or linked to by the Service violates your copyright, please immediately notify Company by emailed DMCA takedown notice (“**Infringement Notice**”), providing the information described below. If Company takes action in response to an Infringement Notice, it will make a good faith attempt to contact the party who made the content available at the most recent email address that party provided to Company.
- 19.4.3. Under the DMCA, you may be held liable for damages based on material misrepresentations in your Infringement Notice. You must also make a good-faith evaluation of whether the use of your content is a fair use; fair uses are not infringing. (See 17 U.S.C. Section 107, available at <https://www.law.cornell.edu/uscode/text/17/107>, and *Lenz v. Universal Music Corp.*, No. 13-16106 (9th Cir. Sep. 14, 2015), available at <https://www.courtlistener.com/opinion/2937139/stephanie-lenz-v-universal-music-corp/>.) If you are not sure if content located on or linked to by the Service infringes your copyright, you should first contact an attorney.
- 19.4.4. The DMCA requires that all Infringement Notices must include the following:
- 19.4.4.1. A signature, electronic or physical, of the copyright owner or a person authorized to act on their behalf;
 - 19.4.4.2. An identification of the copyright claimed to have been infringed;
 - 19.4.4.3. A description of the nature and location of the material that you claim to infringe your copyright, in sufficient detail to permit Company to find and positively identify that material;
 - 19.4.4.4. Your name, address, telephone number, and email address; and
 - 19.4.4.5. A statement by you: (i) that you believe in good faith that the use of the material that you claim to infringe your copyright is not authorized by law, or by the copyright owner or such owner’s agent; and, (ii) under penalty of perjury, that all of the information contained in your Infringement Notice is accurate, and that you are either the copyright owner or a person authorized to act on their behalf.
- 19.4.5. Infringement Notices should be sent to copyright@birthdayte.com with the subject line “DMCA Notice: (INSERT YOUR NAME OR YOUR COMPANY’S NAME)”.
- 19.4.6. Company will respond to all DMCA-compliant Infringement Notices, including, as required or appropriate, by removing the offending material or disabling all links to the offending material.

19.4.7. Disclosure. All received Infringement Notices may be posted in full to the Lumen database (<https://lumendatabase.org/>), previously known as the Chilling Effects Clearinghouse.

20. Disclaimers; Limitation of Liability.

20.1. No Warranties. *Company, on behalf of itself and its licensors and suppliers, expressly disclaims any and all warranties, express or implied, regarding the Service, arising by operation of law or otherwise, including without limitation any and all implied warranties of merchantability, fitness for a particular purpose, non-infringement, no encumbrance, or title, in addition to any warranties arising from a course of dealing, usage, or trade practice. Neither Company nor its licensors or suppliers warrants that the Service will meet your requirements, or that the operation of the Service will be uninterrupted or error-free. Company disclaims all implied liability for damages arising out of the furnishing of the Service pursuant to this Agreement, including without limitation, mistakes, omissions, interruptions, delays, tortious conduct, errors, representations, or other defects arising out of the failure to the furnish the Service, whether caused by acts of commission or omission, or any other damage occurring. Company shall not be liable for any indirect, incidental, special, consequential, or punitive damages (including without limitation damages for lost profits or lost revenues), whether caused by the acts or omissions of Company, Company Parties, or BirthDayte users, or their agents or representatives.*

20.2. Your Responsibility for Loss or Damage; Backup of Data.

20.2.1. *You agree that your use of the Service is at your sole risk. You will not hold Company or its licensors and suppliers, as applicable, responsible for any loss or damage that results from your access to and/or use of the Service, including without limitation any loss or damage to any of your computers, mobile devices, including without limitations tablets and/or smartphones, or data. The Service may contain bugs, errors, problems, or other limitations.*

20.2.2. *Importantly, you acknowledge that a catastrophic disk failure or other similar event could result in the loss of all of the data related to your account. You agree and understand that it is your responsibility to backup your data to your personal computer or external storage device and to ensure such backups are secure.*

20.3. Limitation of Liability. *In no event shall Company or its licensors or suppliers be liable to you for any claims arising from your use with the Service, including without limitation for special, incidental, or consequential damages, lost profits, lost data or confidential or other information, loss of privacy, costs of procurement of substitute goods or services, failure to meet any duty including without limitation of good faith or of reasonable care, negligence, or otherwise, regardless of the foreseeability of those damages or of any advice or notice given to Company or its licensors and suppliers arising out of or in connection with your use of the Service. This limitation shall apply regardless of whether*

the damages arise out of breach of contract, tort, or any other legal theory or form of action. You agree that this limitation of liability represents a reasonable allocation of risk and is a fundamental element of the basis of the bargain between Company and you. The Service would not be provided without such limitations.

- 20.4. Application of Disclaimers. *The above disclaimers, waivers, and limitations do not in any way limit any other disclaimer of warranties or any other limitation of liability in any other agreement between you and Company or between you and any of Company's licensors and suppliers. Some jurisdictions may not allow the exclusion of certain implied warranties or the limitation of certain damages, so some of the above disclaimers, waivers, and limitations of liability may not apply to you. Company's licensors and suppliers are intended third-party beneficiaries of these disclaimers, waivers, and limitations. No advice or information, whether oral or written, obtained by you through the Service or otherwise shall alter any of the disclaimers or limitations stated in this section.*
21. Your Representations and Warranties. You represent and warrant that your use of the Service will be in accordance with this Agreement and any other Company policies, and with any applicable laws or regulations.
22. Indemnity by You.
- 22.1. Without limiting any indemnification provision of this Agreement, you (the "**Indemnitor**") agree to defend, indemnify, and hold harmless Company and the Company Parties (collectively, the "**Indemnitees**") from and against any and all claims, actions, demands, causes of action, and other proceedings (individually, "**Claim**", and collectively, "Claims"), including but not limited to legal costs and fees, and providing sole and exclusive control of the defense of any action to Company, including the choice of legal counsel and all related settlement negotiations, arising out of or relating to: (i) the relationship between you and Company, whether based in contract, tort, statute, fraud, misrepresentation, or any other legal theory; (ii) your breach of this Agreement, including without limitation any representation or warranty contained in this Agreement; (iii) your access to or use of the Service; (iv) your provision to Company or any of the Indemnitees of information or other data; (v) your violation or alleged violation of any foreign or domestic, international, federal, state, or local law or regulation; or (vi) your violation or alleged violation of any third party's copyrights, trademarks, or other intellectual property or proprietary rights.
- 22.2. The Indemnitees each have the individual right, but not the obligation, to participate through counsel of their choice in any defense by you of any Claim as to which you are required to defend, indemnify, or hold harmless any, each, and/or all Indemnitees. You may not settle any Claim without the prior written consent of the concerned Company Parties.
- 22.3. Without limitation, the Indemnitor also agrees to compensate Company for any and all lost revenues, future lost profits, reasonable search costs, and any other reasonable expenses resulting from any Indemnitor violation of Section 18 (Prohibited Uses), including without limitation any suspension of affiliate

accounts or affiliate payment attributable to fraudulent efforts to manipulate or otherwise modify reported impressions generated by the Company Parties under any affiliate advertising agreement.

23. Dispute Resolution.

23.1. Binding Arbitration.

23.1.1. If you and Company cannot resolve a Claim through negotiations, either party may elect to have the Claim finally and exclusively resolved by binding arbitration. Any election to arbitrate by one party shall be final and binding on the other(s).

23.1.2. ***You acknowledge that without this provision, you would have the right to sue in court with a jury trial or to participate in a class action.***

23.1.3. The language in this Agreement shall be interpreted in accordance with its fair meaning and not strictly for or against either party.

23.1.4. The arbitration shall be commenced and conducted under the Commercial Arbitration Rules of the American Arbitration Association (“AAA”), as modified by this Agreement, available at the AAA website www.adr.org or by calling the AAA at 1-800-778-7879. Except as otherwise provided for in this Agreement, Company will pay the AAA filing, administration, and arbitrator fees. If, however, the arbitrator finds that either the substance of your claim or the relief sought is frivolous or brought for an improper purpose (as measured by Federal Rule of Civil Procedure 11(b) standards), then you will pay the arbitrator fees, in addition to any amount that exceeds the filing fees. In that case, you also agree to reimburse Company for all payments disbursed that are your obligation to reimburse under the AAA Rules. The arbitrator is bound by the terms of this Agreement. All issues are for the arbitrator to resolve, except that issues relating to the enforceability of the arbitration provision are for a Court of Competent Jurisdiction to resolve. The arbitration may be conducted in person, through document submission, through telephone, or online. The arbitrator will issue a decision in writing, but need only provide a statement of reasons if requested by a party. The arbitrator must follow applicable law, and any award may be challenged if the arbitrator fails to do so. Company may litigate to compel arbitration in court, to stay proceedings pending arbitration, or to modify, confirm, vacate, or enter judgment on the award entered by the arbitrator. The arbitrator shall award costs to the prevailing party (including, without limitation, fees, expenses, and reasonable attorneys’ fees) at any time during the proceeding and upon request from either party, within 14 days of the arbitrator’s ruling on the merits.

23.2. Restrictions Against Joinder of Claims.

23.2.1. ***You and Company agree that any arbitration shall be limited to each Claim individually. You and Company agree that each may only bring claims against the other in your or Company’s individual capacity and***

not as a plaintiff or class member in any purported class or representative proceeding.

23.2.2. If this specific provision is found to be unenforceable in a Court of Competent Jurisdiction, the Claim will still be finally and exclusively resolved by binding arbitration upon the election of either party, and any election to arbitrate by one party shall be final and binding on the other(s). In addition: (1) no arbitration shall be joined with any other arbitration, and (2) there is no right for any Claim to be arbitrated on a class-action basis or to employ class action procedures, and (3) there is no right of authority for any dispute to be brought in a purported representative capacity on behalf either of the general public or any other individuals.

23.3. Remedies in Aid of Arbitration; Equitable Relief. This agreement to arbitrate will not preclude you or Company from seeking provisional remedies in aid of arbitration, including without limitation orders to stay a court action, compel arbitration, or confirm an arbitral award, from a Court of Competent Jurisdiction. Furthermore, this agreement to arbitrate will not preclude you or Company from applying to a Court of Competent Jurisdiction for a temporary restraining order, preliminary injunction, or other interim or conservatory relief, as necessary. “**Court of Competent Jurisdiction**” means any federal or state court: (1) that has jurisdiction over the subject matter; and (2) that is located in the State of California.

23.4. Venue for any Judicial Proceeding.

23.4.1. This Agreement, including without limitation this Agreement’s interpretation, shall be treated as though this Agreement were executed and performed in the State of California, and shall be governed by and construed in accordance with the laws of the State of California without regard to its conflict of law principles. The language in this Agreement shall be interpreted in accordance with its fair meaning and not strictly for or against either party.

23.4.2. *The proper venue for any judicial action arising out of, relating to, or in connection with this Agreement will be the state and federal courts located in or nearest to San Jose, California. The parties stipulate to, and agree to waive any objection to, the personal jurisdiction and venue of such courts, and further expressly submit to extraterritorial service of process.*

24. Termination.

24.1. ***By Company.** Without limiting any other provision of this Agreement, Company reserves the right to, in Company’s sole discretion and without notice or liability, deny use of the Service to any person for any reason or for no reason at all, including without limitation for any breach or suspected breach of any representation, warranty, or covenant contained in this Agreement, or of any applicable law or regulation.*

- 24.2. Automatic Termination Upon Breach by You. This Agreement shall automatically terminate if you breach any of this Agreement's representations, warranties, or covenants. This termination is automatic, and does not require any action by Company.
- 24.3. By You. You may terminate this Agreement and your rights under it at any time, for any or no reason at all, by providing to Company notice of your intention to do so, in the manner required by Section 25 (Notices).
- 24.4. Effect of Termination.
- 24.4.1. Any termination of this Agreement automatically terminates all rights and licenses granted to you under this Agreement, including all rights to use the Service. Upon termination, Company may, but has no obligation to, in Company's sole discretion, rescind any services and/or delete from Company's systems all your Personal Information and any other files or information that you made available to Company or that otherwise relate to your use of the Service. Upon termination, you shall cease any use of the Service.
- 24.4.2. After termination, Company reserves the right to exercise whatever means it deems necessary to prevent your unauthorized use of the Service, including without limitation technological barriers such as IP blocking and direct contact with your Internet Service Provider.
- 24.5. Legal Action. If Company, in Company's discretion, takes legal action against you in connection with any actual or suspected breach of this Agreement, Company will be entitled to recover from you as part of such legal action, and you agree to pay, Company's reasonable costs and attorneys' fees incurred as a result of such legal action. The Company Parties will have no legal obligation or other liability to you or to any third party arising out of or relating to any termination of this Agreement.
- 24.6. Survival. Upon termination, all rights and obligations created by this Agreement will terminate, except that the following Sections will survive any termination of this Agreement: Section 1.2 (Agreement), Section 2 (Privacy Policy), Section 4 (Eligibility), Section 5 (License), Section 6 (No Reliance on Third Party Content), Section 7 (Assumption of Risk; Release), Section 8 (User Account, Accuracy, and Security), Section 14 (Third Party Websites), Section 15 (User Content), Section 16 (Your Responsibility for Defamatory Comments), Section 17 (Objectionable Content), Section 18 (Prohibited Uses), Section 19 (Intellectual Property), Section 20 (Disclaimers; Limitation of Liability), Section 21 (Your Representations and Warranties), Section 22 (Indemnity by You), Section 23 (Dispute Resolution), Section 24 (Termination), Section 25 (Notices), Section 26.2 (Partial Invalidity), and Section 26 (General).
25. Notices. All notices required or permitted to be given under this Agreement must be in writing.
- 25.1. Company shall give any notice by email sent to the most recent email address, if any, provided by the intended recipient to Company. You agree that any notice

received from Company electronically satisfies any legal requirement that such notice be in writing.

25.2. ***You bear the sole responsibility of ensuring that your email address on file with Company is accurate and current, and notice to you shall be deemed effective upon the sending by Company of an email to that address.***

25.3. You shall give any notice to Company by email to notice@birthdayte.com.

26. General.

26.1. Entire Agreement. This Agreement constitutes the entire agreement between Company and you concerning your use of the Service.

26.2. Partial Invalidity. Should any part of this Agreement be declared invalid, void, or unenforceable by a Court of Competent Jurisdiction, such decision shall not affect the validity of any remaining portion of this Agreement, which shall remain in full effect, and the parties acknowledge and agree that they would have executed the remaining portion without including the part so declared by a Court of Competent Jurisdiction to be invalid, void, or unenforceable.

26.3. Amendments. This Agreement may only be modified by a written amendment signed by an authorized executive of Company, or by the unilateral amendment of this Agreement by Company along with the posting by Company of that amended version.

26.4. No Waiver. A waiver by either party of any term or condition of this Agreement, or any breach, in any one instance, will not waive that term or condition or any later breach.

26.5. Assignment. This Agreement and all of your rights and obligations under it will not be assignable or transferable by you without the prior written consent of Company. This Agreement will be binding upon and will inure to the benefit of the parties, their successors, and permitted assigns.

26.6. Independent Contractors. You and Company are independent contractors, and no agency, partnership, joint venture, or employee-employer relationship is intended or created by this Agreement.

26.7. No Third Party Beneficiaries. There are no third-party beneficiaries to this Agreement, with the following exceptions: the Company Parties; Company's licensors and suppliers (to the extent expressly stated in this Agreement); and to the extent stated in the following Sections: Section 6 (No Reliance on Third Party Content), Section 14 (Third Party Websites), Section 20.4 (Application of Disclaimers).

26.8. Injunctive Relief. You acknowledge and agree that any actual or threatened breach of this Agreement or infringement of proprietary or other third-party rights by you would cause irreparable injury to Company and Company's licensors and suppliers, and would therefore entitle Company or Company's licensors or suppliers, as the case may be, to injunctive relief.

26.9. Headings. The headings in this Agreement are for convenience only, and shall have no legal or contractual effect.