

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Civil Action No. \_\_\_\_\_

SMIGIEL FOUNDATION TO BENEFIT CHILDREN AND FAMILIES, INC.,  
a Florida corporation,

Plaintiff,

v.

TRADEDESK CAPITAL LLC, a Delaware limited liability company;  
INVICTUS ASSET MANAGEMENT LLC, a North Carolina limited liability company;  
and INVICTUS CAPITAL GROWTH AND INCOME FUND LLP,  
a North Carolina limited liability partnership;

Defendants.

\_\_\_\_\_ /

**COMPLAINT**

Plaintiff, SMIGIEL FOUNDATION TO BENEFIT CHILDREN AND FAMILIES, INC, a Florida corporation (hereinafter “Plaintiff” or “The Foundation”), by and through undersigned counsel, hereby sues Defendants, TRADEDESK CAPITAL LLC, a Delaware limited liability company; INVICTUS ASSET MANAGEMENT LLC, a North Carolina limited liability company; and INVICTUS CAPITAL GROWTH AND INCOME FUND LLP, a North Carolina limited liability partnership (collectively “TRADEDESK”); for damages. In support thereof, Plaintiff states as follows:

**PRELIMINARY STATEMENT**

1. In or about June 2013, Plaintiff learned that David W. Schamens and Phillips Wiegand, Jr. -- the two TRADEDESK principals who served as the “faces” of TRADEDESK and through whom Plaintiff had invested several hundred thousand dollars -- were permanently barred by the U.S. Securities and Exchange Commission (“SEC”) [Mr. Schamens] and subject to an 18-

**SILVER LAW GROUP**

month suspension by the Financial Industry Regulatory Authority (“FINRA”) [Mr. Wiegand], respectively. Upon receiving this information, Plaintiff demanded an immediate return of the funds Plaintiff had invested with TRADEDESK and all proceeds derived therefrom.

2. Following Plaintiff’s demand, Plaintiff and Defendants engaged in protracted negotiations that ultimately resulted in a settlement agreement that was supposed to recompense Plaintiff for its injuries.

3. Notwithstanding the payment obligations to which Defendants agreed in the negotiated settlement agreement, Defendants have failed to satisfy their obligations despite repeated demand by Plaintiff.

4. In accordance with the terms of the parties’ written agreement, Plaintiff is entitled to entry of a Final Judgment/award against TRADEDESK in the total amount of Six Hundred Fifty Five Thousand Three Hundred Forty Four Dollars and Ninety Cents (\$655,344.90), plus the reasonable fees and costs incurred in enforcing the Settlement Agreement, less any money received by Plaintiff pursuant to the Agreement.

## **GENERAL ALLEGATIONS**

### **THE PARTIES**

#### **Plaintiff**

5. Plaintiff SMIGIEL FOUNDATION TO BENEFIT CHILDREN AND FAMILIES, INC. is a not-for-profit corporation organized under the laws of the State of Florida for religious, charitable, and educational purposes within the meaning of Internal Revenue Code section 503(c)(3). The Foundation’s principal place of business is in Lake Worth, Florida; and at all times material hereto, The Foundation maintained an office in, and conducted business from, Lake Worth, Florida. For purposes of diversity jurisdiction, The Foundation is a citizen of the State of Florida.

**Defendants**

6. Defendant TRADEDESK CAPITAL LLC is a Delaware limited liability company with its principal place of business in Charlotte, North Carolina. At all times material hereto, TRADEDESK CAPITAL LLC maintained an office in, and conducted business from, Charlotte, North Carolina; and for purposes of diversity jurisdiction, is a citizen of the State of North Carolina. Furthermore, at all times material hereto, TRADEDESK CAPITAL LLC solicited and accepted investors located in this jurisdiction, including Plaintiff.

7. Defendant INVICTUS ASSET MANAGEMENT LLC is a North Carolina limited liability company with its principal place of business in Charlotte, North Carolina. At all times material hereto, INVICTUS ASSET MANAGEMENT LLC maintained an office in, and conducted business from, Charlotte, North Carolina; and for purposes of diversity jurisdiction, is a citizen of the State of North Carolina. Furthermore, at all times material hereto, INVICTUS ASSET MANAGEMENT LLC solicited and accepted investors located in this jurisdiction, including Plaintiff.

8. Defendant INVICTUS CAPITAL GROWTH AND INCOME FUND LLP is a North Carolina limited liability partnership with its principal place of business in Charlotte, North Carolina. At all times material hereto, INVICTUS CAPITAL GROWTH AND INCOME FUND LLP maintained an office in, and conducted business from, Charlotte, North Carolina; and for purposes of diversity jurisdiction, is a citizen of the State of North Carolina. Furthermore, at all times material hereto, INVICTUS CAPITAL GROWTH AND INCOME FUND LLP solicited and accepted investors located in this jurisdiction, including Plaintiff.

**Non-Party, Material Witnesses**

9. At all times material hereto, David W. Schamens was a representative of INVICTUS ASSET MANAGEMENT LLC and of TradeDesk Financial Group, Inc., which serves as the Manager of, and manages all of the affairs of, TRADEDESK CAPITAL LLC.

10. Phillips Wiegand, Jr. is a Managing Director of TradeDesk Financial Group, Inc. Upon information and belief, Mr. Wiegand is also General Counsel for the TRADEDESK family of companies and is a driving force behind all of TRADEDESK's operations, which includes TradeDesk Financial Corporation, a long-time broker-dealer and FINRA member.

11. In addition to those persons and entities set forth as Defendants herein, there are likely other parties who may well be liable to Plaintiff, but respecting whom Plaintiff currently lacks specific facts to permit them to name such person or persons as a party defendant. By not naming such persons or entities at this time, Plaintiff is not waiving its right to amend this pleading to add such parties, should the facts warrant adding such parties.

#### **JURISDICTION AND VENUE**

12. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds Seventy Five Thousand Dollars (\$75,000.00), exclusive of interest, costs and attorneys' fees, and is an action between citizens of different states.

13. This Court has personal jurisdiction over the defendants because: (a) the corporate defendants are business entities operating, present, and/or doing business within this jurisdiction, as the defendants came to this jurisdiction to specifically solicit funds from Plaintiff, (b) the defendants' contractual breaches occurred within this jurisdiction, and (c) the parties' written agreement provides that "*any suit, action, or legal proceeding arising out of, in connection with, or relating to this Agreement must be brought only in the courts of record of the United States District Court for the Southern District of Florida*" and that the parties "*irrevocably and unconditionally . . . consent to the jurisdiction of that court in any suit, action, or proceeding.*"

14. Venue of this action is proper in this Court pursuant to 28 U.S.C. § 1391, as the causes of action alleged herein arose in Palm Beach County, Florida.

**FACTUAL ALLEGATIONS APPLICABLE TO ALL COUNTS**

15. In or about April 2008, Plaintiff was solicited by Mr. Schamens to invest funds with TRADEDESK in an investment vehicle identified as the INVICTUS CAPITAL GROWTH AND INCOME FUND LLP (the “Invictus Fund”).

16. In reasonable reliance on the representations made to Plaintiff by Mr. Schamens on TRADEDESK’s behalf, Plaintiff invested Two Hundred Fifty Thousand Dollars (\$250,000.00) with TRADEDESK in May 2008 in the Invictus Fund.

17. In or about May 2009, Mr. Schamens made a further solicitation of Plaintiff for an additional investment from The Foundation, this time in a TRADEDESK investment vehicle identified as TRADEDESK CAPITAL LLC. The May 2009 solicitation was made in-person when Mr. Schamens met with Mr. Gary Smigiel (a Director and duly-authorized representative of The Foundation) and Douglas Fountain (a fellow Director and duly-authorized representative of The Foundation) at The Foundation’s office in Lake Worth, Florida.

18. In reasonable reliance on the representations that had been made to Plaintiff by Mr. Schamens on TRADEDESK’s behalf, Plaintiff invested One Hundred Ten Thousand Dollars (\$110,000.00) with Invictus in June 2009 in TRADEDESK CAPITAL LLC.

19. INVICTUS CAPITAL GROWTH AND INCOME FUND LLP and TRADEDESK CAPITAL LLC are collectively referred to herein as “The Funds.”

**The Settlement Agreement and TradeDesk’s Breach Thereof**

20. In June 2013, after learning of Mr. Schamens’ SEC bar and Mr. Wiegand’s FINRA sanction, Plaintiff demanded a return of all of its funds then-held by TRADEDESK as well as all proceeds derived therefrom.

21. After a series of protracted negotiations between the parties, they entered into a Confidential Settlement Agreement and General Release (the “Settlement Agreement”) on or about

October 26, 2013. A true and correct copy of the Settlement Agreement is attached hereto as **Exhibit "A"**.

22. By entering into the Settlement Agreement, TRADEDESK obligated itself to pay to Plaintiff a sum total of Six Hundred Fifty Five Thousand Three Hundred Forty Four Dollars and Ninety Cents (\$655,344.90) in accordance with a payment schedule set forth in Section 2 of the Settlement Agreement.

23. Section 2 of the Settlement Agreement of the Settlement Agreement further provides, *inter alia*: "*As a material inducement to secure The Foundation's entry into this Settlement Agreement, the parties agree in good faith that [TRADEDESK] shall timely pay, or cause to be paid, all installment payments as set forth in the payment schedule above.*"

24. Although the November 15, 2013 TRADEDESK CAPITAL LLC payment (\$5,500.00) was tardily made to Plaintiff on November 22, 2013, the November 15, 2013 INVICTUS ASSET MANAGEMENT LLC payment (\$17,500.00) was never made to Plaintiff, despite repeated demand by Plaintiff. Attached hereto as **Composite Exhibit "B"** is a true and correct copy of Plaintiff's November 2013 demand letters to TRADEDESK.

25. When providing undersigned counsel written confirmation on November 22, 2013 that the November 15, 2013 TRADEDESK CAPITAL LLC payment (\$5,500.00) had been made to Plaintiff, Mr. Schamens further advised the undersigned that the November 15, 2013 INVICTUS ASSET MANAGEMENT LLC payment (\$17,500.00) would follow via Automated Clearing House ("ACH") soon thereafter. No such payment was ever made.

26. Likewise, despite written demand from Plaintiff, the November 30, 2013 TRADEDESK CAPITAL LLC payment (\$11,000.00) and November 30, 2013 INVICTUS ASSET MANAGEMENT LLC payment (\$35,000.00) were not made to Plaintiff. Attached hereto as **Exhibit "C"** is a true and correct copy of Plaintiff's December 2, 2013 demand letter.

27. As of the date of this filing, Defendants have already failed to make three of the four payments due under the Settlement Agreement, *to wit*:

<b>PAYMENT DUE DATE</b>	<b>PAYMENT(S) MADE</b>	<b>PAYMENT(S) NOT MADE</b>
November 15, 2013	\$5,500.00	\$17,500.00
November 30, 2013		\$11,000.00
		\$35,000.00
<b>TOTAL</b>	<b>\$5,500.00</b>	<b>\$63,500.00</b>

28. Despite having been provided due notice of default and a fair opportunity to cure, TRADEDESK failed to cure its default and remains in default today.

29. Defendants’ actions and omissions constitute a breach of the Settlement Agreement.

30. As a result of the above-cited actions and omissions, Plaintiff has been damaged.

31. Plaintiff has duly performed all of its duties and obligations, and any conditions precedent to Plaintiff bringing this action have occurred, have been performed, or else have been excused or waived.

32. To enforce its rights, Plaintiff has retained undersigned counsel and is obligated to pay counsel a reasonable fee for its services, for which Defendants are liable in accordance with Section 9 of the Settlement Agreement, as a result of their bad faith, and otherwise.

**COUNT I – BREACH OF CONTRACT**  
**[AGAINST TRADEDESK]**

Plaintiff re-alleges, and adopts by reference herein, Paragraphs 1 - 32 above, and further alleges:

33. The Settlement Agreement constitutes a contract between Plaintiff and TRADEDESK.

34. TRADEDESK has breached the express terms of the Settlement Agreement by failing to make the necessary payments thereunder and, despite repeated demand, has failed to cure its breach.

35. As a direct and proximate result of TRADEDESK's breach of the Settlement Agreement, Plaintiff has been damaged.

36. Pursuant to Section 9 of the Settlement Agreement, TRADEDESK's default under the Agreement, and failure to cure its default, entitles Plaintiff to entry of a Final Judgment/award against TRADEDESK in the total amount of Six Hundred Fifty Five Thousand Three Hundred Forty Four Dollars and Ninety Cents (\$655,344.90), plus the reasonable fees and costs incurred in enforcing the Settlement Agreement, less any money received by Plaintiff pursuant to the Agreement.

WHEREFORE, Plaintiff SMIGIEL FOUNDATION TO BENEFIT CHILDREN AND FAMILIES, INC, a Florida corporation, demands entry of a judgment against INVICTUS ASSET MANAGEMENT LLC, a North Carolina limited liability company; TRADEDESK CAPITAL LLC, a Delaware limited liability company; and INVICTUS CAPITAL GROWTH AND INCOME FUND LLP, a North Carolina limited liability partnership, jointly and severally, for an amount within the jurisdictional limits of this court, including an award of interest, attorneys' fees, and costs.

#### **PLAINTIFF'S DEMAND FOR JURY TRIAL**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands trial by jury in this action of all issues so triable.

#### **RESERVATION OF RIGHTS**

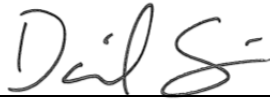
Plaintiff reserves its right to further amend this Complaint, upon completion of its investigation and discovery, to assert any additional claims for relief against Defendants or other parties as may be warranted under the circumstances and as allowed by law.



Respectfully submitted,

**SILVER LAW GROUP**

11780 W. Sample Road  
Coral Springs, Florida 33065  
Telephone: (954) 755-4799  
Facsimile: (954) 755-4684

By:  \_\_\_\_\_

DAVID C. SILVER  
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Dated: December 6, 2013

**CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE**

THIS CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE (“Settlement Agreement”) is made as of the 22nd day of October, 2013, by and between the **Smigiel Foundation to Benefit Children and Families, Inc. (“The Foundation”)**, on the one hand, and **Invictus Asset Management LLC, TradeDesk Capital LLC, and Invictus Capital Growth and Income Fund LLP (collectively referred to herein as “Invictus”)**, on the other (jointly, the “Parties”). In consideration of the mutual agreements, covenants, and conditions contained herein, the sufficiency and receipt of which is hereby acknowledged, the Parties agree as follows:

**1. RESOLUTION OF THE CLAIM**

Commencing in or about May 2008, The Foundation invested funds with Invictus with the expectation that the securities in which the funds were invested would provide a profitable return to The Foundation. Via counsel, The Foundation has requested liquidation of its invested funds. To avoid the high costs and uncertainties of litigation, the Parties, without admitting any fault or liability whatsoever to one another, desire to settle this matter amicably, have participated in good-faith settlement discussions, and have reached a settlement, the terms of which they have now set forth in this Settlement Agreement.

**2. PAYMENT SCHEDULE**

In consideration of the promises and covenants made herein, Invictus shall pay, or cause to be paid, to Silver Law Group f/b/o The Foundation the sums outlined in the following payment schedule (the “Settlement Sum”):

<b>PAYOR: TRADEDESK CAPITAL LLC</b>	
<b>PAYMENT DEADLINE</b>	<b>AMOUNT</b>
November 15, 2013	\$5,500.00
November 30, 2013	\$11,000.00
December 31, 2013	\$11,000.00
January 31, 2014	\$11,000.00
February 28, 2014	\$16,500.00
March 31, 2014	\$11,000.00
April 30, 2014	\$11,000.00
May 31, 2014	\$11,000.00
June 30, 2014	\$11,000.00
July 31, 2014	\$11,000.00
August 31, 2014	\$3,724.78
September 30, 2014	\$3,724.78
October 31, 2014	\$3,724.78
November 30, 2014	\$3,724.78

**EXHIBIT "A"**

Confidential Settlement Agreement and General Release

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December 31, 2014	\$3,724.78
January 31, 2015	\$3,724.78
February 28, 2015	\$3,724.78
March 31, 2015	\$3,724.78
April 30, 2015	\$3,724.78
May 31, 2015	\$3,724.78
TOTAL	\$147,247.80

<b>PAYOR: INVICTUS CAPITAL GROWTH AND INCOME FUND, LLP</b>	
<b>PAYMENT DEADLINE</b>	<b>AMOUNT</b>
November 15, 2013	\$17,500.00
November 30, 2013	\$35,000.00
December 31, 2013	\$35,000.00
January 31, 2014	\$35,000.00
February 28, 2014	\$52,500.00
March 31, 2014	\$35,000.00
April 30, 2014	\$35,000.00
May 31, 2014	\$35,000.00
June 30, 2014	\$35,000.00
July 31, 2014	\$35,000.00
August 31, 2014	\$15,809.71
September 30, 2014	\$15,809.71
October 31, 2014	\$15,809.71
November 30, 2014	\$15,809.71
December 31, 2014	\$15,809.71
January 31, 2015	\$15,809.71
February 28, 2015	\$15,809.71
March 31, 2015	\$15,809.71
April 30, 2015	\$15,809.71
May 31, 2015	\$15,809.71
TOTAL	\$508,097.10

Payments are to be made by, or on behalf of, TradeDesk Capital LLC and Invictus Capital Growth and Income Fund, LLP by wire transfer to the following payee in the following manner:

Account Name: SDS, LLLP d/b/a Silver Law Group f/b/o Smigiel  
Foundation to Benefit Children and Families, Inc.

Account Address: [REDACTED]

Account Number: [REDACTED]

Routing Number: [REDACTED]

Bank: [REDACTED]

As a material inducement to secure The Foundation's entry into this Settlement Agreement, the parties agree in good faith that Invictus shall timely pay, or cause to be paid, all installment payments as set forth in the payment schedule above.

### **3. INVICTUS COMPANY DOCUMENTS**

Attached and incorporated as a material requirement hereto are true and correct copies of the following documents:

#### Invictus Capital Growth and Income Fund, LLP

- Financial Statements - 2008, 2009, 2010, 2011, 2012
- State and Federal Tax Returns (as filed) - 2008, 2009, 2010
- November 2, 2011 letter from Saul Finkelstein, Esq. of Ellenoff, Grosman & Schole, LLP to Invictus Asset Management, LLC, General Partner of Invictus Capital Growth and Income Fund, LLP re: dissolution and liquidation of Invictus Capital Growth and Income Fund, LLP
- July 15, 2013 Liquidation and Dissolution Schedule Notice

#### TradeDesk Capital LLC

- Transaction Ledgers - 2008, 2009, 2010
- Financial Statements for TradeDesk Financial Corp. - 2008 and 2009
- TradeDesk Financial Corp. - Statement of Financial Condition -- 2009
- TradeDesk Financial Corp. - Statement of Income -- 2009
- TradeDesk Financial Group, Inc. - Balance Sheet -- 2009
- TradeStream Analytics, Ltd. - Balance Sheet -- 2009
- TradeStream Analytics, Ltd. - Profit and Loss Statement -- 2009
- TradeDesk Financial Group, Inc. - Quarterly Financial Reports -- 2012-2013

In entering into this Settlement Agreement, The Foundation is relying on the completeness, accuracy, and authenticity of the above-identified documents and information.

Additionally, The Foundation shall be provided, in a timely manner not to exceed ten (10) business days following issuance of, true and correct copies of TradeDesk Financial Group, Inc.'s financial statements as long as Invictus' payment obligations as set forth in Section 2

above remain outstanding. Once Invictus has fully satisfied its obligations under Section 2 above, it shall no longer be obligated to provide The Foundation any more financial statements of TradeDesk Financial Group, Inc.

**4. GENERAL RELEASE**

Upon receipt of the Settlement Sum in the amount of \$655,344.90, and only at that time, in consideration of receipt of the Settlement Sum, as well as other good and valuable consideration received from Invictus, The Foundation shall, upon Invictus' full and complete satisfaction of its obligations as set forth in Section 2 above, and only upon Invictus' full and complete satisfaction of those obligations, forever remise, release, acquit, satisfy, forever discharge, and by these presents for his trustees, guardians, administrators, agents, representatives, successors and assigns forever releases Invictus Asset Management LLC, TradeDesk Capital LLC, Invictus Capital Growth and Income Fund LLP, and their respective present and former parents, subsidiaries, affiliates, and related entities, employees, officers, directors, agents, representatives, predecessors, heirs, successors, attorneys, spouses, conjugal partnerships and assigns, including but not limited to Phillips Wiegand, Jr. and David Schamens, of and from any and all manner of action and actions, cause and causes of action, charges, suits, rights, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims, obligations, liabilities, and demands of any kind or nature whatsoever, at law or in equity, which they may have had, ever had, claim to have had, now have, or which their heirs, executors, administrators, successors, or assigns hereafter can, shall, or may have for, upon, or by reason of any matter, cause, or thing whatsoever from the beginning of the world to the date of these presents, arising out of or related to any account(s) that The Foundation maintained at any time at Invictus or its predecessors.

**5. NO ADMISSION OF LIABILITY**

The Parties acknowledge that this Settlement Agreement has been executed in connection with the compromise and settlement of disputed claims and that the Settlement Agreement and the actions taken pursuant thereto do not constitute an acknowledgment or admission on the part of Invictus of liability for any matter or precedent upon which liability may be assessed. Furthermore, the Parties acknowledge that the execution of this Settlement Agreement is not and should not be construed as an admission of liability by any Party and has been entered into solely for the purpose of avoiding costly and time-consuming litigation of a disputed claim.

**6. CONFIDENTIALITY**

**THIS IS A CONFIDENTIAL SETTLEMENT.** The Parties agree to keep any matters relating to this settlement, and the terms of this Settlement Agreement, confidential and agree not to disclose them to any other person, except as may be required in connection with the preparation and filing of income tax returns, to their accountants or as may be required by the order of a court of competent jurisdiction, or any regulatory or self-regulatory agency or at any hearing in an action between the Parties or any interested party. This Settlement Agreement does not prohibit or restrict the Parties from responding to any inquiry about this settlement or its underlying facts and circumstances by the Securities and Exchange Commission, FINRA, or any

other self-regulatory organization. The Foundation and its attorneys, agents, and accountants specifically agree not to make any disclosure to the press or other member of the media regarding the underlying dispute or the terms of this settlement. This is a material term of this Settlement Agreement.

**7. COSTS**

Each Party shall pay his or its own costs and fees.

**8. NO ASSIGNMENT**

The Foundation is the lawful owner of all claims being settled herein. The Foundation has not assigned or transferred any of the claims released herein to any other persons or entity not bound by the Settlement Agreement.

**9. DEFAULT**

In the event that a Party defaults hereunder and fails to cure said default as set forth below, the non-defaulting Party shall be entitled to an award of reasonable attorneys' fees and costs relative to the enforcement of the terms of this Settlement Agreement. Without limitation, an event of default shall occur if Invictus fails to timely make the payment of, or cause to make the payment of, the Settlement Amount to The Foundation as set forth in Paragraph 2 above, in which case, The Foundation, through counsel, shall provide written notice (the "Written Notice") of the default to Invictus by U.S. Mail, facsimile, private postal carrier (*e.g.*, FedEx, UPS, Airborne Express), or e-mail as indicated in Paragraph 10 below (all of which the Parties agree to be acceptable methods of properly giving notice under this Settlement Agreement). The Written Notice shall provide five (5) business days from the date of such notice to cure the default. Should Invictus fail to cure the default within the period referenced above, then, upon The Foundation's filing for relief from a court or quasi-judicial body of competent jurisdiction, The Foundation, after notice and hearing, shall be entitled to the entry of a Final Judgment/award against Invictus, jointly and severally, in the total amount of \$655,344.90, plus the reasonable fees and costs incurred in enforcing this Settlement Agreement less any money received by The Foundation pursuant to this Agreement. Consistent with Section 4 above, if Invictus defaults under either Section 2 ("Payment Schedule") or Section 3 ("Invictus Company Documents") of this Settlement Agreement, The Foundation shall retain, and shall not release, any and all rights and claims The Foundation has or had prior to execution of this Settlement Agreement.

**10. NOTICES**

All notices to be sent or information to be provided under this Settlement Agreement shall be sent to the following:

- a. The Foundation:  
Smigiel Foundation to Benefit Children and Families, Inc.  
c/o Scott L. Silver, Esq.  
David C. Silver, Esq.  
Silver Law Group  
11780 W. Sample Rd.

Coral Springs, FL 33065  
Telephone: (954) 755-4799  
Facsimile: (954) 755-4684  
E-mail: [ssilver@silverlaw.com](mailto:ssilver@silverlaw.com)  
E-mail: [dsilver@silverlaw.com](mailto:dsilver@silverlaw.com)  
*Counsel for the Smigiel Foundation to Benefit Children and Families, Inc.*

b. Invictus:

Invictus Asset Management LLC, Tradedesk Capital LLC, and  
Invictus Capital Growth and Income Fund, LLP  
c/o Phillips Weigand, Jr.  
Post Office Box 201  
Advance, North Carolina 27006  
E-mail: [pwiegandjr@invictusfunds.com](mailto:pwiegandjr@invictusfunds.com); [pwiegand@tradedeskfinancial.com](mailto:pwiegand@tradedeskfinancial.com)

With copies to:

David W. Schamens  
Managing Director, TradeStream Analytics, Ltd.  
Telephone: (212) 537-6867 or (704) 503-1110  
Facsimile: (704) 973-7736  
E-mail: [dschamens@tradestreamanalytics.com](mailto:dschamens@tradestreamanalytics.com)

**11. ADVICE OF COUNSEL**

The Parties have determined that this settlement is fair and reasonable under all the circumstances, and this determination has in part been based upon their independent judgment after consulting with legal counsel. In making this determination, the Parties have had an adequate opportunity to discuss and assess the merits of all the claims or potential claims. The Parties further agree that no fact, event, evidence, circumstance, or transaction relating directly or indirectly to The Foundation's claim, or which may hereafter be discovered, shall affect in any manner the final and unconditional nature of the settlement and covenant not to sue as set forth herein.

**12. NO CONSTRUCTION OF AGREEMENT**

It is agreed and understood that the general rule that ambiguities are to be construed against the drafter shall not apply to this Settlement Agreement. In the event that any language of this Settlement Agreement is found to be ambiguous, each Party shall have an opportunity to present evidence as to the actual intent of the Parties with respect to any such ambiguous language.

**13. BINDING AGREEMENT**

This Settlement Agreement shall be binding upon and inure to the benefit of the Parties, their parent companies, subsidiaries, affiliates, and their respective heirs, executors, administrators, successors, assigns, personal representatives, and legal representatives.

Confidential Settlement Agreement and General Release  
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**14. GOVERNING LAW**

This Settlement Agreement is deemed entered into in the State of Florida and shall be construed and interpreted in accordance with the laws of the State of Delaware. The Parties irrevocably and unconditionally: (a) agree that any suit, action, or legal proceeding arising out of, in connection with, or relating to this Agreement must be brought only in the courts of record of the United States District Court for the Southern District of Florida; (b) consent to the jurisdiction of that court in any suit, action, or proceeding; (c) waive any objection which they may have to laying venue of any such suit, action, or proceeding in that court; and (d) agree that service of any court paper may be effected on such party by U.S. Mail, private postal carrier (e.g., FedEx, UPS, Airborne Express), or e-mail as provided in this Agreement.

**15. ENTIRE AGREEMENT**

This Settlement Agreement contains the entire agreement between the Parties hereto. The terms of said Settlement Agreement are contractual and may not be modified orally except by a written instrument duly signed by each Party.

**16. COUNTERSIGNATURES**

This Agreement may be executed in one or more counterparts, each of which is an original, but all of which together constitute one and the same instrument. Confirmation of execution by facsimile or e-mailed signature page is binding upon any party so confirming.

We further confirm and state that we have carefully read this Settlement Agreement, know the contents thereof, and sign our names as our own free act. WITNESS our hands and seals on the date(s) indicated below.

**\*\*CAUTION: READ ALL TERMS ABOVE BEFORE SIGNING\*\***

**Smigiel Foundation to Benefit Children and Families, Inc.**

By: 

Name: GARY SMIGIEL

Title: TRUSTEE

Date: 10-23-13

**Invictus Asset Management LLC**

By: 

Name: Phillips Wiegand Jr.

Title: Managing Member

Date: October 26, 2013



Confidential Settlement Agreement and General Release  
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**TradeDesk Capital LLC**

By: 

Name: David W. Schamens

Title: Director of Managing Member

Date: October 26, 2013

**Invictus Capital Growth and Income Fund  
LLP**

By: 

Name: Phillips Wiegand Jr.

Title: Managing Member of GP

Date: October 26, 2013



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11780 W. Sample Road  
Coral Springs, FL 33065  
Tel: (954) 755-4799  
Fax: (954) 755-4684

November 18, 2013

**VIA ELECTRONIC MAIL ONLY**

Invictus Asset Management LLC, Tradedesk Capital LLC, and  
Invictus Capital Growth and Income Fund, LLP  
c/o Phillips Wiegand, Jr.  
General Counsel and Managing Director  
TradeDesk Financial Group, Inc.  
E-mail: [pwiegandjr@invictusfunds.com](mailto:pwiegandjr@invictusfunds.com); [pwiegand@tradedeskfinancial.com](mailto:pwiegand@tradedeskfinancial.com)

**VIA ELECTRONIC MAIL ONLY**

David W. Schamens  
Managing Director, TradeStream Analytics, Ltd.  
E-mail: [dschamens@tradestreamanalytics.com](mailto:dschamens@tradestreamanalytics.com); [dschamens@gmail.com](mailto:dschamens@gmail.com)

Re: Smigiel Foundation to Benefit Children and Families, Inc. v. Invictus, *et al.*

Dear Gentlemen:

In accordance with Section 2 of the Confidential Settlement Agreement and General Release (the "Settlement Agreement") negotiated and executed by the parties thereto on or about October 22, 2013, Invictus Asset Management LLC, TradeDesk Capital LLC, and Invictus Capital Growth and Income Fund LLP (collectively "Invictus") were obligated to pay to my client, the Smigiel Foundation to Benefit Children and Families, Inc. ("The Foundation"), Twenty Three Thousand Dollars (\$23,000.00) on or before November 15, 2013. No such payment was timely made; and as of the date of this letter, no such payment has been made. As a result, Invictus has defaulted on its obligations under the Settlement Agreement. Pursuant to Section 9 of the Settlement Agreement, we are providing Invictus this opportunity to cure, within five (5) days of the date of this letter, its default. If Invictus fails to timely effectuate a cure of its default, The Foundation will avail itself of an appropriate legal remedy. If you have already sent the wire transfer, please provide the confirmation information.

I look forward to Invictus' prompt compliance with its obligations under the Settlement Agreement.

Very Truly Yours,

A handwritten signature in black ink that reads 'David C. Silver'.

David C. Silver, Esq.

cc: Gary Smigiel  
Saul H. Finkelstein, Esq. ([sfinkelstein@egsllp.com](mailto:sfinkelstein@egsllp.com))

**COMPOSITE EXHIBIT "B"**



www.silverlaw.com

11780 W. Sample Road  
Coral Springs, FL 33065  
Tel: (954) 755-4799  
Fax: (954) 755-4684

November 22, 2013

**VIA ELECTRONIC MAIL ONLY**

Invictus Asset Management LLC, Tradedesk Capital LLC, and  
Invictus Capital Growth and Income Fund, LLP  
c/o Phillips Wiegand, Jr.  
General Counsel and Managing Director  
TradeDesk Financial Group, Inc.  
E-mail: [pwiegandjr@invictusfunds.com](mailto:pwiegandjr@invictusfunds.com); [pwiegand@tradedeskfinancial.com](mailto:pwiegand@tradedeskfinancial.com)

**VIA ELECTRONIC MAIL ONLY**

David W. Schamens  
Managing Director, TradeStream Analytics, Ltd.  
E-mail: [dschamens@tradestreamanalytics.com](mailto:dschamens@tradestreamanalytics.com); [dschamens@gmail.com](mailto:dschamens@gmail.com)

Re: Smigiel Foundation to Benefit Children and Families, Inc. v. Invictus, *et al.*

Dear Gentlemen:

In accordance with Section 2 of the Confidential Settlement Agreement and General Release (the "Settlement Agreement") negotiated and executed by the parties thereto on or about October 22, 2013, Invictus Asset Management LLC, TradeDesk Capital LLC, and Invictus Capital Growth and Income Fund LLP (collectively "Invictus") were obligated to pay to my client, the Smigiel Foundation to Benefit Children and Families, Inc. ("The Foundation"), Twenty Three Thousand Dollars (\$23,000.00) on or before November 15, 2013. No such payment was timely made; and as of the date of this letter, no such payment has been received. As a result, Invictus has defaulted on its obligations under the Settlement Agreement. Pursuant to Section 9 of the Settlement Agreement, we provided Invictus an opportunity to cure its default. Invictus failed to timely effectuate a cure of its default. The Foundation will avail itself of an appropriate legal remedy. If you have already sent the wire transfer as Mr. Schamens claimed on November 18, 2013, please provide the confirmation information.

I look forward to Invictus' prompt compliance with its obligations under the Settlement Agreement.

Very Truly Yours,

A handwritten signature in black ink that reads 'David C. Silver'.

David C. Silver, Esq.

cc: Gary Smigiel  
Saul H. Finkelstein, Esq. ([sfinkelstein@egsllp.com](mailto:sfinkelstein@egsllp.com))



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Fax: (954) 755-4684

November 25, 2013

**VIA ELECTRONIC MAIL ONLY**

Invictus Asset Management LLC, Tradedesk Capital LLC, and  
Invictus Capital Growth and Income Fund, LLP  
c/o Phillips Wiegand, Jr.  
General Counsel and Managing Director  
TradeDesk Financial Group, Inc.  
E-mail: [pwiegandjr@invictusfunds.com](mailto:pwiegandjr@invictusfunds.com); [pwiegand@tradedeskfinancial.com](mailto:pwiegand@tradedeskfinancial.com)

**VIA ELECTRONIC MAIL ONLY**

David W. Schamens  
Managing Director, TradeStream Analytics, Ltd.  
E-mail: [dschamens@tradestreamanalytics.com](mailto:dschamens@tradestreamanalytics.com); [dschamens@gmail.com](mailto:dschamens@gmail.com)

Re: Smigiel Foundation to Benefit Children and Families, Inc. v. Invictus, *et al.*

Dear Gentlemen:

In accordance with Section 2 of the Confidential Settlement Agreement and General Release (the "Settlement Agreement") negotiated and executed by the parties thereto on or about October 22, 2013, Invictus Asset Management LLC, TradeDesk Capital LLC, and Invictus Capital Growth and Income Fund LLP (collectively "Invictus") were obligated to pay to my client, the Smigiel Foundation to Benefit Children and Families, Inc. ("The Foundation"), Twenty Three Thousand Dollars (\$23,000.00) on or before November 15, 2013. No such payment was timely made. On Friday, November 22, 2013, we received the TradeDesk Capital LLC payment of Five Thousand Five Hundred Dollars (\$5,500.00). As of the date of this letter, the Invictus Capital Growth and Income Fund, LLP payment of Seventeen Thousand Five Hundred Dollars (\$17,500.00) has not been received. As a result, Invictus has defaulted on its obligations under the Settlement Agreement. Pursuant to Section 9 of the Settlement Agreement, we provided Invictus an opportunity to cure its default. Invictus failed to timely effectuate a cure of its default. The Foundation will avail itself of an appropriate legal remedy. If you have already sent the wire transfer as Mr. Schamens claimed on November 18, 2013, and re-iterated on November 22, 2013, please provide the confirmation information. As a reminder, the next scheduled payment date is November 30, 2013.

I look forward to Invictus' prompt compliance with its obligations under the Settlement Agreement.

Very Truly Yours,

A handwritten signature in black ink that reads 'David C. Silver'.

David C. Silver, Esq.

cc: Saul H. Finkelstein, Esq. ([sfinkelstein@egsllp.com](mailto:sfinkelstein@egsllp.com))



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Fax: (954) 755-4684

December 2, 2013

**VIA ELECTRONIC MAIL ONLY**

Invictus Asset Management LLC, Tradedesk Capital LLC, and  
Invictus Capital Growth and Income Fund, LLP  
c/o Phillips Wiegand, Jr.  
General Counsel and Managing Director  
TradeDesk Financial Group, Inc.  
E-mail: [pwiegandjr@invictusfunds.com](mailto:pwiegandjr@invictusfunds.com); [pwiegand@tradedeskfinancial.com](mailto:pwiegand@tradedeskfinancial.com)

**VIA ELECTRONIC MAIL ONLY**

David W. Schamens  
Managing Director, TradeStream Analytics, Ltd.  
E-mail: [dschamens@tradestreamanalytics.com](mailto:dschamens@tradestreamanalytics.com); [dschamens@gmail.com](mailto:dschamens@gmail.com)

Re: Smigiel Foundation to Benefit Children and Families, Inc. v. Invictus, *et al.* - **DEFAULT**

Dear Gentlemen:

In accordance with Section 2 of the Confidential Settlement Agreement and General Release (the "Settlement Agreement") negotiated and executed by the parties thereto on or about October 22, 2013, Invictus Asset Management LLC, TradeDesk Capital LLC, and Invictus Capital Growth and Income Fund LLP (collectively "Invictus") were obligated to pay to my client, the Smigiel Foundation to Benefit Children and Families, Inc. ("The Foundation"), Twenty Three Thousand Dollars (\$23,000.00) on or before November 15, 2013. No such payment was timely made. On Friday, November 22, 2013, we received the TradeDesk Capital LLC payment of Five Thousand Five Hundred Dollars (\$5,500.00). As of the date of this letter, the Invictus Capital Growth and Income Fund, LLP payment of Seventeen Thousand Five Hundred Dollars (\$17,500.00) has not been received. **As a result, Invictus has defaulted on its obligations under the Settlement Agreement.** Pursuant to Section 9 of the Settlement Agreement, we provided Invictus an opportunity to cure its default. Invictus failed to timely effectuate a cure of its default. Invictus has also now missed its scheduled payment of November 30, 2013 of Forty Six Thousand Dollars (\$46,000.00). Please provide wire confirmation in the amount of Sixty Three Thousand Five Hundred Dollars by **3:00PM** or The Foundation will avail itself of an appropriate legal remedy.

I look forward to Invictus' prompt compliance with its obligations under the Settlement Agreement.

Very Truly Yours,

A handwritten signature in black ink that reads 'David C. Silver'.

David C. Silver, Esq.

cc: Saul H. Finkelstein, Esq. ([sfinkelstein@egsllp.com](mailto:sfinkelstein@egsllp.com))

**EXHIBIT "C"**