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# MEMO

APPROVED  
8/8/2022



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DATE: August 1, 2022  
FROM: Matney M. Ellis  
Procurement Director  
TO: Board of County Commissioners  
SUBJECT: Agreement – MessageMedia, USA, Inc.

A handwritten signature in black ink, appearing to read "Matney M. Ellis", with a long horizontal flourish extending to the right.

Submitted for your approval and execution is the attached agreement between the Board of County Commissioners of Tulsa County on behalf of Tulsa County Election Board and MessageMedia, USA, Inc. for messaging services during a one-year period with an annual fee of \$3288.00 as further described in the attached.

Respectfully submitted for your approval and execution.

MME / jdf

SUBMITTED FOR: The August 8, 2022 BOCC meeting agenda.

CMF# 20221551



## MessageMedia (USA) application form

### ABOUT THIS DOCUMENT -

This document, when completed and accepted by us, forms part of your Customer Contract as defined in our Customer Terms (attached hereto).

### PARTIES - The parties to your Customer Contract are:

a. MessageMedia, USA, Inc ("Supplier", "we" or "us") b. the Customer whose details appear below ("you").

#### 1. Company

Company name: Board of County Commissioners of Tulsa County

Postal address: 218 W. 6th St.

City: Tulsa

State: OK

Zipcode: 74119

Country: USA

#### 2. Customer type

Direct customer

#### 3. Support

Standard

#### 4. Minimum term

12 months

#### 5. Contact details

Key contact name: Gwen Freeman

Phone: 9185965760

Mobile:

Email: gfreeman@tulsacounty.org

Billing contact name:

Different to Key Contact

Phone:

Mobile:

Email:

#### 6. Payment methods

(a) Our preferred methods for receiving funds are Direct Debit / Credit Card.

(b) We will issue an invoice at the end of each month and take payment on the invoice due date.

(c) Please note that service suspension for non-payment by the due date is strictly enforced.

(d) If you exceed the agreed upon Annual Surcharge Upfront Rate set forth in Section 7 below, in addition to your subscription, MessageMedia will pass along US and Canadian carrier surcharges, as set out here: <https://support.messagemedia.com/hc/en-us/articles/4624035425935-U-S-Canada-Charges-Surcharges>. These charges may change from time to time.



7. Charges: Post-Paid in USD excluding taxes	
Monthly Access Fee	\$249.00
Included SMS	10,000
Messaging US Rate	\$0.0249
Messaging International Rate	\$0.10
MMS Rate	\$0.055
STL - Short Trackable Links	Included
MLP - Mobile Landing Pages	Included
Dedicated Toll Free Number	1 included
Annual Surcharge Upfront Rate (Carrier Surcharges)	\$300.00
Total Setup	\$0.00
Total Annual Fee	\$3288.00

**8. Special Conditions**  
 Notwithstanding anything in our Customer Terms, you must pay a Bill within 30 days after the date of the Bill. (Paid by PO)

Date Signed -

The Parties have executed this contract from Today's Date, signed by their respective officer duly authorized.

<p><b>MessageMedia, USA, Inc</b></p> <p>DocuSigned by:    <small>54C89E7DD3B454</small>                  Authorized representative                  Name: Doug Rubingh                  Title: US President</p>	<p><b>Customer</b></p> <p>                  Authorized representative                  Name: Karen Keith                  Title: Chairman</p>	<p>Attest:   </p>
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APPROVED AS TO FORM:  
**Nicholas Williams**  
Digitally signed by Nicholas Williams  
 Date: 2022.07.29 10:57:14 -05'00'  
 ASSISTANT DISTRICT ATTORNEY

## Customer Terms

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### Part A – Your Contract with Us

#### 1. Your Customer Contract

‘We’ and ‘Us’ refers to MessageMedia, USA, Inc. of The Lab, 2420 17th St, Denver, CO 80202 (“MessageMedia”).

(a) We supply Services to you under your Customer Contract. Your Customer Contract comprises:

- (i) your Application Form;
- (ii) the terms of your Plan;
- (iii) the Product Terms;
- (iv) these Customer Terms; and
- (v) if you are a Reseller, Part C.

(b) The parties to the Customer Contract are the Customer (you) and the Supplier (we, us).

#### 2. The Term of Your Contract

(a) The Customer Contract will continue until the end of the Minimum Term. Upon expiry of the Minimum Term the Contract may be renewed upon written agreement by the parties. Should you continue to use the Services after the end of the Minimum Term, subject to annual fiscal appropriations, the Contract will continue thereafter on a month-to-month basis until it is terminated by 30 days’ notice by either party at any time without penalty.

(b) Your Customer Contract will commence upon our acceptance of your Application Form or when we commence providing the Services to you, whichever happens first.

### Provision of Our Services

#### 3. The Services

(a) We will provide to you a non-exclusive, non-transferable, non-sub-licensable license for the Services subject to the terms of your Customer Contract.

(b) We may provide the Services using such facilities and such Carrier as we choose from time to time.

(c) We may provide the Services using Our Facilities and/or third party facilities. Together, we call those Facilities our Network.

#### 4. Exclusive or Preferred Supplier

If your Application Form states:

(a) that we are to be your preferred supplier then you must not engage a third party to provide to you more than 10% of your total requirements for the Messaging Services or services substantially similar to the Messaging Services; or

(b) that we are to be your exclusive supplier then you must not engage a third party to provide to you any Messaging Services or services substantially similar to the Messaging Services.

(c) Within 14 days of receipt of a written request, you will provide to us assurances (in a form acceptable to us) attesting to your compliance with clause 4.1(a) or clause 4.1(b).

## 5. Periodic Entitlements

(a) If your Plan or Application Form states that you are required to pay a Monthly Access Fee you may receive Message Credits equal to the value stated in your Plan or Application Form, which may be redeemed by you against Message Fees incurred during that month. We call these Periodic Entitlements.

(b) Unused Periodic Entitlements do not carry forward and are not redeemable for cash or other credit.

(c) If you exceed your Periodic Entitlements, extra Charges may apply or a Service may be limited in some way. Your Plan or Application Form will give details.

## 6. Compliance with Policies

(a) You must comply with any applicable Acceptable Use Policy we publish on our website or make available to you. Unused Periodic Entitlements do not carry forward and are not redeemable for cash or other credit.

(b) You must comply with any policy we publish on our website or make available to you directed to ensuring that the use of a Service complies with all Laws.

## 7. Operational Directions

(a) Acting reasonably, we may give Operational Directions about a Service. Operational Directions will be directed to the safety, security or reliability of Facilities, compliance with Laws or dealing with an emergency. We will only give an Operational Direction as and when reasonably necessary.

(b) You must comply with any applicable Operational Direction.

## 8. Carrier or carriage service provider

You promise that you are not a Carrier or a carriage service provider.

## 9. Use of Service by others

(a) Unless your Application Form states that we have appointed you as a Reseller, you must not share, resell or resupply a Service for remuneration or reward.

(b) The acts and omissions of your Staff and End Users with respect to a Service are deemed to be your acts and omissions.

(c) You must ensure that your Staff and End Users do not do (or omit to do) anything that would breach your Customer Contract if done (or not done) by you.

## 10. Payment for third party services

Using a Service may depend on you having goods or services supplied by third parties. For instance, in order to use an email-to-SMS Service, you must have an internet connection. You are solely responsible for the costs of all third party goods and services you acquire.

## 11. Using a Service

(a) When using a Service, you must comply with:

- (i) your Customer Contract (including any applicable Acceptable Use Policy); and
- (ii) any applicable Laws.

(b) You must not use a Service, and you must Ensure that your End Users do not use a Service:

- (i) to send Restricted Content;

- (ii) for publishing, reproducing or advertising any message, information, symbol or other communication which is offensive or abusive or of an indecent, obscene or menacing character or for the purpose of causing annoyance, inconvenience or needless anxiety to any person, or for any unlawful purpose;
- (iii) to defame any person;
- (iv) to breach the rights of any person;
- (v) to infringe copyright;
- (vi) to create, transmit or communicate communications which are defamatory, obscene, pornographic, discriminatory, offensive, in breach of confidence, illegal or which bring us or any of our Providers into disrepute;
- (vii) to host or transmit Content which contains viruses or other harmful code or data designed to interrupt, damage, destroy or limit the functionality of any software, hardware or computer or communications equipment;
- (viii) to send, allow to be sent, or assist in the sending of spam, to use or distribute email harvesting software, or otherwise breach any Privacy Law;
- (ix) in a way that is misleading or deceptive, where that is contrary to Law;
- (x) in a way that results, or is likely to result, in damage to property or injury to any person; or
- (xi) in any way that damages or interferes with our Services to other customers, our Providers or any Facilities or exposes us to liability.

(c) As between you and us, you are solely responsible for all acts or omissions that occur under your Account including any password provided to you by us, and the Content of any Messages transmitted through the Service. You acknowledge and agree that any Messages sent using your Account are deemed to have been sent and/or authorized by you.

## **Confidentiality, Intellectual Property and Privacy**

### **12. Confidentiality**

- (a) Each party (Recipient) agrees that, in respect of Confidential Information disclosed to the Recipient by the other party (Disclosing Party), it will not disclose Confidential Information except:
- (i) for the purpose for which the Confidential Information was disclosed to the Recipient under the terms of the Customer Contract;
  - (ii) to those employees, officers and agents of the Recipient who need to know the information for the purposes of the Customer Contract, if that person undertakes to keep confidential the Confidential Information;
  - (iii) to professional advisers and consultants of the Recipient whose duties in relation to the Recipient require that the Confidential Information be disclosed to them;
  - (iv) with the prior written approval of the Disclosing Party; or
  - (v) as otherwise required by law to disclose such information.
- (b) The parties acknowledge that monetary damages alone would not be adequate compensation for a breach of the obligations of confidentiality under this Customer Contract, and a Disclosing Party is entitled to seek an injunction from a Court of competent jurisdiction on a breach or threatened breach of this clause.
- (c) Despite anything else contained in this Customer Contract and in particular in this clause 12, we retain the unconditional and irrevocable right to disclose your identity and address and those of any

of your Staff or End Users in the event of any complaint received from any regulatory or Government body or Carrier, in connection with this Customer Contract. In such circumstances, we will use all reasonable efforts to limit such disclosure and to provide notice of such request to you as soon as reasonably practicable.

(d) If either party becomes aware of any actual or perceived breach of or unauthorized access to the other party's Confidential Information, the party possessing such knowledge shall promptly notify the other party and provide all reasonably requested assistance in addressing such event.

(e) Nothing in this clause 12 prevents us from naming you as a customer and user of our Services in our marketing materials.

### **13. Intellectual Property**

(a) The parties agree that other than as provided in this clause 13, nothing in the Customer Contract transfers ownership in, or otherwise grants any rights in, any Intellectual Property Rights of a party.

(b) If a party provides any material to the other party that contains any Intellectual Property Rights which were developed by or on behalf of, or licensed to, the first party independently of the Customer Contract (Pre-Existing Material), then the first party grants to the other party a non-transferable, non-exclusive, royalty-free licence to use, during the term of the Customer Contract, the Pre-Existing Material solely for the purpose of using or supplying the Services under the Customer Contract.

### **14. Privacy**

(a) If a party is provided with, or has access to, Personal Information in connection with the Services, it must comply, to the extent applicable, with the Privacy Laws in respect of that Personal Information, whether or not it is an organization bound to comply with such laws. Details of our privacy policy can be found on our website.

(b) You acknowledge and agree that where you authorize or require us to collect or otherwise deal with Personal Information in your name or on your behalf in connection with providing the Services, that we do so as your agent.

(c) You acknowledge and agree that except as may be required by this Agreement, we are not required to take steps to ensure that any Personal Information collected by you has been collected in accordance with the Privacy Laws.

(d) If the Services or the performance of our respective obligations under this Customer Contract involve any processing of any personal data (as defined in the GDPR) of, or sending Messages to, any individuals in the European Union, then we each agree that we shall comply with the additional terms set out in Parts D and E.

## **Prices, Billing and Payment Terms**

### **15. Charges & payment: Prices**

(a) You agree to pay our Charges in accordance with the terms of your Contract.

(b) If the price for a service is not listed in your Application Form, for example the price for international SMS, we may charge you a fee equal to the cost to us of providing that service plus a reasonable margin.

(c) You warrant that you will use the Messaging Services exclusively for the sending of Standard Rate Messages containing Unrestricted Content to End Users and, where the Service supports it, receiving Messages from End Users. We may make an extra Charge if you send any Messages that are not Standard Rate Messages, equal to the amount charged to us by the Carrier plus a reasonable margin.

(d) Unless otherwise agreed by you and us, you must pay for every Message dispatched using the Messaging Services irrespective of receipt by the intended recipient, provided that we deliver the Message to the relevant Carrier or Provider.

(e) On written request received within 30 days of the Message being dispatched, we will provide evidence that the Message was delivered to the relevant Carrier or Provider.

(f) Any failure by a Carrier to deliver a Message to the intended recipient is beyond our control and you will not hold us liable in respect of any such failure.

(g) Surcharges are payable in addition to our price for the service. Surcharges are subject to change, are passed onto you at cost if applicable, and vary according to the service and carrier supporting the particular service.

#### 16. Calculation of number of SMS

*Information point: The SMS system allows a maximum message size of 160 characters (or 70 characters if you include any Unicode characters and send via a Unicode supported service). If a user sends a longer message, the system splits it to two or more separate SMS that may be reassembled on delivery so that they appear to be a single message (or, on some handsets, may be delivered as a series of separate SMS). When a longer message is split in this way, the components are no more than 153 characters long (or 67 characters long if you include any Unicode characters and send via a Unicode supported service), because seven characters are used to facilitate re-joining on delivery. For messages sent to End Users in Canada, the maximum message size is 140 characters. When a message longer than 140 characters is sent to an End User in Canada, the system splits the message into two or more components, each of which are no more than 133 characters long (or 67 characters long if you include any Unicode characters and send via a Unicode supported service). As a result, a longer message will result in more than one SMS being transmitted, and charges apply accordingly, as described in this clause.*

Charges for an SMS Service will be based on the number of SMS you send, calculated in accordance with the following rules:

(a) If you include any Unicode characters and send via a Unicode supported service, content that contains no more than 70 characters counts as one SMS. In all other cases, content that contains no more than 160 characters (or no more than 140 characters if you send to End Users in Canada) counts as one SMS.

(b) If you include any Unicode characters and send via a Unicode supported service, content that contains more than 70 characters counts as one SMS for each block of 67 characters or part thereof. In all other cases, content that contains more than 160 characters (or more than 140 characters if you send to End Users in Canada) counts as one SMS for each block of 153 characters or part thereof (or each block of 133 characters or part thereof if sending to End Users in Canada).

(c) A 'character' includes each individual letter, digit, punctuation and other symbol in the Content.

(d) Each press of a 'spacebar' generates a separate character.

(e) Some special symbols and non-English letters may comprise more than one character and you will be charged accordingly.

(f) Where an SMS is sent to multiple End Users, each one is counted separately.

#### 17. Calculation of the size of an MMS

Charges for an MMS Service will be based on the size and number of MMS you send, calculated in accordance with the following rules:

(a) Content that contains no more than 215kB is charged at the Standard Rate (as defined in your Plan or Application Form).



- (b) Content that contains between 216kB and 350kB is charged at the First Tier Premium Rate (as defined in your Plan or Application Form).
- (c) Content that contains more than 351kB up to 2000kB is charged at the Second Tier Premium Rate (as defined in your Plan or Application Form).
- (d) Where an MMS is sent to multiple End Users, each one is counted separately.

**18. When we can bill**

- (a) Your 'Billing Period' is the period between bills. Unless your Application Form states otherwise, our standard Billing Period is monthly.
- (b) We can bill a part-period eg to align your Billing Period with the first day of each month.

**19. Extra Charges for bills and information**

- (a) We may charge you an extra Charge if:
  - (i) you request non-standard information about your bill or Charges; or
  - (ii) you ask us to deliver a bill by a method that is not the standard method for a Plan.
- (b) If you request a paper bill when that is not the standard method for a Plan, the extra Charge is \$5 per bill, or as otherwise notified by us to you.

**20. Late billing**

- (a) We may late bill.
- (b) Some Charges in a Bill may relate to a previous Billing Period.

**21. When you must pay**

- (a) Where a Direct Debit or credit card arrangement applies, we may debit payment for Charges:
  - (i) 30 days after they are billed (if we issue a Bill for the Service); or
  - (ii) 30 days after the end of the current Billing Period (if we do not issue a Bill for the Service).
- (b) If any Bill is overdue for payment, you must pay that Bill and any other Bill immediately.
- (c) You must pay a Bill within 30 days after the date of the Bill, unless your Application Form or Plan states otherwise.

**22. How you can Pay**

- (a) If your Plan or Application Form specifies 'Direct Debit only' (or similar) then:
  - (i) Direct Debit payment is a precondition to supply of Service to you.
  - (ii) We may suspend Service if Direct Debit arrangements are not maintained.
  - (iii) You must not cause to be reversed any Direct Debit payment to us, unless you have our prior written approval. Otherwise, you must pay our reasonable costs (including legal fees if necessary) of reinstating the transaction.
- (b) In any other case:
  - (i) Direct Debit is our preferred payment method and incurs no **card** surcharges.
  - (ii) You may pay by MasterCard or Visa (or any other card we notify you that we accept) or direct deposit.
  - (iii) Payments made using credit cards may be subject to a credit card surcharge. Unless your Application Form states otherwise, non-Direct Debit payments attract a monthly credit **card**

**surcharge** of \$5 and, in addition to our usual **credit card** processing fee, Amex or Diners Club will attract an extra 2% surcharge.

(c) If any payment you make is dishonored, we may charge you a reasonable payment dishonor fee and recover from you any fees charged by our bank which result from the dishonored payment.

### 23. Late payment

If a Bill is not paid on time:

(a) you are in breach of your Contract, and

(b) [intentionally omitted].

### 24. Billing

(a) Our records of what you owe us are deemed to be right unless you show them to be wrong.

(b) If you dispute a bill, you must pay it on time and without set off. We shall credit you if it is later determined that you are entitled to a credit.

(c) You may not raise a billing dispute more than 12 months after a bill is issued, and we will not pay a refund or give a credit in respect of a period prior to that.

### 25. Taxes

(a) Each party shall be responsible for its own Taxes arising out of its performance under this Agreement. Unless otherwise stated, when you pay Charges on your Service, you'll also pay us an additional amount that's equal to the Taxes on the Charges or Services.

(b) If you are exempt from any such Taxes for any reason, we will exempt you from such Taxes on a going-forward basis once you deliver a duly executed and dated valid exemption certificate to our tax department and our tax department has approved such exemption certificate. Such exemptions should be sent directly to [collections@messagemedia.com.au](mailto:collections@messagemedia.com.au).

(c) If you are required by law to make any deduction or withholding on account of any Taxes from payments due under this Agreement, you must increase the payment due so that, after deducting or withholding such Tax, we receive an amount equal to the amount we would have received had no deduction or withholding been made.

### 26. Representations and Warranties

(a) Mutual Representations and Warranties. Each party represents and warrants to the other that (i) this Agreement constitutes a legal, valid and binding obligation, enforceable against it in accordance with its terms; (ii) the party's obligations under this Agreement do not violate any law or breach any other agreement to which such party is bound; (iii) it has all necessary right, power and ability to execute this Agreement and to perform its obligations therein; and (iv) no authorization or approval from any third party is required in connection with such party's execution, delivery or performance of this Agreement.

(b) Your Representations and Warranties. You represent and warrant that you are engaged in a lawful business and are duly licensed to conduct such business under the laws of all jurisdictions in which you conduct business. You further represent and warrant that all statements made by you in this Agreement, or in any other document relating hereto by you or on your behalf, are to the best of your knowledge true, accurate and complete. To the extent applicable to you, you will comply with all Applicable Laws, regulations, rules, ordinances and orders of governmental authorities having jurisdiction over you and your business.

(c) Our Representations and Warranties. We represent and warrant that we will provide the Services in a professional manner consistent with the level of care, skill, practice and judgment exercised by other professionals in performing Services of a similar nature under similar circumstances by

personnel with requisite skills, qualifications and licenses needed to carry out such work, and in compliance with all applicable laws, regulations, rules, ordinances and orders of governmental authorities having jurisdiction over us and our business, and in a timely and commercially reasonable manner.

## **Warranties**

### **27. Indemnities and Limitation of Liability**

(a) [intentionally omitted]

(b) We will indemnify and hold you and your affiliates, and your respective officers, directors and employees harmless from and against any and all costs (including reasonable attorneys' fees), expenses, loss, liabilities, suits, actions, damages or claims or proceedings arising or in any other way connected with (a) any wilful or negligent act or omission by us, our employees, agents or contractors; or (b) any knowing infringement of any other party's patent or trademark.

(c) An Indemnified Party shall promptly provide the Indemnifying Party with written notice upon learning of any Claims or complaints that may reasonably result in the indemnification of the Indemnified Party, provided, however, that failure by the Indemnified Party to provide prompt notice to the Indemnifying Party shall not relieve the Indemnifying Party of its obligations under this clause 27, unless the Indemnifying Party's ability to defend the Claim has been materially disadvantaged or compromised.

(d) Any indemnity in this Agreement is a continuing obligation, independent of other obligations under this Agreement and continues after this Agreement ends.

### **28. Recipient Information and Disclaimers**

(a) You, on your own behalf and on behalf of your recipients, hereby grants to us the non-exclusive right to access and use certain recipient information as is necessary for us to provide the Messaging Services. You represent and warrant that you possess all rights, consents and permissions necessary to use and disclose recipient information in connection with the Messaging Services and this Customer Contract and that you have authority to grant us the rights set forth in this clause.

(b) You acknowledge that we exercise no control over, and will have no liability for, any recipient information. You will be responsible at all times for maintaining the accuracy, timeliness and security of your and your recipient's information, and we bear no liability for the accuracy, loss or damage in part or whole, of such information or failure to store any such information.

(c) EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED HEREIN AND TO THE MAXIMUM EXTENT PERMITTED BY LAW, WE DO NOT MAKE ANY REPRESENTATIONS, WARRANTIES, CONDITIONS OR GUARANTIES WITH RESPECT TO THIS CUSTOMER CONTRACT OR THE MESSAGING SERVICES, INCLUDING WITH RESPECT TO THE RESULTS THAT MAY BE OBTAINED FROM YOUR USE OF THE MESSAGING SERVICES OR THE RELIABILITY, TIMELINESS, QUALITY, SUITABILITY, AVAILABILITY, ACCURACY OR COMPLETENESS OF THE MESSAGING SERVICES. WE EXPRESSLY DISCLAIM ANY AND ALL WARRANTIES, CONDITIONS, REPRESENTATIONS, AND GUARANTEES WITH RESPECT TO THIS CUSTOMER CONTRACT AND THE MESSAGING SERVICES, WHETHER EXPRESS OR IMPLIED, ARISING BY LAW, CUSTOM, PRIOR ORAL OR WRITTEN STATEMENTS, OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT, OR ANY IMPLIED WARRANTIES ARISING OUT OF COURSE OF PERFORMANCE, COURSE OF DEALING OR USAGE OF TRADE. THE SMS MESSAGING SERVICE IS PROVIDED ON AN "AS-IS" BASIS. NO REPRESENTATION OR OTHER AFFIRMATION OF FACT, INCLUDING, WITHOUT LIMITATION, STATEMENTS REGARDING CAPACITY, SUITABILITY FOR USE OR PERFORMANCE OF THE MESSAGING SERVICES, WHETHER OR NOT CONTAINED IN THIS CUSTOMER CONTRACT SHALL BE DEEMED TO BE A WARRANTY BY US.

(d) IN NO EVENT SHALL WE HAVE ANY LIABILITY TO YOU FOR ANY LOST PROFITS OR FOR ANY INDIRECT, INCIDENTAL, PUNITIVE, CONSEQUENTIAL OR SPECIAL DAMAGES OF ANY KIND OR NATURE HOWEVER CAUSED AND, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, WHETHER OR NOT WE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ADDITION, IN NO EVENT SHALL OUR AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS CUSTOMER CONTRACT, WHETHER IN CONTRACT, TORT, OR UNDER ANY THEORY OF LIABILITY EXCEED THE FEES ACTUALLY PAID BY YOU TO US IN THE SIX (6) MONTHS PRECEDING THE INCIDENT GIVING RISE TO THE CLAIM.

### **Termination and Suspension**

#### **29. Termination by us**

We may, by written notice to you, terminate your Contract:

- (a) immediately if you are in material breach of your Contract (including but not limited to a failure to pay us on time, a breach of the Acceptable Use Policy or a breach of the Privacy Laws) and you fail to remedy such breach within 7 days of being served notice to do so;
- (b) immediately if you breach clause 4.1(a) (preferred supplier) or 4.1(b) (exclusive supplier) and you fail to remedy such breach within 14 days of being served notice to do so;
- (c) immediately if you suffer an Insolvency Event;
- (d) immediately if we become entitled to suspend the Service, and the suspension continues for more than a month;
- (e) immediately if we reasonably suspect that you, your Staff or your End User has infringed or attempted to infringe our Intellectual Property Rights;
- (f) immediately if you cause to be reversed any Direct Debit or credit card payment to us (except with our prior written agreement);
- (g) immediately if it is necessary to do so in order to comply with a warrant or other court order, or as otherwise required or authorized by law;
- (h) immediately if we reasonably suspect fraud or attempted fraud involving the Service;
- (i) immediately if you are, or become, a carrier or carriage service provider under applicable telecommunications laws; or
- (j) in any other circumstances stated elsewhere in your Contract.

#### **30. Termination by you**

You may terminate your Contract:

- (a) immediately, by giving us written notice, if we are in material breach of your Contract and we fail to remedy that breach within 14 days of being served notice to do so;
- (b) immediately, by giving us written notice, if we suffer an Insolvency Event;
- (c) by giving us 14 days' written notice, if an Intervening Event occurs and you are unable to use the Service for more than 30 days;
- (d) by giving us 14 days' written notice, if you reasonably suspect that we have infringed or attempted to infringe your Intellectual Property Rights; or
- (e) in any other circumstances stated elsewhere in your Contract.

#### **31. Consequences of Termination**

If your Contract ends:

- (a) [intentionally omitted];
- (b) our obligations to you under your Contract are at an end;
- (c) you must immediately cease use of any of our Services supplied under that Contract;
- (d) we may bill you for any Services we have not yet invoiced and all other amounts we are entitled to under the Contract;
- (e) all bills are payable immediately;
- (f) you authorize us to recover any outstanding Charges from any overpayment you have made, or Direct Debit them from your credit card or bank account if you normally pay by Direct Debit;
- (g) it does not affect the accrued rights or liabilities of either party; and
- (h) it does not affect the provisions which expressly or by implication are intended to operate after termination including, without limitation clauses 12, 13 and 14 and the limitations of liability and rights of indemnity.

### **32. Suspension of Service**

We may suspend Service at any time, without liability and immediately by reasonable notice to you (except in the case of an emergency), if:

- (a) there are problems with the Network, or we or our Providers need to suspend the Services to conduct operational and maintenance work on the Network;
- (b) you fail to pay any amount owing to us in respect of the Service under your Customer Contract (which is not the subject of a bona fide dispute) by the due date, and you fail to pay that amount within the period specified in any subsequent notice we send you;
- (c) you breach your Customer Contract or we reasonably believe you are in breach of your Customer Contract, including terms relating to your use of the Service or any Acceptable Use Policy;
- (d) there is an emergency;
- (e) there is a threat or risk to the security of the Service or integrity of the Network;
- (f) the Service may cause death, personal injury or damage to property;
- (g) we are required to do so to comply with any Law or direction of any Regulator;
- (h) an Intervening Event occurs; or
- (i) we are otherwise entitled to do so under your Customer Contract.

Upon written request, we will provide a written explanation of the circumstances surrounding the suspension.

### **33. Charges during a period of suspension**

If we suspend Service:

- (a) because of your fault or breach of your Contract – you remain liable for all Charges payable under your Contract during the period of suspension;
- (b) otherwise – you are entitled to a pro rata reduction in Charges in respect of the period of suspension.

### **General**

#### **34. General power to vary your Contract**

Subject to clause 35,

- (a) we may vary your Contract from time to time on 14 days' written notice to you; and
- (b) any variations that have been deemed to be accepted pursuant to clause 35 will take effect 15 days after the date of any notice.

### **35. Customer Right to terminate on Receipt of Notice of Variation**

If you do not accept the variation set out in a notice from us pursuant to clause 34 you must notify us in writing within 14 days. If you fail to do so, you will be deemed to have accepted the variation. If you notify us that you do not agree to the variation, then we must discuss the proposed variation in good faith. If no agreement on the variation is achieved within 10 Business Days either party may terminate this Customer Contract by providing 30 days' written notice to the other party.

### **36. Acknowledgments**

You acknowledge that:

- (a) there has been no reliance by you on our skill or judgement or written or oral representations in deciding whether our Service is fit for a particular purpose or meets particular criteria;
- (b) the internet is not an inherently secure system and you undertake responsibility for the protection of your information and data;
- (c) the internet may contain viruses (including other destructive programs), which may, if not eliminated, destroy parts or all of the data contained within your system, and that we have no control over these viruses; and
- (d) we do not provide any filtering or checking of data to eliminate these viruses, and you agree to provide you own mechanism for checking your system for viruses.

### **37. Assignment**

- (a) We may assign all or part of our rights and obligations under your Contract without your consent.
- (b) You cannot assign all or part of your rights and obligations under your Contract unless we agree in writing.

### **38. Governing law**

This Agreement shall be governed and interpreted according to the laws of the State of Oklahoma and any dispute arising out of or relating to this Agreement shall be brought and heard in a state or federal court located in the City and County of Tulsa, Oklahoma. To the extent permitted by law, each party also waives any right to jury trial in connection with any action or litigation related to this Agreement.

### **39. Entire agreement**

Your Contract is the entire agreement between you and us regarding its subject matter, and you acknowledge that:

- (a) your Contract does not include any term, condition, warranty, representation or guarantee that is not expressly set out in it; and
- (b) you have not relied on any representation that is not expressly set out in your Contract.

### **40. Delays**

- (a) Time is not of the essence in the performance of our obligations, including the provision of Services, under your Contract.
- (b) We are not liable to you for any delay in the provision of any Service.

(c) You may not cancel or amend an order for a service on the grounds of any delay in providing it.

**41. No waiver**

A failure, delay, relaxation or indulgence by us in exercising any power or right conferred under your Contract (such as a right that we have due to your breach of your Contract) does not operate as a waiver of the power or right.

**Interpretation and Definitions**

**42. Interpreting your Contract**

- (a) If an expression is defined in clause 43, that is what it means.
- (b) If an expression is defined in clause 43, grammatical derivatives of that expression have a corresponding meaning. (For instance, if ‘to color’ means ‘to paint blue’, then ‘colored’ means ‘painted blue’.)
- (c) Expressions like ‘includes’, ‘including’, ‘eg’ and ‘such as’ are not words of limitation. Any examples that follow them are not to be taken as an exhaustive list.
- (d) Headings are only for convenience. They are to be ignored when interpreting our Customer Terms.
- (e) A schedule to a document is part of that document.
- (f) A reference to the singular includes the plural and vice versa.
- (g) There is no significance in the use of gender-specific language.
- (h) A ‘person’ includes any entity which can sue and be sued.
- (i) A ‘person’ includes any legal successor to or representative of that person.
- (j) A reference to a law includes any amendment or replacement of that law.
- (k) Anything that is unenforceable must be read down, to the point of severance if necessary.
- (l) Anything we can do, we may do through an appropriately authorized representative.
- (m) Any matter in our discretion is in our absolute and unfettered discretion.
- (n) A reference to a document includes the document as modified from time to time and any document replacing it.
- (o) The word ‘month’ means calendar month and ‘year’ means 12 months.
- (p) The words ‘in writing’ include any communication sent by letter or email or any other form of communication capable of being read by the recipient.
- (q) A reference to all or any part of a statute, rule, regulation or ordinance (statute) includes that statute as amended, consolidated, re-enacted or replaced from time to time.
- (r) Money amounts are stated in US currency unless otherwise specified.

**43. Definitions**

<i>The expression:</i>	<i>means:</i>
Acceptable Use Policy	a policy so titled and issued under clause 6
Account	the Customer’s entitlement to Messaging Services subject to the Customer Contract and, where relevant, includes any Service features, associated usernames or passwords

Application or Application Form	your application to us to access Messaging Services, in a form we specify from time to time which may also contain features, entitlements, Charges and special conditions in connection with a Service
Automatic Direct Debit	a periodic payment that is automatically deducted by us from your nominated financial institution account
Bill	an invoice from us which advises you of the total of each Charge that is due for payment
Billing Period	see clause 18.1(a)
Carrier	a telecommunications carrier
Charges	fees and/or charges applicable under your Customer Contract including any Surcharges where applicable
Claim	any claim, demand, action, proceeding or legal process (including by way of set off, cross-claim or counterclaim)
Confidential Information	<p>in relation to each party (for the purposes of this definition, the Discloser's</p> <ol style="list-style-type: none"> <li>1. all information relating to or used by the Discloser, including know-how, trade secrets, ideas, marketing strategies and operational information;</li> <li>2. all information concerning the business affairs (including products, services, customers and suppliers) or property of the Discloser, including any business, property or transaction in which the Discloser may be or may have been concerned or interested;</li> <li>3. any other information disclosed by or on behalf of the Discloser which, by its nature or by the circumstances of its disclosure, is or could reasonably be expected to be regarded as confidential;</li> <li>4. the terms and the actual existence of your Contract; and</li> <li>5. including any such information made available to the Discloser by any third party, but excluding any information that: <ol style="list-style-type: none"> <li>1. is publicly known or becomes publicly known other than by breach of this Contract or any other obligation of confidentiality;</li> <li>2. is disclosed to the other party without restriction by a third party and without any breach of confidentiality by the third party; or</li> <li>3. is developed independently by the other party without reliance on any of the Discloser's Confidential Information</li> </ol> </li> </ol>
Content	the content of a Message you send or receive
Contract	same as Customer Contract
Customer	the customer named in the Application Form



Customer Contract	see clause 1
Customer Terms	the terms and conditions set out in Part A of this document
Direct Debit	a payment that is deducted by us from your nominated financial institution account, including an Automatic Direct Debit
Early Termination Fee	is calculated as follows – (45% of the average amount we have invoiced you from the commencement of the Contract until the date of termination) multiplied by (the number of remaining months (or any part thereof) of the Minimum Term
End User	a person who receives a Message you send using your Account, and a person who sends you a Message via your Account
Equipment	a handset, modem, router or other hardware
Facilities	systems, software, computers, equipment and network infrastructure of all kinds used to provide or in connection with the provision of a Service
GDPR	the General Data Protection Regulation (Regulation (EU) 2016/6790)
Insolvency Event	includes an event where a receiver or receiver and manager is appointed over a party's property or assets, an administrator, liquidator or provisional liquidator is appointed to the party, the party enters into any arrangement with its creditors, the party becomes unable to pay its debts when they are due, the party is wound up or becomes bankrupt, or any other analogous event or circumstance occurs under the laws of any jurisdiction
Intellectual Property Rights	<p>Includes all right, title and interest wherever subsisting (now or in the future) throughout the world, and whether registered or not, in and to:</p> <ol style="list-style-type: none"> <li>1. copyright, neighboring rights, moral rights and the protection of databases, circuit layouts, topographies and designs;</li> <li>2. methods, inventions, patents, utility models, trade secrets, confidential information, technical and product information; and</li> <li>3. trade-marks, business and company names and get ups,</li> </ol> <p>and includes the right to apply for registration, grant or other issuance of the rights described in paragraphs (a), (b) and (c) above and any other rights generally falling within this term</p>
Intervening Event	an event beyond our reasonable control which interferes with and prevents us from providing the Services to you. Such events include any act or omission of our Providers, any disruption to our or our Providers' networks, infrastructure and equipment, failure of any electrical power supply, changes to any laws or regulations, industrial action and acts of God including but not limited to lightning strikes, earthquakes, floods or other natural disaster

Law	laws, Acts of Congress, regulations, mandatory standards and industry codes and including the requirements or directions of any regulatory body
Message	an SMS, MMS or OTT Message
Message Credits	a credit equal to your Monthly Access Fee that may be applied to your Messaging Fees for that month, provided that any unused balance in each month (a) is not carried over to any later month and (b) is not refundable
Messaging Fee	a Charge per Message sent or received on your Account
Messaging Service	a telecommunications service for sending and/or receiving and/or processing Messages
Minimum Term	the period specified in your Plan or Application Form, or if your Plan or Application Form does not so specify, means 12 months
MMS	a message including text and/or multimedia content carried by the multimedia messaging service developed by the Open Mobile Alliance, whether it originates or terminates on a mobile phone or another kind of computer
MMS Service	a Messaging Service for MMS
Model Clauses	the standard contractual clauses for transfers from data controllers in the EEA to data processors outside the EEA set out in the Commission Decision 2010/87/EU, dated 5th February 2010, entered into between you and us, as set out in Part E of this Customer Contract.
Monthly Access Fee	the charge identified as such in a Plan or Application Form
Network	see clause 3.1(c)
Operational Directions	Any direction we give you in relation to the Services or your Account in accordance with clause 7
OTT Message	is an instant message that uses the internet for transmission
Our Facilities	Facilities we own and/or operate
Personal Information	as defined in Privacy Laws from time to time
Periodic Entitlements	see clause 5
Plan	a particular set of features, entitlements, term of contract, Charges and special conditions in connection with a Service. Many of our Services are available under different Plans, each with its own features, entitlements, contract period, Charges and special conditions. The terms of your Plan form part of your Customer Contract
Privacy Laws	the Telephone Consumer Protection Act (TCPA) and applicable Federal Communications Commission (FCC) regulations; the Controlling the Assault of Non-Solicited Pornography and Marketing

	Act of 2003 (CAN SPAM) and applicable FCC and Federal Trade Commission (FTC) regulations; as such may be amended from time to time
Professional Services	advisory services which may include the design and creation of text and/or images used in an SMS and/or MMS and includes, without limitation, concepts, ideas, innovation and development work to further enhance the Messaging Services. Professional Services may also include the management of the delivery or execution of a process or campaign on behalf of the Customer
Provider	a third party that, under a contract with us, provides (a) access to Facilities they manage or maintain or (b) content or (c) a service – that we resupply to you
Regulator	Includes, but is not limited to the Federal Trade Commission and the Federal Communications Commission and any other government or statutory body or authority with jurisdiction relevant to the activities covered under this Agreement.
Reseller	a Customer whose Application Form states that they are appointed as a reseller of the Supplier's Services
Restricted Content	Content that: <ol style="list-style-type: none"> <li>1. is likely to be offensive to reasonable consumers;</li> <li>2. is likely to be unsuitable for minors;</li> <li>3. promotes, incites or instructs in matters of crime;</li> <li>4. describes, incites or promotes unlawful sexual activity;</li> <li>5. promotes or incites violence or hatred against any person or group, or incites racial hatred;</li> <li>6. causes unnecessary alarm, distress or panic or is menacing in character;</li> <li>7. contains a computer worm or virus;</li> <li>8. breaches any Law;</li> <li>9. is in contravention of any privacy rules;</li> <li>10. infringes the confidentiality, copyright or other intellectual property rights or any other proprietary interest of any person;</li> <li>11. is false, misleading or deceptive, or likely to mislead or deceive;</li> <li>12. provides financial advice to any person;</li> <li>13. is out of date, having regard to information generally available, subsequently published, or released, or made available; or</li> <li>14. is for the purpose of providing any warning or notification about a serious risk to the safety of persons or property (for example, emergency services)</li> </ol>
Services	a service (including any Equipment) which we provide to you as defined in your Contract
SMS	a text message carried by the short message service that was originally developed for use on the GSM mobile telephone network, whether it originates or terminates on a mobile phone or another

	kind of computer
SMS Service	a Messaging Service for SMS
Staff	any person, whether your employee, contractor or otherwise, who uses your Account
Standard Rate Messages	Messages that are billed by telecommunications carriers at standard rates, and in particular are not premium rate Messages, which are billed by such carriers at premium rates
Supplier	the entity described as such in the Application Form and/or your Plan and/or on the website on which these Customer Terms are published
Surcharges	carrier surcharges as notified to you on our website, or otherwise in writing and set out in your invoice
Taxes	Applicable federal, state and local taxes, fees, charges, telecommunications provider (e.g., carrier) surcharges or other similar exactions, including, without limitation, sales and use taxes, communications service taxes, utility user's taxes or fees, excise taxes, VAT, GST, other license or business and occupations taxes, 911 taxes, franchise fees and universal service fund fees or taxes. Taxes do not include any Taxes that are imposed on or measured by our net income, property tax, or payroll taxes
Unrestricted Content	Content that is not Restricted Content

## Part B – Professional Services Service Terms

### 44. About this Part

This Part applies when we supply you with Professional Services.

### 45. Quote and Specifications

Prior to providing any Professional Services we will agree:

- (a) the specifications and requirements for the Professional Services; and
- (b) total estimated cost of the Professional Services.

### 46. Deposit for Services

We may require you to pay a deposit (of up to 35% of total estimated cost) for any Professional Services that you have asked us to provide to you.

### 47. Approval of Professional Services

Where we undertake Professional Services or any form of professional services, Customer will not unreasonably withhold signoff and approval of the completed project, where we are able to reasonably demonstrate that we have met the agreed specifications or requirements.

### 48. Customer Warranty

Customer warrants that all Content provided to us in relation to the provision of the Professional Services is duly licensed or authorized and not in breach of any law, third party rights or trademarks. The Customer further accepts without limitation that any fees, royalties or other payments for use of Content are to be paid by the Customer.

#### **49. Payment**

Upon completion of the Professional Services you agree to pay the total cost of the Professional Services within 14 days of receipt of an invoice for such services.

#### **Part C – Reseller Terms**

##### **50. About this Part**

This Part C applies if your Application Form states that you are a Reseller.

##### **51. Reseller Rights**

We grant you the non-exclusive and non-transferable right to market and resell the Services to your customers.

##### **52. Reseller Independence**

Your business is an independent business. Accordingly:

- (a) you are not, and must not (in any circumstances) hold yourself out as our agent, associate or affiliate;
- (b) you must not represent that we are in any way the owner or operator of your business;
- (c) your acts or omissions do not bind us;
- (d) this Customer Contract does not constitute either you or us as a joint venturer, partner, agent, employee or fiduciary of the other.

##### **53. Provision of Services to Others**

You:

- (a) will enter in to separate legal agreements with your customers to whom you resell the Services which contain terms and conditions substantially similar to but no less restrictive than the Customer Terms;
- (b) expressly acknowledge that we will not, at any time, be responsible for or liable for the Content or the destination of any Content conveyed by or to you;
- (c) agree that, if you become aware that any End User does not wish to continue to receive Messages, you will take all necessary steps, including notifying us, to ensure that the End User does not continue to receive Messages.

#### **Part D – E-Privacy**

##### **54. About this Part**

This Part D applies if the Services or the performance of our respective obligations under this Customer Contract involve the processing of any personal data (as defined in the GDPR) of, or sending Messages to, any individuals in the European Union.

##### **55. Privacy and Electronic Communications and Ecommerce**

- (a) You warrant and undertake at all times to comply (and to ensure that your Staff and End Users also comply) with your obligations under the Privacy and Electronic Communications (EC Directive) Regulations 2003 and the Electronic Commerce (EC Directive) Regulations 2002, in particular, you:
  - (i) warrant and represent that End Users to whom you send Messages have consented or otherwise opted-in to the receipt of such Messages as required by any applicable Law or regulation.

- (ii) agree that you will include clear opt-out/unsubscribe information on your Messages when required to do so by any applicable Law or regulation; and
- (iii) will adhere to the Consumer Best Practices Guidelines promulgated by the Mobile Marketing Association, if applicable to your messages

(b) [intentionally omitted]

#### 56. Data Protection

- (a) The terms 'data subject', 'personal data', 'process', and 'supervisory authority' have the meanings given to them in the GDPR.
- (b) With effect from 25 May 2018, if a party is provided with, or has access to personal data in connection with the Services, it must comply with the GDPR and any other applicable law in respect of that personal data.
- (c) The subject matter of the processing by us shall be the performance of this Customer Contract. The nature and purpose of the processing shall be the provision of the Services. The duration of the processing shall be the duration of this Customer Contract.
- (d) We shall:
  - (i) only process personal data on your behalf in accordance with, your instructions and for the purposes set out in this Customer Contract;
  - (ii) implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.
  - (iii) ensure that any of our personnel engaged in the processing are subject to a duty of confidentiality.
  - (iv) co-operate with you if you are required to deal or comply with any assessment, enquiry, notice or investigation by the Information Commissioner, to assist you in complying with such assessment, enquiry, notice or investigation.
  - (v) notify you if we receive a request from a data subject for access to personal data, and shall provide you with reasonable co-operation and assistance in relation to any such request.
  - (vi) inform you without undue delay if at any time any personal data is or is suspected to be, lost, corrupted, used or disclosed to a third party except in accordance with this Customer Contract and provide reasonable assistance to you in relation to your obligation to notify data subjects or a supervisory authority.
- (e) You acknowledge that in providing the Services, personal data may be transferred outside the European Economic Area under the Customer Contract and each party undertakes to comply with its obligations under the Model Clauses.
- (f) You hereby consent to the sub-processing of personal data by a Provider. We shall only appoint additional sub-processors where we have your prior consent to do so and where we have written terms in place with the sub-processor that reflect these terms.
- (g) You warrant that you have provided a fair processing notice to End Users that notifies them of our processing activities and that where our processing of personal data on your behalf requires the consent of End Users, you have and will obtain this and provide us with evidence on request.
- (h) On termination of this Client Contract, we shall delete all personal data that you have provided to us, unless we are required by law to retain it (in which case, we will not actively process it after the termination date).

(i) You may, not more than once in any 12-month period and on giving at least 30 days' written notice, conduct an audit of our processing of personal data under this Client Contract. We shall mutually agree on the scope, timing and duration of the audit. The audit shall exclude any personnel records and any data, systems and facilities which are subject to confidentiality obligations to third parties. You shall not be entitled to take copies of any information.

(j) [intentionally omitted]