

# Terms of Service

May 15, 2023

## **REVISED AND EFFECTIVE May 15, 2023**

Textel ("**Textel**") has updated our Terms of Services ("**Terms of Service**" or "**Agreement**"). If you are a new Customer, then this Agreement will be effective as of May 15, 2023. If you are an existing Customer as of May 15, 2023, Textel is providing you with prior notice of the changes to our Services Agreement which will be effective as of June 15, 2023. For the previous version of our Agreement, please click [here](#).

BY ENTERING INTO AN ORDER FORM WITH TEXTEL OR BY ACCESSING OR USING ANY OF THE TEXTEL SERVICES, THE "CUSTOMER" LISTED ON THAT ORDER FORM OR SUCH PERSON OR ENTITY WHO IS ACCESSING OR USING THE TEXTEL SERVICES ("CUSTOMER") AGREES TO BE BOUND BY THE TERMS OF THIS AGREEMENT. THIS AGREEMENT GOVERNS ALL ACCESS TO AND USE OF THE SERVICES WHETHER IN CONNECTION WITH A PAID SUBSCRIPTION OR FREE TRIAL.

In this Agreement, "we," "us," "our" or "Textel" will refer to Textel CX, Inc. and the terms "you," "your," "Customer," or "Subscriber" will refer to you.

Any person entering into this Agreement on behalf of a company, organization or another legal entity (an “**Entity**”) is agreeing to this Agreement for that Entity and representing to Textel that such person has the authority to bind such Entity to this Agreement, in which case the terms “Subscriber” and “Customer” refer to such Entity and its affiliates. “**Services**” includes our website, any Textel Application Program Interfaces (“**API**”), our downloadable software applications and related tools and technologies. “**Order Form**” refers to the document (order form, service order or otherwise) for placing orders for access to and use of the Services and agreed to by you either in writing or by electronic acceptance submission. If you subscribe via Textel’s online checkout, then the checkout form submitted by you and accepted by Textel constitutes the Order Form for purposes of this Agreement.

THE TERMS OF SERVICE INCLUDE A CLASS ACTION WAIVER AND A WAIVER OF JURY TRIALS. IN SOME JURISDICTIONS, SUCH WAIVERS MAY BE UNENFORCEABLE. IN SUCH EVENT, THIS CLAUSE WILL HAVE NO LEGAL EFFECT, BUT THE REMAINING PROVISIONS SHALL SURVIVE.

Your use of, and participation in certain Services may be subject to additional terms (“**Supplemental Terms**”) and such Supplemental Terms will be presented to you for your signature. If any of this Agreement conflict with the Supplemental Terms, the Supplemental Terms will control with respect to such conflict.

The Services, and any and all software, algorithms, interfaces, data, system performance data, metadata, machine learning algorithms, and aggregated results of such machine learning, hardware, systems

and materials used to provide the Services (collectively, the “**Company Technology**”) are protected by intellectual property laws of the United States and throughout the world. Company Technology is licensed, not sold.

## 1. Changes to This Agreement.

THE TERMS ARE SUBJECT TO CHANGE IN OUR SOLE DISCRETION AT ANY TIME. You agree to review the website periodically to be aware of any changes or modifications. Your continued use of the Services will be deemed your conclusive acceptance of such changes or modifications.

## 2. Modification of the Services.

We are always looking to innovate and make Textel Services better. As a result, we may at any time, without notice or liability, update the Services. Such updates may require you to update third-party software (e.g. you device’s operating system) from time to time in order to continue to use the Services and Company Technology.

## 3. Your Account(s).

Access to the Services is provided through a Subscriber account ("**Account**"). Through Subscriber's Account, Subscriber may authorize and provide access to the Services to individuals, affiliates of Subscriber (including their users) or another entity (including its users) (collectively Subscriber's "**Users**"). Users may access the Services solely on behalf of Subscriber as permitted herein.

You represent that you are (x) at least thirteen (13) years old; (y) of legal age to form a binding contract; and (z) not a person barred from using Services under the laws of your place of residence or any other applicable jurisdiction.

Depending on your Services package, Subscriber may designate certain Users as "Administrators" or "Agents", who are Subscriber's support staff with the primary responsibility, respectively, for administration of the Services and for assigning tickets and interacting with Subscriber's Users. Textel is the data controller (as defined in data protection laws) with respect to contact information for Administrators and Agents and will process such contact information in accordance with <https://textel.net/privacy/>. If Subscriber is an individual, such person would also act as Administrator. Subscriber will ensure that all relevant consents, permissions and rights are obtained and will provide all relevant notices necessary under applicable data protection laws for Textel to lawfully process the contact information of Administrators and Agents as a data controller.

You must ensure that all information provided in connection with establishing the Account and regarding each User is and remains accurate and complete. You are solely responsible for all use of

Services through the Account by each User and for compliance by each User with the applicable terms of this Agreement. You will ensure the security and confidentiality of all User credentials associated with the Account and will prevent unauthorized access to or use of the Services through the Account or using any User credentials. Subscriber will notify us promptly of any such unauthorized access or use of the Account or Services, or if any User credentials are lost, stolen, or otherwise compromised.

Certain Services may enable you to specify the level at which such Services restrict access to Your Content. You are solely responsible for applying the appropriate level of access to Your Content. If you do not choose, the system may default to its most permissive setting.

## 4. Access and Use of Our Services.

You may access and use our Services, on a non-exclusive, non-transferrable (except as otherwise expressly provided herein), non-sublicensable basis, solely in strict compliance with this Agreement, which may be updated from time to time, solely for your business purposes.

Your license to the Services may include access to our API. We may limit: (i) the number of network calls that you may make via the API; (ii) the maximum file size; and (iii) the maximum Content that may be accessed, or anything else about the API and Your Content it accesses that we deem appropriate, in each case in our sole

discretion. We may utilize technical measures to prevent over-usage or stop usage of the API by you or any other User after any usage limitations are exceeded or suspend your access to the API with or without notice to you in the event you exceed any such limitations.

## 5. Types of Content; License To Your Content.

You acknowledge that all information, data, text, software, music, sound, photographs, graphics, video, messages, tags and/or other materials accessible through or transmitted through the Services ("**Content**") is the sole responsibility of the party from whom such Content originated. This means that you, and not Textel, are entirely responsible for all Content that you upload, post, e-mail, transmit or otherwise make available ("**Make Available**") through the Services ("**Your Content**").

You acknowledge that Textel has no obligation to pre-screen Content (including, but not limited to, Your Content), although Textel reserves the right in its sole discretion to pre-screen, refuse or remove any Content. By entering into this Agreement, you hereby provide your irrevocable consent to such monitoring. You acknowledge and agree that you have no expectation of privacy concerning the transmission of Your Content, including without limitation chat, text, or voice communications.

In order to enable Textel to send and deliver your messages and otherwise provide you the Services, you grant Textel a fully paid, royalty-free, perpetual, irrevocable, worldwide, non-exclusive right

(including any moral rights) and license to use, distribute, reproduce Your Content (in whole or in part) for the purposes of operating and providing the Services to you. You warrant that the holder of any worldwide intellectual property right, including moral rights, in Your Content, has completely and effectively waived all such rights and validly and irrevocably granted to you the right to grant the license stated above. You will maintain the applicable permissions, authorizations, and consents (via its employee handbook, privacy policy or otherwise) for Textel to access, use, disclose, Make Available, store and process Your Content as permitted thereunder. You agree that you, not Textel, are responsible for all of Your Content that you Make Available on or in the Services.

You agree that Textel retains the right to create reasonable limits on Textel's use and storage of the Content, including Your Content, such as limits on file size, storage space, processing capacity, and similar limits described in the web pages accompanying the Services and as otherwise determined by Textel in its sole discretion.

## 6. Our Services.

You understand that the Services are not designed, intended, authorized or warranted to be suitable for use in the following **"Unauthorized Applications"**: life support applications, devices or systems; the operation of nuclear facilities; aircraft navigation systems; aircraft communication systems; air traffic control; direct life support machines; weapons systems; military or space

equipment requiring radiation hardened components; and Enhanced 911 or the E911 emergency calling system. You warrant that you will not use the Services for Unauthorized Applications.

You must exercise caution and judgment when changing carriers. Porting your voice service from one carrier to another may break the texting route. We have no control over this so you must check with your carrier prior to porting your number. You will remain responsible for all charges associated with your account notwithstanding a break in the texting route as a result of your change of carriers.

We engage third parties to support the delivery and availability of the Services. Some of these third parties are engaged as "**Subprocessors**" to host or process data. Subprocessors that we use to host or process data are listed at <https://textel.net/subprocessors/>. You consent to us engaging Subprocessors to process Your Data to the extent necessary or desirable for the Services.

We may generate and maintain information based on the use of the Services by Subscriber and Users and collect and maintain User account information, provided that such information does not identify Subscriber or any User or include any Subscriber Personal Information (collectively "Usage Data"). As between you and us, we own all right, title, and interest, including all intellectual property rights, in and to all Usage Data and may use any Usage Data for any purpose. We may also collect and maintain billing records, call, text or messaging logs and traffic routing information, as well as the content of communications sent through or integrated with our



Services, such as audio recordings, message bodies, and call recording transcriptions.

## 7. Restrictions.

(a) Customer shall not (i) permit any third party to access and use the Services except as permitted herein or except for Users authorized on an Order Form, (ii) create derivative works based on the Services, (iii) reverse engineer the Services, or (iv) access the Services in order to (a) build a competitive website, application, product or service, or (b) copy any features, functions or graphics of the Services.

(b) You agree not to transfer, resell, lease, license, rent, assign, reproduce, distribute, host or otherwise make available our Services to third parties or offer them on a standalone basis.

(c) You represent and warrant that (i) you have or have procured all power and authority necessary to use and text enable those phone numbers you register or associate with your Account without the consent of any third party, (ii) you will not use the Services on a phone number that has been exchanged, rented, or purchased from a third party without the permission of the phone number owner, (iii) the phone number is not a mobile subscriber phone number, (iv) you will use the Services for legal purposes only, and (v) you agree to execute any additional documents necessary to ensure your authority to use and text enable those phone numbers.

(d) You will not bypass or breach any security device or protection measure to access or use the Services or Services other than by an authorized User.

(e) You will not input, upload, transmit or otherwise provide to or through the Services any information or materials that are unlawful or injurious, or contain, transmit or activate any virus, worm, malware or other malicious computer code.

(f) You will not damage, destroy, disrupt, disable or impair, interfere with or otherwise impede or harm in any manner the Services or our provision of the Services to any third party, in whole or in part.

(g) You will not access or use the Services or Services in any manner or for any purpose that infringes, misappropriates or otherwise violates any Intellectual Property Rights of any third party or that violates any Applicable Law.

## 8. Acceptable Use Policy (Prohibited Uses and Activities)

This Acceptable Use Policy applies to Users of these Services.

(a) No Infringing, Illegal, Threatening, Defamatory, and Offensive Uses. You may not use the Services to violate any Applicable Law. "**Applicable Law**" includes all applicable laws, rules and regulations

applicable to you, your business or the subject matter of the Agreement including without limitation, laws governing the use of individual information, deceptive and misleading advertising, electronic commercial communications, telemarketing and other similar laws, which include without limitation the U.S. Telephone Consumer Protection Act of 1991, U.S. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 and the Canada Anti-SPAM Legislation, if applicable, and each as amended. Without limiting the foregoing, you shall not use the Services for, or in connection with, the following:

- Theft or infringement of copyrights, trademarks, trade secrets, or other types of intellectual property.
- Fraud; forgery; or theft or misappropriation of funds, credit cards, or personal information.
- Impersonation of any person or entity, including, but not limited to, Textel personnel, or falsely state or otherwise misrepresent your affiliation with a person or entity.
- Harm minors in any way.
- Making available any Content that (i) is unlawful, tortious, defamatory, vulgar, obscene, libelous, or racially, ethnically or otherwise objectionable; (ii) violates, or encourages any conduct that would violate, any Applicable Law or would give rise to civil liability; (iii) promotes discrimination, bigotry,

racism, hatred, harassment or harm against any individual or group; (iv) is violent or threatening, or promotes violence or actions that are threatening to any other person; or (v) promotes illegal or harmful activities.

- Making available any Content that you do not have a right to make available under any law or under contractual or fiduciary relationships (such as inside information, proprietary and confidential information learned or disclosed as part of employment relationships or under non-disclosure agreements).
- Stalking or otherwise harassing any person or entity.
- Export, re-export, or transfer of restricted software, algorithms or other data in violation of applicable export control laws.
- Intentionally or unintentionally violate any applicable local, state, provincial, national or international law, treaty, or regulation, or any order of a court.
- Deceptive practices such as posing as another service for the purposes of phishing or pharming.
- Distributing any materials of a threatening or harmful nature, including without limitation threats of death or physical harm,

or materials that are malicious, harassing, libelous, defamatory, or which facilitate extortion or harmful action.

- Distributing any offensive materials, including without limitation obscene, pornographic, indecent or hateful materials and materials which promote gambling or discrimination based on race, sex, religion, nationality, disability, sexual orientation, or age.
- Sending unwanted telemarketing, promotional or informational messages without having procured the necessary consents, right and license from the recipient(s) of your messages.
- Sending messages in violation of the U.S. National Do Not Call Registry or related considerations under Applicable Law.
- Send Protected Health Information unless allowed under Applicable Law.
- Registering for more Accounts or associated Admin Logins or User Logins than for which fees have been paid or register for an Account on behalf of an individual other than yourself.
- Advocate, encourage or assist any third party in doing any of the foregoing activities in this section.

(b) Security and Interference. You may not use the Services to violate, attempt to violate, or knowingly facilitate the violation of the security or integrity of any network, electronic service, or other system that is accessible through, or in connection with, the Services. You shall not use the Services in a manner that interferes with any other party's ability to use and enjoy the Services, that interferes with Textel's or its service partners' ability to provide the Services, or that otherwise may create legal liability for Textel or its service partners in Textel's sole discretion. You shall not use the Services to violate the acceptable use policy or terms of service of any other service provider, including, without limitation, any Internet service provider. Without limiting the foregoing, you shall not use the Services for, or in connection with, the following:

- Hacking, cracking into, or otherwise using the non-public areas of the Services or any other system without authorization.
- Unauthorized probes or port scans for vulnerabilities.
- Unauthorized penetration tests, traffic that circumvents authentication systems or other unauthorized attempts to gain entry into any system.
- Web crawling which is not restricted to a rate so as not to impair or otherwise disrupt the servers being crawled.
- Unauthorized network monitoring or packet capture.

- Forged or non-standard protocol headers, such as altering source addresses.
- Flooding.
- Denial of Service (DoS) attacks of any kind.
- Distributing unauthorized data, malware, viruses, Trojan horses, spyware, worms, or other malicious or harmful code.
- Operating network services such as: open proxies; open mail relays; or open, recursive domain name servers.
- Sharing or publishing content from the Services to cause, or have the consequence of causing, the user of the content to be in violation of the Agreement.
- Advocate, encourage or assist any third party in doing any of the foregoing activities in this section.

(c) Spam. You shall not use the Services for purposes of distributing text messaging "spam," bulk unsolicited messages, or any other form of unsolicited electronic communications distributed on a bulk basis to recipients with which you have no preexisting business or personal relationship. You shall not use the Services to collect responses from spam. You shall not harvest, collect, gather or assemble information or data of users, including email addresses, without their consent. You are solely responsible for obtaining all necessary and appropriate rights, licenses and consents from those person(s) and entity(ies) with whom you message or otherwise

communicate with via the Services, prior to commencing any such messaging or communication. Additionally, you shall not use the Services to send unwanted messages to individuals who have asked to stop receiving messages through any medium. To the extent required by Applicable Law, you must track and record all such requests specific to your business. You must also provide recipients of those MMS/SMS messages you send via the Services with conspicuous notice of their ability to opt-out from receiving any future text messages, by texting STOP in a stand-alone message with no additional characters or punctuation. Without limiting the foregoing, you shall not use the Services for, or in connection with, the following:

- Sending pyramid schemes.
- Sending chain letters.
- Sending any mail in contravention of Applicable Law.
- Altering or obscuring mail headers or assuming the identity of a sender without the explicit permission of that sender.
- Advocate, encourage or assist any third party in doing any of the foregoing activities in this section.

**Textel's platform responds programmatically to the keyword STOP, and it works with a market leading digital security firm to monitor for and prevent spam.**



## 9. Subscription Term, Renewal.

The “**Subscription Term Start Date**” is the date specified in your Order Form, or if no Order Form is in effect, the date that you create or upgrade your Account and select your package and associated features and your Account has been accepted and confirmed by us.

Your “**Initial Subscription Period**” will be for a monthly or annual period as designated on your order form which begins on the Subscription Term Start Date and ends on the last day of the designated subscription period. Following your Initial Subscription Period, your subscription will automatically renew for successive equivalent periods (each a “**Renewal Term**”). During your Initial Subscription Period or any Renewal Term, if you purchase a new package of SMS messages, then your subscription will immediately reset for a successive Renewal Term.

We reserve the right to increase the Service Subscription Fees applicable to any Renewal Term upon at least forty-five (45) days written notice to you, with any such increase to go into effect at the beginning of the next Renewal Term.

## 10. Free Trials / Instant Activation.

If Subscriber has created an Account online through a free trial link, we may suspend Subscriber's access to the Services at the end of such free trial (generally 30 days). Additional terms may apply to such a free trial and we reserve the right to terminate a free trial at any time. Any Subscriber Data entered into a Service and any configurations of the Services customized during the free trial period will be lost unless Subscriber subscribes to and pays for such Services before the end of the trial period.

## 11. Fees and Payment Terms.

In full consideration for the Services and the rights granted under this Agreement, Subscriber agrees to pay the fees and other charges specified in each Order Form ("Fees").

Payment method will be as specified in your Order Form and may include credit card, ACH, wire or check. Depending on the agreed-upon payment method, you must provide Textel with a valid credit card (Visa, MasterCard, or any other issuer accepted by us) ("**Payment Provider**"), or ACH or wire payment information. By providing Textel with your credit card number account and associated payment information, you agree that Textel is authorized to immediately charge your Account for all Service Subscription Fees due and payable to Textel hereunder and that no additional notice or consent is required. You agree to immediately notify Textel in writing of any change in your billing address or the credit card or billing information, used for payment hereunder.

You will be responsible for payment of the applicable fees for any Services (each, a “**Service Subscription Fee**”) beginning on the Subscription Term Start Date and at the beginning of any Renewal Term. Service Subscription Fees may include an initial, one-time activation fee, and include recurring subscription fees. All Service Subscription Fees are non-cancellable and non-refundable during the applicable subscription period. Should Customer elect to cancel their subscription during the subscription period, the remaining balance of the full Service Subscription Fee will become immediately due and owing and in the event payment is made via a Payment Provider or ACH payment method, the remaining outstanding Service Subscription Fee will be charged upon cancellation. Payment is due upon receipt of the invoice.

All Fees in any invoice will be considered to be accepted by Subscriber unless Subscriber notifies us of a good faith and reasonable dispute regarding such Fees in writing within 10 days of the date of the invoice. Subscriber may not withhold, reduce, or offset payment of any Fees against any amounts due to Subscriber. Any amount not paid when due will be subject to finance charges equal to 1% of the unpaid balance per month or the highest rate permitted by applicable usury law, whichever is less. Subscriber will reimburse any costs or expenses (including, but not limited to, reasonable attorneys’ fees) incurred by us to collect any amount that is not paid when due. We may terminate an Account due to your non-payment, in which case all unpaid fees for the remainder of the current Term will be immediately due. Each Order Form may specify any additional payment terms.

## 12. Taxes.

Textel's Service Subscription Fees are exclusive of any applicable Sales Tax, VAT taxes, and use taxes, utility user's fees, excise taxes, any other business and occupations taxes, 911 taxes, franchise fees and universal service fund fees or taxes and carrier surcharges imposed on or with respect to our Services whether these taxes are imposed directly on you or on Textel (collectively, the "**Taxes**"). If any Services, or payments for any Services, under the Agreement are subject to Taxes, or in any country/jurisdiction and you have not remitted the applicable Taxes to Textel, you will be responsible for the payment of such Taxes and any related penalties or interest to the relevant tax authority, and you will indemnify Textel for any liability or expense we may incur in connection with such Taxes. For purposes of this section, "**Sales Tax**" shall mean any sales or use tax, and any other tax measured by sales proceeds, that Textel is permitted to pass to its customers, that is the functional equivalent of a sales tax where the applicable taxing jurisdiction does not otherwise impose a sales or use tax. For purposes of this section, Taxes do not include any taxes that are imposed on or measured by the net income, property tax or payroll taxes of Textel.

## 13. Termination of Your Subscription to the Services.

In addition to termination or suspension of our Services for non-payment of the applicable Service Subscription Fees, we may

also, upon written notice to you, terminate or suspend your access to the Services immediately for cause if: (a) you violate (or give us reason to believe you have violated) this Agreement; (b) there is reason to believe the traffic created from your use of our Services or your use of our Services is fraudulent or negatively impacting the operating capability of our Services; (c) we determine, in our sole discretion, that providing our Services is prohibited by law, or it has become impractical or unfeasible for any legal or regulatory reason to provide our Services; or (d) subject to Applicable Law, upon your liquidation, commencement of dissolution proceedings, disposal of your assets or change of control, a failure to continue business, assignment for the benefit of creditors, or if you become the subject of bankruptcy or similar proceeding. If we suspend our Services to your account, we will make a reasonable attempt to notify you. You agree that all terminations for cause shall be made in Textel's sole discretion and that Textel shall not be liable to you or any third party for any termination of your Account.

If you want to cancel or terminate the Services, you may do so by providing us with at least thirty (30) days written notice prior to the end of the then current subscription period (Initial Subscription Period or any Renewal Term), with such termination to take effect at the end of such subscription period. Any cancellation notice must be sent to [support@textel.net](mailto:support@textel.net).

Termination of any Services includes removal of access to such Services and bars further use of the Services. Termination of all Services includes deletion of your password keys and Your Content. Textel will not have any liability whatsoever to you for any suspension or termination, including for deletion of Your Content.

## 14. Ownership and IP Rights.

We retain all right, title, and interest, including all intellectual property rights, in and to: (a) the Company Technology; (b) all data, information, Content, and materials provided through the Services, excluding only the Your Data and third-party Content licensed to us for incorporation in the Services; and (c) any updates, upgrades, enhancements, modifications, and improvements thereto.

Subscriber receives no ownership interest in or to any of the foregoing and Subscriber is not granted any right or license to use any of the foregoing (whether by implication, estoppel, or otherwise), apart from the rights to access and use the Services as expressly permitted in this Agreement. Subscriber hereby does assign to Textel all right, title or interest in or to any developments, modifications, or improvements to the Company Technology, and all intellectual property rights therein or relating thereto, that Subscriber may make, acquire, develop, create, or conceive at any time.

The Textel and Capacity names, stylized names, logos, graphics and all product and service names associated with the Services are trademarks of Textel and Capacity, and Subscriber is granted no right or license to use them. Subscriber covenants, on behalf of itself and its successors and assigns, not to assert against us any rights, or any claims of any rights, in any Company Technology.

We own any suggestions, ideas, enhancement requests, feedback, processes, recommendations or other information suggested or provided by Subscriber or any User relating to the the Company

Technology or to features, functionality or operation of the Services ("**Suggestions**"). To the extent that we do not for any reason own such Suggestions, we may, but is not obligated, to use such Suggestions for any purpose with no financial, credit, confidentiality or other obligation to Subscriber.

Either Party may describe its role in relation to the other Party and, if applicable, the Services provided to the other Party on its website and promotional materials.

## 15. Confidentiality.

"Confidential Information" means all confidential and proprietary information of a Party ("Disclosing Party") disclosed to the other Party ("Receiving Party"), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information or the circumstances of disclosure, including: the terms and conditions of this Agreement, the Services, and each Party's respective business and marketing plans, technology and technical information, product designs, and business processes. Without limiting the foregoing, our Confidential Information includes the Company Technology. The obligations in this Section shall not apply to any information that: (i) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party; (ii) was known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party and without an obligation of confidentiality; (iii) was independently

developed by the Receiving Party without the use of or reference to the Confidential Information of the Disclosing Party; or (iv) is lawfully received from a third party without breach of any obligation owed to the Disclosing Party and without an obligation of confidentiality.

The Receiving Party shall not disclose or use any Confidential Information of the Disclosing Party, except as provided in this Agreement, except with the Disclosing Party's prior written permission (given pursuant to the Notice provisions) or except to its employees and advisors who have a need to know such Confidential Information and who are subject to confidentiality obligations comparable in scope to those herein. The Receiving Party shall be liable for any breach of confidentiality obligations by its representatives to which it discloses the Disclosing Party's Confidential Information. Notwithstanding the foregoing, Receiving Party and its representatives shall not be obligated to destroy any Confidential Information that is in an archived computer system backup in accordance with the Receiving Party's security, compliance, corporate governance, disaster recovery and/or document retention policies or to the extent relevant to demonstrate compliance with any legal, professional or contractual obligation or document retention policy.

If the Receiving Party discloses or uses (or threatens to disclose or use) any Confidential Information of the Disclosing Party in breach of the confidentiality protections hereunder, the Disclosing Party shall have the right, in addition to any other remedies available to it, to seek injunctive relief to enjoin such acts, it being specifically



acknowledged by the Parties that any other available remedies are inadequate.

Any existing non-disclosure agreement entered into by the Parties is hereby superseded and replaced by the terms in this Section, which will govern all disclosures and exchanges of Confidential Information made by the Parties previously under that agreement.

## 16. Violations; Breaches.

If Textel becomes aware of any possible violations by you of the Terms, Textel reserves the right to investigate such violations. If, as a result of the investigation, Textel believes that criminal activity has occurred, Textel reserves the right to refer the matter to, and to cooperate with, any and all applicable legal authorities. Textel is entitled, except to the extent prohibited by Applicable Law, to disclose any information or materials on or in the Services, including Your Content, in Textel's possession in connection with your use of the Services, to (1) comply with applicable laws, legal process or governmental request; (2) enforce the Agreement, (3) respond to any claims that Your Content violates the rights of third parties, (4) respond to your requests for customer service, or (5) protect the rights, property or personal safety of Textel, its Users or the public, and all enforcement or other government officials, as Textel in its sole discretion believes to be necessary or appropriate.

In the event that Textel determines, in its sole discretion, that you have breached any portion of the Agreement, or have otherwise

demonstrated conduct inappropriate for the Services, Textel reserves the right to:

(a) Warn you via e-mail (to any e-mail address you have provided to Textel) that you have violated the Agreement;

(b) Delete and/or discontinue delivery or transmission of any of Your Content provided by you or your agent(s) to Services;

(c) Discontinue your registration(s) with the any of the Services;

(d) Discontinue your subscription to any Services;

(e) Notify and/or send Content to and fully cooperate with the proper law enforcement authorities for further action; and

(f) Pursue any other action which Textel deems to be appropriate.

If your registration(s) with or ability to access the Services is discontinued by Textel due to your violation of any portion of your Order Form or the Agreement or for conduct otherwise deemed inappropriate, then you agree that you will not attempt to re-register with or access the Services through use of a different member name or otherwise, and you acknowledge that you will not be entitled to receive a refund for fees related to those Services to which your access has been terminated. In the event that you violate the immediately preceding sentence, Textel reserves the

right, in its sole discretion, to immediately take any or all of the actions set forth herein without any notice or warning to you.

## 17. Warranties and Disclaimers.

WITHOUT LIMITING TEXTEL'S EXPRESS WARRANTIES AND OBLIGATIONS UNDER THESE TERMS, TO THE EXTENT PERMITTED BY APPLICABLE LAW, TEXTEL HEREBY DISCLAIMS ANY AND ALL OTHER WARRANTIES, REPRESENTATIONS AND CONDITIONS OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY, TITLE, NON-INFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE AND WARRANTIES RELATED TO THIRD-PARTY EQUIPMENT, MATERIAL, SERVICES OR SOFTWARE. TEXTEL'S SERVICES ARE PROVIDED "AS IS" TO THE FULLEST EXTENT PERMITTED BY LAW. TO THE EXTENT THIS DISCLAIMER CONFLICTS WITH APPLICABLE LAW, THE SCOPE AND DURATION OF ANY APPLICABLE WARRANTY WILL BE THE MINIMUM PERMITTED UNDER THAT LAW.

TEXTEL MAKES NO WARRANTY, REPRESENTATION OR CONDITION THAT: (1) THE SERVICES WILL MEET YOUR REQUIREMENTS; (2) YOUR USE OF THE SERVICES WILL BE UNINTERRUPTED, TIMELY, SECURE OR ERROR-FREE; (3) THE RESULTS THAT MAY BE OBTAINED FROM USE OF THE SERVICES WILL BE ACCURATE OR RELIABLE; OR (4) ANY ERRORS IN THE COMPANY PROPERTIES WILL BE CORRECTED. NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN,

OBTAINED FROM TEXTEL OR THROUGH THE SERVICES WILL CREATE ANY WARRANTY NOT EXPRESSLY MADE HEREIN.

THE SERVICES MAY BE SUBJECT TO DELAYS, CANCELLATIONS AND OTHER DISRUPTIONS. TEXTEL MAKES NO WARRANTY, REPRESENTATION OR CONDITION WITH RESPECT TO SERVICES, INCLUDING BUT NOT LIMITED TO, THE QUALITY, EFFECTIVENESS, REPUTATION AND OTHER CHARACTERISTICS OF SERVICES. CONNECTIVITY, FEATURES, OR DELIVERY CAPABILITY MAY VARY, MAY BE LIMITED, AND MAY CHANGE OVER TIME.

WE GAVE NO LIABILITY FOR CONDUCT OF THIRD PARTIES. YOU ACKNOWLEDGE AND AGREE THAT NEITHER TEXTEL NOR ANY PERSON OR ENTITY ASSOCIATED WITH TEXTEL ARE LIABLE, AND YOU AGREE NOT TO SEEK TO HOLD TEXTEL OR ANY PERSON OR ENTITY ASSOCIATED WITH TEXTEL LIABLE, FOR THE CONDUCT OF THIRD PARTIES, INCLUDING OPERATORS OF TELECOMMUNICATIONS NETWORKS AND MOBILE CARRIERS, AND THAT THE RISK OF INJURY FROM SUCH THIRD PARTIES RESTS ENTIRELY WITH YOU.

YOUR CONTENT MAY BE TRANSMITTED VIA UNENCRYPTED METHODS OVER VARIOUS THIRD PARTY NETWORKS.

## 18. Indemnification.

You will defend, indemnify and hold Textel and its affiliates, as well as their respective officers, directors and employees, harmless against any actual or threatened claim, loss, expense, liability, proceeding, third-party discovery demand, governmental investigation or enforcement action (each a "**Claim**") arising out of or relating to your activities under this Agreement or your acts or omissions in connection with (a) Your Content that you submit, post, transmit or Make Available through the Services; (b) your use of, or inability to use, the Services; (c) your violation of the Agreement; or (d) your violation of any Applicable Law. Textel will cooperate as fully as reasonably required in the defense of any Claim, at your expense. We reserve the right, at your expense, to retain separate counsel for ourselves in connection with any Claim or, if you have not responded reasonably to the applicable Claim, to assume the exclusive defense and control of any Claim in which you are a named party and that is otherwise subject to indemnification under this Section. You will pay all costs, reasonable attorneys' fees and any settlement amounts or damages awarded against us in connection with any Claim. You will also be liable to us for any costs and reasonable attorneys' fees we incur to successfully establish or enforce our right to indemnification under this Section. You agree that the provisions in this Section will survive any termination of your Account, the Agreement or your access to the Services.

## 19. Exclusion of Damages; Limitations of Liability.

EXCEPT FOR LIABILITY ARISING FROM VIOLATIONS OF SECTIONS 8 (RESTRICTIONS), 9 ACCEPTABLE USE POLICY, 14 (OWNERSHIP AND IP RIGHTS) OR 17 (INDEMNIFICATION), UNDER NO CIRCUMSTANCES AND UNDER NO LEGAL THEORY, WHETHER IN TORT, CONTRACT, OR OTHERWISE, WILL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY CHARACTER, INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF GOODWILL, LOST PROFITS, LOST SALES OR BUSINESS, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION, LOST DATA, OR FOR ANY AND ALL OTHER DAMAGES OR LOSSES, EVEN IF SUCH PARTY HAD BEEN ADVISED, KNEW OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES. EXCEPT AS DESCRIBED IN THIS SECTION, UNDER NO CIRCUMSTANCES AND UNDER NO LEGAL THEORY, WHETHER IN TORT, CONTRACT, OR OTHERWISE, WILL TEXTEL BE LIABLE TO YOU FOR ANY DIRECT DAMAGES, COSTS OR LIABILITIES IN EXCESS OF THE AMOUNTS PAID BY YOU DURING THE TWELVE (12) MONTHS PRECEDING THE INCIDENT OR CLAIM OR \$500, WHICHEVER IS GREATER.

TEXTEL'S SERVICES ARE NOT INTENDED TO SUPPORT OR CARRY EMERGENCY CALLS OR SMS MESSAGES TO ANY EMERGENCY SERVICES. NEITHER TEXTEL NOR ITS REPRESENTATIVES WILL BE LIABLE UNDER ANY LEGAL OR EQUITABLE THEORY FOR ANY CLAIM, DAMAGE, OR LOSS (AND CUSTOMER WILL HOLD TEXTEL HARMLESS AGAINST ANY AND ALL SUCH CLAIMS, DAMAGES OR LOSSES) ARISING FROM OR

RELATING TO THE INABILITY TO USE OUR SERVICES TO CONTACT EMERGENCY SERVICES.

## 20. International Users.

In order to address compliance with EU and UK data protection laws, Textel makes the Services available to Subscriber, if applicable, pursuant to the Data Processing Addendum available at <http://textel.net/textel-DPA> which contains the applicable Standard Contractual Clauses to reflect the Parties' agreement with regard to the processing of personal information (with Subscriber acting as data controller and Textel acting as a data processor).

## 21. Export Controls; Communications and Other Applicable Laws.

Subscriber and each of its Users shall adhere to all applicable U.S. and foreign export control laws and shall not export or re-export any regulated item or information to anyone outside the U.S. in connection with this Agreement without first complying with all export control laws and regulations that may be imposed by the U.S. or any country or organization of nations within whose jurisdiction Subscriber operates. Subscriber and each of its Users shall adhere to all Applicable Laws governing the use of individual information, deceptive and misleading advertising, electronic commercial communications, telemarketing and other similar laws, which include

without limitation the U.S. Telephone Consumer Protection Act of 1991, U.S. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 and the Canada Anti-SPAM Legislation, if applicable, and each as amended.

## 22. General.

### 22.1 No Waiver.

Textel's failure to enforce at any time any provision of this Agreement does not waive our right to do so later. And, if we do expressly waive any provision of this Agreement that does not mean it is waived for all time in the future. Any waiver must be in writing and signed by and us to be legally binding.

### 22.2 Assignment.

Neither Party may assign this Agreement without the prior written consent of the other Party (which consent shall not unreasonably withheld), except that either Party may assign this Agreement in its entirety, with written notice to the other Party, but without the consent of the other Party, if (a) to an affiliate, or (b) in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets not involving a direct competitor of the other Party. Subject to the foregoing, this Agreement shall bind and inure to the benefit of the Parties, and their respective successors



and permitted assigns. No assignment or delegation shall relieve the assigning or delegating party of any of its obligations hereunder.

### 22.3 Relationship of the Parties.

The Parties are independent contractors, and nothing herein shall be deemed to constitute the relationship of employer-employee, a partnership, or a joint venture between the Parties hereto. Neither Party is an agent of the other and neither Party is authorized to make any representation, contract, or commitment on behalf of the other Party.

### 22.4 Severability.

If any provision of this Agreement is held by a court or other tribunal of competent jurisdiction to be unenforceable, that provision will be limited or eliminated to the minimum extent necessary to make it enforceable and, in any event, the rest of this Agreement will continue in full force and effect.

### 22.5 Notices.

Where Textel requires that you provide an e-mail address, you are responsible for providing Textel with your most current e-mail address. In the event that the last e-mail address you provided to

Textel is not valid, or for any reason is not capable of delivering to you any notices required/ permitted by the Agreement, Textel's dispatch of the e-mail containing such notice will nonetheless constitute effective notice. You may give notice to Textel at the following address: Textel c/o Capacity, 6665 Delmar Blvd., Ste 300, St. Louis, MO 63130 or by emailing [support@textel.net](mailto:support@textel.net). Any mailed notice shall be deemed given when received by Textel by letter delivered by nationally recognized overnight delivery service or first class postage prepaid mail at the above address. A copy of any notice to Textel shall be sent to [legal@textel.net](mailto:legal@textel.net).

## 22.6 Entire Agreement.

This Agreement, including any exhibits, schedules or Order Forms hereunder, as amended, constitutes the sole and entire agreement of the Parties with respect to the subject matter of this Agreement. To the fullest extent possible, each Order Form and this Agreement shall be interpreted so as to be consistent with each other. Any additional or different terms or conditions contained in Subscriber's purchase orders, acknowledgments, invoices, non-disclosure agreements, shrink-wrap, click-wrap, browse-wrap or other documents are null and void.

## 22.7 Survival.

The terms and conditions of this Agreement that by their sense and context are intended to survive after performance of the Services

hereunder shall survive the termination or expiration of this Agreement.

## 22.8 Force Majeure.

No failure, delay or default in performance of any obligation of a party shall constitute an event of default or breach of this Agreement to the extent that such failure to perform, delay or default arises out of a cause, existing or future, that is beyond the control and without negligence of such party, including action or inaction of governmental, civil or military authority; fire; strike, lockout or other labor dispute; flood, terrorist act; war; riot; theft; earthquake and other natural disaster. The party affected by such cause shall take all reasonable actions to minimize the consequences of any such cause.

## 22.9 Governing Law and Venue.

This Agreement will be governed by and interpreted according to the laws of the State of Missouri without regard to conflicts of laws and principles that would cause laws of another jurisdiction to apply. This Agreement will not be governed by the United Nations Convention on Contracts for the International Sale of Goods. Any legal suit, action or proceeding arising out of or related to this Agreement or our Use shall be instituted in either the state or federal courts of St. Louis County and we each consent to the personal jurisdiction of these courts.

#### 22.10 Waiver of Jury Trial.

THE PARTIES HEREBY WAIVE THEIR CONSTITUTIONAL AND STATUTORY RIGHTS TO GO TO COURT AND HAVE A TRIAL IN FRONT OF A JURY

#### 22.11 Waiver of Class or Consolidated Actions.

ALL CLAIMS AND DISPUTES WITHIN THE SCOPE OF THIS AGREEMENT MUST MEDIATED OR LITIGATED ON AN INDIVIDUAL BASIS AND NOT ON A CLASS BASIS, AND CLAIMS OF MORE THAN ONE CUSTOMER OR USER CANNOT BE MEDIATED OR LITIGATED JOINTLY OR CONSOLIDATED WITH THOSE OF ANY OTHER CUSTOMER OR USER.

#### 22.12 Limitations Period.

YOU AND TEXTEL AGREE THAT ANY CAUSE OF ACTION ARISING OUT OF OR RELATED TO THE TERMS, SERVICES OR THE CONTENT MUST COMMENCE WITHIN ONE (1) YEAR AFTER THE CAUSE OF ACTION ACCRUES. OTHERWISE, SUCH CAUSE OF ACTION IS PERMANENTLY BARRED.