

Smarsh Service Agreement for AT&T Resale of Message Archiving Services

Version Date: 5/12/2017

BY CLICKING A BOX INDICATING ACCEPTANCE OF THIS AGREEMENT OR BY EXECUTING AN ORDER FORM THAT REFERENCES THIS AGREEMENT, YOU (THE "CLIENT") AGREE TO THE TERMS OF THIS AGREEMENT. IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY TO THIS AGREEMENT.

This Smarsh Service Agreement (the "**Agreement**") constitutes a binding agreement between Smarsh Inc. ("**Smarsh**") and the Client identified in an order document (including electronic ordering mechanisms) referencing this Agreement ("**Order Form**") or the Client who accepts the terms of this Agreement via click-through acceptance ("**Client**"). Client agrees that the terms of this Agreement will govern Client's use of the Services (as defined in Section 1). In the event any term in an Order Form conflicts with the terms of this Agreement, the Order Form will supersede this Agreement solely with respect to the conflicting term.

1. **Services.** The Services consist of text message archiving services. The Services include the features and functionality specified in the Starter Package as described here: <http://www.smarsh.com/wp-content/uploads/2016/08/ServiceDescriptions2016August.pdf> ("**Services**"). Following execution of the Order Form, Smarsh will activate the applicable Services by providing Client with access to an account within such Service ("**Activation Date**"). As used in this Agreement, the term "**Client Data**" means the communication data that the Services receive from the Smarsh API used for AT&T messages. Client hereby grants Smarsh the limited, non-exclusive right to access, copy, transmit, download, display, and reproduce Client Data as necessary to provide, support, and improve the Services as directed by Client or as authorized hereunder. Platform usage data is not Client Data.
2. **Third Party Providers.** The Services receive Client Data from third-party sources, and as such are dependent on the third party's services, software, applications, platforms or API's ("**Third-Party Services**"). Third-Party Services are not offered, controlled or provided by Smarsh. The Third-Party providing such Service may make changes to its service, or components thereof, or discontinue a service without notice to Smarsh. In addition, the availability of the Third-Party Service may depend on Client's compliance with the Third-Party Service terms. The Third-Party Service will have access to Client's data and will provide Client Data to Smarsh. Accordingly, Smarsh expressly disclaims any and all liability related to or arising from Third-Party Services, including Client's use thereof, or any updates, modifications, outages, delivery failures, corruptions, discontinuance of services or termination of Client's account by the Third Party or its Third-Party Service. Smarsh does not control and is not responsible or liable for how the Third-Party Service transmits, accesses, processes, stores, uses or provides data to Smarsh. Client is solely responsible for ensuring Client complies with any terms and conditions applicable to the Third-Party Services. The Additional AT&T Service Terms are available at www.smarsh.com/legal. Such additional terms are subject to modification by AT&T.
 - 2.1. **Support and Service Level Agreements.** Service Level Agreements are available at www.smarsh.com/legal and are subject to modification by Smarsh as mutually agreed by AT&T for AT&T customers. Client may find support FAQ's and other support resources, or initiate support requests by submitting support tickets here: <http://www.smarsh.com/support/>. Changes in Smarsh's support policies will be made available in the applicable Support and Service Level Agreement policies at www.smarsh.com/legal and will be effective on the date the policy is posted. Client must contact AT&T for billing or account related inquiries.
 - 2.2. **Data Retention.** With respect to the Services, Smarsh will retain Client Data for the Term of the Agreement, unless Client requests or implements specific retention policies within the Services. Retention policies are based on variables assigned to Client Data as directed by Client or implemented by Client. Client is solely responsible for compliance with all applicable legal, regulatory or internal requirements with respect to such retention policies. Following termination or expiration of this Agreement, Smarsh will retain Client Data associated with the Services for a minimum of six (6) months. Thereafter, Smarsh reserves the right, in its sole discretion, to delete Client Data.
 - 2.3. **Trial Services.** If a trial period is indicated on the Order Form, Smarsh will provide Client with a temporary account to one or more of the Services free of charge (a "**Trial Account**"). The Trial Account will be accessible for the trial period set forth in the Order Form, or if no trial period is stated, the trial period will be thirty (30) days from the Activation Date. During the trial period, the Trial Account and associated Services are provided "AS IS" and without representation or warranty of any kind. Smarsh is under no obligation to store or retain Client Data during the trial period and may delete such data unless Client purchases the same Services as the Trial Account Services. Smarsh will not be responsible for any direct, indirect, consequential or any other damages, loss or claims resulting from Client's access to, or use of the Trial Account or the Trial Account Services during the trial period.
3. **Client Obligations and Responsibilities.**
 - 3.1. **Account.** Client is responsible for (a) ensuring that Client's account registration information is complete and accurate; and (b) the security and confidentiality of Client's account credentials. Client will notify Smarsh immediately of any unauthorized use of any password or account or any other known or suspected breach of security. Client will not permit Smarsh competitors to access the Services for any reason. Client is solely responsible for all activity which occurs within Client's account and for the actions of its employees, contractors or agents, whether or not such person is or was acting within the scope of their employment, engagement or agency relationship. Client is responsible for configuring applicable third-party platforms or systems to transmit Client Data to the Platform. Client is responsible for providing Smarsh with any historical data to be archived by the SaaS Services in a format acceptable to Smarsh.
 - 3.2. **Representatives.** Client may provide Representatives with access to the Services, may purchase Services on behalf of Representatives, or where Client is required to review Representative communications, Client may use the Services to meet such requirement. A "**Representative**" means any entity which (a) Client controls or which is under common control with Client; or (b) Client has a regulatory requirement to archive or review communications data on behalf of. Subject to the terms of this Agreement, Client may provide access to, or use of, the Services to Representatives; provided that Client remains liable for Representative acts or omissions. Representatives use of the Services is subject to the terms of this Agreement.

- 3.3. **Users.** Client may designate different user roles with different support or Service access. An “**Authorized User**” is the administrative user(s) who have the highest level of access and are responsible for managing the Services for Client. Only Authorized Users may appoint other Authorized Users, request or agree to changes to the Services, add or remove users, make billing inquiries, contact support, agree to modifications to this Agreement or take other, similar actions. A “**User**” is any individual who accesses the Services in any capacity. Reviewers and Authorized Users are also “Users.” Users may not share account log in credentials.
- 3.4. **Acceptable Use of Services.** Client will comply with Smarsh’s Acceptable Use Policy available at www.smarsh.com/legal. The Acceptable Use Policy may be updated from time to time by Smarsh. Client is prohibited from, and will not copy, modify, adapt, transmit, sell, distribute or otherwise use the Services, in whole or in part, except as expressly permitted in this Agreement. Client is solely responsible for Client Data and represents and warrants that Client Data will not (a) infringe any third party right, including, without limitation, third party rights in patent, trademark, copyright, or trade secret; or (b) constitute a breach of any other right of a third party, including without limitation, any right under contract or tort theories. Client will abide by all applicable local, state, national or foreign laws, rules, regulations or treaties in connection with Client’s use of the Services including, without limitation, those related to data privacy, communications, SPAM, Telephone Consumer Protection Act or the transmission and storage of technical or personal data. It is Client’s responsibility to post all legally required privacy policies, or notices and to obtain all legally required or necessary consents with respect to the transmission, collection or storage of Client Data. Client represents that, with respect to any account, website or webpage Client directs Smarsh to archive, Client has all necessary rights or licenses to archive such account, website or webpage and that the archiving of the same does not place Client or Smarsh (as Client’s agent) in violation of any website terms and conditions included on the website.
- 3.5. **Text Message Carrier Requirements.** Client is only permitted to archive text messages for Client’s current employees and contractors. Client is not permitted to actively archive text messages for any individual who is not a Client employee or contractor. Client agrees to notify Smarsh immediately when any employee’s employment or contract is terminated. Client agrees to provide each employee and contractor with clear and conspicuous policies regarding the receipt, transmission, storage and use of employee or contractor text messages. Client is responsible for ensuring that each employee and contractor has agreed to such policies and has been made aware that such employee or contractor has no reasonable expectation of privacy in such employee’s text messages. Smarsh is not responsible for delays in implementation caused by telecommunication carriers, Client or Client employees or contractors. Client is responsible for following all implementation processes and procedures communicated to Client during the implementation process.
- 3.6. **Client Indemnification.** Client will indemnify, defend and hold harmless Smarsh, its officers, directors, employees and agents, from and against all claims, losses, damages, liabilities and expenses (including reasonable attorneys’ fees), arising from Client’s breach of any of Client’s obligations under this Section 3. Client’s obligation for indemnification will be predicated upon (a) Smarsh providing Client with prompt written notice upon becoming aware of any such claim, provided that Client will not be relieved of its obligation for indemnification as the result of Smarsh’s failure to provide such notice unless Client is actually prejudiced in defending such a claim as a result of Smarsh’s failure to provide notice; (b) if requested by Client, and at Client’s expense, Smarsh reasonably cooperating with the defense of such claim; and (c) Smarsh allowing Client sole and exclusive control over the defense and settlement of any such claim.
4. **Confidentiality.**
- 4.1. **Definition of Confidential Information.** “**Confidential Information**” means (a) the non-public information of either party, including but not limited to information relating to either party’s product plans, customers, designs, costs, prices, finances, marketing plans, business opportunities, personnel, research, development or know-how; (b) any information designated by either party as “confidential” or “proprietary” or which, under the circumstances taken as a whole, would reasonably be deemed to be confidential; (c) the terms of this Agreement; (d) Client Data; or (e) the Software. “Confidential Information” will not include information that: (i) is in, or enters, the public domain without breach of this Agreement; (ii) the receiving party lawfully receives from a third party without restriction on disclosure and without breach of a nondisclosure obligation; (iii) the receiving party knew prior to receiving such information from the disclosing party; or (iv) the receiving party develops independently without reference to the Confidential Information.
- 4.2. **Obligations with Respect to Confidential Information.** Each party agrees: (a) that it will not disclose to any third party, or use for its own benefit or the benefit of any third party, any Confidential Information disclosed to it by the other party except as expressly permitted in this Agreement; and (b) that it will use reasonable measures to maintain the confidentiality of Confidential Information of the other party in its possession or control. Either party may disclose Confidential Information of the other party: (i) pursuant to the order or requirement of a court, administrative or regulatory agency, or other governmental body, provided that the receiving party, if feasible and/or legally permitted to do so, gives reasonable notice to the disclosing party to contest such order or requirement; or (ii) to the parties agents, representatives, subcontractors or service providers who have a need to know such information provided that such party maintain the Confidential Information on a confidential basis.
- 4.3. **Remedies.** Each party acknowledges and agrees that a breach of the obligations of this Section 4 by the other party may result in irreparable injury to the disclosing party for which there will be no adequate remedy at law, and the disclosing party will be entitled to seek equitable relief, including injunction and specific performance, in the event of any breach or threatened breach or intended breach by the recipient of Confidential Information.
5. **Intellectual Property.** As between Smarsh and Client, all server hardware, technology, software and applications required to operate the Services, other associated technology or documentation, data regarding the use of the Services, are the sole and exclusive property of Smarsh. Except as expressly stated herein, nothing in this Agreement will serve to transfer to Client any intellectual property right in or to the Services, Smarsh trademarks or other intellectual property. Smarsh retains all right, title and interest in and to the Services, Software and the associated technology and documentation. As between Smarsh and Client, Client Data is the sole and exclusive property of Client and, other than the limited license to Client Data granted in Section 1, nothing in this Agreement will serve to transfer to Smarsh any intellectual property rights in the Client Data.
6. **Term.**

Term. The Agreement will commence on the Effective Date of Client's order with AT&T and will remain in effect for the period specified in the Order Form.

- 6.1. **Termination for Breach.** Either party may terminate this Agreement if the other party materially breaches its obligations under this Agreement and the breach remains uncured for a period of thirty (30) days following the non-breaching party's written notice of the breach to the breaching party. Smarsh reserves the right to suspend Client's access to the Services in the event of any breach of this Agreement and will not be liable for any damages resulting from such suspension.
- 6.2. **Effect of Termination.** Upon any termination or expiration of the Agreement: (a) all rights and licenses to the Services granted to Client by Smarsh will immediately terminate;; and (b) upon request, each party will return to the other or delete the Confidential Information of the other party; provided, however, if Client requests Smarsh to return Client Data, Client agrees to pay Smarsh's then-current data extraction and exportation fees plus any hardware costs.

7. **Warranties; Disclaimers of Warranties.**

- 7.1. **Performance Warranty.** Smarsh represents and warrants that it will provide the Services in accordance with generally accepted industry standards.
- 7.2. **Proper Authority.** Smarsh represents that it has the right and authority to enter into this Agreement and that the performance of its obligations under this Agreement will not breach or be in conflict with any other agreement to which Smarsh is a party.
- 7.3. **Compliance with Laws.** Smarsh warrants that it will comply with the laws and regulations applicable to Smarsh's business.
- 7.4. **Disclaimer of Warranty.** EXCEPT AS SET FORTH IN SECTIONS 7.1 — 7.3 ABOVE, SMARSH MAKES NO REPRESENTATION OR WARRANTY OF ANY KIND IN CONNECTION WITH THE SERVICES, PROFESSIONAL SERVICES OR SOFTWARE, INCLUDING, WITHOUT LIMITATION, ANY OTHER INFORMATION OR MATERIALS PROVIDED, OR MADE AVAILABLE, BY SMARSH. SMARSH HEREBY DISCLAIMS ANY AND ALL REPRESENTATIONS AND WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. SMARSH DOES NOT REPRESENT OR WARRANT THAT THE SERVICES OR SOFTWARE WILL BE AVAILABLE OR ERROR-FREE. SMARSH WILL NOT BE LIABLE FOR DELAYS, INTERRUPTIONS, SERVICE FAILURES OR OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET, ELECTRONIC COMMUNICATIONS, OR OTHER SYSTEMS OUTSIDE THE REASONABLE CONTROL OF SMARSH. SMARSH MAKES NO REPRESENTATION OR WARRANTY THAT USE OF THE SERVICES OR THE ADVICE, CONSULTING OR PROFESSIONAL SERVICE PROVIDED TO CLIENT GUARANTEES LEGAL COMPLIANCE UNDER ANY FEDERAL, STATE OR INTERNATIONAL STATUTE, LAW, RULE, REGULATION, OR DIRECTIVE AND SMARSH EXPRESSLY DISCLAIMS ALL LIABILITY ARISING OR RELATED TO CLIENT'S COMPLIANCE WITH ANY FEDERAL, STATE OR INTERNATIONAL STATUTE, LAW, RULE, REGULATION, OR DIRECTIVE. THE SOFTWARE IS NOT DESIGNED OR INTENDED FOR USE IN HAZARDOUS ENVIRONMENTS REQUIRING FAIL-SAFE PERFORMANCE, INCLUDING BUT NOT LIMITED TO ANY APPLICATION IN WHICH THE FAILURE OF THE SOFTWARE COULD LEAD DIRECTLY TO DEATH, PERSONAL INJURY, OR SEVERE PHYSICAL OR PROPERTY DAMAGE.

8. **Remedies; Limitations of Remedies.**

- 8.1. **Remedies.** In the event of a breach of any warranty under Section 7, Smarsh will use commercially reasonable efforts to provide Client with an error correction or work-around that corrects the reported non-conformity. The foregoing remedies represent Client's sole and exclusive remedy for a breach of Section 7.
- 8.2. **Limitation of Liability.** IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER, OR TO ANY THIRD PARTY, FOR ANY SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES (INCLUDING LOSS OF USE, DATA, BUSINESS OR PROFITS), ARISING OUT OF OR IN CONNECTION WITH THE SERVICES OR SOFTWARE, WHETHER BASED ON BREACH OF CONTRACT, BREACH OF WARRANTY, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, REGARDLESS OF WHETHER SUCH DAMAGE WAS FORESEEABLE OR WHETHER THE PARTY HAD BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. SMARSH'S AGGREGATE LIABILITY HEREUNDER FOR ALL DAMAGES ARISING UNDER OR RELATING TO THIS AGREEMENT, NOTWITHSTANDING THE FORM IN WHICH ANY ACTION IS BROUGHT (E.G., CONTRACT, TORT, OR OTHERWISE), WILL BE LIMITED TO \$10,000. THE LIMITATION ON LIABILITY SET FORTH ABOVE IS CUMULATIVE; ALL PAYMENTS MADE FOR ALL CLAIMS AND DAMAGES WILL BE AGGREGATED TO DETERMINE IF THE LIMIT HAS BEEN REACHED.
- 8.3. THE ABOVE LIMITATIONS OF LIABILITY REFLECT AN ALLOCATION OF RISK BETWEEN THE PARTIES IN VIEW OF THE FAVORABLE FEES CHARGED BY SMARSH RELATIVE TO THE SERVICES DESCRIBED HEREIN, AND ARE MATERIAL TERMS HEREOF.

9. **Indemnification.**

- 9.1. Smarsh will defend, indemnify and hold Client harmless from third-party claims arising out of a claim that the Services infringe any United States patent, trademark or copyright; provided that, (a) Client provides Smarsh with prompt written notice upon becoming aware of any such claim; (b) Client reasonably cooperates with Smarsh in the defense of such claim; and (c) Smarsh has sole and exclusive control over the defense and settlement of any such claim. Notwithstanding the foregoing, Smarsh will have no liability of any kind to the extent any claim relates to or arises from: (i) custom functionality provided to Client based on Client's specific requirements; (ii) any modification of the Services by Client or any third party; (iii) the combination of Services with any technology or other services, software or technology not provided by Smarsh; or (iv) the failure of Client to use updated

or modified versions of the Services made available by Smarsh. If the Services are subject to a claim of infringement of the intellectual property rights of a third party, Smarsh may, in its sole discretion, either (a) procure for Client the right to continue to use the Services; (b) modify the Services such that they are non-infringing; or (c) if in the reasonable opinion of Smarsh, neither (a) nor (b) are commercially feasible, then Smarsh may upon thirty (30) days prior written notice to Client, terminate the applicable Service.

9.2. The indemnification obligation contained in this Section 9 will be Client's sole remedy, and Smarsh's sole obligation, with respect to claims of infringement.

10. General Provisions.

- 10.1. **Assignment.** Neither party may assign this Agreement, in whole or in part, without the other party's prior written consent, except that either party may assign this Agreement without the other's consent in the case of a merger, reorganization, acquisition, consolidation, or sale of all, or substantially all, of its assets. Any attempt to assign this Agreement other than as permitted herein will be null and void. Without limiting the foregoing, this Agreement will inure to the benefit of and bind the parties' respective successors and permitted assigns.
- 10.2. **Force Majeure.** No failure or omission by the parties hereto in the performance of any obligation of this Agreement will be deemed a breach of this Agreement, nor will it create any liability, provided the party uses reasonable efforts to resume performance hereunder, if the same will arise from any cause or causes beyond the reasonable control of the parties, including, but not limited to the following, which, for the purpose of this Agreement, will be regarded as beyond the control of the parties in question: (a) acts of God; (b) acts or omissions of any governmental entity; (c) any rules, regulations or orders issued by any governmental authority or any officer, department, agency or instrumentality thereof; (d) fire, storm, flood, earthquake, accident, war, rebellion, insurrection, riot, strikes and lockouts; or (e) utility or telecommunication failures.
- 10.3. **Governing Law.** This Agreement will be governed by and construed in accordance with the laws of the State of Delaware, without regard to conflict/choice of law principles. Any legal action or proceeding arising under this Agreement will be brought exclusively in the federal or state courts located in New York, and the parties hereby irrevocably consent to the personal jurisdiction and venue therein.
- 10.4. **Notices.** Any legal notice under this Agreement will be in writing and delivered by personal delivery, express courier, or certified or registered mail, postage prepaid and return receipt requested. Notices will be deemed to be effective upon personal delivery, one (1) day after deposit with express courier, five (5) days after deposit in the mail. Notices will be sent to Client at the address set forth on the Order Form or such other address as Client may specify. Notices will be sent to Smarsh at the following address: Smarsh, Inc., Attention: Legal, 851 SW 6th Ave, Suite 800, Portland, OR 97204.
- 10.5. **No Agency.** The parties are independent contractors and will have no power or authority to assume or create any obligation or responsibility on behalf of each other. This Agreement will not be construed to create or imply any partnership, agency, or joint venture.
- 10.6. **Entire Agreement.** This Agreement is the complete and exclusive agreement between the parties with respect to the subject matter hereof, and supersedes any prior or contemporaneous agreements, negotiations and communications (both written and oral) regarding such subject matter.
- 10.7. **Severability.** If for any reason a court of competent jurisdiction finds any provision or portion of this Agreement to be unenforceable, that provision of the Agreement will be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remainder of this Agreement will continue in full force and effect.
- 10.8. **Waiver.** Failure of either party to insist on strict performance of any provision herein will not be deemed a waiver of any rights or remedies that either party will have and will not be deemed a waiver of any subsequent default of the terms and conditions thereof.
- 10.9. **Electronic Signatures and Communications.** The parties agree that electronic signatures, whether digital or encrypted, or click-through acceptance, by an Authorized User or a party's authorized signatory are intended to authenticate such signatures and give rise to a valid, enforceable, and fully effective agreement. The parties expressly agree that any terms in Client's purchase order forms, or electronic communications form no part of this Agreement.