

# Text Messaging Platform Agreement

This Text Messaging Agreement (“Agreement”) is made on \_\_\_\_\_, by and between Xanadu Leads Inc., d/b/a/ Text-Calibur with its principal business offices located at 956 3 Mile Road NW, Grand Rapids MI 49544. hereinafter referred to as “Text-Calibur” and \_\_\_\_\_ with its principal business offices located at \_\_\_\_\_ hereinafter referred to as “Client”. Text-Calibur and Client hereinafter may sometimes be referred to individually as a “Party” and collectively as “Parties”.

## RECITALS

WHEREAS Text-Calibur is in the business of providing text message platforms for their clients; and,

WHEREAS Client desires to engage Text-Calibur to provide such a platform for their outgoing text messaging campaigns.

NOW THEREFORE, in consideration of the foregoing and of the mutual promises and covenants set forth herein, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

## AGREEMENT

- 1. Agreement to Provide Platform:** Text-Calibur agrees to provide Client with a text messaging platform, which will allow Client to send text messages. There is no charge for the use of the platform. To get a free account, Client will go to <https://text-calibur.com/site/sign-up-today> and sign up to create one. Once the account has been created Client must add funds to the account before sending any text messages and/or making any calls. The account shall operate on a pre-payment basis. The Client is not obligated to deposit any funds and may choose not to use the platform, or the services specified in this Agreement.
- 2. Price Per Message:** Client shall pay, from its pre-funded account, \_\_\_\_\_, for text messaging sent using the Text-Calibur platform. In no event will any payment under this Agreement be contingent on receipt of any monies or other compensation associated with or generated by any message(s) sent by or on behalf of Client. Use of the Text-Calibur platform provided to the Client is conditioned on Text-Calibur’s receipt of full payment by Client. In addition, Text-Calibur may suspend use of the platform if Client’s account contains insufficient funds. Text-Calibur shall not be liable for any damages, losses or liabilities that may arise out of any such suspension. In addition, Client shall be liable to Text-Calibur for all reasonable attorney’s fees and other costs of collection associated with any unpaid amounts.
- 3. Legal Compliance:** Client understands and acknowledges that Text-Calibur is a service provider who provides the platform necessary to allow Client to send text messages. Under no circumstance shall Text-Calibur be liable for any text messages sent and/or phone calls made by Client or any entity on behalf of Client that violates any federal, state or local, laws, acts and/or regulations including, but not limited to the Telephone Consumer Protection Act (TCPA), and any and all requirements of any national, state and/or local do not call lists.
- 4. Consent Requirements:** Prior to sending the first text message, Client must obtain agreement from the recipient to communicate with them, hereafter referred to as "Consent", It must be made clear that the individual is agreeing to receive messages of the type to be sent. Client agrees to keep a record of the Consent, such as a copy of the document or form that the message recipient signed, or a timestamp of when the customer completed a sign-up flow. Client agrees to make such Consent available to Text-Calibur upon request.
- 5. Indemnification/Hold Harmless:** Each Party (“Indemnifying Party”) agrees to defend, indemnify and hold harmless the other Party (“Indemnified Party”) from all damages, losses, expenses, costs (including reasonable attorneys’ fees) and other liabilities arising out of or related to any third party claim with respect to (a) the willful or negligent acts or omissions of the Indemnifying Party, its employees or agents; (b) Indemnifying Party or any of its agents, affiliates, subsidiaries, directors, officers, employees, licensors, licensees, consultants, contractors, and partner’s breach or alleged  
**Client Initials:** \_\_\_\_\_ **Text-Calibur Initials:** \_\_\_\_\_

breach of any of the representations, warranties, covenants, agreements or obligations under the Agreement; (c) the use of or access to advertisements or any material to which users can link, or any third party products or services made available by Indemnifying Party; and (d) any violation of law and/or violation of any third party's rights by Indemnifying Party, its agents, affiliates, subsidiaries, directors, officers, employees, licensors, licensees, consultants, contractors and/or partners which results in liability to the Indemnified Party; provided that the Indemnified Party gives prompt written notice of any such claim of to the Indemnified Party and that Indemnifying Party receives the full cooperation of the Indemnified Party in the defense thereof.

**6. Limitation of Liability:** NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY SPECIAL, INDIRECT, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES (FOR EXAMPLE, LOST PROFITS), EVEN IF THE PARTIES KNOW ABOUT THE POSSIBILITY OF THESE DAMAGES, INCLUDING, BUT NOT LIMITED TO LOSS OF DATA, LOSS OF BUSINESS, PROFITS OR OTHER LOSS, THAT RESULT FROM THIS AGREEMENT, EVEN IF SUCH PARTY OR ITS AUTHORIZED REPRESENTATIVE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. EACH PARTY ACKNOWLEDGES THAT THE OTHER PARTY HAS ENTERED INTO THE AGREEMENT IN RELIANCE UPON THE LIMITATIONS OF LIABILITY SET FORTH HEREIN AND THAT THE SAME IS AN ESSENTIAL BASIS OF THE BARGAIN BETWEEN THE PARTIES. WITH THE EXCEPTION OF THE INDEMNITY OBLIGATIONS, BREACH OF WARRANTY OBLIGATIONS, AND CONFIDENTIALITY PROVISIONS SET FORTH HEREIN, NEITHER PARTY NOR ITS AFFILIATE'S TOTAL LIABILITY TO THE OTHER PARTY FOR ANY DAMAGES, LOSSES, AND CAUSES OF ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT (WHETHER IN CONTRACT OR TORT, INCLUDING NEGLIGENCE, WARRANTY, OR OTHERWISE) EXCEED THE PAYMENTS MADE BY CLIENT TO TEXT-CALIBUR IN THE SIX (6) MONTHS PRECEDING THE EVENT GIVING RISE TO THE CLAIM.

**7. Force Majeure:** Neither Party will have any liability for any failure or delay resulting from any governmental action, war, fire, flood, insurrection, earthquake, power failure, riot, explosion, embargo, strikes whether legal or illegal, labor or material shortage, transportation interruption of any kind, work slowdown or any other condition affecting production or delivery in any manner beyond the control of that Party.

**8. Confidentiality and Non-Disclosure:** Text-Calibur and Client mutually agree to hold in confidence all confidential and proprietary information and trade secrets disclosed to them, either directly or indirectly, in writing, orally, or by inspection of tangible objects ("Confidential Information") and agree that such information shall not be used for any purpose other than those contemplated by this Agreement. These restrictions shall remain in place for a term of three (3) years after the termination of this Agreement. Confidential Information includes but is not limited to the monetary value of Text-Calibur business with Client, rates and fees, business models, business practices, revenue sources, software code, software designs, hardware designs, and network architecture designs. Confidential Information shall not include information that is publicly known and made generally available in the public domain by a third party. If required by law to disclose Confidential Information, either Party may do so provided that prompt written notice of such requirement is given prior to such disclosure and any such disclosure is limited to the minimum extent necessary to comply with the legal requirement.

**9. Notices:** All notices to be given under this Agreement shall be either by e-mail, personal delivery, overnight mail or certified mail to the addresses of the Parties as set forth on the first page of this Agreement. If either Party should change its address, then said Party shall notify the other Party of the change.

**10. Refund Policy:** No refunds will be made, once messages have been sent. Text-Calibur is not responsible for text messages generated by Client or any entity on behalf of Client.

**11. Term:** The term of this Agreement will commence on the date and shall automatically renew every month unless terminated earlier, by either Party, in accordance with this Agreement. Either Party may terminate this Agreement for any reason upon thirty (30) day's written notice. Either Party may immediately terminate this Agreement for cause if (i) there is a material breach of this Agreement by the other Party; (ii) services provided by Text-Calibur are materially affected adversely by a change in ownership or management of Text-Calibur; or (iii) the filing of a petition in bankruptcy involving Text-Calibur.

Client Initials: \_\_\_\_\_

Text-Calibur Initials: \_\_\_\_\_

**12. Disclaimer of Warranties:** EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, TEXT-CALIBUR MAKES NO WARRANTIES AND EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESSED OR IMPLIED, AS TO THE SUBJECT MATTER OF THIS AGREEMENT, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. TEXT-CALIBUR SHALL NOT BE LIABLE FOR ANY ISSUES WITH ANY AND ALL MESSAGES SENT BY OR ON BEHALF OF CLIENT, WHICH INCLUDES BUT IS NOT LIMITED TO THE CONTENT THEREOF, ANY ISSUES RELATED TO THE UNAVAILABILITY OR INOPERABILITY OF THE INTERNET, UNAVAILABILITY OR CONSEQUENCES OF ANY MESSAGE, OR ANY TECHNICAL MALFUNCTION, COMPUTER ERROR, CORRUPTION OR LOSS OF INFORMATION RELATED TO OR ARISING OUT OF CLIENTS USE OF THE TEXT-CALIBUR PLATFORM, PROVIDED SUCH ISSUES WERE NOT DUE TO TEXT-CALIBUR WILLFUL MISCONDUCT OR NEGLIGENCE. THE TEXT-CALIBUR MESSAGING PLATFORM IS PROVIDED ON AN "AS IS" BASIS WITH NO WARRANTY.

TEXT-CALIBUR DOES NOT WARRANT OR GUARANTEE CONVERSION RATES, PAY-UP RATES, RESPONSE RATES, THE ABILITY TO CONVERT THE RESPONSES INTO SALES OR ANY BENEFIT CLIENT MAY RECEIVE FROM ITS USE OF THE TEXT-CALIBUR MESSAGING PLATFORM.

**13. Warranties and Representations:** Each Party represents and warrants that: (a) it has full right and power to enter into and perform this Agreement without the consent of any third party; (b) this Agreement is a valid and binding obligation of such Party; (c) it has obtained and shall maintain throughout the term of this Agreement all necessary licenses, authorizations, approvals and consents to enter into and perform its obligations hereunder in compliance with all applicable laws, rules and regulations; and (d) shall comply with all federal, state or local, laws, acts and/or regulations including but not limited to the Telephone Consumer Protection Act (TCPA) and any and all requirements of any national, state and/or local do not call lists.

Text-Calibur represents and warrants that during the term of this Agreement, it shall: (a) provide Client with a messaging platform, which will allow Client to send text messages for marketing and promotional purposes, (b) not violate the copyright, patent, trademark, trade secret or other right of any third party; (c) its provision and operation of the messaging platform is in compliance with all applicable local, state, federal and international laws, rules, treaties, inter-governmental agreements and governmental orders, regulations and regulatory codes of practice and industry standards; and (d) there are no actions, suits or proceedings, pending or threatened, that could reasonably be expected to have a material adverse effect on Text-Calibur's ability to fulfill its obligations under this Agreement.

Client represents and warrants that no part of any text message distributed through the use of the text messaging platform provided by Text-Calibur will: (a) infringe on any third party's copyright, patent, trademark, trade secret or other proprietary or intellectual property rights; (b) violate any law, statute, ordinance or regulation, including, without limitation, laws and regulations governing export control, false advertising, Children's Online Privacy Protection Act, the Can-Spam Act, the Federal Trade Commission Act and the Digital Millennium Copyright Act or result in unfair competition; (c) be defamatory or libelous; (d) be pornographic or obscene; or (e) contain viruses, trojan horses, worms, time bombs, cancelbots or other similar harmful or deleterious programming routines

Client further represents and warrants that the products and/or services that are being promoted through any text messaging platform provided by Text-Calibur are legitimate goods and services that comply with all laws, statutes or other governmental or administrative rules or regulations.

**14. Intellectual Property.** Client shall retain all right, title and interest in and to all documents, messages, graphics, images, files, data and other information transmitted by Client through the use of the Text-Calibur text message platform (collectively, the "Client-Provided Data"), provided however, that Client hereby grants to Text-Calibur a worldwide, revocable, royalty-free, non-exclusive license to use the Client-Provided Data solely for the purposes of fulfilling its obligations hereunder. Client shall retain all right, title and interest in and to all of Client's logos, promotional graphics and related marketing designs. Text-Calibur hereby grants to Client, and Client hereby accepts, a non-exclusive, non-transferable (except as expressly provided in this Agreement), and limited right for Client to access and use the Text-Calibur message platform specified in the Agreement in accordance with this Agreement solely during the term and solely for the its internal business purposes.

**Client Initials:** \_\_\_\_\_

**Text-Calibur Initials:** \_\_\_\_\_

**15. Applicable Law:** This Agreement and any action arising out of it shall be governed by the laws of the State of Michigan and the United States, without regard to the conflicts of law provisions thereof. The exclusive jurisdiction and venue of any action with respect to the subject matter of this Agreement shall be the state courts of the State of Michigan or the United States District Court for the Western District of Michigan and each party hereto submits itself to the exclusive jurisdiction and venue of such courts for the purpose of any such action.

**16. No Waiver:** The failure of any Party to enforce, at any time, the provisions of this Agreement, or to insist upon the strict performance of any covenant or condition of this Agreement, or to exercise any option provided herein, shall in no way be construed to be a waiver of such provision; nor in any way affect the validity of this Agreement, or the right of such Party thereafter to enforce each and every provision of this Agreement.

**17. Non-Assignment:** Neither Party may assign this Agreement without the prior written consent of the other Party. Such consent shall not be unreasonably withheld.

**18. Severability:** If any provision of this Agreement is held to be invalid or unenforceable by a court of competent jurisdiction, such provision will be restated to reflect as nearly as possible the original intentions of the Parties in accordance with applicable law; and the remaining terms, provisions and restrictions of the Agreement will remain in full force and effect.

**19. Relationship of the Parties:** The relationship of the parties under this Agreement is that of independent contractors, and no Party is an employee, agent, partner or joint venture of the other.

**20. Entire Agreement:** This Agreement embodies the entire agreement and supersedes all prior oral and written agreements and may not be amended unless in writing and accepted by both Parties. This Agreement may be executed in any number of parts and facsimile copies, each of which shall be deemed the original, and all of which together shall be deemed one and the same instrument.

ACCORDINGLY, the parties have executed this Agreement as of the date first written above and agree to all terms and statements made herein. Each party warrants that it has full power and authority to enter into this Agreement and that the execution, delivery and performance by each Party of this Agreement will not violate any law, statute or other governmental regulations.

## SIGNATURES

### AUTHORIZED REPRESENTATIVE OF CLIENT

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

### AUTHORIZED REPRESENTATIVE OF TEXT- CALIBUR

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Client Initials: \_\_\_\_\_

Text-Calibur Initials: \_\_\_\_\_