

WHALEBACK SYSTEMS TERMS AND CONDITIONS

1. DEFINITIONS. Unless otherwise defined in the glossary in Section 27 below, the capitalized terms shall be defined in the context in which they are used.

2. SCOPE OF SERVICES. The terms and conditions listed herein are part of and incorporated by reference into one or more Service Orders entered into by the Parties from time to time (each a "Service Order", and collectively the "Service Agreement"). Whaleback agrees to provide the services (the "Services") as described in the Service Agreement.

Activation Fee:

- The Activation Fee shall be due and payable (by check, pre-approved credit card authorization, or ACH) per the payment terms stipulated on the signed Quotation.

Monthly Service Fee:

- Fixed and Variable Monthly Service Fees are charged separately. Beginning on the date of Whaleback's Service Activation, the Fixed Monthly Service Fee for the first month of service shall be due. Each subsequent Fixed Monthly Service Fee shall be due on the 15th of each month for activations that occur between the 30th and the 13th and the 1st of the month for activations between the 14th and the 29th. Client shall pay the Fixed Monthly Service Fee by pre-approved credit card authorization or ACH.
- Variable Monthly Service Fees are charged for usage (Local, Long Distance and International Outbound calls or Toll Free Inbound calls) on a per minute basis and according to Whaleback's published rate table. Rate tables are subject to change with 30 day notice to customer. Additional charges will also be applied to 900# calls and for Directory Assistance. Variable Monthly Service Fees shall be billed monthly in arrears and shall be paid within 5 days of invoice. Whaleback reserves the right to require credit card or pre-authorized billing for these charges for any reason at any time with 5 days prior written notice (invoice serves as written notice). Any changes to the pricing included in this Service Order will be submitted to Client for approval, prior to this Service Order being mutually accepted by the Client and Whaleback Systems. All Service Orders are subject to acceptance by Whaleback in the Company's sole discretion and are subject to an overall credit limit as determined by Whaleback from time to time. Any client purchase orders or similar forms shall be solely for Client's convenience - additional or conflicting terms used therein shall be deemed to be void and have no effect.

3. LICENSE. Subject to the terms and conditions of the Service Agreement, Whaleback grants to Client a limited, non-transferable, non-exclusive license, without the right to sublicense, to access and use the Services provided by Whaleback in their intended manner in accordance with the Documentation provided to Client, solely to support Client's normal course of business. Client shall not: (i) use the Services in a resale capacity, (ii) modify, decompile, reverse engineer, disassemble, attempt to discover the source code of, or create derivative works based on, any of the Services or any part thereof, including any Whaleback Equipment provided to Client, or (iii) disable or circumvent any access control or related device, process or procedure established with respect to the Services or any part thereof. Upon expiration or termination of the Service Agreement for any reason, Client's license to use the Services shall immediately terminate, and Client shall cease all use of the Services.

4. PAYMENTS. Client agrees to pay all amounts due, including any late payment fees, as are specified in each Service Order, as applicable. If any authority imposes a regulatory surcharge, duty, tax or similar amount (other than based on Whaleback's net income), Client agrees to pay, or to promptly reimburse Whaleback for, all such amounts. Payments shall be made in the manner, and on the dates, set out in each Service Order. Late payments are subject to a late payment charge, which is the lower of: (i) 1.5% per month, or (ii) the maximum legal rate. If any unpaid amounts are referred to collection, Client shall reimburse Whaleback for all costs and expenses of collection, including all reasonable attorneys' fees incurred therefore. Whaleback reserves the right to suspend any or all Services until overdue accounts are paid in full.

5. TERM. The service Period (the "Service Period") shall commence on the date which the Services are initially installed at the Client's premises (the "date of Service Activation") and shall continue for the duration of time specified on each outstanding Service Order, or until earlier termination in accordance with Section 6 below. At

the end of the Service Period, the Service Period shall automatically renew for subsequent twelve (12) month terms at the then prevailing rates being charged by Whaleback for such Services, unless either party serves the other with a sixty (60) day notice prior to the expiration of the then-applicable term.

6. TERMINATION. Client may terminate the Service Agreement in its entirety upon thirty (30) days prior written notice to Whaleback if Whaleback materially breaches the terms of a Service Order and does not cure such breach within thirty (30) days following receipt of written notice specifying the breach (in which case the Service Agreement shall terminate at the end of such period); provided, however, that if Client (i) fails to comply with the Acceptable Use Policy (the "AUP") or (ii) fails to make payment in accordance with Section 4 within five (5) days following Client's receipt of written notice of such non-payment, then Whaleback, in its sole discretion, may terminate the Service Agreement in its entirety immediately upon notice to Client; and further provided, that, in lieu of any termination as provided above in this Section 6, Whaleback may, in its sole discretion, elect instead to take remedial measures such as suspending or otherwise restricting Client's access to any of the Services for any period of time or terminating only those Service Orders that are the subject of the breach, provided that such suspension, restriction or Service Order termination shall not prevent Whaleback from subsequently terminating the Service Agreement as a result of such breach. Upon any termination of the Service Agreement (i) all outstanding Service Orders shall automatically and immediately terminate, (ii) Client shall promptly pay all amounts accrued or otherwise owing to Whaleback for the terminated Service Agreement or otherwise as of the effective date of such termination, and (iii) Client shall cease all use of the Services and Whaleback Equipment, and Whaleback may remotely disable components of the Services and may cancel all telephone lines. In the event of any termination by Whaleback for Client's breach, Client hereby agrees and acknowledges that, notwithstanding the termination of Services and removal of all Whaleback Equipment from Client premises, Client shall be obligated to pay the monthly Service fees set forth in each Service Order for the duration of the Service Period(s) applicable to such Service Order(s), unless Client shall cure such breach within thirty (30) days following such termination. Sections 1, 4, 6-9, 11-16, and 18-25 shall survive any termination or expiration of the Service Agreement.

7. OWNERSHIP. As between the Parties, the Services and equipment provided by Whaleback ("the Equipment") are, and at all times shall remain, Whaleback's sole and exclusive property, including all copyrights and other intellectual property rights therein or thereto. Except as otherwise expressly provided, Client agrees that neither Client nor any third party ("Third Party") shall obtain any express or implied rights in or to any part of the Services or Equipment. All rights not expressly granted are reserved by Whaleback. Client may not (i) attempt to sell, charge or encumber the Services or Equipment or (ii) add to, modify, or interfere with the Services or Equipment, or allow any Third Party (other than someone authorized by Whaleback) to do so. Client shall take such action (including, but not limited to, the execution, acknowledgment, delivery and assistance in preparation of documents or the giving of testimony) as may be requested by Whaleback to evidence, confirm and put third parties on notice of Whaleback's interest in the Services and Equipment, including without limitation, the filing of financing statements under the Uniform Commercial Code.

8. INSTALLATION; PROVISION OF EQUIPMENT (A) Any Equipment installed on Client premises in connection with the Services will be delivered, installed and maintained by Whaleback. Client will be responsible for preparing its site for installation, for providing adequate space, foundations, heating and cooling, electrical power, and for affording Whaleback or its agents, access to the premises for installation and maintenance.

(B) The Services shall be deemed accepted unless the Client provides written notification to Whaleback within seven (7) days following the Service Activation. Upon notification, Whaleback may in its sole discretion immediately terminate such Services and remove the Equipment relating to such Services. Further, upon any such termination, Whaleback will return to Client all fees paid by Client at the signing of the Service Order and any monthly Service charges paid to Whaleback prior to such termination, provided, however, that Whaleback may offset from all such return payments the amount of Whaleback's expenses incurred since inception in connection with the installation and provision of the terminated Services.

(C) Client will be liable for the costs of repair or replacement of the Equipment if damaged or lost due to theft, negligence, intentional acts, unauthorized acts or other causes within the reasonable control of Client, its agents or employers. Within five (5) business days following the termination of the Service Agreement, Client will return or make available for removal the Equipment, in the same condition as originally installed (ordinary wear and tear excepted), or Client will pay for the restoration of the Equipment to original condition.

9. CONFIDENTIALITY. Whaleback and Client each agree to use reasonable efforts to maintain the other's Confidential Information in confidence and to not use or disclosure any portion of the other Party's Confidential Information to Third Parties, except as reasonably necessary to perform their duties under this Service Agreement and as expressly authorized in this Service Agreement. Whaleback and Client agree that, upon termination of the Service Agreement, each will return any Confidential Information received from the other party. The Confidential Information shall remain the sole property of the disclosing party, and no license is granted to the recipient under any intellectual property rights or other proprietary rights by the disclosure of any Confidential Information, nor is any warranty made as to such information.

10. REMOTE SYSTEM MONITORING. Client acknowledges and agrees that Whaleback will remotely monitor the Whaleback Equipment and any other equipment, systems and software used to provide Services in order to (i) monitor quality of the Services, such as with respect to voice quality parameters, (ii) monitor and generate call volume and usage statistics, and (iii) ensure Client's compliance with the AUP and any other limitations on the use of Services.

11. WARRANTIES. Client warrants and covenants that: (i) it has obtained all authorization(s), consents, and permissions necessary to perform its duties and to satisfy its obligations under the Service Agreement fully, consistent with applicable laws, (ii) this Service Agreement will constitute valid and binding obligations of Client, enforceable against it in accordance with its terms, and (iii) it shall comply with the Documentation, the policies set forth in the AUP, and the other terms and conditions of the Service Agreement. Whaleback warrants that the Services will be performed with reasonable skill and care in a professional and workmanlike manner and that it will use reasonable efforts to restore Services in the case of failure.

12. SECTION 11 ABOVE REPLACE AND ARE IN LIEU OF ALL OTHER WARRANTIES OR CONDITIONS, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING BUT NOT LIMITED TO ANY IMPLIED OR OTHER WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NONINFRINGEMENT.

WHALEBACK DOES NOT WARRANT ANY PARTICULAR RESULTS THAT MAY BE OBTAINED BY THE USE OF THE SERVICES OR THAT THE SERVICES OR ASSOCIATED SYSTEMS AND EQUIPMENT WILL OPERATE IN AN ERROR-FREE OR UNINTERRUPTED MANNER, OR IN COMBINATION WITH THIRD PARTY PRODUCTS.

While Whaleback may implement certain agreed upon security measures for Client, Whaleback does not warrant or guaranty secure operation of the Services or of any systems, or that it will be able to prevent service disruptions or unauthorized access.

13. DISCLAIMER FOR E911 SERVICE. The FCC requires Internet phone service providers to inform a subscriber that, under certain circumstances, when 911 is dialed from a phone connected to an Internet phone service; E911 service may not be available or may be limited. You are advised that the E911 service provided by Whaleback 1) will not function with the loss of electrical power; 2) will not function if the broadband connection is not operational; 3) may not transmit the correct physical address for the E911 call if the phone equipment is located at a physical address other than the one you provided or due to delays in recording or updating the physical address information into the E911 database; 4) will not function or may transmit incorrect physical location information if the phone equipment is at a remote location as may be the case when subscribing to Whaleback's duplicate phone service; 5) may not function if the phone equipment is improperly configured; 6) may not be able to be received and/or acted upon by an emergency call center due to technical issues; 7) may be affected by other factors, such as network congestion or the quality of the broadband connection. Your signature on the Service Order will serve as your acknowledgement that Whaleback has advised you of these potential E911 service limitations. Whaleback will also provide labels for remotely located phones to inform users that 911 Service is not available from those phones. The FCC has suggested that these labels be placed on or near the telephone equipment being used for your Whaleback service.

14. PATENTS AND COPYRIGHTS. If an unaffiliated Third Party claims that any of the Services or Equipment infringes on that party's U.S. copyright or patent, Whaleback will, at Whaleback's expense, defend Client against that claim and pay all costs, losses, damages, and attorneys' fees that a court finally awards, and all associated settlements. If such a claim is made or appears likely to be made, Client agrees to permit Whaleback to enable Client to continue to use the affected Services or Equipment, or to modify them to make them non-infringing, or to replace them with another service that is substantially a functional equivalent. If Whaleback determines that none of these options is reasonably available, then Whaleback may terminate the Service Agreement in whole or with respect to the effected Services or Equipment and no further payment obligations shall be due from Client. **THIS IS WHALEBACK'S ENTIRE OBLIGATION AND LIABILITY REGARDING INFRINGEMENT OR CLAIMS OF INFRINGEMENT.** Notwithstanding the foregoing, Whaleback will have no responsibility for (i) any use of the Services or Equipment or any deliverable thereof after Whaleback has notified Client to discontinue use, or (ii) alteration or combination of the Services or Equipment or a deliverable with Third Party materials, or any misuse or unauthorized use of such Services or Equipment.

15. CLIENT INDEMNITY. Client will, at its expense, defend Whaleback against all claims by Third Parties arising from or related to any use or misuse of the Services or Equipment, and Client shall pay costs, losses, damages, and reasonable attorneys' fees that a court finally awards, and all associated settlements.

16. INDEMNIFICATION PROCEDURE. The indemnification obligations under Sections 13 and 14 are conditioned on the indemnifying Party receiving (i) prompt written notice of the claim, (ii) the necessary assistance, information and authority to defend the claim and perform its obligations, and (iii) control of the defense and settlement of such claim and all associated negotiations. No indemnifying Party shall, without the prior written consent of the indemnified party, effect any settlement, compromise or consent to the entry of judgment in any pending or threatened action, suit or proceeding in respect of which any indemnified Party is or could have been a party and indemnity was or could have been sought under Sections 13 or 14 by such indemnified Party, unless such settlement, compromise or consent includes an unconditional release of such indemnified Party from all liability on claims that are the subject matter of such action, suit or proceeding.

17. LIMITATION OF LIABILITY. In no event will Whaleback's total, aggregate liability arising from or related to the Service Agreement (including for negligence, strict liability, breach of contract, misrepresentation, and other contract or tort claims), exceed the lesser of (i) the amount of direct damages actually incurred by Client or (ii) the amount of Services fees paid to Whaleback for the specific Service Order under which the damages arose during the six (6) months immediately preceding the earliest event giving rise to the damages. **UNDER NO CIRCUMSTANCES SHALL WHALEBACK OR ITS SUPPLIERS OR LICENSORS BE LIABLE FOR ANY OF THE FOLLOWING: (i) THIRD PARTY CLAIMS OTHER THAN THOSE IDENTIFIED IN SECTION 12, (ii) LOSS OR DAMAGE TO ANY RECORDS OR DATA, (iii) ANY DAMAGES CAUSED BY DELAY IN DELIVERY, INSTALLATION, OR FURNISHING OF SERVICES HEREUNDER, (iv) ANY DELAY, LOSS, DAMAGE OR SERVICE FAILURE ATTRIBUTABLE TO ANY SERVICE, PRODUCT OR ACTIONS OF ANY PERSON OTHER THAN WHALEBACK, ITS EMPLOYEES AND AGENTS, INCLUDING BUT NOT LIMITED TO DELAY, LOSS, DAMAGE OR SERVICE FAILURE ATTRIBUTABLE TO COMPUTER VIRUSES, WORMS, COMPUTER SABOTAGE, "DENIAL OF SERVICE" ATTACKS, DNS SPOOFING ATTACKS AND/OR OTHER HACKING ATTACKS OF A SIMILAR NATURE, OR (v) INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, PUNITIVE, RELIANCE, OR COVER DAMAGES (INCLUDING LOST PROFITS AND LOST SAVINGS), EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.**

18. ADDITIONAL SERVICES. All requests for additional or changed Services shall be submitted to Whaleback in writing. If applicable, the Parties will use reasonable efforts to negotiate a new Service Order or written amendment to this Agreement for such changed or additional Services. Any such new Service Order or amendment shall be effective only when mutually executed; Whaleback shall have no obligations in the absence of a mutually executed amendment or new Service Order. All changed and additional Services shall be charged at Whaleback's then-current rates.

19. COMPLIANCE WITH LAWS. The Services are provided solely for lawful purposes and use. Without limiting the other terms of this Agreement, Client shall be solely responsible for, and agrees to comply with, all laws, statutes, ordinances and/or regulations (including without limitation the laws and regulations governing export control, unfair competition, anti-discrimination, false advertising, privacy and

data protection, and publicity) (collectively, “*Laws*”) applicable to Client’s business and its use of the Services. The Parties agree that Whaleback may in its sole discretion make changes to any of the Services from time to time as may be reasonably necessary or appropriate for Whaleback to comply with applicable Laws. The Parties further agree that if a change in applicable Laws makes the continued performance of the Service Agreement (or any part thereof), in Whaleback’s sole reasonable discretion, unduly burdensome or unlawful, Whaleback may terminate the Service Agreement in whole or in part.

20. COMPLETE AGREEMENT. The Service Order, including the terms and conditions listed herein, and the AUP are collectively the Parties’ complete agreement regarding its subject matter, superseding any prior oral or written communications. Amendments or changes to this Agreement must be in mutually executed writings to be effective.

21. INDEPENDENT CONTRACTORS. The Parties are independent contractors for all purposes under this Agreement. Neither Party has the authority to bind the other Party or to incur any obligation on behalf of the other Party or to represent itself as the other’s agent or in any way that might result in confusion as to the fact that the Parties are separate and distinct entities.

22. GOVERNING LAW; SEVERABILITY. The Service Agreement shall be governed in all respects by the laws of the Commonwealth of Massachusetts, without regard to choice-of-law rules or principles. Any dispute arising out of or related to the Service Agreement shall be resolved only in the state or federal courts having jurisdiction in Boston, Massachusetts. If any provision is held to be illegal or unenforceable for any reason, then such provision shall be deemed to be restated so as to be enforceable to the maximum extent permissible under law; the remainder of this Service Agreement shall remain in full force and effect.

23. NOTICES. All notices will be personally sent by certified or registered mail, return receipt requested, or by nationally recognized overnight express courier, to the address specified herein or such other address as a party may specify in writing. Such notices will be effective upon receipt, which may be shown by confirmation of delivery. All notices to Whaleback shall be sent to the attention of Legal Department, Whaleback Systems Corporation, 72 Pease Boulevard, Portsmouth, New Hampshire 03801.

24. NO WAIVER. The waiver by either Party of any breach of the Service Agreement by the other in a particular instance will not operate as a waiver of subsequent breaches of a same or different kind. The failure of either Party to exercise any rights in a particular instance will not operate as a waiver of right to exercise the same or different rights in any subsequent instance.

25. ASSIGNMENT. Client may not assign or otherwise transfer the Service Agreement without Whaleback’s prior written consent. The Service Agreement shall be binding upon and inure to the benefit of the Parties’ successors and permitted assigns.

26. FORCE MAJEURE. Neither Party shall be liable for any delay or failure due to force majeure and other causes beyond its control, including for acts of God, labor disputes, changes in government policy/law, war, epidemics, acts or omissions of vendors or suppliers, disruptions caused by failures of the Internet or service providers (including those providing electricity, telecommunications links and/or Internet connectivity), or other occurrences which are beyond its reasonable control. This provision shall not apply to any of Client’s payment obligations. Failure of either Party to perform because of the occurrence of an event of force majeure lasting more than forty-five (45) days will, upon twenty-four (24) hours’ written notice to the other, represent a ground for termination only of the Service affected by such event (and not of the entire Service Agreement).

27. DEFINITIONS.

“*AUP*” means Whaleback System’s Acceptable Use Policy. This policy prohibits use of the Crystal Blue Service for predictive dialing, or the creation of phone SPAM, or any attempt to tamper, probe, or scan the Whaleback equipment or service offering. Complete Acceptable Use Policy attached as Exhibit B.

“*Confidential Information*” means non-public information that a Party provides and reasonably consider to be of a confidential, proprietary or trade secret nature, including but not limited to the Services, as well as Whaleback’s (and Whaleback’s licensors’) marketing, engineering and other plans, financial statements and projections, customer and supplier information, research, designs, plans, compilations, methods, techniques, processes, procedures, and know-how, whether in tangible or intangible form, and whether or not stored, compiled or memorialized physically, electronically, graphically, photographically, or in writing. Confidential Information shall not include Non-Confidential Information.

“*Service Activation*” Service Activation occurs when the customer has been enabled to utilize the primary services rendered in the service order. The service activation date is the date upon which billing commences for the services rendered.

“*Documentation*” means the Quick Reference Cards for the IP 320, IP 330, IP 430, IP 501, IP 550, IP 601, IP 650, IP 4000, for the Whaleback Softphone, for the Administrator, and for the Installer.

“*Non-Confidential Information*” means information which: (i) is, as of the time of its disclosure or thereafter becomes part of the public domain through no fault of the receiving party; (ii) can be demonstrated by credible evidence: (x) as rightfully known to the receiving party prior to the time of its disclosure, or (y) to have been independently developed by the receiving party; (iii) is subsequently learned from a Third Party not under a confidentiality obligation to the disclosing party; or (iv) is required to be disclosed pursuant to a duly authorized subpoena, court order, or government authority, provided that the receiving party has provided prompt written notice and assistance to the disclosing party prior to such disclosure, so that such party may seek a protective order or other appropriate remedy to protect against disclosure.

“*Third Party Products*” means, collectively, any non-Whaleback software, or other Third Party products or services.

**EXHIBIT B TO MASTER SERVICES AGREEMENT
WHALEBACK ACCEPTABLE USE POLICY**

You are prohibited from violating, or attempting to violate, the security of the Services and the Whaleback Equipment. Any such violations may result in criminal and civil liabilities to you. We will investigate any alleged violations, and, if a criminal violation is suspected, we will cooperate with law enforcement agencies in their investigations. Violations of the security of the Services and the Whaleback Equipment include, without limitation, the following:

- Using or attempting to use the Services or the Whaleback Equipment for predictive dialing, creating phone SPAM, or any other similar purpose that is not expressly permitted by the Whaleback Telephone Users Manual.
- Logging into a server or account that you are not authorized to access;
- Accessing data or taking any action to obtain services not intended for you or your use;
- Attempting to probe, scan, or test the vulnerability of any system, subsystem or network;
- Tampering, hacking, modifying or otherwise corrupting or breaching security or authentication measures without proper authorization; and
- Transmitting material that contains viruses, Trojan horses, worms, time bombs, cancelbots or other computer programming routines or engines with the intent or effect of damaging, destroying, disrupting or otherwise impairing a computer’s functionality or the operation of the Services or the Whaleback Equipment;
- Interfering with, intercepting or expropriating any system, data or information; or
- Interfering with service to any user, host, or network including, without limitation, by means of overloading, “flooding,” “mailbombing,” or “crashing” any computer system.



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