



Master Services Agreement

1. DEFINITIONS

“**Agreement**” means this Master Services Agreement governing the purchase of the Services from Bluecore.

“**Affiliate**” means an entity which is directly or indirectly controlling, controlled by, or under common control with a Party.

“**Bluecore**” means Bluecore, Inc., a Delaware corporation, with offices at 116 Nassau Street, 7th Floor, New York, NY 10038.

“**Bluecore Content**” means the (i) Services and related user interface; (ii) template workflow tools provided or made available by Bluecore; (iii) core technology making up the Platform; and (iv) aggregated and anonymized statistics about the effectiveness of campaigns for Bluecore customers using the Platform.

“**Customer**” means the entity entering into a SOW with Bluecore, pursuant to this Agreement, for the purposes of purchasing the Services.

“**Customer Data**” means all data collected by the Services from the Customer Sites.

“**Customer Sites**” means the websites, mobile sites, and mobile applications on which Customer is authorized to use the Services, including the look and feel and the underlying technology related thereto.

“**Effective Date**” means the date Customer first accesses the Services.

“**IP**” means, in the case of Bluecore, the Bluecore Marks, the Bluecore Content, and the Services; and, in the case of Customer, the Customer Marks, the Customer Data, and the Customer Sites.

“**Marks**” means a Party’s trade names, trademarks, service marks, logos or other commercial or product designations.

“**Party**” means each of Bluecore and Customer.

“**Parties**” means, collectively, Bluecore and Customer.

“**Platform**”, means Bluecore’s proprietary marketing software platform. Platform includes any Updates made during the Term.

“**Professional Services**” means additional services other than the Platform that Customer purchases and Bluecore provides to Customer pursuant to a SOW, including any visual designs or concepts prepared by Bluecore for Customer.

“**Services**” means the Platform and Professional Services.

“**SLA**” means Bluecore’s Service Level Agreement, located at www.bluecore.com/legal.

“**SOW**” means a written order executed by the Parties which identifies the details of the Services being purchased by Customer.

“**Updates**” means modifications, updates, and changes made by Bluecore to the Platform which Bluecore makes generally available to its customers at no additional fee. Updates exclude new features, functions and capabilities which are offered for an additional fee and must be specified in a SOW.

2. SERVICES; OWNERSHIP; IP; THIRD-PARTY PRODUCTS; SLA; RESTRICTIONS

2.1 During the Term, Bluecore will provide to Customer the Services as further described in a SOW. Any change in the Services to be provided under any SOW must be agreed to in writing by the Parties.

2.2 As between Bluecore and Customer, Customer owns all right, title and interest in and to the Customer IP. As between Customer and Bluecore, Bluecore owns all right, title, and interest in and to the Bluecore IP. Nothing in this Agreement will confer in either Party any right of ownership in the other Party’s IP.

2.3 Subject to the terms and conditions of this Agreement, (a) Bluecore hereby grants to Customer a non-exclusive, non-transferable license to use the Bluecore Content delivered to Customer and to access and use the Services during the Term as permitted by this Agreement and the applicable SOW(s); and (b) Customer hereby grants to Bluecore a non-exclusive non-transferable license to use the Customer Data during the Term solely as necessary to provide the Services to Customer pursuant to this Agreement and the applicable SOW(s). Each of Customer and Bluecore will not take any action that could reasonably be anticipated to harm, prejudice or otherwise damage the reputation and goodwill associated with the other Party’s Marks. Each Party’s use of the other Party’s Marks will inure to the benefit of such other Party. Notwithstanding anything to the contrary in this Agreement, Customer hereby grants Bluecore a perpetual, royalty-free, right and license to use aggregated Customer Data,



which shall not identify Customer, Customer's customers, or any person or entity, for all legally permissible purposes, including without limitation benchmarking and analytics.

2.4 Bluecore may make available to Customer and/or Customer's customer(s), and/or the Services may integrate with, certain third-party applications, services or products, for use in connection with the Services ("**Third-Party Products**"). Where the providers of such Third-Party Products require Customer to have a separate agreement directly with such provider, Customer's use of such Third-Party Products is subject to that separate agreement between Customer and the provider of such Third-Party Products. Any exchange of information (including any entitlement to retrieve Customer Data generated through such Third-Party Products) is between Customer and the provider of such Third-Party Products. Bluecore makes no warranties of any kind and assumes no liability whatsoever for Customer's or Customer's customer(s)' use of such Third-Party Products. Upon termination of this Agreement, Bluecore will use commercially reasonable efforts to assist Customer, at Customer's request, in retrieving Customer Data from such Third-Party Products. Alternatively, where Customer is not required to execute a separate agreement for a Third-Party Product with the provider of such Third-Party Product, Customer's use of such Third-Party Products shall be deemed part of the Services and shall be subject to this Agreement, and Customer's ability to access and retrieve Customer Data upon termination is detailed in Section 4.3.

2.5 The SLA, in its current version at the Effective Date of this Agreement, shall be incorporated into this Agreement, in its entirety, and Bluecore will provide the Platform in accordance with the SLA.

2.6 Customer will not (i) misappropriate or infringe Bluecore IP; (ii) reverse engineer, decompile, disassemble, disclose, or otherwise attempt to discover the source code, object code, or underlying structure, ideas, or algorithms of the Platform; (iii) modify, translate, or create derivative works based on the Platform; (iv) use the Services for purposes of a third party or otherwise for the benefit of a third party; or (v) use or view the Platform for the purposes of developing a product or service commercially competitive to the Services.

3. FEES; TAXES

3.1 Unless otherwise agreed in the applicable SOW or elsewhere herein, (a) Bluecore will invoice Customer for all fees for Services listed in a SOW (the "**Fees**") on an annual basis in advance of the Services to be provided, (b) Customer will pay each such invoice within 30 days after receipt from Bluecore, and (c) all payment obligations are non-cancelable and all amounts paid are non-refundable. In the event the Fees are more than fifteen (15) days overdue, upon five (5) days notice to Customer, Bluecore may (i) charge interest on any overdue payments of one percent (1%) for each month that the payment remains overdue thereafter; and/or (ii) suspend performance of the Services and require full payment of all Fees prior to restarting performance.

3.2 Nothing in Section 3.1 shall apply to Fees subject to a good faith dispute, provided that Customer provides written notice of the dispute to Bluecore within thirty (30) days of receipt of the relevant invoice, and Customer continues to pay all Fees not subject to such good faith dispute. Once the dispute is resolved, to the extent any Fees remain outstanding, Customer shall pay such Fees within five (5) business days.

3.3 All Fees listed in the applicable SOW are exclusive of any sales, use, value added, or excise taxes or import duties, and Customer remains liable for payment of all such taxes (other than taxes on Bluecore's income). In the event Customer is required by applicable law to withhold or deduct any amounts from the Fees, Customer will gross up payment to Bluecore such that Bluecore will receive the total Fees listed in the applicable invoice.

4. TERM; TERMINATION

4.1 This Agreement will begin on the Effective Date and will continue for as long as there is at least one (1) active SOW, unless earlier terminated in accordance with the provisions of this Agreement (the "**Term**").

4.2 This Agreement, or an applicable SOW, may be terminated immediately by the non-breaching Party, if the other Party has materially breached its obligations hereunder and such breach is not cured within thirty (30) days after written notice from the non-breaching Party to the breaching Party identifying the nature of said breach.

4.3 Upon termination of this Agreement: (i) Bluecore will continue providing the Services pursuant to an applicable SOW through the termination date; (ii) Customer will pay all Fees due hereunder through the termination date; (iii) upon written request to Bluecore within fifteen (15) days after such termination, Bluecore will provide to Customer any Customer Data in its possession, encrypted using industry-standard protocols, via a secure electronic storage service managed by Bluecore, and Customer must download the Customer Data within thirty (30) days thereafter; (iv) within thirty (30) days, each Party will return any other Confidential Information of the other Party and will erase or destroy any remaining electronic versions of Confidential



Information of the other Party then in its possession, provided however that nothing herein will require such Party to delete or purge any records in backup or archival systems kept in the normal course of business; and (v) Sections 3, 5.4, 5.5, 6, and 7, and any other provisions which by their nature would reasonably be considered to survive, will survive the termination of this Agreement. Notwithstanding anything to the contrary, in the event (y) Customer fails to request a copy of the Customer Data within the fifteen (15) day period, or (z) Customer requests a copy of the Customer Data but fails to download such Customer Data within the thirty (30) day period, then Bluecore shall have no obligation to continue maintaining Customer Data.

5. REPRESENTATIONS AND WARRANTIES; INDEMNIFICATION; LIMITATION OF LIABILITY

5.1 Each Party represents and warrants to the other Party that: (a) such Party has the full corporate right, power and authority to enter into this Agreement and to perform the acts required of it hereunder; (b) this Agreement constitutes a legal, valid and binding obligation of such Party, enforceable against such Party in accordance with its terms; and (c) in connection with this Agreement and its activities hereunder, it will comply with all applicable laws, ordinances, rules, regulations, orders, licenses, permits, judgments, decisions, and other requirements of any governmental authority that has jurisdiction over it, including (federal, state, or otherwise) but not limited to (i) the Payment Card Industry (PCI) Data Security Standard; (ii) the CAN-SPAM Act of 2003; (iii) the Children's Online Privacy Protection Act of 2008 (COPPA); (iv) other data privacy regulations or standards; and (v) the laws or regulations of the FTC and state Unfair and Deceptive Trade Practices Acts or "Little FTC Acts".

5.2 Bluecore further represents and warrants that: (a) it will perform all Services in a professional and workmanlike manner consistent with industry standards; (b) the Services will not violate applicable laws, rules, or regulations; (c) the Services and functionality will comply with the terms of this Agreement and the applicable SOW(s), and will not be materially degraded during the Term; and (d) materials provided to Customer by Bluecore will, at the time of delivery to Customer are free of any computer "virus" or other similar harmful, malicious, or hidden program, code, or data.

5.3 EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION 5, NEITHER PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, OR THAT THE SERVICES WILL BE TIMELY, UNINTERRUPTED, OR ERROR-FREE.

5.4 Bluecore will defend and indemnify Customer, and its respective parents, subsidiaries, and Affiliates and the officers, directors, and employees of the foregoing from and against any and all claims, damages, liabilities, costs, and expenses, including reasonable attorneys' fees, arising out of any claim that the Bluecore IP when used by Customer as permitted hereunder, directly infringe a valid third-party intellectual property right. In the event that the Services are enjoined, or in Bluecore's reasonable opinion are likely to be enjoined, Bluecore will elect to do one of the following, in its sole discretion: (i) procure for Customer the right to continue using the Bluecore IP; (ii) modify the Bluecore IP to make it non-infringing but functionally equivalent, or (iii) terminate this Agreement and provide a pro-rata refund of any prepaid Fees for Services not yet rendered as of the date of termination. Bluecore shall have no obligation to indemnify a claim described herein where the infringement arises out of (x) Customer's use of the Bluecore IP other than as permitted hereunder, (y) Customer's use of the Bluecore IP in connection with other products and services not provided by, or consented to, by Bluecore; or (z) terminate this Agreement and refund to Customer any prepaid Fees for Services not yet rendered as of the termination date. The foregoing states Bluecore's sole liability and Customer's sole and exclusive remedy in the event of a claim described herein.

5.5 The indemnification obligations in Section 5.4 are conditioned upon: (i) prompt notice by Customer to Bluecore of any claim for which Customer seeks indemnification; (ii) complete control of the defense and settlement of the claim by Bluecore; and (iii) reasonable cooperation by Customer in the defense as Bluecore may request.

5.6 EXCEPT WITH RESPECT TO BLUECORE'S INDEMNIFICATION OBLIGATION IN SECTION 5.4 AND/OR EITHER PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE, EXEMPLARY, OR CONSEQUENTIAL DAMAGES (INCLUDING DAMAGES FOR LOST PROFITS) ARISING FROM OR IN CONNECTION WITH THIS AGREEMENT, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. ADDITIONALLY, EXCEPT WITH RESPECT TO BLUECORE'S INDEMNIFICATION OBLIGATION IN SECTION 5.4 CUSTOMER'S BREACH OF SECTION 2.6, AND/OR EITHER PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, IN NO EVENT WILL EITHER PARTY'S TOTAL AGGREGATE LIABILITY IN CONNECTION WITH THIS AGREEMENT FOR ANY CLAIMS (WHETHER IN CONTRACT OR TORT OR OTHERWISE) EXCEED THE TOTAL FEES PAID OR PAYABLE BY CUSTOMER TO BLUECORE DURING THE TWELVE (12) MONTH PERIOD PRECEDING THE DATE ON WHICH THE CLAIM AROSE.



6. CONFIDENTIALITY; DATA SECURITY; DATA PROTECTION

6.1 All data and information of either Party (“**Disclosing Party**”) that is received or otherwise accessed by the other Party (“**Receiving Party**”) and is (i) identified or marked as confidential; or (ii) given the nature of the information and the circumstances of the disclosure a reasonable person would believe the information to be confidential, shall be considered the confidential information of the Disclosing Party (“**Confidential Information**”). Confidential Information shall not include information that (w) is or becomes public other than as a result of a disclosure by the Receiving Party; (x) was already in the Receiving Party’s possession or was available to the Receiving Party on a non-confidential basis before disclosure; (y) is received by the Receiving Party from a third party that is not bound by separate confidentiality obligations with the Disclosing Party; or (z) is independently developed by the Receiving Party without using the Confidential Information. For the avoidance of doubt, Bluecore Confidential Information includes all Bluecore IP and Customer Confidential Information includes all Customer Data.

6.2 The Receiving Party shall maintain the Confidential Information in strict confidence, shall disclose the Confidential Information only to those individuals or entities who have a need-to-know such information and are under confidentiality obligations at least as restrictive as those found in this Agreement, and shall not use the Confidential Information for any purposes other than as expressly permitted in this Agreement. The Receiving Party shall, at all times, remain liable for the acts and omissions of the party to whom the Receiving Party discloses Confidential Information. In the event the Receiving Party is obligated to disclose the Confidential Information pursuant to a valid legal order, then prior to such disclosure, the Receiving Party shall (unless prohibited at law to do so) notify the Disclosing Party, provide the Disclosing Party with a meaningful opportunity to contest the order prior to the Receiving Party’s disclosure, and take reasonable steps to limit the disclosure of Confidential Information to only that which is strictly necessary to comply with such legal order.

6.3 The obligations in this Section 6 shall survive any termination of this Agreement for a period of five (5) years.

6.4 Bluecore collects two types of information from Customer: (a) limited information about Customer’s customers that principally includes the email address (which is encrypted at rest) and any other user attributes that might be necessary to personalize an email; and (b) product and catalog information that is associated with a user based on browse, add-to-cart and purchase activity. This information is associated with a user without the use of personally identifiable information (“**PII**”), using a unique, anonymous identifier. Bluecore does not store any other PII and does not access any payment information. Notwithstanding any other provision of this Agreement, Customer agrees and acknowledges that the design and intended use of the Services are such that Bluecore’s potential access to any Customer Data (including but not limited to any PII) is limited in scope, and Bluecore’s responsibility for Customer Data is correspondingly limited, as described in this paragraph as follows: Bluecore will only have access to Customer Data (a) where Customer transmits user information such as an email address when a user logs in, clicks on a promotional email or completes an email collection form on the Customer Site and (b) when users perform actions on the Customer Site including browsing products, adding to cart and purchases.

6.5 Bluecore shall implement and maintain a written information security program that is reasonably designed to: (i) ensure the security, integrity and confidentiality of Confidential Information; (ii) protect against anticipated threats or hazards to the security or integrity of Confidential Information; and (iii) protect against unauthorized access to or use of Confidential Information. Such program shall contain physical, technical and administrative controls for the maintenance, transmittal and disposal of Confidential Information provided under this Agreement, as same are reasonable and appropriate given the type of Confidential Information received or anticipated to be received by Bluecore, and shall include regularly-scheduled data security risk assessments and adjustments. Except where prohibited by law, (w) Bluecore shall inform Customer of any breach of Confidential Information (a “**Security Incident**”) within twenty-four (24) hours of discovery; (x) provide daily updates to Customer; (y) within five (5) days of discovery, provide a detailed summary of the scope of the Security Incident; and (z) allow Customer, within Customer’s sole discretion, to determine whether to publicly disclose the occurrence and circumstances of the Security Incident.

6.6 Bluecore’s Data Processing Addendum, in its current version as of the Effective Date of this Agreement, located at www.bluecore.com/legal, is incorporated into and is subject to the terms of this Agreement by reference (the “**DPA**”).

7. MISCELLANEOUS



7.1 This Agreement will be governed by the laws of the State of New York, without resort to its conflict of law principles, and each Party irrevocably consents to the exclusive jurisdiction of the state or federal courts located in the Borough of Manhattan, New York, over any suit, action, or proceeding arising out of or relating to this Agreement. Additionally, the United Nations Convention on Contracts for the International Sale of Goods does not apply to this Agreement. The Parties unconditionally and irrevocably waive any right to trial by jury in any action, suit, or proceeding arising out of or relating to this Agreement.

7.2 The rights and obligations of either Party under this Agreement cannot, in whole or in part, be assigned without the other Party's prior written consent, which shall not be unreasonably withheld; provided, however, that (a) Customer acknowledges that Bluecore may use a third-party ad server platform; and (b) either Party may assign or otherwise transfer this Agreement to (i) an Affiliate or (ii) in connection with a merger or sale of all or substantially all of such Party's assets. Any attempt to assign this Agreement other than as permitted herein will be void. This Agreement will bind and inure to the benefit of the respective successors and permitted assigns of Customer.

7.3 Bluecore may identify Customer as a Bluecore customer, and use Customer's logo, on Bluecore's website and in its customer lists. Any other uses by either Party of the other Party's name or logo shall require such other Party's prior written consent in each instance.

7.4 All notices to be provided hereunder shall be sent by one Party certified mail, return receipt requested, to the other Party, at the address listed in the opening paragraph of this Agreement. If to Bluecore, notices shall be sent to **Bluecore, Inc., 116 Nassau Street, 7th Floor, New York, NY 10038**. If to Customer, notices shall be sent to the Customer address listed in the applicable SOW between Customer and Bluecore.

7.5 This Agreement, including any Exhibits hereto, and other documents referenced herein, including without limitation the SLA and the DPA, contains the entire agreement between the Parties and supersedes and replaces any and all prior or contemporaneous agreements or understandings (whether written or oral) concerning the subject matter hereof. No term or condition of this Agreement may be amended or waived except by mutual written agreement. The Parties are independent contractors, and nothing herein will be construed to create a joint venture, partnership, or the relationship of principal and agent between the Parties. This Agreement may be executed in multiple counterparts (including by electronic, facsimile or PDF execution), each of which will be deemed to be an original, but all of which together will constitute one and the same instrument. If any provision of this Agreement is determined by a court or other authority having competent jurisdiction to be void, illegal or otherwise unenforceable: (i) that provision will be enforced to the maximum extent allowed so as to effect the intent of the Parties; and (ii) all other provisions of this Agreement will remain in full force and effect. To the extent there is a conflict between the terms of this Agreement and any SOW, the terms of the SOW shall control. If performance of any obligation under this Agreement or a SOW is prevented by any condition beyond the reasonable control of the affected Party (a "**Force Majeure Event**"), the Party so affected, upon giving prompt notice to the other Party, will be excused from such performance to the extent of such prevention. The foregoing shall not relieve a Party from its obligation to use all commercially reasonable efforts to resume performance under this Agreement or a SOW as soon as possible following the Force Majeure Event.