



Terms and conditions
2011



MailPerformance UK Ltd is engaged in the business of, amongst other things, providing certain email distribution services, including delivering content generated by MailPerformance UK Ltd clients to lists of subscribers provided by such clients (each an "Email Distribution"), operating computer systems, administering clients' subscriber lists, managing relations with clients' subscribers, providing customer service on behalf of clients, and analysing and reporting the email results. The parties wish to enter into an agreement pursuant to which MailPerformance UK Ltd will provide to Client the Email Distribution services described in and upon the terms and conditions set forth in this Agreement.

1. MAILPERFORMANCE DELIVERY, MAINTENANCE AND OTHER SERVICES

1. MailPerformance Services.
 - a. Email Distribution services. MailPerformance UK Ltd will provide to Client the Email Distribution services set out in the Confirmation of Order at the fees set out in that Confirmation of Order. If it comes to MailPerformance's attention that any of the text, pictures, sound, video or other data for an Email Distribution (the "Content") provided by Client or Client's subscribers is, in the sole opinion of MailPerformance UK Ltd, obscene, threatening, abusive, libelous, or hateful, or encourages conduct that would constitute a criminal offence, gives rise to civil liability, or otherwise violates the law of any jurisdiction in which the Content will be available ("Objectionable Content"), Client agrees that MailPerformance UK Ltd may refuse to provide Email Distribution services for such Objectionable Content.
 - b. SMS Distribution services. MailPerformance offers the deployment of international SMS campaigns according to the scale of charges detailed in the Order Form. By signing the Order Form the client agrees to this scale of charges for international SMS sends. The client can limit SMS sends to certain countries, these must be specified in the Order Form.
The restriction of SMS sends to certain countries will result in the automatic rejection of SMS messages destined for non-authorized countries during the course of the deployment. Details of such rejections will be provided to the client along with their campaign statistics.
2. Spam Policy. MailPerformance UK Ltd will provide to Client, upon request, its current Spam Policy, (the "Spam Policy"). MailPerformance UK Ltd may, in its sole discretion, revise the Spam Policy on sixty (60) days written notice to Client.
3. Audit Rights. MailPerformance UK Ltd will during the term of this Agreement allow Client to engage the services of a third party to perform audits of MailPerformance's electronic data processing environment which relates to the services MailPerformance UK Ltd provides under this Agreement, provided that such audits will be (i) preceded by fourteen (14) days written notice, (ii) conducted during normal business hours in a manner reasonably designed to minimise interference with MailPerformance's daily operations and (iii) conducted no more frequently than once per any six (6) month period.





4. Service Enhancements. MailPerformance UK Ltd may from time to time, at its sole discretion, make system enhancements and changes related to its Email Distribution services. Client acknowledges that, in connection with such an enhancement or change, it may be converted to a new version of software. In the event of a conversion, Client understands that (i) the new system features will include the basic functionality of services that Client originally received under this Agreement and (ii) Client's payments obligations under this Agreement will remain unchanged. If MailPerformance makes a system enhancement that requires Client to undertake additional work to maintain delivery of the Content, MailPerformance will provide Client with at least ten (10) days prior written notice of the work required.

2. CLIENT CONTENT

1. Content Creation and Management. Client will be solely responsible for creating, editing, reviewing, deleting and otherwise controlling all of the Content that Client publishes and distributes via the Email Distribution. Client acknowledges that MailPerformance UK Ltd is only providing Client with the ability to publish and distribute the Content and the content of third parties and, accordingly, is acting as a passive conduit for the distribution and publishing of such content. MailPerformance UK Ltd has no obligation to Client, and undertakes no responsibility, to review any of the Content or subscriber-generated content to determine whether any such content may incur liability to third parties or violate the law of any jurisdiction in which such content will be used.
2. Content, List and Confirmation of Order Delivery. Except as otherwise set out in this Agreement, Client will be solely responsible for providing to MailPerformance UK Ltd all Content in the format(s) specified in Confirmation of Order. Client will bear all costs associated with the telecommunications and computer hardware, software and services necessary to generate the Content and deliver it to MailPerformance UK Ltd. In addition, Client will provide MailPerformance UK Ltd with a full and accurate list of the subscribers to whom Client intends to have the Content delivered.
3. License Grant. For the term of this Agreement, Client grants MailPerformance UK Ltd a non-exclusive, royalty-free, worldwide licence only to reproduce, distribute, publicly perform and publicly display the Content in conjunction with Client's Email Distributions and in accordance with the terms of this Agreement. Title to and ownership of all intellectual property rights in the Content will remain with Client or its third party licensors.

3. FEES

1. Client will pay to MailPerformance UK Ltd the fees specified in Confirmation of Order for the Email Distribution services. MailPerformance will provide invoices to Client of all fees due and payable by Client and Client will make payment within thirty (30) days of receipt of each invoice. If there is an unpaid balance thirty (30) days after receipt of invoice, Client will also pay interest at the rate of 4% per annum above the base rate of





Barclays Bank Plc from the due date to the date of payment. VAT is payable on all fees levied by MailPerformance.

4. REPRESENTATIONS, WARRANTIES, COVENANTS AND DISCLAIMERS

1. Client. Client represents and warrants the following: Client has full rights to enter into and perform its obligations under this Agreement. Client is the owner or valid licensee of the Content and the intellectual property contained within it (including all copyright and database rights) and Client has the right to grant to MailPerformance UK Ltd the license contained within this Agreement. Nothing in this Agreement will be construed as transferring any ownership rights whatsoever in the Content to MailPerformance UK Ltd. Client will not provide any Content that: (1) infringes any third party's copyright, patent, trademark, trade secret or other proprietary rights; (2) violates the law of any jurisdiction in which the Content will be available; (3) constitutes defamation, libel, invasion of privacy or violation of any right of publicity; (4) is pornographic or obscene; or (5) does not conform to general standards of behaviour for the Internet, including MailPerformance's Spam Policy as revised by MailPerformance UK Ltd from time to time. Client will use all commercially reasonable efforts to provide Content that is accurate and correct in all respects and that contains no viruses, trojan horses, worms, time bombs, cancelbots or other similar harmful or deleterious programming routines. Client has all necessary consents from its subscribers to permit the transfer of the subscriber list set out in Confirmation of Order and any personal data in relation to the subscribers to MailPerformance UK Ltd in accordance with the Data Protection Acts 1984 and 1998 ("Acts") and to enable MailPerformance UK Ltd to process the subscriber list set out in Confirmation of Order and personal data in accordance with this Agreement. Client also warrants that it is registered under the Acts to collect and process the subscriber's list set out in Confirmation of Order and any personal data in relation to the subscriber. Client covenants that it will have one of its personnel designated as a MailPerformance UK Ltd contact person at all times during the term of this Agreement.
2. MailPerformance. MailPerformance UK Ltd represents and warrants the following: It will use its reasonable endeavours to provide the services under this Agreement. MailPerformance UK Ltd does not, however, guarantee continuous or uninterrupted Email Distribution services. In the event of interruption to the Email Distribution services, MailPerformance UK Ltd sole obligation will be to restore service as soon as reasonably possible. Other than as expressly stated under this Agreement, MailPerformance UK Ltd provides all services performed under this Agreement "AS IS" and without any warranty of any kind. Client acknowledges that, except as expressly set out in this Agreement, MailPerformance UK Ltd has not made any representations, express or implied, regarding the email distribution services. MailPerformance UK Ltd excludes all warranties of any kind, express or implied, including any implied warranty or merchantability or fitness for a particular purpose to the maximum extent permitted by law.





5. TRADEMARKS

1. Neither party may use the other party's trademarks, service marks, trade names, logos, or other commercial or product designations for any purpose whatsoever without the prior written consent of the other party.

6. CONFIDENTIALITY

1. Confidential Information. By virtue of this Agreement, each party may disclose to the other party information that is confidential and otherwise proprietary. Subject to the exceptions listed below, "Confidential Information" means information communicated by one party to the other party concerning business plans, product development plans, technology, know-how, pricing, subscriber count, subscriber identity and subscriber data, whether communicated verbally or in writing. However, Confidential Information will not include any information that (i) can be shown was already known to the receiving party at the time of disclosure, (ii) is independently developed by the receiving party without any use of or reference to the disclosing party's information, (iii) is provided to the receiving party by a third party without breach of this Agreement and otherwise not in violation of the disclosing party's rights or (iv) is already in or enters into the public domain by some action other than breach of this Agreement by the receiving party. The Confidential Information of a party is and will remain the property of such party, notwithstanding any permissible disclosure of such information under this Agreement.
2. Confidentiality Obligations. Each party agrees, for the term of this Agreement and three (3) years after its expiration or termination, (i) to hold the other party's Confidential Information in strict confidence, (ii) not to disclose such Confidential Information to third parties not authorized by the disclosing party to receive such Confidential Information, and (iii) not to use such Confidential Information for any purpose except as expressly permitted hereunder. Each party agrees to take reasonable steps to protect the other party's Confidential Information to ensure that such Confidential Information is not disclosed, distributed or used in violation of the provisions of this Agreement. The foregoing prohibition on disclosure of Confidential Information will not apply to the extent certain Confidential Information is required to be disclosed by the receiving party as a matter of law or by order of a court, provided that the receiving party uses reasonable efforts to provide the disclosing party with prior notice of such obligation to disclose and reasonably assists in obtaining a protective order if required by the disclosing party.

7. INDEMNITY





1. By Client. Client agrees to indemnify and hold harmless MailPerformance UK Ltd and its directors, officers, agents and employees for any and all losses, costs, liabilities or expenses (including without limitation reasonable legal and expert witnesses' fees) incurred or arising from (a) any breach of the representations, warranties or covenants in clause 4(a), (b) any content generated by a subscriber of Client, or (c) any claims arising from the sale or license of goods or services in connection with any Email Distribution.
2. By MailPerformance. MailPerformance UK Ltd agrees to indemnify and hold harmless Client and its directors, officers, agents and employees for any and all losses, costs, liabilities or expenses (including without limitation reasonable legal and expert witnesses' fees) incurred or arising from any breach of the representations, warranties or covenants in clause 4(b).

8. LIMITATIONS ON LIABILITY

1. Except for each party's liability assumed in clause 7 above, in no event will either party be liable for any special, indirect, incidental or consequential damages, or for interrupted communications, lost data or lost profits, arising out of or in connection with this agreement, even if such party has been advised of (or knows or should know of) the possibility of such damages. Except for each party's liability assumed in clause 7 above, under no circumstances will either party be liable to the other under this agreement for an amount greater than the amounts paid by customer to MailPerformance UK Ltd under this Agreement.

9. GOVERNING LAW

1. This Agreement will be governed and construed in accordance with the law of England and Wales and the parties submit to the exclusive jurisdiction of the courts of England and Wales.

10. SEVERABILITY

1. Waiver. If any provision of this Agreement is held to be invalid or unenforceable for any reason, the remaining provisions will continue in full force without being impaired or invalidated in any way. The parties agree to replace any invalid provision with a valid provision that most closely approximates the intent and economic effect of the invalid provision. The waiver by either party of a breach of any provision of this Agreement will not operate or be interpreted as a waiver of any other or subsequent breach.

11. HEADINGS

1. Headings used in this Agreement are for reference purposes only and in no way define, limit, construe or describe the scope or extent of such section, or in any way affect this Agreement.

12. FORCE MAJEURE



MailPerformance UK Ltd: a NP6 group entity

58 Broadwick Street, LONDON. W1F 7AL

Tel: +44 (0) 207 434 7390

www.mailperformance.co.uk



1. If the performance of this Agreement, or any obligation under this Agreement, except the making of payments, is prevented, restricted or interfered with by any act or condition whatsoever beyond the reasonable control of the affected party, the party so affected, upon giving prompt notice to the other party, will be excused from such performance to the extent of such prevention, restriction or interference.

13. INDEPENDENT CONTRACTORS

1. The parties to this Agreement are independent contractors. Neither party will have any right, power or authority to enter into any agreement for or on behalf of, or incur any obligation or liability of, or to otherwise bind, the other party. No agency, partnership, joint venture or employee-employer relationship is intended or created by this Agreement

14. NOTICE

1. Any notices required or permitted under this Agreement will be given to the appropriate party at the address specified above or at such other address as the party will specify in writing. Such notice will be deemed given in the following circumstances: upon personal delivery; if sent by telephone facsimile, upon confirmation of receipt; if sent by electronic mail, upon confirmation of delivery; or if sent by certified or registered mail, postage prepaid, five (5) days after the date of mailing.

15. ENTIRE AGREEMENT

This Agreement sets forth the entire understanding and agreement of the parties and supersedes any and all oral or written agreements or understandings between the parties as to the subject matter of this Agreement.

16. DURATION OF AGREEMENT

This contract is concluded for an initial period of twelve months and is tacitly renewed for a further period of twelve months unless cancelled in writing, unless otherwise indicated on the Order Confirmation. The non-renewal of the contract is conditioned by the receipt by one or the other party of a formal letter, no later than 90 days before the closing date of the current period. Otherwise, the contract is renewed for another period of time equivalent to the length of the initial period.

