



# Product Terms and Conditions of Sale and Services Agreement

These terms and conditions of sale (this "Agreement") are made and entered into as of \_\_\_\_\_, 2010 (the "Effective Date") by and between BlueArc Corporation, located at 50 Rio Robles, San Jose, CA 95134 ("BlueArc") and \_\_\_\_\_ ("Buyer"), with a mailing address of \_\_\_\_\_. The parties agree to the installation and use of a certain Products and Services (as defined below) sold by BlueArc as follows:

1. **Definitions.** Any capitalized terms not defined in this Section 1 (Definitions) shall have the meanings set forth elsewhere in this Agreement or on any Exhibit hereto.
  - (a) "Agreement" means this Product Terms and Conditions of Sale and Services Agreement and any Exhibits now or hereinafter attached hereto.
  - (b) "Defect" means a failure of the respective Product to conform substantially to its then-current Documentation.
  - (c) "Documentation" means the BlueArc documentation made available in hard copy or in electronic form shipped with the Products or otherwise provided to Buyer for the respective Products. Documentation does not include advertising or marketing material.
  - (d) "Email-Home" means the capability of Hardware to send email alerts to BlueArc's Telephone Support center when certain server errors occur according to the respective specifications for the Hardware and installed Software and subject to the required connection of the Hardware to a remote access network.
  - (e) "Hardware" means a tangible product provided to Buyer by BlueArc.
  - (f) "Hardware Service" means replacement of the parts having Defects according to the BlueArc Service Plan for Hardware.
  - (g) "Order" is a written or electronic document identifying the Products to be licensed, including Order Information, subject to the terms of this Agreement.
  - (h) "On-Site Replacement Parts Storage" means storage of a set of Replacement Parts at Buyer's facilities, provided at BlueArc's sole discretion and selected by BlueArc for Buyer's Products. It is understood that On-site Replacement Parts Storage, if provided, shall be subject to Buyer's responsibilities in Section 5(k) (Replacement Items).
  - (i) "Premium Service Plan" means the respective set of Services set forth in Exhibit A under the name Premium.
  - (j) "Products" means, collectively, Hardware and Software provided by BlueArc to Buyer hereunder.
  - (k) "Remote Server Support" means the server management and support Services provided by BlueArc from a remote location subject to the required connection of the Hardware to a telephone line or remote access network, provided according to BlueArc's then-current Service policies.
  - (l) "Service Area" means the area in which the respective Services are available from BlueArc, according to BlueArc's then-current Service policies.
  - (m) "Service Level" means the elapsed time between the time at which BlueArc identifies the need for a hardware replacement and the time at which the Replacement Part is delivered to Buyer. Installation time, if applicable, is not included in Service Level.
  - (n) "Service Plan" means the Warranty, Standard, or Premium Service Plan.
  - (o) "Services" means any maintenance, technical support, installation, consultation and other services performed or to be performed for Buyer by BlueArc or its agents, regardless of whether required under this or any other agreement.
  - (p) "Software" means each software program provided by BlueArc in machine readable, object, printed, embedded within a Product, or interpreted form and any updates or upgrades of the foregoing that are provided to Buyer by BlueArc.
  - (q) "Software Service" means support of Software according to the then-current BlueArc Service policies for Software. Software Support includes Software Updates and Software Upgrades.
  - (r) "Standard Service Plan" means the respective set of Services set forth in Exhibit A under the name Standard.
  - (s) "Telephone Support" means the telephone support services made available to Buyer by BlueArc for the purposes of consultation and technical assistance on the use of the Products and the diagnosis of Defects in the Products, according to BlueArc's then-current telephone support policies.
  - (t) "Updates" means software releases, provided by BlueArc from time to time in its sole discretion, that are patches, workarounds, or bug fixes that correct errors in coding, or make minor enhancements to the functionality or performance of the Software, but do not add new functionality. Updates do not include Upgrades.
  - (u) "Upgrades" means software releases that contain significant enhancements to the functionality or performance of the Software. Software that is marketed by BlueArc as new software is not an Upgrade.
  - (v) "Warranty Service Plan" means the respective set of Services set forth in Exhibit A under the name Warranty.
  - (w) "Web Support" means the support of the BlueArc's Products via a web-based support portal. Use of Web Support is subject to the terms, conditions and policies that are posted on BlueArc's Web Support site.
2. **Confidential Information.** Buyer agrees to treat any confidential information and Technology (as defined below) regarding the Products and Services and any other information provided by BlueArc hereunder that would reasonably be understood to be confidential ("Confidential Information") as strictly confidential, and use such Confidential Information only for the purposes of using the Products and Services as permitted hereunder. In the event that Buyer is compelled to disclose the Confidential Information by law, Buyer will first notify BlueArc.

3. **Indemnity.** Subject to the limitations hereinafter set forth, Buyer agrees that BlueArc has the right to defend, or at its option to settle, and BlueArc agrees, at its own expense, to defend or at its option to settle, any claim, suit or proceeding (collectively, "Action") brought against Buyer alleging that the Products infringe any U.S. patent or copyright. BlueArc shall have sole control of any such Action or settlement negotiations, and BlueArc agrees to pay, subject to the limitations set forth in Section 7 (Limitation of Liability), any final judgment entered against Buyer as a result of such infringement in any such Action defended by BlueArc. Buyer agrees that BlueArc at its sole option shall be relieved of the foregoing obligations unless Buyer notifies BlueArc promptly in writing of such Action and gives BlueArc authority to proceed as contemplated herein, and, at BlueArc's expense, gives BlueArc proper and full information and assistance to settle and/or defend any such Action. If the Products, or any part thereof, are, or in the opinion of BlueArc may become, the subject of any Action for infringement, or if use or distribution of the Products is enjoined, then BlueArc may, at its option and expense: (i) procure for Buyer the right to distribute or use, as appropriate, the Products; (ii) replace the Products with other suitable Products; (iii) suitably modify the Products; or (iv) if the foregoing alternatives cannot be accomplished on a commercially reasonable basis as determined in BlueArc's sole discretion, require Buyer to return such Products and refund the aggregate payments paid therefore by Buyer, less a reasonable sum for use and damage. BlueArc shall not be liable for any costs or expenses incurred without its prior written authorization. Notwithstanding the foregoing, BlueArc assumes no liability for any claims arising from the following: (a) the combination of a Product or use with other hardware, software or other items not provided by BlueArc; (b) the modification of the Products, or any part thereof; or (c) Buyer's specifications or designs. Buyer shall indemnify and hold harmless BlueArc from and against any claims arising out of such exclusions (a)-(c) and from and against any and all third party claims arising out of the distribution of Products after BlueArc has required Buyer to return such Products.

The foregoing provisions of this Section 3 (Indemnity) state the entire liability and obligation of BlueArc and the exclusive remedy of Buyer with respect to any alleged infringement.

#### 4. **Intellectual Property Rights**

- (a) **Ownership.** BlueArc shall retain all title, copyright, patent rights, moral rights, and other proprietary rights in the Products and Services worldwide, including all software development tools, routines and computer programs, and all tools, routines, programs, designs, technology, ideas, know-how, processes, formulas, techniques, improvements, inventions and works of authorship which are made, developed, conceived or reduced to practice by BlueArc in its provision of the Products and Services ("Technology"). Neither this Agreement nor the provision of Products or Services shall grant to convey or confer upon Buyer or any third party any right or license, express or implied, to any Product, Service or Technology except as expressly specified in this Agreement. The Software is licensed only, and no title to, or ownership of, the Software is transferred to Buyer. Feedback and other information that is provided by Buyer to BlueArc in connection with BlueArc's provision of the Products and Services may be used by BlueArc to improve or enhance its products and services and, accordingly, BlueArc shall have a non-exclusive, worldwide, fully paid, royalty free, perpetual license to use, reproduce, disclose, distribute, modify and otherwise exploit such feedback and information for any purpose and in any medium or product without restriction. Such right and license shall survive any termination or expiration of this Agreement for any reason. All rights not granted herein are specifically reserved by BlueArc.
- (b) **Software License.** BlueArc grants to Buyer a nonexclusive and nontransferable license to use the specific modules and features of the Software for which Buyer has paid the applicable fees, only in object code form. Buyer's use of the

Software shall be limited to use on the Product on which it is shipped for Buyer's internal business use, in accordance with the Documentation. Unless otherwise expressly provided in the Documentation, Buyer's use of the Software shall be limited to use on a single server. All Buyer's rights under this Section 4(b) (Software License) will terminate immediately without notice from BlueArc in the event that Buyer breaches (a) any provision of this Section 4 (Intellectual Property Rights) or (b) any other provision of this Agreement. Any Software subsequently provided to Buyer shall be governed by this Agreement unless BlueArc provides a separate license agreement expressly governing such Software. Buyer agrees to be bound by any such terms provided by BlueArc with such Software. If BlueArc provides third party Software with the Products, such Software shall be supplied with a corresponding shrink wrap or click through license relevant to such third party licensor. Buyer will be responsible to do whatever is necessary or required by the third party licensor for the licenses and related terms to take effect (e.g. online registration). Unless stated otherwise in this Agreement or in the third party license, BlueArc will not provide support for third party Software and will not extend the indemnity of Section 3 (Indemnity) to third party Software.

- (c) **Restrictions on Products.** Except as permitted by applicable law, Buyer shall not remove the Software from the Products, copy, modify or create a derivative work of, disassemble, decompile or reverse translate or otherwise attempt to derive the source code of the Products, or permit a third party to do so. Buyer shall not disclose any performance information, metrics or other similar information related to the Products. Notwithstanding the foregoing, if the Software is rightfully located in a member state of the European Union and Buyer needs information about the Software in order to achieve interoperability of an independently created software program with the Software, Buyer will first request such information from BlueArc. BlueArc may charge Buyer a reasonable fee for the provision of such information. If BlueArc refuses to make such information available, then Buyer may take steps, such as reverse assembly or reverse compilation, to the extent necessary solely in order to achieve interoperability of the Software with an independently created software program. To the extent that the Buyer is expressly permitted by applicable mandatory law to undertake any of the activities listed in this section Buyer will not exercise those rights until Buyer has given BlueArc twenty (20) days prior written notice of its intent to exercise any such rights.
5. **Services.** Subject to the following terms and conditions, BlueArc will use commercially reasonable efforts to provide the Services to which the Buyer is entitled according to the Service Plan that has been purchased by Buyer or to which Buyer is otherwise entitled. BlueArc's obligation to provide Services pursuant to this Agreement is contingent upon: (i) the existence of a license from BlueArc for the subject Software, (ii) Buyer's payment of the purchase price for the respective Product and any fees required for the Service and (iii) the performance by Buyer of all of its obligations set forth in the Agreement (including Exhibit A hereto) relating to the Services.
- (a) **Service Plan.** Buyer shall be entitled only to the Service Plan for which (i) BlueArc has accepted the respective order in writing; and (ii) Buyer has paid the respective fees (other than the Warranty Service Plan, which is included with the Products and provided by BlueArc at no cost to Buyer in accordance with the terms of this Agreement).
- (b) **Prices, Taxes and Payment Terms for Services.** Prices for Services for any Renewal Period (defined below) shall be the prices for the respective Service according to BlueArc's then-current list prices at the beginning of such Renewal Period. All prices for Services are exclusive of insurance, taxes, customs fees, VAT, tariffs, and duties, all of which shall be paid by Buyer (except for taxes on BlueArc's net income, which shall be paid by BlueArc). Payment for Services shall be due in advance of the twelve (12) month period for which the fees are due and in no event later than thirty (30) days

from the date of invoice. Past due payments shall be subject to a monthly charge at the lower of (i) one and one-half percent (1.5%) per month or (ii) the highest rate of interest permitted by law. All invoices and payments shall be in U.S. Dollars or local currency, as set forth on an Order.

- (c) Initial and Renewal Service Periods. Except as otherwise provided herein, Blue Arc's obligation to provide Services shall commence upon the delivery of the respective Product to which the Services apply and shall continue for a period of twelve (12) months (the "Initial Service Period") and shall automatically renew for successive twelve (12) month terms (each a "Renewal Service Period") unless terminated by either party in accordance with Section 9(c) (Termination of Services). Notwithstanding the foregoing, BlueArc's obligation to provide Services included as part of the Warranty Service Plan shall apply for the duration of the Hardware Warranty Period (as defined below).
- (d) Subcontracts. BlueArc shall have the right to use subcontractors to perform all or a portion of the Services that it performs hereunder, and the work of such subcontractors shall be deemed to satisfy BlueArc's obligations hereunder provided that such work meets the requirements of this Agreement. Such subcontracting shall not relieve Buyer from its duty to make all payments to BlueArc unless Buyer is notified to the contrary by BlueArc.
- (e) Notification of Defects. If Buyer believes that there is a Defect in the Products, Buyer will (i) notify BlueArc, describing the parameters, procedures and conditions resulting from the Defect in reasonable detail to permit BlueArc to identify the Defect, and (ii) provide BlueArc with all data files, software or any other relevant material, together with (if BlueArc requires) on-site access, reasonably believed necessary by BlueArc for it to reproduce and analyze the Defect.
- (f) Equipment and Buyer Information. To receive Services, Buyer must provide BlueArc any information required by BlueArc regarding the location and configuration of the Products for which Buyer desires to receive the Services. Customer agrees not to move equipment to another location without the express written consent of BlueArc. Continuation of Services at any new location is subject to approval by BlueArc, and additional charges may apply.
- (g) Service Area. The availability of On-site Replacement Parts Storage and the respective Service Level are limited to the Service Area.
- (h) Excluded Services. Notwithstanding anything to the contrary, BlueArc shall have no obligation to provide: (i) support or replacement of Products damaged by, or resolution of problems caused by, accident, abuse, misuse, third party product(s), natural or personal disaster including without limitation power surge or failure or the like, or other disaster, any unauthorized disassembly, repair or modification, or any failure to maintain and use the Products in a manner consistent with their intended purpose, the Documentation and instructions from BlueArc, (ii) support or replacement of Products that BlueArc determines in its reasonable discretion do not have a Defect; (iii) hardware or software upgrades or third party products required to operate new Hardware or Software; (iv) support of Products not equipped with the most current version of the Software or Hardware, if such version has been made available to Buyer; (v) delivery or on-site Services outside the Service Area or on-site Services where, in BlueArc's opinion, a condition exists that represents a hazard to the safety of its employees or agents; (vi) installation services other than those expressly provided herein or Exhibit A; (vii) customization of the Products; (viii) support or replacement of any third party product or Product in which any parts have been replaced with any third party product; or (ix) expendable parts. Buyer will be responsible for charges on a time and materials basis for Services provided as a result of fault of Buyer or third party products.

- (i) Service Procedure Changes. Notwithstanding anything to the contrary, BlueArc shall have the right to modify its procedures with respect to Services (including the terms in Exhibit A) by notifying Buyer of the changes. Such changes shall apply to the Services on a going forward basis.
- (j) Buyer Cooperation. Buyer shall provide BlueArc reasonable assistance and prompt access to and use of the Products and Software to allow BlueArc to provide the Services. Buyer shall be responsible for providing backup of data and otherwise protecting data against loss or destruction prior to the provision of any Services. At BlueArc's reasonable request, Buyer shall provide connection of Product to a telephone line or remote access network for remote diagnostics and trouble-shooting and safe adequate facilities in the event that BlueArc elects to perform any Services at Buyer's site. Upon discovery of the Defect for which Services are requested, Buyer shall promptly notify BlueArc according to BlueArc's published service procedures and provide a reasonably detailed observation of the Defect including a description of the parameters, procedures, and conditions resulting from the Defect, as well as any data files, results of diagnostic programs and other information reasonably believed necessary by BlueArc to reproduce and analyze the Defect.
- (k) Replacement Items. Only with the prior written authorization of BlueArc may Buyer install replacement Products or Replacement Parts, and Buyer shall promptly package and ship the replaced items to BlueArc. Replacement Parts will be subject to the same Hardware Service and Service Level as the original Product(s) and shall be warranted for the remainder of the applicable Hardware Warranty Period (if applicable) measured from the date of original purchase or thirty (30) days, whichever is longer. At its option, BlueArc may elect to treat replacements as an exchange or to return repaired items to Buyer. Exchanged and loaned items are the property of BlueArc. Replacement Parts or replacement Products will be provided by BlueArc on an exchange basis, and will be either new or refurbished to be functionally equivalent to new. Hardware or Replacement Parts replaced under this provision shall become the property of BlueArc. Any replaced or loaned items not returned to BlueArc within ninety (90) days of receipt of the replacement or repaired original will be invoiced to Buyer and Buyer agrees to pay the then current list price for such items. Buyer agrees, at Buyer's cost and expense, to be responsible for diligence and care in the use and protection of the Replacement Parts. Without limiting the foregoing, Buyer shall be responsible for following any instructions or guidelines from BlueArc with respect to On-site Replacement Parts Storage. Buyer will be liable to BlueArc and shall indemnify BlueArc for any damages for loss of, or injury to, the Replacement Parts in the On-site Replacement Parts Storage facility. All title, interest, and ownership rights in and to the Replacement Parts shall remain in BlueArc until installation of such Replacement Parts has been completed. BlueArc shall have the right, from time to time and upon reasonable notice to Buyer, to audit the Replacement Parts stored at Buyer's facilities during normal business hours for the purposes of verifying compliance with Buyer's responsibilities with respect to the Replacement Parts.

## 6. Limited Warranties

- (a) Hardware. BlueArc warrants the Hardware against Defects in material and workmanship for a period of three (3) years from the date of original purchase ("Hardware Warranty Period"). BlueArc's entire liability and Buyer's exclusive remedy for breach of the warranty contained in this Section 6(a) (Hardware) shall be for BlueArc to, at its option, (i) perform the repair or replacement of the Hardware returned to BlueArc according to BlueArc's Return Materials Authorization ("RMA") procedures during the Hardware Warranty Period, or (ii) perform the standard Service as contemplated hereunder, subject to the limitations set forth herein, or, (iii) upon return to BlueArc of the Hardware according to BlueArc's RMA procedures during the Hardware Warranty Period, refund the amount paid by Buyer for the affected Hardware less

depreciation based on a five (5) year useful life. Any replacement parts will be new or warranted as new, and are warranted for the remainder of the Hardware Warranty Period or thirty (30) days, whichever is longer. Purchases of additional components or upgrading of the relevant Product does not extend the Hardware Warranty Period.

- (b) **Software.** BlueArc warrants that, for a period of ninety (90) days from the date of original purchase ("Software Warranty Period"), the media upon which the Software is furnished will be free from defects in material and workmanship under normal use and service. BlueArc's entire liability and Buyer's exclusive remedy for breach of warranty of this Section 6(b) (Software) shall be for BlueArc to, at its option, upon return to BlueArc of the defective media: (i) repair or replace such media during the Software Warranty Period or (ii) refund the amount of fees paid by Buyer for the affected Software or, in the case of Software not separately priced, a pro-rated amount of the purchase price that applies to the affected Software. Any replacement media is warranted for the remainder of the Software Warranty Period or thirty (30) days, whichever is longer. Purchases of additional components or upgrading of the relevant Product does not extend the Software Warranty Period.
- (c) **Service.** BlueArc warrants that it will use commercially reasonable efforts to perform the Services that BlueArc is required to supply pursuant to this Agreement in a professional and workmanlike manner. If such Services are not performed in a professional and workmanlike manner, Buyer's exclusive remedy will be the re-performance of the affected work as soon as commercially practicable at no additional cost to Buyer. In the event BlueArc is, after reasonable opportunity, unable to remedy the deficient Services through re-performance within ninety (90) days of notice from Buyer, BlueArc's entire liability and Buyer's exclusive remedy for breach of this warranty shall be for Buyer to cancel the Service. If Buyer cancels Services under this Section 6(c), Buyer will be relieved of any payment obligations for the pro rata remaining portion of the canceled Services measured from the time of such notice.
- (d) **Warranty Exclusions.** BlueArc, its licensors, vendors or contractors do not warrant that any Product or Service will operate uninterrupted or error free. No oral or written information, or advice provided in the name of BlueArc or its suppliers, by BlueArc, its sub-contractors, partners, resellers, distributors, employees, or representatives, will create a warranty or in any way increase the scope of the foregoing warranties. In the event the Product(s) include third party Product(s) not manufactured by BlueArc, BlueArc provides such third party Product(s) without warranties or maintenance of any kind unless otherwise stated in such third party Documentation provided with such third party Product(s).
- (e) **Disclaimer of Warranty.** THE PRODUCTS AND SERVICES ARE NOT DESIGNED, MANUFACTURED OR INTENDED FOR USE IN HAZARDOUS OR CRITICAL ENVIRONMENTS OR IN ACTIVITIES REQUIRING EMERGENCY OR FAIL-SAFE OPERATION, SUCH AS APPLICATIONS TO SUPPORT OR SUSTAIN LIFE, THE OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION OR COMMUNICATION SYSTEMS OR IN ANY OTHER APPLICATIONS OR ACTIVITIES IN WHICH FAILURE OF THE PRODUCTS AND SERVICES MAY POSE THE RISK OF ENVIRONMENTAL HARM OR PHYSICAL INJURY OR DEATH TO HUMANS ("DANGEROUS APPLICATIONS"). BLUEARC SPECIFICALLY DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTY OF FITNESS FOR ANY DANGEROUS APPLICATION, AND ANY SUCH USE SHALL BE AT BUYER'S SOLE RISK. THIS WARRANTY DOES NOT COVER ANY DAMAGE TO THE PRODUCTS WHICH RESULTS FROM ACCIDENT, ABUSE, MISUSE, THIRD PARTY PRODUCTS, NATURAL OR PERSONAL DISASTER, OR ANY UNAUTHORIZED DISASSEMBLY, REPAIR OR MODIFICATION OR ANY FAILURE TO MAINTAIN AND USE THE PRODUCTS IN A MANNER CONSISTENT WITH THEIR PURPOSE AND THE DOCUMENTATION AND

INSTRUCTIONS FROM BLUEARC. EXCEPT FOR THE FOREGOING, THE PRODUCTS AND SERVICES ARE PROVIDED ON AN "AS IS" BASIS. THIS WARRANTY SETS FORTH THE ENTIRE LIABILITY AND OBLIGATIONS OF BLUEARC AND ITS SUPPLIERS WITH RESPECT TO BREACH OF WARRANTY, AND THE WARRANTIES SET FORTH OR LIMITED HEREIN ARE THE SOLE AND EXCLUSIVE WARRANTIES AND ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING WARRANTIES OF NONINFRINGEMENT, SATISFACTORY QUALITY, FITNESS FOR PARTICULAR PURPOSE, MERCHANTABILITY AND THOSE ARISING FROM A COURSE OF DEALING. TO THE EXTENT AN IMPLIED WARRANTY CANNOT BE EXCLUDED, SUCH WARRANTY IS LIMITED IN DURATION TO THE APPLICABLE WARRANTY PERIOD.

7. **Limitation of Liability.** NEITHER BLUEARC, ITS SUPPLIERS, ITS REPRESENTATIVES, NOR ANY OF THE PERSONNEL UTILIZED BY BLUEARC IN PROVIDING THE SERVICES SHALL BE LIABLE FOR ANY INDIRECT, CONDITIONAL, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES OR LOSS (INCLUDING DAMAGES FOR LOSS OR CORRUPTION OF DATA, LOSS OF BUSINESS, LOSS OF PROFITS, OR THE LIKE), HOWEVER CAUSED, ON ANY THEORY OF LIABILITY (INCLUDING, WITHOUT LIMITATION, NEGLIGENCE, BREACH OF CONTRACT OR OTHERWISE), EVEN IF BLUEARC OR ITS REPRESENTATIVES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. BLUEARC'S CUMULATIVE LIABILITY FOR ALL CAUSES OF ACTION ARISING OUT OF THIS AGREEMENT AND/OR SALE OR PROVISION OF THE PRODUCTS AND SERVICES (INCLUDING UNDER ANY WARRANTY EXTENDED IN CONNECTION THEREWITH) SHALL BE LIMITED TO THE AMOUNT PAID BY BUYER FOR THE PRODUCT(S) AND/OR SERVICE(S) GIVING RISE TO THE CLAIM, OR, IN THE EVENT THAT THE RESPECTIVE PRODUCT OR SERVICE IS OFFERED WITHOUT CHARGE, THE AMOUNT PAID FOR THE PRODUCT OR SERVICE MOST CLOSELY RELATED TO THE CLAIM. THIS LIABILITY LIMIT IS CUMULATIVE AND NOT PER INCIDENT.
8. **Allocation of Risk.** THE LIMITED WARRANTY, EXCLUSIVE REMEDIES AND LIMITED LIABILITY SET FORTH ABOVE ARE FUNDAMENTAL ELEMENTS OF THE BASIS OF THE BARGAIN BETWEEN BLUEARC AND BUYER. BUYER AGREES THAT BLUEARC WOULD NOT BE ABLE TO PROVIDE THE PRODUCTS AND SERVICES ON AN ECONOMIC BASIS WITHOUT SUCH LIMITATIONS.
9. **Term and Termination**
- (a) **Term.** This Agreement shall commence upon the delivery of the respective Product and shall continue until the end of the longer of (i) the Hardware or Software Warranty Period, or (ii) the conclusion of BlueArc's provision of Services to Buyer upon the expiration or termination of the Initial Service Period or, to the extent applicable, any Renewal Service Period.
- (b) **Termination of Agreement by BlueArc.** Notwithstanding anything to the contrary, this Agreement may be terminated immediately by BlueArc in the event of (a) failure of Buyer to pay amounts due hereunder and failure to remedy such breach within thirty (30) days after written notification by BlueArc of such breach, provided, however, that no cure period shall apply to Buyer's failure to timely pay the initial payment for Products or Services, (b) in the event of transfer or sale of all or substantially all of Buyer's assets, or transfer of a controlling interest in Buyer to an unaffiliated third party, (c) Buyer ceasing to carry on business as a going concern, becoming the object of the institution of voluntary or involuntary proceedings in bankruptcy or liquidation, or a receiver being appointed with respect to a substantial part of Buyer's assets or (d) any material breach of this Agreement or any provision thereof by Buyer.

- (c) **Termination of Services.** Either party may terminate any or all Services by written notice to the other party no less than thirty (30) days prior to the expiration of the Initial Service Period or any subsequent Renewal Service Period. In addition, Buyer may terminate the Services at any time upon written notice to BlueArc, for any reason or no reason, but Buyer shall not be entitled to any refund of the fee attributable to the remainder of the twelve (12) month period for which the Services were ordered. Any Services not terminated by notice will automatically renew for an additional twelve (12) month period. Buyer may reinstate lapsed Services by paying all Services fees that are in arrears, plus (a) a reinstatement fee equal to fifty percent (50%) of the then current annual fee, and (b) any costs, on a time and material basis, that BlueArc incurs to update Buyer's installation of Products to current versions (if applicable) or to resolve Defects caused by or arising during the lapse.
- (d) **Survival.** Sections 1 (Definitions), 2 (Confidential Information), 4(a) (Ownership), 4(c) (Restrictions on Products), 5(b) (Prices, Taxes and Payment Terms for Services), 6(d) (Warranty Exclusions), 6(e) (Disclaimer of Warranty), 7 (Limitation of Liability), 8 (Allocation of Risk), 8 (Term and Termination) and 10 (Miscellaneous) shall survive any termination of this Agreement. Section 4(b) (Software License) shall survive termination of this Agreement subject to the termination provision and other requirements of Section 4 (Intellectual Property Rights).
10. **Miscellaneous.** Buyer shall obtain all government licenses and approvals, including those necessary to import, export, and re-export the Products, and shall comply with all applicable laws and regulations including without limitation U.S. export controls, and the E.U. Directives on Waste Electrical and Electronic Equipment ("WEEE") and the Restriction of Hazardous Substances ("RoHS"). Buyer agrees not to knowingly sell or distribute directly or indirectly any BlueArc product with a European ECCN Classification of 5D002 to any military entity or to any other entity for military purposes, including any State Security Forces pursuant to this Agreement, nor to knowingly sell any BlueArc Technology to end-users for use in connection with chemical, biological or nuclear weapons or missiles capable of delivering such weapons. Buyer also agrees not to knowingly export or re-export any BlueArc Technology to any country that is subject to relevant European Union, United Nations or Organisation for Security and Co-Operation in Europe sanctions. If Buyer is acquiring the Products and accompanying documentation on behalf of the U.S. Government, special provisions apply. If the Software is supplied to the Department of Defense ("DOD"), the Software is subject to "Limited Rights," as that term is defined in the DOD Supplement to the Federal Acquisition Regulations ("DFAR") in paragraph 252.227-7013 (c)(1). If the Software is supplied to any unit or agency of the United States Government other than DOD, the Government's rights in the Software will be defined in paragraph 52.227-19(c) (1) or (2) of the Federal Acquisition Regulations ("FAR"), as applicable. Use, duplication, reproduction or disclosure by the Government is subject to such restrictions or successor provisions. Contractor/Manufacturer is: BlueArc Corporation, 50 Rio Robles, San Jose, CA 95134. Except as expressly licensed hereunder, all rights are reserved.
11. Buyer hereby grants to BlueArc, its affiliates and its authorized representatives a worldwide, non-exclusive right and license to use and display Buyer's name and logo in presentations to third parties for the limited purpose of identifying Buyer as a user of the Products and Services. Any notice required to be given hereunder shall be given in writing and will reference this Agreement, to the address of each party set forth above, or to such other address as either party may substitute by written notice to the other and will be effective: (a) one business day following delivery when delivered personally; (b) one business day following delivery when sent by facsimile, with written confirmation of receipt by the sending facsimile machine; (c) four business days after having been sent by registered or certified mail, return receipt requested, postage prepaid; or (d) two business days after deposit with an express courier, with written confirmation of receipt. This Agreement and any dispute related to the Products shall be governed in all respects by the laws of California in the United States of America and the parties consent to the exclusive personal jurisdiction and venue of the state and federal courts of Santa Clara County, California. This Agreement represents the entire agreement between BlueArc and Buyer with respect to the subject matter, and Buyer agrees that all prior negotiations, understandings, representations, purchase orders and/or agreements of the parties relating to the subject matter hereof, whether oral or written, are merged herein and superseded in their entirety. The Agreement may be modified only by a writing signed by both parties. Other than for express payment obligations, neither party shall be liable for any delay or failure in performance due to events outside the defaulting party's reasonable control, including without limitation strikes, shortages of supplies, riots, war, earthquake, fire, epidemics, criminal or malicious acts of third parties, failure of utilities or common carriers, or other circumstances beyond its reasonable control. Neither this Agreement nor any rights under this Agreement, other than monies due or to become due, shall be assigned or otherwise transferred by Buyer (by operation of law or otherwise) without the prior written consent of BlueArc. BlueArc shall have the right to assign all or part of this Agreement without Buyer's approval. This Agreement shall bind and inure to the benefit of the successors and permitted assigns of the parties. BlueArc's failure to exercise any of its rights hereunder shall not constitute or be deemed a waiver or forfeiture of such rights. In the event that any of the terms of this Agreement become or are declared to be illegal or otherwise unenforceable by any court of competent jurisdiction, all remaining terms of this Agreement shall remain in full force and effect. The relationship of BlueArc and Buyer established by this Agreement is that of independent contractors, and neither party is an employee, agent, partner or joint venturer of the other. The parties confirm that it is their wish that this Agreement, as well as all other documents relating hereto, including all notices, have been and shall be drawn up in the English language only. Les parties aux présentes confirment leur volonté que cette convention, de même que tous les documents, y compris tout avis, qui s'y rattachent, soient rédigés en langue anglaise. Las partes ratifican que es su voluntad que este Contrato, así como cualquier otro documento relacionado con el mismo, incluyendo todo tipo de notificaciones, han sido redactados y deberán continuar siendo redactados únicamente en el idioma inglés.

[signature page follows]

**IN WITNESS WHEREOF**, the parties have executed this Agreement by their duly authorized officers or representatives and delivered it effective for all purposes as of the date of the delivery of the Products to Buyer.

**BLUEARC:**

**BLUEARC CORPORATION**

\_\_\_\_\_  
Signature

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

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

Address: \_\_\_\_\_

\_\_\_\_\_  
Facsimile: \_\_\_\_\_

**BUYER:**

\_\_\_\_\_  
Buyer Name

\_\_\_\_\_  
Signature

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

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

Address: \_\_\_\_\_

\_\_\_\_\_  
Facsimile: \_\_\_\_\_

**EXHIBIT A**  
**BLUEARC**  
**SERVICE PLAN DESCRIPTION**

1. **HARDWARE SERVICE PLANS**

The BlueArc Service Plans provide customers with the level of hardware support and service needed to ensure optimal uptime and system performance. Many businesses have different in-house technical resources and capabilities, as well as availability and response time requirements. BlueArc offers three options for hardware service (Warranty, Standard and Premium) to meet the spectrum of customer requirements, each level tailored to fit a specific set of needs. All Service Plans provide the following:

- ❖ Toll free 24 x 7 x 365 phone support
- ❖ Remote diagnostics
- ❖ 24 x 7 x 365 system monitoring via BlueArc email home system

The Warranty Plan provides best effort Service Level for the delivery of Replacement Parts along with 24 x 7 x 365 telephone support, Remote Server Support, web support diagnostics, and remote service capability via WebEx.

The Standard Plan includes all the Services of the Warranty Plan with next business day Service Level for the delivery of Replacement Parts.

The Premium Plan includes all the Services of the Standard Plan with 4-hour Service Level for the delivery of Replacement Parts

The following table highlights the features of the three Service Programs.

<b>Hardware Service Plans</b>	<b>Warranty</b>	<b>Standard</b>	<b>Premium</b>
<b><i>Hardware Service</i></b>	3 years	May be purchased for periods of 1-3 years	May be purchased for periods of 1-3 years
<b><i>Service Level for Replacement Parts</i></b>	Best Effort	Parts delivered onsite next business day Cut-off for a business day is 3:00pm at the Customer's location.  Decisions made to replace a hardware component made after 3:00pm will fall to the next business day.	Parts delivered onsite within 4 hours No cut-off for 4hr service level
<b><i>Email Support and Web support</i></b>	24 x 7 x 365	24 x 7 x 365	24 x 7 x 365
<b><i>Remote Server Support</i></b>	<i>Alerts EMAIL-Home remote monitoring – proactive parts replacement. Remote Server Support, diagnostics, and service via Webex.</i>	<i>Alerts EMAIL-Home remote monitoring – proactive parts replacement. Remote Server Support, diagnostics, and service via Webex.</i>	<i>Alerts EMAIL-Home remote monitoring– proactive parts replacement. Remote Server Support, diagnostics, and service via Webex.</i>

2. **SOFTWARE SERVICE PLAN**

The BlueArc Software Support plan can be purchased in conjunction with or separate from a BlueArc Hardware Service Plan. The Software Support plan provides 24 x 7 x 365 telephone/ email support, Remote Server Support, diagnostics, and service via Webex, continuation and extension of the standard 90 day software warranty, and managed software upgrades. The Software Support Plan is required in order to receive any BlueArc Software Updates after the 90 day software warranty period expires.