

DATED

MANAGED SERVICES AGREEMENT

between

PARTY 1

and

PARTY 2

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THIS AGREEMENT is dated [DATE]

PARTIES

- (1) [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS](**Supplier**).
- (2) [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS](**Customer**).

BACKGROUND

- (A) The Supplier has developed and will provide a service consisting of the integrated management of personnel, equipment, materials, software and telecoms services so as to be able to offer customers a seamless “end to end” service consisting of [DETAILS] (the “**Managed Service**”).
- (B) The Customer wishes to use the Supplier's Managed Service in its business operations.
- (C) The Supplier has agreed to provide and the Customer has agreed to take and pay for the Managed Service subject to the terms and conditions of this agreement.

AGREED TERMS

1. INTERPRETATION

- 1.1 The definitions and rules of interpretation in this clause apply in this agreement.

Acceptance Date: has the meaning given at clause 2.6.

Assets: means any Customer-Side Equipment, Software or Intellectual Property used by Supplier exclusively for the delivery of the Managed Service to Customer.

Assumed Contracts: contracts which Supplier identifies as part of the Set-Up Service and which will be subject to the obligations of clause 3

Benchmark Review: any benchmarking of the Fees as conducted by the Benchmarker pursuant to Schedule 7

Benchmarker: has the meaning set out in Schedule 7.

Benchmarking Report: the report produced by the Benchmarker following a Benchmark Review.

Business Day : any day which is not a Saturday, Sunday or public holiday in [the UK].

Change of Control: the direct or indirect acquisition of either the majority of the voting stock, or of all, or substantially all, of the assets, of a party by another entity in a single transaction or a series of transactions.

Confidential Information: information that is proprietary or confidential and which is either labelled as such or else which ought reasonably to be considered as confidential because of its nature and the manner of its disclosure.

Customer Account Team: the individuals appointed by the Customer from time to time who shall serve as the Supplier's primary contacts for the Supplier's activities under this agreement. The initial members of the Supplier Account Team are listed in Schedule 2

Customer Data: any information which is provided by Customer to Supplier as part of Customer's use of the Managed Service, including any information derived from such information.

Customer's Project Manager: the member of the Customer Account Team appointed in accordance with clause 7.1(c). The Customer's Project Manager at the Effective Date is named in Schedule 2.

Customer-Side Equipment: means any equipment located or to be located on a Customer Site but controlled or to be controlled exclusively by Supplier as part of the Managed Service

Customer Site: means any premises occupied by Customer at which it receives the Managed Service

Dispute Resolution Procedure: the procedure at clause [INSERT].

Effective Date: the date of this agreement.

Fees: the fees payable to the Supplier, as described in Schedule 1.

Initial Term: means the period from the Acceptance Date until [insert date]

Intellectual Property means any and all intellectual property rights of any nature anywhere in the world whether registered, registerable or otherwise, including patents, utility models, trade marks, registered designs and domain names, applications for any of the foregoing, trade or business names, goodwill, copyright and rights in the nature of copyright, design rights, rights in databases, moral rights, know-how and any other intellectual property rights which subsist in computer software, computer programs, websites, documents, information, techniques, business methods, drawings, logos, instruction manuals, lists and procedures and particulars of customers, marketing methods and procedures and advertising literature, including the "look and feel" of any websites.

Maintenance: any error corrections, updates and upgrades that the Supplier may provide or perform with respect to the Managed Service, as well as any other support or training services provided to the Customer under this agreement, all as described in Schedule 5.

Managed Service Specification means the specification for the Managed Service as described at Schedule 4.

Normal Business Hours: [8.30 am to 6.00 pm] local UK time on a Business Day.

Project Plan: the plan to be developed in the planning stage of the Set-Up Service.

Replacement Supplier: has the meaning given at clause 17.1

Service Credit: means any credits payable to Customer in accordance with the Service Level Arrangements.

Service Level Arrangements: the service level arrangements set out in Schedule 6.

Services: the Set-Up Service and the Managed Service.

Set-Up Service: the due diligence, configuration and related work referred to in clause 2.1 and Schedule 3, to be performed by the Supplier to set-up the Managed Service.

Software: means any Software used by Supplier exclusively to provide the Managed Service to the Customer whether owned by a third party (“**Third Party Software**”), by Customer (“**Customer Software**”) or by Supplier (“**Supplier Software**”).

Supplier Account Team: the individuals appointed by the Supplier from time to time who shall serve as the Customer's primary contacts for the Customer's activities under this agreement. The initial members of the Supplier Account Team are listed in Schedule 2.

Supplier's Project Manager: the member of the Supplier's Account Team appointed in accordance with clause 2.2. The Supplier's Project Manager at the Effective Date is named in Schedule 2.

Transferring Contracts: the third party contracts (including licenses to Third Party Software) which Supplier reasonably considers necessary to enable the transition of the Managed Service to the Customer or any Replacement Supplier on expiry or termination of this agreement.

Transition Services: has the meaning given at clause 17.2

- 1.2 Clause, schedule and paragraph headings shall not affect the interpretation of this agreement.
- 1.3 A **person** includes a corporate or unincorporated body (whether or not having separate legal personality) [and that person's legal and personal representatives, successors or permitted assigns].
- 1.4 A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.
- 1.5 Words in the singular shall include the plural and vice versa.
- 1.6 A reference to one gender shall include a reference to the other genders.

- 1.7 A reference to a statute or statutory provision is a reference to it as it is in force for the time being, taking account of any amendment, extension, or re-enactment and includes any subordinate legislation for the time being in force made under it.
- 1.8 A reference to **writing** or **written** includes faxes but not e-mail.
- 1.9 Any phrase introduced by the words “**including**”, “**includes**”, “**in particular**” or “**for example**” or similar shall be construed as illustrative and shall not limit the generality of the related general words.
- 1.10 References to clauses and schedules are to the clauses and schedules of this agreement; references to paragraphs are to paragraph of the relevant schedule.

2. SET-UP SERVICES

- 2.1 The Supplier Account Team shall consist of the personnel listed at Schedule 2. The Supplier shall use reasonable endeavours to ensure continuity of its personnel assigned to this agreement.
- 2.2 The Supplier shall appoint the Supplier's Project Manager, who shall have the authority to contractually bind the Supplier on all matters relating to this agreement. The Supplier shall use reasonable endeavours to ensure continuity of the Supplier's Project Manager, but has the right to replace him from time to time where reasonably necessary in the interests of the Supplier's business;
- 2.3 The Supplier shall perform the Set-Up Services in accordance with the timetable set out in part A of Schedule 3. The Supplier shall use reasonable endeavours to meet the performance dates set out in Schedule 3, but any such dates shall be estimates only, and time shall not be of the essence in this agreement;
- 2.4 When Supplier considers that the Managed Service is ready for activation is shall so-notify Customer. Within five days of such notification the Customer shall review the operation of the Managed Service to confirm that it functions in material conformance with the Managed Service Specification. If the managed Service fails in any material respect to conform with Managed Service Specification, the Customer shall give the Supplier a detailed description of any such non-conformance (**Error**), in writing, within the five-day review period;
- 2.5 The Supplier shall use reasonable efforts to correct any such Error within a reasonable time and, on completion, re-submit the Managed Service to the Customer. The provisions of this clause 2.5 shall then apply again, up to three additional times. If the Supplier is unable to correct such Error after three attempts, either party may terminate this agreement without further liability to the other; and

2.6 If the Customer does not provide any written comments in the five-day period described above, or if the Managed Service is found to conform with the Managed Service Specification, then the Managed Service shall be deemed accepted as from the date of the notification (the “Acceptance Date”).

2.7 The Customer will, as from the Acceptance Date, transfer Assets in accordance with Schedule 3.

3. ASSUMED CONTRACTS AND ASSETS

3.1 With effect from the Acceptance Date the Customer shall:

- (a) Transfer the Assets to Supplier in accordance with part B of Schedule 3
- (b) subject to clause 3.2, transfer the benefit of the Assumed Contracts to the Supplier (subject to the burden attaching to each of them).

3.2 The Customer shall use reasonable endeavours to assign, novate or transfer each of the Assumed Contracts with effect from the Acceptance Date to Supplier. If any consent of any third party is required to the assignment, novation or transfer of an Assumed Contract and has not been obtained at or prior to the Acceptance Date the Customer and the Supplier shall each use all reasonable endeavours to obtain that consent as soon as possible after the Acceptance Date. Unless or until any Assumed Contract is assigned, novated or transferred or any necessary consent is obtained, the parties shall work together, in good faith, to agree an alternative solution which may include the Supplier finding an alternative source of supply and/or the Customer holding the benefit of the relevant Assumed Contract as agent for the Supplier.

4. SERVICE PROVISION

4.1 Supplier will provide the Managed Service as from the Acceptance Date until expiry or termination of this agreement for any reason.

4.2 The Service Level Arrangements shall apply with effect from the start of the first complete month occurring at least [30] days after the Acceptance Date.

4.3 The Customer shall not store, distribute or transmit any material through the Managed Service that is unlawful, harmful, threatening, defamatory, obscene, harassing or racially or ethnically offensive; facilitates illegal activity; depicts sexually explicit images; or promotes unlawful violence, discrimination based on race, gender, colour, religious belief, sexual orientation, disability, or any other illegal activities.

4.4 The Customer shall not provide the Managed Service on to third parties.

5. CUSTOMER DATA

5.1 The Supplier shall follow its archiving and security procedures for Customer Data [as described in Schedule 4.]

5.2 In the event of any loss or damage to Customer Data, the Customer's sole and exclusive remedy shall be for the Supplier to use reasonable commercial efforts to restore the lost or damaged Customer Data from the latest back-up of such Customer Data [maintained by the Supplier in accordance with the archiving procedure described in Schedule 4]. The Supplier shall not be responsible for any loss, destruction, alteration or disclosure of Customer Data caused by any third party (except those third parties sub-contracted by the Supplier to perform services related to Customer Data maintenance and back-up).

6. SUPPLIER'S OBLIGATIONS

6.1 The Supplier warrants that the Managed Service will be performed with all reasonable skill and care and that it will be provided substantially in accordance with the Managed Service Specification.

6.2 The warranty at clause 6.1 shall not apply to the extent of any non-conformance which is caused by use of the Managed Service contrary to the Supplier's instructions.

6.3 If the Managed Service does not conform with the warranty at clause 6.1, Supplier will, at its expense, use all reasonable commercial efforts to correct any such non-conformance promptly, or provide the Customer with an alternative means of accomplishing the desired performance. Such correction or substitution constitutes the Customer's sole and exclusive remedy for any breach of the warranty at clause 6.1.

6.4 Notwithstanding the foregoing, Supplier does not warrant that the Customer's use of the Managed Service will be uninterrupted or error-free.

6.5 This agreement shall not prevent the Supplier from entering into similar agreements with third parties, or from independently developing, using, selling or licensing materials, products or services which are similar to those provided under this agreement.

7. CUSTOMER'S OBLIGATIONS

7.1 The Customer shall:

(a) provide the Supplier with:

(i) all necessary co-operation in relation to this agreement; and

- (ii) all necessary access to such information as may be required by the Supplier;

in order to render the Managed Service, including but not limited to Customer Data, security access information and software interfaces to the Customer's other business applications;

- (b) provide such personnel assistance, including the Customer Account Team and other Customer personnel, as may be reasonably requested by the Supplier from time to time. The Supplier Account Team shall consist of the personnel listed in Schedule 2. The Supplier shall use reasonable endeavours to ensure continuity of its personnel assigned to this agreement;
- (c) appoint the Customer's Project Manager, who shall have the authority to contractually bind the Customer on all matters relating to this agreement. The Customer shall use reasonable endeavours to ensure continuity of the Customer's Project Manager;
- (d) comply with all applicable laws and regulations with respect to its activities under this agreement; and
- (e) carry out all other Customer responsibilities set out in this agreement or in any of the Schedules in a timely and efficient manner. In the event of any delays in Customer's provision of such assistance as agreed by the parties, the Supplier may adjust any timetable or delivery schedule set out in this agreement as reasonably necessary.

8. CHARGES AND PAYMENT

- 8.1 The Customer shall pay Fees set out in Schedule 1 for the Set-Up Services and the monthly Fees set out in Schedule 1 for the Managed Service.
- 8.2 The Customer shall reimburse the Supplier for all actual, reasonable travel expenses including, but not limited to, airfare, hotel and meals incurred by the Supplier in performance of the Set-Up Service.
- 8.3 All amounts and fees stated or referred to in this agreement are exclusive of value added tax, which shall be added to the Supplier's invoice(s) at the appropriate rate.
- 8.4 The Supplier shall invoice the Customer monthly as of the last day of each month for all Services performed by the Supplier during that month. If any Service Credits are due then they will be shown as a deduction from the invoice.
- 8.5 Each invoice is due and payable 30 days after the invoice date. Interest shall accrue on any overdue amounts at the rate of [4]% over the base lending rate of the Supplier's bankers in the UK from time to time, commencing on the due date and continuing until fully paid, whether before or after the judgment.

8.6 On expiry or termination of this agreement for any reason any unpaid Service Credits represent a debt due from Supplier to Customer.

9. CHANGE CONTROL

9.1 If either party wishes to change the scope of the Managed Service (including Customer requests for additional services), it shall submit details of the requested change to the other in writing.

9.2 If either party requests a change to the scope or execution of the Services, the Supplier shall, within a reasonable time, provide a written estimate to the Customer of:

- (a) the likely time required to implement the change;
- (b) any variations to the Fees arising from the change;
- (c) the likely effect of the change on the Project Plan; and
- (d) any other impact of the change on the terms of this agreement.

9.3 If the Supplier requests a change to the scope of the Services, the Customer shall not unreasonably withhold or delay consent to it.

9.4 If the Customer wishes the Supplier to proceed with the change, the Supplier has no obligation to do so unless and until the parties have agreed in writing the necessary variations to its charges, the Project Plan and any other relevant terms of this agreement to take account of the change.

10. [PRICE REDUCTION] OR [BENCHMARKING]

10.1 [Each year, as from the first day of the month falling after the anniversary of the Acceptance Date, the Fees will reduce by [x%].]

[OR]

10.2 The Customer may, by written notice, require a Benchmark Review of the Managed Service in accordance with the provisions of Schedule 7. The first Benchmark Review may not take place until at least [18] months after the Acceptance Date and each subsequent Benchmark Review must be at least [12] months after the previous one.

10.3 Subject to clause 10.5, if any Benchmark Review determines that the Fees do not represent Good Value (as defined in Schedule 7), then Supplier shall, in accordance with clause 9 and within [3 months] of completion of the Benchmark Review, make a proposal for a new solution, with fees representing Good Value in accordance with

the recommendations of the Benchmarker under paragraph 5.2(c) of Schedule 7, under which there will be a new Initial Term, and modifications may be made to the Managed Service Specification and the Service Level Arrangements.

- 10.4 Upon receipt of the proposal from the Supplier under clause 10.3 above Customer shall have the option to either:
- (a) accept the new proposal in which case the Parties shall record the change in accordance with clause 9;
 - (b) reject the proposal and elect to continue to receive the Managed Service on the existing basis; [or]
 - (c) [reject the proposal and terminate this agreement on [3 months'] notice in writing to Supplier without cost other than the Fees up to the date of such termination]
- 10.5 If the Supplier reasonably believes the Benchmarker has not complied with the provisions of Schedule 7 in any material respects, or that the Benchmarker has made a manifest error in determining the results of the Benchmark Review, the Supplier may dispute the Benchmark Report and the matter shall be dealt with in accordance with the Dispute Resolution Procedure.

11. CONTINUOUS IMPROVEMENT

- 11.1 The Supplier shall, at its own cost, submit a report to the Customer within 20 Business Days of each anniversary of the Acceptance Date which shall identify the emergence of new and evolving relevant technologies and processes which could improve the Managed Service. Such report shall be provided in sufficient detail to enable the Customer to evaluate properly the benefits of the new technology or process.
- 11.2 If the Customer wishes to incorporate any improvement identified by the Supplier pursuant to clause 11.1 the Customer shall send the Supplier a change request for consideration in accordance with clause 9 provided always the parties agree that:
- (a) if the Supplier's costs in providing the Managed Service to the Customer are reduced as a result of any business change implemented by the Customer, [PERCENTAGE]% of the cost savings shall be passed on to the Customer by way of a consequential and immediate reduction in the Fees; and
 - (b) if the charges payable by Customer are reduced as a result of any business change implemented by the Supplier, [PERCENTAGE]% of the savings shall be passed on to Supplier by way of a consequential and immediate increase in the Fees.

12. SERVICE REVIEW AND GOVERNANCE

- 12.1 The Customer Project Manager and the Supplier Project Managers shall have regular monthly meetings (“Monthly Meetings”) to monitor and review the performance of this agreement, to discuss any changes proposed in accordance with clause 9 and to discuss the Service Level Arrangements. These meetings shall be minuted by the Supplier Project Manager and copies of those minutes shall be circulated to and approved by both parties.
- 12.2 Prior to each Monthly Meeting, the Customer's Project Manager shall notify the Supplier's Project Manager, and vice versa, of any problems relating to the provision of the Managed Service for discussion at the monthly meeting. At the meeting, the parties shall agree a plan to address such problems. In the event of any problem being unresolved, or a failure to agree on the plan, matter shall be resolved in accordance with the Dispute Resolution Procedure. Progress in implementing the plan shall be included in the agenda for the next monthly meeting.
- 12.3 A review meeting to assess the performance of the Supplier in the delivery of the Managed Service shall be held at [six-monthly] intervals (“Review Meetings”). Each meeting shall be attended by senior representatives of the Customer and of the Supplier, together with the Project Managers.
- 12.4 The Customer and the Supplier shall review the Service Level Arrangement at each Review Meeting and will, in accordance with the clause 9, agree modifications to reflect changes in the Customer’s requirements for the Managed Service.

13. PROPRIETARY RIGHTS

- 13.1 The Customer acknowledges and agrees that, as between the parties, the Supplier and/or its licensors own all Intellectual Property Rights in all materials connected with the Managed Service and in any material developed or produced in connection with this agreement by the Supplier, its officers, employees, sub-contractors or agents. Except as expressly stated here, this agreement does not grant the Customer any rights to such Intellectual Property.

14. CONFIDENTIALITY

- 14.1 Each party may be given access to Confidential Information from the other party in order to perform its obligations under this agreement. A party's Confidential Information shall include information that:
- (a) is or becomes publicly known other than through any act or omission of the receiving party; or
 - (b) was in the other party's lawful possession before the disclosure; or

- (c) is lawfully disclosed to the receiving party by a third party without restriction on disclosure; or
 - (d) is independently developed by the receiving party, which independent development can be shown by written evidence; or
 - (e) is required to be disclosed by law, by any court of competent jurisdiction or by any regulatory or administrative body.
- 14.2 Each party shall keep the other's Confidential Information secure and hold it in confidence and, unless required by law, shall not make the other's Confidential Information available to any third party, or use the other's Confidential Information for any purpose other than the implementation of this agreement.
- 14.3 Customer acknowledges that the Supplier's Confidential Information includes any designs, plans, software or other materials created by Supplier in connection with the Managed Service and Customer agrees not to make use of any such material for any purpose other than receipt of the Managed Service from the Supplier.
- 14.4 Each party shall take all reasonable steps to ensure that the other's Confidential Information to which it has access is not disclosed or distributed by its employees or agents in violation of the terms of this agreement.
- 14.5 The Supplier acknowledges that the Customer Data is the Confidential Information of the Customer.
- 14.6 This clause 14 shall survive termination of this agreement, however arising.

15. LIMITATION OF LIABILITY

- 15.1 This clause 15 sets out the entire financial liability of the Supplier (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer in respect of:
- (a) any breach of this agreement;
 - (b) any use made by the Customer of the Managed Service; and
 - (c) any representation, statement or tortious act or omission (including negligence) arising under or in connection with this agreement.
- 15.2 Except as expressly and specifically provided in this agreement:
- (a) the Customer assumes sole responsibility for results obtained from the use of the Managed Service, and for conclusions drawn from such use. The Supplier shall have no liability for any damage caused by errors or omissions in any information, instructions or scripts provided to the

Supplier by the Customer in connection with the Managed Service, or any actions taken by the Supplier at the Customer's direction; and

- (b) all warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from this agreement.

15.3 Nothing in this agreement excludes or limits the liability of the Supplier for:

- (a) death or personal injury caused by the Supplier's negligence;
- (b) fraud or fraudulent misrepresentation; or for
- (c) any other liability which cannot lawfully be excluded or limited.

15.4 The Service Level Arrangements state the Customer's full and exclusive right and remedy, and the Supplier's only obligation and liability in respect of, the performance and/or availability of the Managed Service, or its non-performance and non-availability.

15.5 Subject to clauses 15.3 and clause 15.4:

- (a) the Supplier shall not be liable for any loss of profits, loss of business, depletion of goodwill and/or similar losses or pure economic loss, or for any special, indirect or consequential loss costs, damages, charges or expenses however arising; and
- (b) the Supplier's total aggregate liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of this agreement shall be limited to [£[AMOUNT] **OR** the price paid for the Managed Service during the [12] months preceding the date on which the claim arose].

16. TERM AND TERMINATION

16.1 This agreement shall commence on the Effective Date and shall continue, unless otherwise terminated as provided in this clause 16, until expiry of the Initial Term. Thereafter this agreement shall automatically renew for successive yearly periods, unless either party terminates by notice in writing to the other, such notice to be given at least [120] days before the end of the then-current term and to be effective only at the end of the then-current term.

16.2 [The Customer may, on [120] days notice at any time during the Initial Term, terminate this agreement for convenience provided that on any such termination it shall, without prejudice to any accrued rights or obligations as at that time, be obliged to pay termination compensation to the Supplier calculated as follows: [INSERT DETAILS]].

16.3 Without prejudice to any other rights or remedies to which the parties may be entitled, but subject to clause 17 (exit assistance), either party may terminate this agreement without liability to the other if:

- (a) the other party commits a material breach of any of the terms of this agreement and (if such a breach is remediable) fails to remedy that breach within 30 days of that party being notified in writing of the breach; or
- (b) [Customer exercises an option to terminate in accordance with clause 10.4(c)]; or
- (c) an order is made or a resolution is passed for the winding up of the other party, or circumstances arise which entitle a court of competent jurisdiction to make a winding-up order in relation to the other party; or
- (d) an order is made for the appointment of an administrator to manage the affairs, business and property of the other party, or documents are filed with a court of competent jurisdiction for the appointment of an administrator of the other party, or notice of intention to appoint an administrator is given by the other party or its directors or by a qualifying floating charge holder (as defined in paragraph 14 of Schedule B1 to the Insolvency Act 1986); or
- (e) a receiver is appointed of any of the other party's assets or undertaking, or if circumstances arise which entitle a court of competent jurisdiction or a creditor to appoint a receiver or manager of the other party, or if any other person takes possession of or sells the other party's assets; or
- (f) the other party makes any arrangement or composition with its creditors, or makes an application to a court of competent jurisdiction for the protection of its creditors in any way, or becomes bankrupt; or
- (g) the other party ceases, or threatens to cease, to trade; or
- (h) [there is a Change of Control of the other party; or]
- (i) the other party takes or suffers any similar or analogous action in any jurisdiction in consequence of debt.

16.4 On termination of this agreement for any reason:

- (a) Supplier shall immediately cease provision of the Managed Service but may provide Transition Services for a further period in accordance with clause 17.2;
- (b) each party shall return and make no further use of any equipment, property, materials and other items (and all copies of them) belonging to the other party;
- (c) the Supplier may destroy or otherwise dispose of any of the Customer Data in its possession unless the Supplier receives, no later than ten days after the effective date of the termination or expiry of this agreement, a written request for the delivery to the Customer of the then most recent back-up of the Customer Data. The Supplier shall use reasonable commercial efforts to

deliver the back-up to the Customer within 30 days of its receipt of such a written request, provided that the Customer has, at that time, paid all fees and charges outstanding at and resulting from termination (whether or not due at the date of termination). The Customer shall pay all reasonable expenses incurred by the Supplier in returning or disposing of Customer Data; and

- (d) the accrued rights of the parties as at termination, or the continuation after termination of any provision expressly stated to survive or implicitly surviving termination, shall not be affected or prejudiced.

17. EXIT ASSISTANCE AND TRANSFER OF ASSETS

17.1 Supplier shall, on request from Customer at any time after the expiry of 6 months from the Acceptance Date, prepare or update a detailed plan (the “Exit Plan”) for the orderly transition of the Managed Service from the Supplier to the Customer or its nominated replacement supplier (the “Replacement Supplier”).

17.2 The Customer may, at any time before termination of this agreement for any reason request Supplier to put into effect the Exit Plan or otherwise to offer reasonable assistance in transitioning the Managed Service to a Replacement Supplier (by providing the “Transition Services”). Supplier will, in return for a reasonable fee (to be agreed in advance) provide such Transition Services for a maximum period of 3 months, or until termination of this agreement in accordance with clause 16, whichever is later.

17.3 On expiry or termination of this Agreement Supplier will promptly produce a list of the Customer-Side Equipment and of the Transferring Contracts. The Supplier shall then sell, and the Customer shall buy, the Customer-Side Equipment for net book value, calculated in accordance with Supplier’s reasonable then-current depreciation policy. Title to such Customer-Side Equipment shall pass to the Customer on payment for the same.

17.4 The Supplier and Customer shall co-operate to procure the novation or assignment to the Customer and/or Replacement Supplier of the Transferring Contracts.

17.5 The Customer shall:

- (a) accept assignments from the Supplier or join with the Supplier in procuring a novation of each Transferring Contract; and
- (b) once a Transferring Contract is novated or re-assigned to the Customer or the Replacement Supplier, the Customer shall carry out, perform and discharge all the obligations and liabilities created by or arising under that Transferring Contract and exercise its rights arising under that Transferring

Contract or, as applicable, procure that the Replacement Supplier does the same.

18. FORCE MAJEURE

18.1 The Supplier shall have no liability to the Customer under this agreement if it is prevented from or delayed in performing its obligations under this agreement, or from carrying on its business, by acts, events, omissions or accidents beyond its reasonable control, including, without limitation, strikes, lock-outs or other industrial disputes (whether involving the workforce of the Supplier or any other party), failure of a utility service or transport network, act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or sub-contractors, provided that the Customer is notified of such an event and its expected duration.

19. AUDIT

19.1 The Supplier shall, on reasonable written notice in advance, allow the Customer and any auditors of or other advisers to the Customer to access any of the Supplier's premises, personnel and relevant records as may be reasonably required in order to undertake verification that the Managed Service is being provided in accordance with this agreement.

19.2 The Customer shall use its reasonable endeavours to ensure that the conduct of each audit does not unreasonably disrupt the Supplier or delay the provision of the Managed Service by the Supplier.

19.3 Subject to the Customer's obligations of confidentiality, the Supplier shall provide the Customer (and its auditors and other advisers) with all reasonable co-operation, access and assistance in relation to each audit.

19.4 The parties shall bear their own costs and expenses incurred in respect of compliance with their obligations under this clause.

20. WAIVER

20.1 A waiver of any right under this agreement is only effective if it is in writing and it applies only to the party to whom the waiver is addressed and to the circumstances for which it is given.

20.2 Unless specifically provided otherwise, rights arising under this agreement are cumulative and do not exclude rights provided by law.

21. SEVERANCE

- 21.1 If any provision (or part of a provision) of this agreement is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force.
- 21.2 If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the parties.

22. ENTIRE AGREEMENT

- 22.1 This agreement, and any documents referred to in it, constitute the whole agreement between the parties and supersede any previous arrangement, understanding or agreement between them relating to the subject matter they cover.
- 22.2 Each of the parties acknowledges and agrees that in entering into this agreement it does not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to this agreement or not) relating to the subject matter of this agreement, other than as expressly set out in this agreement.

23. ASSIGNMENT

- 23.1 The Customer shall not, without the prior written consent of the Supplier, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this agreement.
- 23.2 The Supplier may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this agreement without the consent of Customer.

24. NO PARTNERSHIP OR AGENCY

Nothing in this agreement is intended to or shall operate to create a partnership between the parties, or authorise either party to act as agent for the other, and neither party shall have the authority to act in the name or on behalf of or otherwise to bind the other in any way (including, but not limited to, the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).

25. THIRD PARTY RIGHTS

This agreement is made for the benefit of the parties to it and (where applicable) their successors and permitted assigns, and is not intended to benefit, or be enforceable by, anyone else.

26. NOTICES

26.1 Any notice required to be given under this agreement shall be in writing and shall be delivered by hand or sent by pre-paid first-class post or recorded delivery post to the other party at its address set out in this agreement, or such other address as may have been notified by that party for such purposes, or sent by fax to the other party's fax number as set out in this agreement.

26.2 A notice delivered by hand shall be deemed to have been received when delivered (or if delivery is not in business hours, at 9 am on the first Business Day following delivery). A correctly addressed notice sent by pre-paid first-class post or recorded delivery post shall be deemed to have been received at the time at which it would have been delivered in the normal course of post. A notice sent by fax shall be deemed to have been received at the time of transmission (as shown by the timed printout obtained by the sender).

27. GOVERNING LAW AND JURISDICTION

27.1 This agreement and any disputes or claims arising out of or in connection with its subject matter are governed by and construed in accordance with the law of England.

27.2 The parties irrevocably agree that the courts of England have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement.

This agreement has been entered into on the date stated at the beginning of it.

Schedule 1 Fees

1. SET-UP SERVICES FEES

1.1 £[AMOUNT] based on [NUMBER] man-days at £[AMOUNT] per day.

1.2 In the event that the Supplier reasonably expects that the actual cost will exceed the amounts specified in paragraph 1.1, any work to be completed in additional man-days shall first be approved in writing by both the Supplier and the Customer, shall be charged at the rates set out in paragraph 1.1 and shall result in an extension of any target or deadline the Acceptance Date on a day-for-day basis.

2. MONTHLY FEE

£[AMOUNT], payable in advance

Schedule 2 Personnel

1. SUPPLIER

1.1 Supplier Account Team

Account manager	[NAME]
Account representative	[NAME]
Account representative	[NAME]

1.2 Supplier's Project Manager: [NAME]

2. CUSTOMER

2.1 Customer Account Team

Executive sponsor	[NAME]
Project representative	[NAME]
Project representative	[NAME]

2.2 Customer's Project Manager: [NAME]

2.3 Customer support representatives: [NAMES of staff who can request support]

Schedule 3 Set-Up Services

PART A - OUTLINE

1. TIMETABLE

Stage	Timetable	
	Estimated start date	Estimated completion date
Planning and Due Diligence:		
Implementation:		
Rollout:		

2. PLANNING AND DUE DILIGENCE

The Supplier shall conduct a due diligence exercise to examine all relevant Customer Sites, the Customer-Side Equipment and the Customer's contracts with third parties and will then prepare the Project Plan in co-operation with the Customer. The Project Plan will list any Assets to be transferred to Supplier in accordance with part B of this Schedule and any Assumed Contracts to be transferred in accordance with clause 3.

3. IMPLEMENTATION

The Supplier and the Customer shall co-operate in implementing the Managed Services in accordance with the implementation provisions of the Project Plan.

4. ROLLOUT

The Supplier and the Customer shall co-operate in rolling out the Managed Service in accordance with the roll-out provisions of the Project Plan.

PART B – ASSET TRANSFER

In consideration of the sum of one pound (receipt of which is, as of the Effective Date, acknowledged) Customer agrees that:

1. CUSTOMER-SIDE EQUIPMENT

If the Project Plan identifies any Customer-Side Equipment then Customer will, as from the Acceptance Date transfer that Customer-Side Equipment, with full title guarantee.

2. THIRD PARTY SOFTWARE

If the Project Plan identifies any Third Party Software then Customer will, in accordance with the Project Plan either:

- (a) arrange for the novation of its licences to such Third Party Software from itself to the Supplier, such novations to be effective as of the Acceptance Date; or
- (b) terminate its own licences to such Third Party Software and assist Supplier in obtaining, as from the Acceptance Date, licences directly from the licensor on similar terms

3. CUSTOMER SOFTWARE

If the Project Plan identifies any Customer Software then Customer will, as from the Acceptance Date, grant Supplier a royalty-free licence to use such Customer Software for the purpose of providing the Managed Service for the duration of this agreement.

4. INTELLECTUAL PROPERTY

If the Project Plan identifies any Intellectual Property (aside from the Third Party Software and the Customer Software) which is needed by Supplier in order to provide the Managed Service then Customer will, as from the Acceptance Date, but in accordance with the Project Plan:

- (a) arrange for the novation of its licences to such Intellectual Property from itself to the Supplier, such novations to be effective as of the Acceptance Date; or
- (b) terminate its own licences to such Intellectual Property and assist Supplier in obtaining, as from the Acceptance Date, licences directly from the licensor on similar terms; or

- (c) grant Supplier a royalty-free licence to use such Intellectual Property for the purpose of providing the Managed Service for the duration of this agreement.

5. NO WARRANTY

Any transfer (whether by way of sale, licence or sub-licence) of Assets made by Customer to Supplier under this section is made on an “as is” basis. Customer excludes all representations (unless fraudulent), warranties and conditions and other contractual terms howsoever arising (whether by statute, common law or otherwise) (except that the items are free from encumbrances) to the maximum extent permitted by law in relation to those Assets.

Schedule 4 Managed Service Specification

[INSERT SERVICE DESCRIPTION. *Could* include the following:]

1. INSTALLATION AND CONFIGURATION

[The Supplier shall procure, install and configure equipment for use to provide the Managed Service. This includes the rack mounting of servers and related equipment, installation of system and database software components, configuration of clustering and cross-connects, installation of the Software, and loading of initial Customer Data.]

2. INTERNET CONNECTIVITY

2.1 [The Supplier shall provide internet connectivity to the Customer. The connectivity shall include multiple, diversely routed high-speed connections, a firewall for security and a load balancer for traffic management and speed optimisation.

2.2 The Supplier shall supply burstable bandwidth connectivity services. The connectivity shall include multiple connections and a network operations centre that monitors servers, the network platform and internet access.]

3. SECURITY SERVICES

[The Supplier shall provide security services as follows:

- (a) access to a dedicated hosting facility (the “Supplier Facility”) shall be limited to the authorised Supplier and contracted third-party personnel;
- (b) the Supplier Facility shall be monitored 24 hours a day, seven days a week through closed circuit video surveillance and shall require identification for access; and
- (c) data access security shall be provided through managed firewall services with security on all web pages, a private network path for administration and SNMP monitoring, and fully hardened servers.]

4. MONITORING SERVICES

[The Supplier shall provide, 24 hours a day and seven days a week, monitoring of the computing, operating and networking infrastructure to detect and correct abnormalities. This includes environmental monitoring, network monitoring, load-balancing monitoring, web server and database monitoring, firewall monitoring, and intrusion detection.]

5. BACK-UP, ARCHIVING AND RECOVERY SERVICES

[The Supplier shall develop the back-up schedule, perform scheduled back-ups, provide routine and emergency data recovery, and manage the archiving process. The back-up schedule shall include at least weekly full back-ups and daily incremental back-ups. In the event of data loss, the Supplier shall provide recovery services to try to restore the most recent back-up.]

6. RELEASE MANAGEMENT AND CHANGE CONTROL

[The Supplier shall provide release management and change control services to ensure that versions of servers, network devices, storage, operating system software and utility and application software are audited and logged, and that new releases, patch releases and other new versions are implemented as deemed necessary by the Supplier to maintain the Managed Service].

7. ADMINISTRATION SERVICES

[These services include the installation and administration of additional hardware, operating system and other software, and other resources as necessary to maintain the Managed Services].

Schedule 5 Maintenance and Support

1. TRAINING

The Supplier shall provide training to such number of the employees of the Customer as are specified in, and are otherwise in accordance with, the Project Plan.

2. MAINTENANCE EVENTS

2.1 Maintenance work that may require interruption of the Managed Service (**Maintenance Events**) shall not normally be performed during Normal Business Hours. The Supplier may interrupt the Managed Service outside Normal Business Hours for maintenance provided that it has given the Customer at least [three] days' advance written notice.

2.2 Any Maintenance Events which occurs during Normal Business Hours, or which occur with less notice than required by paragraph 2.1 above, and which were not requested by the Customer, shall be considered downtime for the purpose of service availability measurement. The Supplier shall at all times endeavour to keep any service interruptions to a minimum.

3. TECHNICAL SUPPORT SERVICES

3.1 Should the Customer determine that the Managed Service includes a defect, the Customer support representatives in paragraph 2.3 of Schedule 2 (**CSRs**) may file error reports or support requests. The Supplier shall provide technical support services only to specified CSRs.

3.2 Supplier shall accept voicemail, e-mail and web form-based incident submittal from CSRs 24 hours a day, seven days a week. The Supplier shall accept telephone calls for English language telephone support [during Normal Business Hours]. The Supplier shall use reasonable endeavours to process support requests, issue trouble ticket tracking numbers if necessary, determine the source of the problem and respond to the Customer. The Supplier shall use reasonable endeavours to respond to all support requests from CSRs within the time periods specified below, according to priority.

3.3 The Supplier shall determine the priority of any fault in accordance with the following table:

Priority	Description	Response time	Target resolution time
Priority 1	The entire Managed Service is completely inaccessible. Priority 1 incidents shall be reported by telephone only.	Within two Normal Business Hours.	Four Normal Business Hours. Continuous effort after initial response and with Customer co-operation.
Priority 2	Operation of the Managed Services is severely degraded, or major components of the Managed Service are not operational and work cannot reasonably continue. Priority 2 incidents shall be reported by telephone only.	Within four Normal Business Hours.	Within two Business Days after initial response.
Priority 3	Certain non-essential features of the Service are impaired while most major components of the Service remain functional.	Within 12 Normal Business Hours.	Within seven Business Days after initial response.
Priority 4	Errors that are, non disabling or cosmetic and clearly have little or no impact on the normal operation of the Services.	Within 24 Normal Business Hours.	When reasonably possible

3.4 If no progress has been made on a Priority 1 or Priority 2 incident within the Target Resolution Time, the incident shall be escalated to [POSITION]. If the incident is not resolved, then after each successive increment of the Target Resolution Time the incident shall be escalated to the [POSITION], followed by [POSITION], followed by the [President **OR** CEO].

- 3.5 [The Supplier shall provide monitoring of its Managed Service as described in Schedule 4 24 hours a day seven days a week.]
- 3.6 The Customer shall provide front-line support to other Managed Service users who are not the designated CSRs. However, the Customer's designated CSRs may contact Supplier Technical Support in order to report problems that the Customer's designated CSRs cannot resolve themselves after they have performed a reasonable level of diagnosis.

Schedule 6 Service Level Arrangements

1. SERVICE AVAILABILITY

- 1.1 The Supplier shall provide at least a [99.5%] uptime service availability level (**Uptime Service Level**).
- 1.2 The Managed Service will be considered as unavailable only:
- (a) during periods of Priority 1 or Priority 2 faults in accordance with paragraph 3.3 of Schedule 5; and
 - (b) during periods of unplanned Maintenance in accordance with 2.2 of Schedule 5;
- 1.3 For the avoidance of doubt the Managed Service will not be considered as “unavailable” during Maintenance Events as described in Schedule 5, Customer-caused outages or disruptions, or outages or disruptions attributable in whole or in part to force majeure events within the meaning of clause 18.

2. SERVICE CREDITS

- 2.1 If availability falls below the Uptime Service Level (as defined in paragraph 1 above) in a given calendar month (**Service Delivery Failure**), the Supplier shall credit the Customer's account by an amount calculated as the product of the total cumulative downtime (expressed as a proportion of the total possible uptime minutes in the month concerned) and the total monthly Fees owed for that month (**Service Credit**).
- 2.2 A Service Credit shall not be payable unless the Customer requests it within 40 Business Days of the end of the calendar month in respect of which the Uptime Service Level was not met. The maximum Service Credit allowable in a given month is limited to [20%] of the total monthly Fee payable for that month.
- 2.3 The Customer acknowledges and agrees that the terms of this Schedule 6 relating to service credits do not operate by way of penalty and constitute a genuine attempt to pre-estimate loss.

Schedule 7 Benchmarking

1. INTERPRETATION

- 1.1 The definitions and rules of interpretation in this paragraph apply in this Schedule.

Benchmarked Services: the Managed Service taken as a whole.

Benchmarker: the independent third party appointed by the Customer following discussions with the Supplier under paragraph 3 of this Schedule 7.

Comparison Sample: a sample of organisations providing Equivalent Services identified in accordance with paragraph 4.8 of this Schedule 7.

Equivalent Services: services that are identical, or similar in all material respects, to the Benchmarked Services (including in terms of scope, specification, volume and quality of performance) that are generally available within the UK and are supplied to a customer similar in size to the Customer over a similar period.

Median Price: in relation to the Equivalent Services provided by a Comparison Sample, the median price of the relevant services over the previous 12-month period. In the event that there are an even numbered number of organisations in the Comparison Sample then the Median Price will be the arithmetic mean of the middle two prices.

- 1.2 The Benchmarked Services as a whole shall be “**Good Value**” if the Fees attributable to the Benchmarked Services are, having regard to the Service Level Arrangement, less than or equal to [10%] more than the Median Price for Equivalent Services provided by a Comparison Sample

2. PURPOSE AND SCOPE OF BENCHMARK REVIEW

- 2.1 The purpose of the Benchmark Review shall be to establish whether the Benchmarked Services as a whole are Good Value.

3. APPOINTMENT OF BENCHMARKER

- 3.1 Each Benchmark Review shall be performed by an independent third party appointed by agreement between the parties. [If the parties cannot agree on the independent third party within [NUMBER] Business Days of receipt by the Supplier of the Customer's written request, then the Benchmarker shall be [INSERT CONSULTANTS].
- 3.2 The Supplier has the right at any time to require the Benchmarker to enter into an appropriate and reasonable confidentiality undertaking directly with it.

- 3.3 Each party shall bear its own costs relating to a Benchmark Review, save that the costs and expenses of the Benchmarker shall be shared equally by the parties.
- 3.4 The Benchmarker shall conduct the Benchmark Review by applying the following general principles and criteria:
- (a) benchmarking shall be carried out in an independent and objective manner;
 - (b) the Benchmarker shall be jointly instructed by the parties;
 - (c) benchmarking shall be truly comparative in respect of the technology, services and service levels;
 - (d) benchmarking shall be structured and undertaken in a way that causes the minimum disruption possible; and
 - (e) immediately following selection of the Benchmarker, the parties and the Benchmarker shall agree the general principles and method of benchmarking.
- 3.5 The Supplier shall not be deemed to be in breach for any failure to perform any obligation under this agreement (nor will it be liable for Service Credits) where such failure results from any disruption to the Supplier's performance as a result of disruption caused by the Benchmarker.

4. BENCHMARKING PROCESS

- 4.1 The Customer's instructions to the Benchmarker shall require the Benchmarker to produce, and to send to each party for approval, a draft plan for the Benchmark Review within [NUMBER] Business Days after the date of appointment of the Benchmarker. The plan shall include:
- (a) a proposed timetable for the Benchmark Review (including for delivery of the Benchmarking Report);
 - (b) a description of the information that the Benchmarker requires each party to provide;
 - (c) a description of the benchmarking methodology to be used; and
 - (d) details of any organisations providing Equivalent Services which the Customer proposes, having consulted with the Supplier (and including any organisations providing Equivalent Services reasonably proposed by the Supplier), are included within the Comparison Sample.
- 4.2 In carrying out the benchmarking analysis, the Benchmarker shall have regard to the following matters when performing a comparative assessment of the Benchmarked Services:
- (a) the contractual and business environment under which the Equivalent Services are being provided;

- (b) any front-end investment and development costs;
 - (c) the Supplier's risk profile, including the financial, performance or liability risk (including any limitation or exclusion or limitation of the Supplier's liability under this agreement) associated with the provision of the Equivalent Services as a whole; and
 - (d) any other factors reasonably identified by the Supplier which, if not taken into consideration, could unfairly cause the Supplier's pricing to appear non-competitive.
- 4.3 Each party shall give notice in writing to the Benchmarker and to the other party within [NUMBER] Business Days after receiving the draft plan, advising whether it approves the draft plan or, if it does not approve the draft plan, suggesting amendments to that plan. Neither party may unreasonably withhold its approval of the draft plan and any suggested amendments shall be reasonable.
- 4.4 Where a party suggests amendments to the draft plan under paragraph 4.3, the Benchmarker shall, if it believes the amendments are reasonable, produce an amended draft plan. Paragraph 4.2 shall apply to any amended draft plan. If the Benchmarker believes that the suggested amendments are not reasonable then the Benchmarker shall discuss the amendments with the parties to reach a resolution. If the parties are unable to agree a resolution within [NUMBER] Business Days of the matter first being referred to each of them by the Benchmarker for discussion, then such matter shall be resolved in accordance with the Dispute Resolution Procedure.
- 4.5 Failure by a party to give notice under paragraph 4.3 shall be treated as approval of the draft plan by that party.
- 4.6 Once the plan is approved by both parties, the Benchmarker shall carry out the Benchmark Review in accordance with it. Each party shall, to the extent it is not precluded from doing so by confidentiality obligations owed to third parties, provide the information described in the plan, together with any additional information reasonably required by the Benchmarker.
- 4.7 The Benchmarker shall share with the parties, in an even-handed manner, all data relating to the Benchmarking and the Benchmarking Report to the extent that it is lawfully able to do so.
- 4.8 The selection of the Comparison Sample (both in terms of number and identity of entities) shall be a matter for the Benchmarker's professional judgement, but such sample shall not include entities providing Equivalent Services in off-shore jurisdictions if, and to the extent that, the Supplier is not itself providing the Benchmarked Service off-shore.

- 4.9 In conducting the Benchmark Review, the Benchmarker shall apply correction factors to the information to take account of reasons for difference in accordance with his professional judgement. Such normalisation information shall be available for approval by the parties prior to the production of the Benchmarking Report.
- 4.10 The Benchmarker shall perform the Benchmark Review in a fully transparent and open manner and shall promptly provide the Customer and the Supplier with full details of all data and methodologies employed at all stages of the Benchmark Review.

5. BENCHMARK REPORT

- 5.1 The Benchmarker shall prepare a Benchmark Report setting out its findings. Those findings shall:
- (a) include a finding as to whether or not the Benchmarked Services as a whole are Good Value;
 - (b) include other findings regarding the quality and competitiveness or otherwise of the Services; and
 - (c) if the Benchmarked Services as a whole are not Good Value, specify the changes that would be required to the Services, and in particular to the Fees, that would be required to make the Benchmarked Services Good Value.
- 5.2 If the Benchmarking Report states that the Services, Charges or Service Levels (or any part of them) that are benchmarked are not Good Value then clause 10.3 shall apply.

Signed by [NAME OF DIRECTOR]
for and on behalf of [NAME OF Director
SUPPLIER]

Signed by [NAME OF DIRECTOR]
for and on behalf of [NAME OF Director
CUSTOMER]

This document was prepared for a Kemp Little seminar and does not constitute legal advice.