

This Agreement is dated the                      day of                      2020

## SCHEDULE 1 - STANDARD TERMS OF BUSINESS

### 1. INTRODUCTION

- 1.1 These Standard Terms set out the terms of business of Breakwater which apply to any contract for the supply of goods or services by Breakwater, unless otherwise agreed in writing by it.
- 1.2 This Agreement shall come in to force when the Customer clicks “Accept Order”, on the Order Form, following digital signature of the same.

### 2. INTERPRETATION

- 2.1 In these Standard Terms, the following definitions apply:

<b>Agreement</b>	the Order Form, these Standard Terms, Service Level Agreement, Service Contract and Specification (and in the event of discrepancy between any of the aforementioned documents, they shall have priority in the order they are listed);
<b>Applicable Laws</b>	all laws, rules and regulations (including, without limitation, Data Protection Legislation and laws relating to the provision of voice-over IP ( <b>VOIP</b> ) services) and all codes of conduct, decisions, directions or recommendations issued by Ofcom and/or Phone-paid Services Authority and/or any other competent regulatory body (including in relation to VOIP services) as amended from time to time;
<b>Business Day</b>	a day (other than a Saturday, Sunday or public holiday) when banks in London are open for business;
<b>Charges</b>	the charges payable by the Customer for the supply of the Services in accordance with clause 6;
<b>Commencement Date</b>	the date stated as such in the Service Contract from which date Breakwater will commence the provision of the Services;
<b>Core Hours of Service</b>	Monday to Friday 0800–1800 UK local time (excluding

UK Public Holidays);

<b>Customer</b>	the person, firm or company who purchases the Services from Breakwater;
<b>Data Centre</b>	any data centre facility used by Breakwater from time to time;
<b>Data Protection Legislation</b>	(i) unless and until the GDPR is no longer directly applicable in the UK, the General Data Protection Regulation (IEU) 2016/679) and any national implementing laws, regulations and secondary legislation, as amended or updated from time to time, in the UK and then (ii) any successor legislation to the GDPR or the Data Protection Act 1998;
<b>Deliverables</b>	any product and material produced or developed by Breakwater for the Customer in any media, including without limitation computer programmes, data diagrams, reports and specifications (including drafts);
<b>Dispute</b>	any dispute between the parties arising under or in connection with this Agreement;
<b>Employment Costs</b>	all salaries, wages, commissions, bonuses, all statutory contributions, holiday pay, national insurance contributions, pension contributions, taxation and all other employment costs;
<b>Equipment</b>	the equipment agreed to be purchased by the Customer from Breakwater (including without limitation any part of it);
<b>Intellectual Property Rights</b>	all patents, rights to inventions, utility models, copyright and related rights, trade marks, service marks, trade, business and domain names, rights in trade dress or get-up, rights in goodwill or to sue for passing off, unfair competition rights, rights in designs, rights in computer software, database rights, topography rights, moral rights, rights in confidential information (including know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered and including all applications for and renewals or extensions of such rights, and all similar or

equivalent rights or forms of protection in any part of the world;

<b>Liabilities</b>	all claims or proceedings made or brought or threatened against Breakwater by any person and all losses, liabilities or costs (on a full indemnity basis), damages and expenses Breakwater does or will incur or suffer as a result of defending or settling any such actual or threatened claims or proceedings;
<b>Losses</b>	all losses (including direct, indirect and consequential losses), liabilities, costs, damages, professional costs and expenses that Breakwater does or will incur or suffer;
<b>Malicious Software or Codes</b>	any time-bomb worm, Trojan Horse, protect code, data destruct code or other similar or analogous codes or programmes;
<b>Non-Core Hours of Service</b>	all hours outside of Core Hours of Service;
<b>Order Form</b>	the order form provided by Breakwater to the Customer;
<b>Previous Service Provider</b>	any supplier or provider appointed by the Customer to provide the Services or any part of them prior to Breakwater commencing provision of the Services (or any part of the Services);
<b>Rules &amp; Regulations</b>	such rules, regulations, policies and procedures relating to the Data Centre or its use as are notified by Breakwater to the Customer from time to time and include any charges payable by the Customer pursuant to the same;
<b>Service Contract</b>	any contract between Breakwater and the Customer for the supply of Services which shall be effective when signed by both parties;
<b>Service Level Agreement</b>	the service level agreement provided to the Customer, where relevant;
<b>Services</b>	the services, including the Deliverables, supplied by Breakwater to the Customer as set out in the

Specification;

**Specification** the description or specification for the Services agreed by Breakwater from time to time;

**Standard Terms** these standard terms of business as amended from time to time in accordance with clause 17.9;

**Supplier** a third party supplier of Breakwater from time to time;

**TUPE** The Transfer of Undertakings (Protection of Employment) Regulations 2006.

2.2 In these Standard Terms, the following rules of interpretation apply:

2.2.1 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).

2.2.2 A reference to a party includes its personal representatives, successors or permitted assigns.

2.2.3 A reference to a statute or statutory provision is a reference to such statute or provision as amended or re-enacted. A reference to a statute or statutory provision includes any subordinate legislation made under that statute or statutory provision, as amended or re-enacted.

2.2.4 Any phrase introduced by the terms **including, include, in particular** or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms.

2.2.5 A reference to **writing** or **written** includes faxes and e-mails.

2.2.6 Any obligation to do or not to do something shall include an obligation to procure that it be done or not done.

### 3. **BASIS OF CONTRACT**

3.1 Services shall be supplied by Breakwater and purchased by the Customer on the terms of the Agreement.

3.2 Any samples, drawings, descriptive matter or advertising issued by Breakwater, and any descriptions or illustrations contained in the catalogues or brochures of Breakwater, are issued or published for the sole purpose of giving an approximate idea of the Services described in them. They shall not form part of this Agreement or have any contractual force.

3.3 These Standard Terms apply to the Agreement to the exclusion of, and shall prevail over, any other terms that the Customer seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing. No addition to, variation of, exclusion or attempted exclusion of any terms of the Agreement shall be binding on Breakwater unless in writing and signed by a duly authorised representative of Breakwater, or otherwise in accordance with clause 17.9.

3.4 Any quotation given by Breakwater shall not constitute an offer, and is only valid on the date that it is issued, unless expressly stated otherwise by Breakwater in writing on the quotation.

#### 4. **SUPPLY OF SERVICES**

4.1 Breakwater shall supply the Services to the Customer in accordance with the Specification and any express terms set out in the Agreement in all material respects.

4.2 Breakwater shall use reasonable endeavours to meet any performance dates specified in the Service Level Agreement, but any such dates shall be estimates only and time shall not be of the essence for performance of the Services.

4.3 Breakwater shall have the right to make any changes to the Services which are necessary to comply with any applicable law or safety requirement, or which do not materially affect the nature or quality of the Services, and Breakwater shall notify the Customer in any such event.

4.4 Breakwater warrants to the Customer that the Services will be provided using reasonable care and skill.

4.5 Breakwater does not warrant or undertake that the Services will cause the Equipment to operate, or that the Services will be available, without fault or interruption.

4.6 Breakwater may sub-contract performance of any of the Services (or part thereof) to any third party.

4.7 Without prejudice to any other provision of the Agreement, the terms on which Breakwater will supply any third party goods or services to the Customer shall be on terms that are no more onerous than the terms on which the third party supplies the goods or services to Breakwater.

4.8 A statement by Breakwater that a particular provision of the Agreement applies in any circumstance shall, in the absence of manifest error or fraud, be binding on the Customer.

## 5. OBLIGATIONS OF THE CUSTOMER

### 5.1 The Customer shall:

- 5.1.1 ensure that the terms of the Agreement and any information it provides in the Specification are complete and accurate;
- 5.1.2 co-operate with Breakwater in all matters relating to the Services;
- 5.1.3 provide Breakwater, its employees, agents, consultants and subcontractors, with access to the premises of the Customer, office accommodation and other facilities as reasonably required by Breakwater;
- 5.1.4 provide Breakwater with such information and materials as Breakwater may reasonably require in order to supply the Services, and ensure that such information is accurate in all material respects;
- 5.1.5 prepare the premises of the Customer for the supply of the Services;
- 5.1.6 obtain and maintain all necessary licences, permissions and consents which may be required before the date on which the Services are to start;
- 5.1.7 keep and maintain all materials, equipment, documents and other property of Breakwater (**Breakwater Materials**) at the premises of the Customer in safe custody at its own risk, maintain Breakwater Materials in good condition until returned to Breakwater, and not dispose of or use Breakwater Materials other than in accordance with the written instructions or authorisation of Breakwater;
- 5.1.8 comply with the requirements of Breakwater's technical and installation standards and any applicable Rules and Regulations;
- 5.1.9 unless otherwise expressly agreed by Breakwater in the Service Contract, be exclusively responsible for maintaining regular backup copies of its data to ensure recovery of its data;
- 5.1.10 permit Breakwater to publicise its involvement with the Customer in relation to Services with the Customer's prior consent, such consent not to be unreasonably withheld or delayed;
- 5.1.11 provide an agreed person(s) who has good knowledge of one or more components of the IT system who will be assigned as a **Super User** for the Customer at each designed supported site, and the Super User will be available to provide help and advice to end users and to assist

Breakwater with remote diagnostics;

- 5.1.12 provide the name(s) and contact details of the person(s) responsible for the management and support of this Agreement. This/these person(s) will be known as point of contact(s) (**POCs**) and will have the authority to be able to schedule and co-ordinate the activities of Breakwater with the staff of the Customer and sign-off any capital expenditure associated requests or for Services Request For Change (**RFC**);
- 5.1.13 ensure that the POC(s) approves any remedial work done on-site and confirm that all associated systems have been left in an operational state and, if applicable, the issue has been resolved. The Customer acknowledges that failure to adhere to this will automatically approve any remedial work carried out;
- 5.1.14 provide name and contact details (separate telephone numbers) of two off-site contacts that can be contacted by Breakwater in an emergency, out of normal business hours;
- 5.1.15 will also provide the name and contact details (two separate telephone numbers) of all remote workers who fall under the supportable site(s);
- 5.1.16 provide Breakwater with a contact to which issues can be escalated to with the assurance from the Customer that the issues will be promptly reviewed and dealt with;
- 5.1.17 inform Breakwater of any request to change its current IT systems and follow the change control procedure (which is available on request by the Customer);
- 5.1.18 if deemed necessary by Breakwater, the Customer will allow Breakwater to place asset tags on its IT equipment;
- 5.1.19 purchase replacement equipment upon failure of any specific piece of IT equipment that is irreparable or not protected under any active hardware warranty cover and Breakwater reserves the right to vary the terms of Service if the Customer fails to do so;
- 5.1.20 not add any hardware or software to their IT systems without providing advance notice to Breakwater;
- 5.1.21 take all reasonable steps to ensure unauthorised access is not gained to their IT systems;
- 5.1.22 at the end of normal business hours (unless stated otherwise by

Breakwater), ensure that each Customer staff member will ensure that their individual PC is either shutdown, logged off or a password protected screensaver is in operation unless advised by Breakwater to the contrary;

- 5.1.23 ensure that all staff of the Customer adhere to an IT policy which has been agreed by Breakwater;
- 5.1.24 ensure that it maintains and complies with any licenses, consents or permissions in respect of all software distributed by or used within the Customer's business and Breakwater will be entitled to refuse any request to uninstall any non-licensed illegal software and will be under no obligation to support any un-licensed or illegal software;
- 5.1.25 exercise due care and skill in respect of its IT system and in particular will keep this equipment in suitable premises and under suitable conditions as recommended by the manufacturer or Breakwater from time to time.
- 5.1.26 ensure that its computer systems meet, and continue to meet, such minimum requirements as required by Breakwater and/or the relevant equipment manufacturers from time to time (such minimum requirements available from Breakwater on request);
- 5.1.27 allow Breakwater to access the Customer's IT system via a remote access and shall allow Breakwater's technical support agents to create, as necessary or desirable, systems administration accounts on the Customer's computers and the Customer shall keep those accounts active and unchanged as required for Breakwater to perform to the Services and shall give permission for Breakwater's technical support staff to remotely access and monitor the Customer's IT systems and network for the purposes of fault diagnosis and resolution;
- 5.1.28 provide Breakwater with such access to the Customer's premises as Breakwater may reasonably require to carry out its obligations under the Agreement;
- 5.1.29 provide Breakwater with such facilities at the Customer's premises as Breakwater may require to discharge its obligations (including, but not limited to, adequate workspace, use of telephone and facsimile machines, storage, electrical supplies, environmental conditions, cabling, office furniture and equipment);
- 5.1.30 carry out all necessary precautions to protect the health and safety of Breakwater's staff whilst on the Customer's premises;



- 5.1.31 provide Breakwater with access to the Customer's IT system and supply Breakwater with any documentation and other information necessary or desirable for Breakwater to diagnose any fault in the equipment;
  - 5.1.32 comply at all times with the Breakwater IT Acceptable Use Policy (as varied from time to time) available at <http://www.breakwaterit.co.uk/terms;>
  - 5.1.33 knowingly create or introduce, or allow to be introduced, any Malicious Software or Codes or other destructive or contaminating programs; and
  - 5.1.34 ensure that all remote devices used by the Customer are capable of automatically updating their anti-virus and anti-spyware solutions independently of any centrally managed solution.
- 5.2 If the performance of Breakwater of any of its obligations under the Agreement is prevented or delayed by any act or omission by the, Customer or Supplier, or failure by the Customer or Supplier to perform any relevant obligation (**Default**):
- 5.2.1 Breakwater shall without limiting its other rights or remedies have the right to suspend performance of the Services until the Customer or Supplier remedies the Default, and to rely on the Default to relieve it from the performance of any of its obligations to the extent the Default prevents or delays the performance of Breakwater of any of its obligations;
  - 5.2.2 Breakwater shall not be liable for any costs (including without limitation, any Employment Costs), expenses, liabilities, injuries, direct, indirect and consequential loss, damages, claims, demands, proceedings and professional costs and expenses sustained or incurred by the Customer arising directly or indirectly from the failure or delay of Breakwater to perform any of its obligations as set out in this clause 5.2; and
  - 5.2.3 the Customer shall reimburse Breakwater on written demand for any costs (including without limitation, any Employment Costs), expenses, liabilities, injuries, direct, indirect and consequential loss, damages, claims, demands, proceedings and professional costs and expenses sustained or incurred by Breakwater arising directly or indirectly from any Default caused by any act or omission of the Customer.
6. **CHARGES AND PAYMENT**
- 6.1 The Charges for the Services shall be on the basis set out in the respective Service Contract or, if not, within the scope provided for on a time and materials basis in accordance with the following terms:
- 6.1.1 the Charges shall be calculated in accordance with the standard daily fee

rates of Breakwater;

- 6.1.2 the standard daily fee rates of Breakwater for each individual are calculated on the basis of an eight hour day worked on Business Days during Core Hours of Service;
  - 6.1.3 Breakwater shall be entitled to charge an overtime rate, at the rate specified by Breakwater from time to time, of the standard daily fee rate on a pro-rata basis for each part day or for any time worked by individuals whom it engages on the Services during Non-Core hours of Service; and
  - 6.1.4 Breakwater shall be entitled to charge the Customer for any expenses reasonably incurred by the individuals whom Breakwater engages in connection with the Services including, but not limited to, travelling expenses, hotel costs, subsistence and any associated expenses, and for the cost of services provided by third parties and required by Breakwater for the performance of the Services, and for the cost of any materials.
- 6.2 Breakwater reserves the right at any time to increase its standard daily fee rates. Breakwater will give the Customer written notice of any such increase before the proposed date of the increase. If such increase is not acceptable to the Customer, it shall notify Breakwater in writing within two weeks of the date of the notice provided by Breakwater and Breakwater shall have the right without limiting its other rights or remedies to terminate the Agreement by giving four (4) weeks' written notice to the Customer.
- 6.3 The Customer, as agreed between the parties, shall pay the Charges either:
- 6.3.1 on receipt of a valid invoice pursuant to clauses 6.4 and 6.5; or
  - 6.3.2 by direct debit in pursuant to clause 6.6.
- 6.4 Breakwater shall invoice the Customer as provided for in the Agreement or if not provided for either monthly or on completion of the Services at Breakwater's option.
- 6.5 The Customer shall pay each invoice submitted by Breakwater:
- 6.5.1 within thirty (30) days of the date of the invoice; and
  - 6.5.2 in full and in cleared funds to a bank account nominated in writing by Breakwater from time to time.
- 6.6 The Customer shall pay to Breakwater the Charges monthly, in advance and by direct debit to a bank account nominated in writing by Breakwater from time to time.

- 6.7 Time for payment shall be of the essence.
- 6.8 All amounts payable by the Customer under the Agreement are exclusive of amounts in respect of value added tax, or any equivalent or replacement tax, chargeable for the time being (**VAT**). Where any taxable supply for VAT purposes is made under the Agreement by Breakwater to the Customer, the Customer shall, on receipt of a valid VAT invoice from Breakwater, pay to Breakwater such additional amounts in respect of VAT as are chargeable on the supply of the Services at the same time as payment is due for the supply of the Services.
- 6.9 Without limiting any other right or remedy of Breakwater, if the Customer fails to make any payment due to Breakwater under the Agreement by the due date for payment (**Due Date**), Breakwater shall have the right to charge interest on the overdue amount at the rate of 5% per annum above the then current base rate of NatWest Bank plc accruing on a daily basis from the Due Date until the date of actual payment of the overdue amount, whether before or after judgment, and compounding quarterly.
- 6.10 The Customer shall pay all amounts due under the Agreement in full without any deduction or withholding except as required by law and the Customer shall not be entitled to assert any credit, set-off or counterclaim against Breakwater in order to justify withholding payment of any such amount in whole or in part. Breakwater may, without limiting its other rights or remedies, set off any amount owing to it by the Customer against any amount payable by Breakwater to the Customer.
- 6.11 If any sums due to be paid by the Customer to Breakwater remain outstanding for a period of more than 14 days beyond the Due Date, Breakwater may without limiting its other rights or remedies:
- 6.11.1 suspend all the provision of all Services, during which time all Charges and interest shall continue to accrue; or
  - 6.11.2 terminate the Agreement with immediate effect by giving written notice to the Customer.

## 7. DATA PROTECTION

- 7.1 Both parties will comply with all applicable requirements of the Data Protection Legislation. This clause 7 is in addition to, and does not relieve, remove or replace, a party's obligations under the Data Protection Legislation.
- 7.2 The parties acknowledge that for the purposes of the Data Protection Legislation, the Customer is the data controller and Breakwater is the data processor (where **Data Controller** and **Data Processor** have the meanings as defined in the Data Protection Legislation). The Order Form will, where appropriate, set out the scope, nature and

purpose of processing by Breakwater, the duration of the processing and the types of personal data and categories of Data Subject (where Personal Data and Data Subject have the meanings defined in the Data Protection Legislation).

- 7.3 Without prejudice to the generality of clause 7.1, the Customer will ensure that it has all necessary appropriate consents and notices in place to enable lawful transfer of the Personal Data to Breakwater for the duration and purposes of this Agreement.
- 7.4 Without prejudice to the generality of clause 7.1, Breakwater shall, in relation to any Personal Data processed in connection with the performance by Breakwater of its obligations under this Agreement:
- 7.4.1 process that Personal Data only on the written instructions of the Customer unless Breakwater is required by the laws of any member of the European Union or by the laws of the European Union applicable to Breakwater to process Personal Data (**Applicable Laws**). Where Breakwater is relying on laws of a member of the European Union or European Union law as the basis for processing Personal Data, Breakwater shall promptly notify the Customer of this before performing the processing required by the Applicable Laws unless those Applicable Laws prohibit Breakwater from so notifying the Customer;
  - 7.4.2 ensure that it has in place appropriate technical and organisational measures, reviewed and approved by the Customer, to protect against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data, appropriate to the harm that might result from the unauthorised or unlawful processing or accidental loss, destruction or damage and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any measures (those measures may include, where appropriate, pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of its systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the technical and organisational measures adopted by it);
  - 7.4.3 ensure that all personnel who have access to and/or process Personal Data are obliged to keep the Personal Data confidential; and
  - 7.4.4 not transfer any Personal Data outside of the European Economic Area unless the prior written consent of the Customer has been obtained and the following conditions are fulfilled:

- 7.4.4.1 the Customer or Breakwater has provided appropriate safeguards in relation to the transfer;
- 7.4.4.2 the data subject has enforceable rights and effective legal remedies;
- 7.4.4.3 Breakwater complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred; and
- 7.4.4.4 Breakwater complies with reasonable instructions notified to it in advance by the Customer with respect to the processing of the Personal Data;
- 7.4.5 assist the Customer, at the Customer's cost, in responding to any request from a Data Subject and in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;
- 7.4.6 notify the Customer without undue delay on becoming aware of a Personal Data breach;
- 7.4.7 at the written direction of the Customer, delete or return Personal Data and copies thereof to the Customer on termination of the Agreement unless required by Applicable Law to store the Personal Data; and
- 7.4.8 maintain complete and accurate records and information to demonstrate its compliance with this clause 7 and allow for audits by the Customer or the Customer's designated auditor.
- 7.5 The Customer shall not unreasonably withhold or delay its consent to Breakwater appointing third party processors of Personal Data under this Agreement. As between the Customer and Breakwater, Breakwater shall remain fully liable for all acts or omissions of any third party processor appointed by it pursuant to this clause 7.
- 7.6 Breakwater, at any time on not less than thirty (30) days' notice, revise this clause 7 by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when replaced by attachment to this Agreement).
- 8. **INTELLECTUAL PROPERTY RIGHTS**
- 8.1 All Intellectual Property Rights in or arising out of or in connection with the Services shall be owned by Breakwater. Subject to the Customer's compliance with the terms

and conditions of this Agreement, Breakwater will grant to the Customer a royalty-free, non-exclusive, non-transferable licence to use such Intellectual Property Rights owned by it internally as required to make use of the Services in the United Kingdom or such other jurisdiction as agreed in writing between the parties.

- 8.2 The Customer acknowledges that, in respect of any third party Intellectual Property Rights, the use by the Customer of any such Intellectual Property Rights is conditional on Breakwater obtaining a written licence from the relevant licensor on such terms as will entitle Breakwater to license such rights to the Customer.

## 9. **CONFIDENTIALITY**

- 9.1 For the purposes of the Agreement, **Confidential Information** shall mean any information (whether disclosed or oral, written or electronic form) belonging or relating to a party's business affairs or activities and which: (i) has been kept as confidential, (ii) has been identified orally or in writing as being of a confidential nature, and/or (iii) may reasonably be supposed to be confidential in the circumstances.

- 9.2 Each party undertakes that it shall treat as confidential all Confidential Information of the other party and it will not, without the prior written consent of the other party, use, disclose, copy or modify the other party's Confidential Information (or permit others to do so) other than is necessary for the performance of its rights and obligations under the Agreement. Each party agrees that it shall treat the other's Confidential Information with the same or greater degree of care as it employs with regard to its own Confidential Information of a like nature and in any event in accordance with best current commercial security practices, disclosing such Confidential Information only to those of its employees, consultants and bona fide professional advisers who need to have such information for the purposes of the Agreement and ensuring that such employees, consultants and professional advisers are aware of and shall comply with the confidentiality obligations as are set out in this clause 9.

- 9.3 The provisions of clause 9.2 shall not apply to:

- 9.3.1 any information in the public domain otherwise than by breach of the Agreement;
- 9.3.2 information lawfully in the possession of the receiving party thereof before disclosure by the disclosing party and not subject to any obligations of confidentiality of a third party;
- 9.3.3 information lawfully disclosed to the other party without obligations of a confidentiality by a third party; and/or
- 9.3.4 information required to be disclosed by a court of competent jurisdiction,

governmental body or applicable regulatory authority.

- 9.4 Either party may publicise its involvement with the other party with that other party's prior written consent.
- 9.5 If the Agreement is terminated, each party shall, at the other party's option, return or destroy all Confidential Information of the other party.
- 9.6 Provisions of clause 9 shall remain in force and effect notwithstanding termination of the Agreement.

## 10. **LIMITATION OF LIABILITY**

10.1 Nothing in the Agreement shall limit or exclude the liability of Breakwater for:

- 10.1.1 death or personal injury caused by its negligence, or the negligence of its employees, agents or subcontractors; or
- 10.1.2 fraud or fraudulent misrepresentation; or
- 10.1.3 breach of the terms implied by section 2 of the Supply of Goods and Services Act 1982 (title and quiet possession) or any other liability which cannot be limited or excluded by applicable law.

10.2 Subject to clause 10.1:

10.2.1 Breakwater shall under no circumstances whatsoever be liable to the Customer, whether in contract, tort (including negligence), for breach of statutory duty, or otherwise, arising under or in connection with this Agreement for:

- 10.2.1.1 loss of profits;
- 10.2.1.2 loss of sales or business;
- 10.2.1.3 loss of agreements or contracts;
- 10.2.1.4 loss of anticipated savings;
- 10.2.1.5 loss of or damage to goodwill;
- 10.2.1.6 loss of use or corruption of software, data or information; or
- 10.2.1.7 any indirect or consequential loss.

10.2.2 and without prejudice to clause 10.2.3, to the extent that Breakwater supplies the Customer with any third party goods or services, those goods



or services shall be supplied by Breakwater on a limited recourse basis, and accordingly, the total liability of Breakwater to the Customer in respect of all other losses arising under or in connection with the Agreement, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, caused by or arising in connection with any act or omission of any third party supplier shall in no circumstance exceed:

10.2.2.1 if there is no limit on the liability of the third party supplier, the amount actually recovered by Breakwater; or

10.2.2.2 if there is a limit on the liability of the third party supplier, an amount equivalent to the amount that the liability of the third party supplier is so limited;

10.2.3 the total liability of Breakwater to the Customer in respect of all other losses arising under or in connection with the Agreement, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, shall in no circumstances exceed the total Charges paid for the Services (under the Service Contract in question) by the Customer to Breakwater during the twelve (12) month period immediately before the cause of action first arose, or if the cause of action arose during any period before twelve (12) months had elapsed from the Commencement Date, during that shorter period.

10.3 Notwithstanding clause 10.2.1, the losses for which Breakwater assumes responsibility and which shall, subject to clause 10.2.3, be recoverable by the Customer include:

10.3.1 sums paid by the Customer to Breakwater pursuant to this Agreement, in respect of any services not provided in accordance with the terms of this Agreement;

10.3.2 reasonable wasted expenditure;

10.3.3 additional reasonable costs of procuring and implementing replacements for, or alternatives to, the Services including consultancy costs, additional costs of management time and other personnel costs and costs of equipment and materials;

10.3.4 losses incurred by the Customer arising out of or in connection with any claim, demand, fine, penalty, action, investigation or proceeding of any governmental, administrative or regulatory body against the Customer caused by the act or omission of Breakwater; and



10.3.5 anticipated savings.

10.4 The Customer shall at all time take all reasonable steps to minimise and mitigate any loss or damage for which the Customer is entitled to bring a claim under this Agreement.

10.5 Except as set out in the Agreement, all warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Agreement.

10.6 This clause 10 shall survive termination of the Agreement.

## 11. **TERMINATION**

11.1 Without limiting its other rights or remedies, either party may terminate the Agreement with immediate effect by giving written notice to the other party if:

11.1.1 the other party commits a material or persistent breach of the Service Contract and (if such a breach is remediable) fails to remedy that breach within 28 days of receipt of notice in writing of the breach;

11.1.2 the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or (being a company) is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 or (being an individual) is deemed either unable to pay its debts or as having no reasonable prospect of so doing, in either case, within the meaning of section 268 of the Insolvency Act 1986 or (being a partnership) has any partner to whom any of the foregoing apply;

11.1.3 the other party commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors other than (where a company) for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;

11.1.4 a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of that other party (being a company) other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;

11.1.5 the other party takes any step or action in connection with it applying to court for, or, obtaining a moratorium under Part A1 of the Insolvency Act

1986;

- 11.1.6 the other party (being an individual) is the subject of a bankruptcy petition order;
  - 11.1.7 a creditor or encumbrancer of the other party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of its assets and such attachment or process is not discharged within 14 days;
  - 11.1.8 an application is made to court, or an order is made, for the appointment of an administrator or if a notice of intention to appoint an administrator is given or if an administrator is appointed over the other party (being a company);
  - 11.1.9 a floating charge holder over the assets of the other party (being a company) has become entitled to appoint or has appointed an administrative receiver;
  - 11.1.10 a person becomes entitled to appoint a receiver over the assets of the other party or a receiver is appointed over the assets of the other party;
  - 11.1.11 any event occurs, or proceeding is taken, with respect to the other party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause 11.1.1 to clause 11.1.10 (inclusive);
  - 11.1.12 the other party suspends or ceases, or threatens to suspend or cease, to carry on all or a substantial part of its business;
  - 11.1.13 the other party's financial position deteriorates to such an extent that in the terminating party's opinion the other party's capability to adequately fulfil its obligations under the Agreement has been placed in jeopardy; or
  - 11.1.14 the other party (being an individual) dies or, by reason of illness or incapacity (whether mental or physical), is incapable of managing his own affairs or becomes a patient under any mental health legislation.
- 11.2 Without limiting its other rights or remedies, Breakwater may terminate the Agreement with immediate effect by giving written notice to the Customer if the Customer fails to pay any amount due under the Agreement on the Due Date.
- 11.3 Without limiting its other rights or remedies, each party shall have the right to terminate the Agreement by giving the other party three (3) months' written notice.

- 11.4 Without limiting its other rights or remedies, Breakwater shall have the right to suspend provision of the Services under the Agreement or any other contract between the Customer and Breakwater if the Customer becomes subject to any of the events listed in clause 11.1.1 to clause 11.1.14, or Breakwater reasonably believes that the Customer is about to become subject to any of them, or if the Customer fails to pay any amount due under this Service Contract on the Due Date.

## 12. **CONSEQUENCES OF TERMINATION**

- 12.1 On termination of the Agreement for any reason:

- 12.1.1 the Customer shall immediately pay to Breakwater all of the outstanding unpaid invoices and interest of Breakwater and, in respect of Services and/or Equipment supplied but for which no invoice has been submitted, Breakwater shall submit an invoice, which shall be payable by the Customer immediately on receipt;
- 12.1.2 the Customer shall return all of the Breakwater Materials and any Deliverables which have not been fully paid for. If the Customer fails to do so, then Breakwater may enter the premises of the Customer and take possession of them. Until they have been returned, the Customer shall be solely responsible for their safe keeping and will not use them for any purpose not connected with the Agreement;
- 12.1.3 the accrued rights, remedies, obligations and liabilities of the parties as at expiry or termination shall not be affected, including the right to claim damages in respect of any breach of the Agreement which existed at or before the date of termination or expiry; and
- 12.1.4 clauses which expressly or by implication have effect after termination shall continue in full force and effect.

## 13. **TITLE AND RISK IN EQUIPMENT**

- 13.1 The risk in the Equipment shall pass to the Customer on completion of delivery.
- 13.2 Title to the Equipment shall not pass to the Customer until Breakwater has received payment in full (in cash or cleared funds) for:
- 13.2.1 the Equipment; and
  - 13.2.2 any other goods or services that Breakwater has supplied to the Customer in respect of which payment has become due.
- 13.3 Until title to the Equipment has passed to the Customer, the Customer shall:

- 13.3.1 hold the Equipment on a fiduciary basis as Breakwater's bailee;
- 13.3.2 store the Equipment separately from all other goods held by the Customer so that they remain readily identifiable as Breakwater's property;
- 13.3.3 not remove, deface or obscure any identifying mark or packaging on or relating to the Equipment;
- 13.3.4 maintain the Equipment in satisfactory condition and keep them insured against all risks for their full price from the date of delivery;
- 13.3.5 notify Breakwater immediately if it becomes subject to any of the events listed in clause 11.1.2 to 11.1.12 (inclusive); and
- 13.3.6 give Breakwater such information relating to the Equipment as Breakwater may require from time to time,

but the Customer is not prevented by this clause 13.3 from reselling or using the Equipment in the ordinary course of its business.

- 13.4 If before title to the Equipment passes to the Customer the Customer becomes subject to any of the events listed in clause 11.1.2 to 11.1.12 (inclusive), or Breakwater reasonably believes that any such event is about to happen and notifies the Customer accordingly, then provided that the Equipment has not been resold, or irrevocably incorporated into another product, and without limiting any other right or remedy Breakwater may have, Breakwater may at any time require the Customer to deliver up the Equipment and, if the Customer fails to do so promptly, enter any premises of the Customer or of any third party where the Equipment is stored in order to recover them.
- 13.5 If the Customer becomes subject to any of the events listed in clauses 11.1.2 to 11.1.11 (inclusive), or Breakwater reasonably believes that the Customer is about to become subject to any of them then, without limiting any other right or remedy available to Breakwater, Breakwater may cancel or suspend all further deliveries under the Agreement or under any other contract between the Customer and Breakwater without incurring any liability whatsoever to the Customer, and all outstanding sums (including any accrued interest) in respect of Equipment delivered to the Customer shall become immediately due and payable.

#### **14. NON SOLICITATION OF PERSONNEL**

- 14.1 Without in any way restricting the right of an employee freely to accept employment or change employment the Customer shall not, during the course of the Agreement or for twelve (12) months after its termination, induce, offer employment to any person who is, or has been, engaged as an employee of Breakwater. If Customer does

induce, offer employment to or employ such an employee, then (without prejudice to any other remedy which Breakwater may have at law) the Customer shall pay to Breakwater an amount being equivalent to the employee's net annual salary; such sum being a genuine pre-estimate of the cost of the disruption that such inducement would cause to the efficient conduct of Breakwater's business.

## 15. **TUPE**

15.1 The parties agree that TUPE is not intended to apply so as to transfer the employment or engagement of any persons employed or engaged (or formerly employed or engaged) by the Customer or a Previous Service Provider to Breakwater.

15.2 The Customer represents, warrants and undertakes to Breakwater that no persons are or will be employed or engaged by the Customer or any Previous Service Provider in the provision of services to the Customer (on an in-house basis or otherwise) that are comparable or substantially similar to the Services (or any part of the Services).

15.3 If the contract of employment or engagement of any person who is employed or engaged (or formerly employed or engaged) by the Customer or a Previous Service Provider has effect or is alleged to have such effect, pursuant to TUPE, as if originally made between Breakwater and any such person, then, Breakwater may, at any time, dismiss any such person. The Customer will indemnify Breakwater against an amount equal to all Losses and Liabilities in each case arising out of or in connection with:

15.3.1 the employment or engagement of such person, any termination of the employment or engagement of such person, and any failure or alleged failure to inform and consult appropriate representatives under regulation 13 of TUPE; and

15.3.2 any breach of clause 15.2.

15.4 The indemnity in clause 15.3 will apply whether or not Breakwater has been negligent.

## 16. **INDEMNITY**

16.1 The Customer will indemnify Breakwater against an amount equal to all Losses and Liabilities in each case arising out of or in connection with any claim or action relating to a breach of any obligation of the Customer in respect of, or connection with, its use of, any third party product or service at any time.

16.2 The indemnity in clause 16.1 will apply whether or not Breakwater has been negligent.

## 17. **GENERAL**

17.1 Force Majeure (not tempting fate):

- 17.1.1 for the purposes of the Agreement, **Force Majeure Event** means an event beyond the reasonable control of Breakwater including but not limited to:
- 17.1.1.1 acts of God, flood, drought, earthquake or other natural disaster;
  - 17.1.1.2 epidemic or pandemic (including COVID-19);
  - 17.1.1.3 terrorist attack, civil war, civil commotion or riots, war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, or breaking off of diplomatic relations;
  - 17.1.1.4 nuclear, chemical or biological contamination or sonic boom;
  - 17.1.1.5 any law or any action taken by a government or public authority, including without limitation imposing an export or import restriction, quota or prohibition;
  - 17.1.1.6 collapse of buildings, fire, explosion or accident;
  - 17.1.1.7 any outbreak or occurrence of marauding crowds of the undead, reanimated corpses or similar phenomena whether caused or attributed to disease, virus, bacteria or otherwise;
  - 17.1.1.8 any labour or trade dispute, strikes, industrial action or lockouts (other than in each case by the party seeking to rely on this clause, or companies in the same group as that party);
  - 17.1.1.9 non-performance by suppliers or subcontractors (other than by companies in the same group as the party seeking to rely on this clause); and
  - 17.1.1.10 interruption or failure of utility service.
- 17.1.2 Breakwater shall not be liable to the Customer as a result of any delay or failure to perform its obligations under the Agreement as a result of a Force Majeure Event.
- 17.1.3 If the Force Majeure Event prevents Breakwater from providing any of the Services for more than ninety (90) days, Breakwater shall, without limiting its other rights or remedies, have the right to terminate the Agreement immediately by giving written notice to the Customer.

## 17.2 Assignment and subcontracting:

- 17.2.1 Breakwater may at any time assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights under the Agreement and may subcontract or delegate in any manner any or all of its obligations under the Agreement to any third party or agent.
- 17.2.2 The Customer shall not, without the prior written consent of Breakwater, assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Agreement.
- 17.3 Notices:
- 17.3.1 Any notice or other communication required to be given to a party under or in connection with the Agreement shall be in writing and shall be delivered to the other party personally or sent by prepaid first-class post, recorded delivery or by commercial courier, at its registered office (if a company) or (in any other case) its principal place of business, or sent by fax to the other party's main fax number and with respect to Breakwater shall be marked for the attention of the Managing Director.
- 17.3.2 Any notice or communication shall be deemed to have been duly received if delivered personally, when left at the address referred to above or, if sent by prepaid first-class post or recorded delivery, at 9.00 am on the second Business Day after posting, or if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed, or if sent by fax, on the next Business Day after transmission.
- 17.3.3 This clause 17.3 shall not apply to the service of any proceedings or other documents in any legal action. For the purposes of this clause, "writing" shall not include e-mails and for the avoidance of doubt notice given under the Agreement shall not be validly served if sent by e-mail.
- 17.4 Waiver:
- 17.4.1 A waiver of any right under the Agreement is only effective if it is in writing and shall not be deemed to be a waiver of any subsequent breach or default. No failure or delay by a party in exercising any right or remedy under the Agreement or by law shall constitute a waiver of that or any other right or remedy, nor preclude or restrict its further exercise. No single or partial exercise of such right or remedy shall preclude or restrict the further exercise of that or any other right or remedy.
- 17.4.2 Unless specifically provided otherwise, rights arising under the Agreement are cumulative and do not exclude rights provided by law.

17.5 Severance:

17.5.1 If a court or any other competent authority finds that any provision (or part of any provision) of the Agreement is invalid, illegal or unenforceable, that provision or part-provision shall, to the extent required, be deemed deleted, and the validity and enforceability of the other provisions of the Agreement shall not be affected.

17.5.2 If any invalid, unenforceable or illegal provision of the Agreement would be valid, enforceable and legal if some part of it were deleted, the provision shall apply with the minimum modification necessary to make it legal, valid and enforceable.

17.6 No partnership: Nothing in the Agreement is intended to, or shall be deemed to, constitute a partnership or joint venture of any kind between any of the parties, nor constitute any party the agent of another party for any purpose. No party shall have authority to act as agent for, or to bind, the other party in any way.

17.7 Third parties: A person who is not a party to the Agreement shall not have any rights under or in connection with it.

17.8 Entire Agreement:

17.8.1 This Agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

17.8.2 Each party acknowledges that in entering into this Agreement it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Agreement.

17.8.3 Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this Agreement.

17.8.4 Nothing in this clause shall limit or exclude any liability for fraud or fraudulent misrepresentation.

17.9 Variation: Except as set out in the Agreement, Breakwater shall give notice in writing to the Customer of any proposed variation, including any additional terms and conditions, to the Agreement. If the Customer fails to object, in writing to Breakwater, to such variation within twenty (20) Business Days of the date of the notice of the proposed variation, the Customer shall be deemed to have accepted the variation and



it shall apply to and be incorporated into the Agreement and shall be binding on the Customer.

- 17.10 Governing law and jurisdiction: The Agreement, and any Dispute or claim arising out of or in connection with it or its subject matter or formation (including non- contractual disputes or claims), shall be governed by, and construed in accordance with, English law, and the parties irrevocably submit to the non-exclusive jurisdiction of the courts of England and Wales.