

Master Services Agreement



Client: [CLIENT]

Dated: [DATE]



PERFORMANTA

Master Services Agreement

MADE BETWEEN

PERFORMANTA LIMITED

and

[CLIENT]

v1.4

DATED: [DATE]

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THIS AGREEMENT is dated

BETWEEN:

- (1) **PERFORMANTA LIMITED** incorporated and registered in England and Wales with company number 07398950 whose registered office is at 5 Elstree Gate, Elstree Way, Borehamwood, Hertfordshire, WD6 1JD ("**Performanta**");
- (2) **[CLIENT]** incorporated and registered in England and Wales with company number **[CO#]** whose registered office is at **[ADDRESS]** ("**Client**").

BACKGROUND:

- (A) Performanta is in the business of providing the Services.
- (B) The Client wishes to obtain and Performanta wishes to provide the Services on the terms set out in this Agreement.

WHEREBY it is agreed as follows:

1. INTERPRETATION

1.1 The following definitions and rules of interpretation apply in this Agreement:

"Business Day"	a day, other than a Saturday, Sunday or public holiday in England, when banks in London are open for business.
"Business Hours"	the period from 9.00 am to 5.00 pm on any Business Day.
"Change Order"	has the meaning given in clause 7.5.
"Charges"	the charges to be paid to Performanta in return for the provision of the Services, or the method for calculating them, as set out in the Statement of Work.
"Client's Equipment"	any equipment, including tools, systems, cabling or facilities, provided by the Client, its agents, subcontractors or consultants which is used directly or indirectly in the supply of the Services including any such items specified in a Statement of Work.
"Client Materials"	all documents, information, items and materials in any form, whether owned by the Client or a third party, which are provided by the Client to Performanta in connection with the Services, including the items provided pursuant to clause 5.1.4.
"Commencement Date"	The date of this Agreement.

“Control”	shall be as defined in section 1124 of the Corporation Tax Act 2010, and the expression change of control shall be construed accordingly.
“Controller, processor, data subject, personal data, personal data breach, processing and appropriate technical measures:.”	as defined in the Data Protection Legislation.
“Data Protection Legislation”	all applicable data protection and privacy legislation in force from time to time in the UK including the General Data Protection Regulation ((EU) 2016/679); the Data Protection Act 2018; the Privacy and Electronic Communications Directive 2002/58/EC (as updated by Directive 2009/136/EC) and the Privacy and Electronic Communications Regulations 2003 (SI 2003/2426) as amended.
“Deliverables”	any output of the Services to be provided by the Performanta to the Client as specified in a Statement of Work and any other documents, products and materials provided by Performanta to the Client including computer programs, data, diagrams, reports and specifications (excluding Performanta’s Equipment).
“Group”	in relation to a company, that company, any subsidiary or holding company at the date of this Agreement of that company, and any subsidiary at the date of this Agreement of a holding company of that company.
“Group Company”	in relation to a company, any member of its Group.
“Performanta’s Equipment”	any equipment, including tools, systems, cabling or facilities, provided by Performanta to the Client and used directly or indirectly in the supply of the Services, including any such items specified in a Statement of Work but excluding the Deliverables.
“Intellectual Property Rights”	patents, rights to inventions, copyright and related rights, moral rights, trade marks and service marks, business names and domain names, rights in get-up and trade dress, goodwill and the right to sue for passing off or unfair competition, rights in designs, rights in computer software, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how and trade secrets) and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.

“Milestone”	(if applicable) a date by which a part or all of the Services are intended to be completed, as set out in a Statement of Work.
“Pre-existing IPR”	means all Intellectual Property Rights owned by or licensed to Performanta relating to the Services which exist prior to the Commencement Date or which arise or are developed otherwise than as a direct result of providing the Services to the Client, including any developments and improvements made in relation to such Intellectual Property Rights.
“Pre-Purchased Service Days”	the number of Service Days (if any) set out in the Statement of Work or Order which the client has agreed to purchase from Performanta.
“Service Day”	a day on which Performanta has agreed to provide the Services to the Client (or a day on which the Services are performed, as the context requires).
“Services”	the project-based professional services which are provided by Performanta pursuant to and as set out in a Statement of Work.
“Statement of Work”	a contract for the provision of Services by Performanta to the Client in substantially the form set out at Error! Reference source not found. , agreed in accordance with clause 3, describing the services to be provided by Performanta, the estimated timetable for their performance and any other relevant matters relating to the Services.
“Third Party Software”	software which is proprietary to any third party and that is either licensed to the Client or is used by Performanta in the provision of the Services, excluding any software which is used by, or licensed to, the Client other than pursuant to this Agreement and which may be used by Performanta for the sole purpose of providing the Services to the Client.
“VAT”	value added tax or any equivalent tax chargeable in the UK or elsewhere.

- 1.2 Clause, Schedule and paragraph headings shall not affect the interpretation of this Agreement.
- 1.3 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
- 1.4 The Schedules form part of this Agreement and shall have effect as if set out in full in the body of this Agreement. Any reference to this Agreement includes the Schedules.
- 1.5 A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.

- 1.6 Unless the context otherwise requires, words in the singular shall include the plural and, in the plural, shall include the singular.
- 1.7 This Agreement shall be binding on, and ensure to the benefit of, the parties to this Agreement and their respective personal representatives, successors and permitted assigns, and references to any party shall include that party's personal representatives, successors and permitted assigns.
- 1.8 A reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.
- 1.9 A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.
- 1.10 A reference to **writing** or **written** includes email but not fax.
- 1.11 Any obligation on a party not to do something includes an obligation not to allow that thing to be done.
- 1.12 Any words following the terms **including, include, in particular, for example** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.

2. COMMENCEMENT AND DURATION

- 2.1 This Agreement shall commence on the Commencement Date and shall continue, unless terminated earlier in accordance with clause 13 (Termination), until either party gives to the other party not less than 2 months' written notice to terminate.
- 2.2 The Client may procure the Services by agreeing a Statement of Work with Performanta pursuant to clause 3 (Statements of Work).
- 2.3 Performanta shall provide the Services from the date specified in the relevant Statement of Work.

3. STATEMENTS OF WORK AND ORDERS

- 3.1 The Client shall be entitled from time to time to request the provision of the Services from Performanta. Each request for Services shall be deemed to be a separate offer by the Client to purchase Services on the terms of this Agreement. Each Statement of Work is created upon the signature by the parties of the Statement of Work and forms a separate contract between the parties.
- 3.2 Each Statement of Work shall be agreed in the following manner:
 - 3.2.1 the Client shall submit a written request to Performanta to provide the Services and provide Performanta with as much information as Performanta requests in order for Performanta to prepare a draft Statement of Work for the relevant Services;
 - 3.2.2 following receipt of the information requested from the Client, Performanta shall as soon as reasonably practicable either:
 - 3.2.2.1 inform the Client that it declines to provide the requested Services; or

- 3.2.2.2 provide the Client with a draft Statement of Work.
 - 3.2.3 if Performanta provides a draft Statement of Work pursuant to clause 3.2.2.2, Performanta and the Client shall discuss and agree the form of that draft Statement of Work;
 - 3.2.4 both parties shall sign the draft Statement of Work when it is agreed and once signed the parties shall be bound by that Statement of Work; and
 - 3.2.5 no Statement of Work shall become binding until it is signed by both parties.
- 3.3 Once a Statement of Work has been agreed and signed in accordance with clause 3.2.4, no amendment shall be made to it except in accordance with clause 7 (Change control) or clause 17 (Variation).
- 3.4 This Agreement shall:
 - 3.4.1 apply to and be incorporated into each Statement of Work; and
 - 3.4.2 prevail over any inconsistent terms or conditions contained in, or referred to in, the Client's Order, confirmation of order, or specification, or implied by law, trade custom, practice or course of dealing.
- 3.5 When the Client wishes to place an order for services to be performed by Performanta pursuant to a Statement of Work ("**Order**"), it shall either send a purchase order to Performanta or submit notice of its intention to place an Order by email. Any notice of intention to place an Order shall be confirmed by a written purchase order (bearing the additional words "confirmation of order") within two Business Days. Performanta shall be under no obligation to supply any Services unless and until an Order is received.
- 3.6 Performanta shall use its reasonable endeavours to supply the Services in accordance with the Client's Orders and at the time(s) and on the date(s) as shall be agreed between Performanta and the Client.

4. **PERFORMANTA'S RESPONSIBILITIES**

- 4.1 Performanta shall use reasonable endeavours to provide the Services, and deliver the Deliverables to the Client, in accordance with this Agreement, the relevant Statement of Work and the Client's Orders in all material respects.
- 4.2 Performanta shall use reasonable endeavours to meet any performance dates including any Milestones specified in a Statement of Work, however any such dates shall be estimates only and time for performance by Performanta shall not be of the essence of this Agreement.
- 4.3 Performanta shall use reasonable endeavours to observe all health and safety and security requirements that apply at the Client's premises and that have been communicated to it under clause 5.1.5, provided that it shall not be liable under this Agreement if, as a result of such observation, it is in breach of any of its obligations under this Agreement.
- 4.4 Performanta may make changes to the Deliverables and/or the Services:
 - 4.4.1 provided such changes do not have a material adverse effect on the conformance of the Services or Deliverables to the Statement of Work; or

- 4.4.2 in order to comply with any applicable laws and regulations.
- 4.5 Performanta may make recommendations to the Client in the course of providing the Services. The Client agrees and acknowledges that it is responsible at all times for determining whether or not it will implement (or request that Performanta implements) such recommendations and for compliance with all applicable requirements to which the Client is subject. It is the responsibility of the Client to seek any guidance from Performanta in respect of any issues on which it is unclear.
- 4.6 Performanta shall have no liability whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation (whether innocent or negligent), restitution or otherwise for any loss, liability or damage suffered as a result of or in connection with:
 - 4.6.1 any decision taken by the Client not to implement any of Performanta's recommendations; and
 - 4.6.2 the implementation of any of Performanta's recommendations by a third party.
- 4.7 All recommendations, advice and guidance provided by Performanta as part of the Services are provided in good faith and on the basis of the information before Performanta at the time.
- 4.8 Performanta shall have no liability whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation (whether innocent or negligent), restitution or otherwise for any loss, liability or damage suffered as a result of or in connection with any recommendation, advice and/or guidance provided by Performanta which is based on false or misleading information having been provided to Performanta.
- 4.9 No statement made by Performanta as part of the Services is intended to be, nor shall be deemed to be, in any circumstances a representation, undertaking, warranty or contractual condition.

5. **CLIENT'S OBLIGATIONS**

- 5.1 The Client shall:
 - 5.1.1 co-operate with Performanta in all matters relating to the Services;
 - 5.1.2 appoint a project manager/project lead in respect of the Services to be performed under each Statement of Work, such person to be identified in the Statement of Work. That person shall have authority to contractually bind the Client on all matters relating to the relevant Services (including by signing Change Orders under clause 7);
 - 5.1.3 provide, for Performanta, its agents, subcontractors, consultants and employees, in a timely manner and at no charge, access to the Client's premises, office accommodation, Client Equipment, systems (including remote access), data, making available suitably qualified employees and contractors of the Client, power consumables and other facilities as required by Performanta (including any such access as is specified in a Statement of Work);

- 5.1.4 provide to Performanta in a timely manner all documents, data, information, items and materials in any form (whether owned by the Client or a third party) required under a Statement of Work or otherwise required by Performanta in connection with the Services, and ensure that these are accurate and complete in all respects;
 - 5.1.5 inform Performanta of all health and safety and security requirements that apply at the Client's premises;
 - 5.1.6 ensure that all the Client's Equipment is in good working order and suitable for the purposes for which it is used and conforms to all relevant United Kingdom standards or requirements;
 - 5.1.7 obtain and maintain all necessary licences and consents and comply with all relevant legislation as required to enable Performanta to provide the Services, including in relation to the installation of any of Performanta's Equipment, the use of all Client Materials and the use of the Client's Equipment, in all cases before the date on which the Services are to start;
 - 5.1.8 keep and maintain Performanta's Equipment and in accordance with Performanta's instructions from time to time and not dispose of or use Performanta's Equipment other than in accordance with Performanta's written instructions or authorisation; and
 - 5.1.9 comply with any additional responsibilities of the Client as set out in the relevant Statement of Work.
- 5.2 The Client shall:
- 5.2.1 comply with all applicable laws, statutes, regulations and codes from time to time in force; and
 - 5.2.2 notwithstanding the generality of clause 5.2.1, comply with all applicable laws, statutes, regulations and codes relating to anti-bribery and anti-corruption including but not limited to the Bribery Act 2010 ("Relevant Requirements") and shall:
 - 5.2.2.1 not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK;
 - 5.2.2.2 have and shall maintain in place throughout the term of this Agreement its own policies and procedures, including but not limited to adequate procedures under the Bribery Act 2010, to ensure compliance with the Relevant Requirements and will enforce them where appropriate; and
 - 5.2.2.3 notify Performanta (in writing) if it becomes aware of any breach of clause 5.2.2.1 or clause 5.2.2.2, or has reason to believe that it or any person associated with it has received a request or

demand for any undue financial or other advantage in connection with the performance of this Agreement.

- 5.3 If Performanta's performance of its obligations under this Agreement is prevented or delayed by any act or omission of the Client, its agents, subcontractors, consultants or employees then, without prejudice to any other right or remedy it may have, Performanta shall:
- 5.3.1 be allowed an extension of time to perform its obligations equal to the delay caused by the Client; and
 - 5.3.2 be entitled to recover from the Client on demand all reasonable costs, charges or losses sustained or incurred by it (including, without limitation, any direct, indirect or consequential losses, loss of profit and loss of reputation, loss or damage to property, injury to or death of any person and loss of opportunity to deploy resources elsewhere), subject to Performanta confirming such costs, charges and losses to the Client in writing.

6. **NON-SOLICITATION**

- 6.1 In order to protect the legitimate business interests of Performanta, the Client shall not, without the prior written consent of Performanta, at any time from the date on which any Services commence under a Statement of Work, for the duration of that Statement of Work and for a further period of 6 months after the completion of such Services and/or 6 months after the expiry or termination of the relevant Statement of Work (whichever is the longer), other than by means of a national advertising campaign open to all comers and not specifically targeted at any of the staff of Performanta, directly or indirectly, solicit or entice away (or attempt to solicit or entice away) from the employment of Performanta or employ or attempt to employ any person who is, or has been, employed or engaged by Performanta as an employee, consultant or subcontractor of Performanta in the provision of such Services ("**Restricted Person**").
- 6.2 If the Client commits any breach of clause 6.1, the Client shall, on demand, pay to Performanta a sum equal to 20% of the annual salary or the annual fee that was payable by Performanta to the Restricted Person, or, if higher, 20% of the annual remuneration to be paid by the Client to the Restricted Person, plus the recruitment costs incurred by Performanta in replacing such person. The parties confirm that these liquidated damages are reasonable and proportionate to protect the legitimate interest of Performanta in performance.

7. **CANCELLATION OF SERVICE DAYS AND CHANGE CONTROL**

- 7.1 The Client may cancel an agreed Service Day, subject to the following provisions:
- 7.1.1 notice of the cancellation must be served on Performanta in writing;
 - 7.1.2 if the notice of cancellation is received by Performanta less than or equal to 5 Business Days prior to the relevant Service Day:
 - 7.1.2.1 where the Client has purchased any Pre-Purchased Service Days, Performanta shall be entitled to deduct the cancelled Service

Day(s) from the balance of any unused Pre-Purchased Service Days;

7.1.2.2 where the Charges are calculated on a time and materials basis (or the Client has no available balance of any Pre-Purchased Service Days), Performanta shall be entitled to charge and invoice the Client for a sum equal to Identity Expert's Standard Rate for each individual whom it expected to engage on the Services for each Service Day that is cancelled; or

7.1.3 where the Charges are calculated on a fixed price basis, Performanta shall be entitled to charge and invoice the Client for a sum equal to Identity Expert's Standard Rate for each individual whom it expected to engage on the Services for each Service Day that is cancelled; and

7.1.4 Performanta shall be entitled to charge and invoice the Client for any costs and expenses incurred in connection with the relevant Service Day(s) prior to receipt of the notice of cancellation.

7.2 Without prejudice to clause 8.4, if the Client agrees to purchase a specific number of Pre-Purchased Service Days, as stated in the Statement of Work, such Service Days must be used by the Client by prior agreement with Performanta during the period of 12 months from the date of the relevant Order. In the event that the total number of Pre-Purchased Service Days paid for by the Client is not used in the provision of Services by Performanta during such period, the remaining balance of unused but paid for Pre-Purchased Service Days shall expire at the end of that 12 month period.

7.3 If either party requests a change to the scope or execution of the Services, Performanta shall, within a reasonable time, provide a written estimate to the Client of:

7.3.1 the likely time required to implement the change;

7.3.2 any variations to the Charges arising from the change;

7.3.3 the likely effect of the change on the Statement of Work; and

7.3.4 any other impact of the change on the terms of the relevant Statement of Work.

7.4 If Performanta requests a change to the scope of the Services, the Client shall not unreasonably withhold or delay consent to it.

7.5 If the Client wishes Performanta to proceed with the change, Performanta has no obligation to do so unless and until the parties have agreed in writing on the necessary variations to the Charges, the Statement of Work and any other relevant terms of the relevant Statement of Work to take account of the change. No such changes shall come into effect until a relevant Change Order specifying the agreed variations to the Charges, the Statement of Work and any other agreed terms (**Change Order**) has been signed by both parties.

- 7.6 Performanta may charge for the time it spends on preparing and negotiating any change to the Services and/or any Change Order on a time and materials basis at Performanta's standard rates specified in the Statement of Work.

8. CHARGES AND PAYMENT

- 8.1 In consideration of the provision of the Services by Performanta, the Client shall pay the Charges.
- 8.2 Where the Charges are calculated on a time and materials basis:
- 8.2.1 Performanta's daily fee rates for each individual whom it engages on the Services as set out in the Statement of Work are calculated on the basis of an eight-hour day, worked during Business Hours ("**Standard Rate**"). If no such rates are set out in a Statement of Work, Performanta's standard rates shall apply;
 - 8.2.2 Performanta shall be entitled to charge an overtime rate as set out in the Statement of Work on a pro-rata basis for any time worked by individuals whom it engages on the Services outside Business Hours. If no such rates are set out in a Statement of Work, the overtime rate shall be:
 - 8.2.2.1 1.5 x the Standard Rate for work carried out on a Business Day outside of Business Hours;
 - 8.2.2.2 1.5 x the Standard Rate for work carried out on a Saturday;
 - 8.2.2.3 2 x the Standard Rate for work carried out on a Sunday; and
 - 8.2.2.4 2 x the Standard Rate for work carried out on a public holiday.
- 8.3 Where the Charges are calculated on a fixed price basis, the amount of those charges shall be as set out in the Statement of Work.
- 8.4 All sums paid to Performanta in connection with this Agreement in advance of the relevant Services being performed (including Pre-Purchased Service Days) shall be non-refundable, save where Performanta expressly agrees otherwise in writing.
- 8.5 The Charges exclude the following, which shall (unless otherwise stated in a Statement of Work or otherwise agreed in writing by the parties) be payable by the Client monthly in arrears, following submission of an appropriate invoice:
- 8.5.1 the cost of hotel, subsistence, travelling and any other ancillary expenses reasonably incurred by the individuals whom Performanta engages in connection with the Services and Performanta will provide evidence of such expenses, such as receipts, where reasonably requested; and
 - 8.5.2 the cost to Performanta of any software, materials or services procured by Performanta from third parties for the provision of the Services as such items are set out in the Statement of Work or approved by the Client from time to time.
- 8.6 Performanta may increase the Standard Rates from time to time. Any increase in the Standard Rates shall apply to the calculation of the Charges for Statements of Work entered into after the date the increase takes effect.

- 8.7 Performanta may invoice the Client for each Order on or at any time after receipt of that Order. Each invoice shall quote the relevant Order number(s).
- 8.8 The Client shall pay each invoice submitted to it by Performanta within 14 days of receipt (or within such other period as is stated on the invoice or in the relevant Statement of Work) to a bank account nominated in writing by Performanta from time to time.
- 8.9 Without prejudice to any other right or remedy that it may have, if the Client fails to pay Performanta any sum due under this Agreement on the due date:
- 8.9.1 the Client shall pay interest on the overdue sum from the due date until payment of the overdue sum, whether before or after judgment. Interest under this clause will accrue each day at 8% a year above the Bank of England's base rate from time to time, but at 8% a year for any period when that base rate is below 0%; and
- 8.9.2 Performanta may suspend part or all of the Services until payment has been made in full.
- 8.10 All sums payable to Performanta under this Agreement:
- 8.10.1 are exclusive of VAT, and the Client shall in addition pay an amount equal to any VAT chargeable on those sums on delivery of a VAT invoice; and
- 8.10.2 shall be paid in full without any set-off, counterclaim, deduction or withholding (other than any deduction or withholding of tax as required by law). Performanta may, without prejudice to any other rights it may have, set off any liability of the Client to Performanta against any liability of Performanta to the Client.

9. **INTELLECTUAL PROPERTY RIGHTS**

- 9.1 In relation to the Deliverables:
- 9.1.1 subject to clause 9.3, Performanta and its licensors shall retain ownership of all Intellectual Property Rights in the Services and the Deliverables;
- 9.1.2 the Client hereby irrevocably and unconditionally assigns to Performanta (and shall ensure that the Client's officers, employees, agents and contractors assign to Performanta upon request), all right, title and interest in and to the Intellectual Property Rights in the Deliverables;
- 9.1.3 Performanta grants the Client, or subject to clause 9.2 shall procure the direct grant to the Client of, a fully paid-up, worldwide, non-exclusive, royalty-free perpetual and irrevocable licence (subject to any rights in favour of third parties relating to such Deliverables) to copy and modify the Deliverables for the purpose of receiving and using the Services and the Deliverables in its business; and
- 9.1.4 the Client may sub-license the rights granted in clause 9.1.3 only to a member of its Group provided that it shall procure that each such Group Company complies with the provisions of clause 12 in respect of any of the Performanta's Intellectual Property Rights and confidential information comprised in the Deliverables.

- 9.2 The Client acknowledges that the Client's use of any Deliverables containing Pre-existing IPR which is owned by a third party and/or Third Party Software is conditional on Performanta obtaining a licence (or sub-licence) of such rights from the relevant licensor on such terms commercially available to Performanta as will entitle Performanta to license such rights to the Client.
- 9.3 The parties acknowledge that there may be circumstances where Performanta agrees that ownership of certain of the Deliverables or any Intellectual Property Rights in such Deliverables is to pass to the Client upon delivery. In such circumstances, this must be expressly provided for in the Statement of Work (such deliverables shall be known as **"Transferring Deliverables"**) and:
- 9.3.1 title in the Transferring Deliverables shall not pass until all sums due to Performanta have been paid in full;
- 9.3.2 the Client grants to Performanta a fully paid-up, worldwide, non-exclusive, royalty-free, perpetual and irrevocable licence to use the Intellectual Property Rights in the Transferring Deliverables for any purpose;
- 9.3.3 any Pre-existing IPR in the Transferring Deliverables owned by Performanta shall remain the property of Performanta; and
- 9.3.4 Performanta grants to the Client a fully paid-up, worldwide, non-exclusive, non-transferable, royalty-free, perpetual and irrevocable licence (subject to any rights in favour of third parties relating to such Deliverables) to use the any Pre-existing IPR solely for the purpose of using the Transferring Deliverables in the Client's business.
- 9.4 In relation to the Client Materials, the Client:
- 9.4.1 and its licensors shall retain ownership of all Intellectual Property Rights in the Client Materials; and
- 9.4.2 grants to Performanta a fully paid-up, non-exclusive, royalty-free licence to copy and modify the Client Materials for the term of this Agreement for the purpose of providing the Services to the Client.
- 9.5 The Client:
- 9.5.1 warrants that the receipt and use in the performance of this Agreement by Performanta, its agents, subcontractors or consultants of the Client Materials shall not infringe the rights, including any Intellectual Property Rights, of any third party; and
- 9.5.2 shall indemnify Performanta against all liabilities, costs, expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other professional costs and expenses) suffered or incurred or paid by Performanta arising out of or in connection with any claim brought against Performanta, its agents, subcontractors or consultants for actual or alleged infringement of a third party's Intellectual Property Rights arising out of, or in connection with, the receipt or use in the performance of this Agreement of the Client Materials.

- 9.6 Where either party acquires, by operation of law, title to Intellectual Property Rights of the other referred to in clause 9, and this acquisition is inconsistent with the allocation of title set out in this clause 9, such Intellectual Property Rights shall be assigned by it to the other party on the request of the other party, whenever that request is made and it shall, at its expense, execute all documents and do all such acts as the other party may require to perfect the ownership of Intellectual Property Rights as set out in this clause 9.

10. DATA PROTECTION

- 10.1 Both parties will comply with all applicable requirements of the Data Protection Legislation. This clause 10 is in addition to, and does not relieve, remove or replace, a party's obligations or rights under the Data Protection Legislation.
- 10.2 The parties acknowledge that for the purposes of the Data Protection Legislation, the Client is the controller and Performanta is the processor. sets out the scope, nature and purpose of processing by Performanta, the duration of the processing and the types of personal data and categories of data subject.
- 10.3 Without prejudice to the generality of clause 10.1, the Client will ensure that it has all necessary appropriate consents and notices in place to enable the lawful transfer of personal data to Performanta for the duration and purposes of this Agreement.
- 10.4 Without prejudice to the generality of clause 10.1, Performanta shall, in relation to any personal data processed in connection with the performance by Performanta of its obligations under this Agreement:
- 10.4.1 process that personal data only on the documented written instructions of the Client (including as set out in this Agreement) unless Performanta is required by the laws of any member of the European Union or by applicable UK or European laws relating to processing of personal data ("**Applicable Laws**") to otherwise process that personal data;
 - 10.4.2 ensure that it has in place appropriate technical and organisational measures 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;
 - 10.4.3 ensure that all personnel who have access to and/or process personal data are obliged to keep the personal data confidential; and
 - 10.4.4 not transfer any personal data outside of the European Economic Area unless the prior written consent of the Client has been obtained and the following conditions are fulfilled:
 - 10.4.4.1 the Client or Performanta has provided appropriate safeguards in relation to the transfer;
 - 10.4.4.2 the data subject has enforceable rights and effective legal remedies;

- 10.4.4.3 Performanta complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any personal data that is transferred; and
 - 10.4.4.4 Performanta complies with reasonable instructions notified to it in advance by the Client with respect to the processing of the personal data;
 - 10.4.5 assist the Client, at the Client'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;
 - 10.4.6 notify the Client without undue delay on becoming aware of a personal data breach relating to personal data processed by Performanta in connection with the performance of this Agreement;
 - 10.4.7 at the written direction of the Client, delete or return personal data and copies thereof to the Client on termination of this Agreement unless required by Applicable Laws to retain the personal data; and
 - 10.4.8 maintain complete and accurate records and information to demonstrate its compliance with this clause 10 and allow for audits by the Client or the Client's designated auditor on reasonable prior written notice during Business Hours with minimal disruption to Performanta's business, subject to the Client paying Performanta's reasonable costs for assisting with and contributing to such audits;
 - 10.4.9 inform the Client if, in the opinion of Performanta, an instruction infringes the Data Protection Legislation, provided that to the maximum extent permitted by mandatory law, Performanta shall have no liability howsoever arising for any losses, costs, expenses or liabilities arising from or in connection with any processing in accordance with the Client's processing instructions following the Client's receipt of that information.
- 10.5 Performanta shall not appoint any third party processor of personal data under this Agreement without the prior written consent of the Client.

11. CONFIDENTIALITY

- 11.1 Each party undertakes that it shall not at any time during this Agreement, and for a period of 3 years after termination of this Agreement, disclose to any person any confidential information concerning the business, affairs, finances, clients, suppliers, software, technical, operational or commercial know-how, specifications, inventions, processes or initiatives, business plans, marketing or product plans of the other party or of any member of the group of companies to which the other party belongs, except as permitted by clause 11.3.
- 11.2 A party's confidential information shall not be deemed to include information that:
 - 11.2.1 is or becomes publicly known other than through any act or omission of the receiving party;
 - 11.2.2 was in the other party's lawful possession before the disclosure;

11.2.3 is lawfully disclosed to the receiving party by a third party without restriction on disclosure.

11.3 Each party may disclose the other party's confidential information:

11.3.1 to its employees, officers, representatives or advisers who need to know such information for the purposes of exercising the party's rights or carrying out its obligations under or in connection with this Agreement. Each party shall ensure that its employees, officers, representatives or advisers to whom it discloses the other party's confidential information comply with this clause 11; and

11.3.2 as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority.

11.4 No party shall use the other party's confidential information for any purpose other than to exercise its rights and perform its obligations under or in connection with this Agreement. Notwithstanding any other provision of this clause 11, Performanta shall be entitled to use the Client's name for marketing purposes.

12. **LIMITATION OF LIABILITY**

12.1 This clause sets out the entire financial liability of Performanta (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Client:

12.1.1 arising under or in connection with this Agreement and each Statement of Work;

12.1.2 in respect of any use made by the Client of the Services or Deliverables; and

12.1.3 in respect of any representation, misrepresentation (whether innocent or negligent), statement or tortious act or omission (including negligence) arising under or in connection with this Agreement.

12.2 Nothing in this Agreement limits any liability which cannot legally be limited, including liability for:

12.2.1 death or personal injury caused by negligence;

12.2.2 fraud or fraudulent misrepresentation; and

12.2.3 breach of the terms implied by section 2 of the Supply of Goods and Services Act 1982.

12.3 All warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from this Agreement (including the terms implied by sections 3, 4 and 5 of the Supply of Goods and Services Act 1982).

12.4 Subject to clause 12.2:

12.4.1 Performanta shall not be liable whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation (whether innocent or negligent), restitution or otherwise for any:

12.4.1.1 loss of profits;

- 12.4.1.2 loss of business;
- 12.4.1.3 depletion of goodwill and/or similar losses or loss;
- 12.4.1.4 corruption of data or information;
- 12.4.1.5 pure economic loss; or
- 12.4.1.6 for any special, indirect or consequential loss costs, damages, charges or expenses,
- however arising under or in connection with this Agreement; and
- 12.4.2 Performanta's total aggregate liability in contract, tort (including negligence or breach of statutory duty), misrepresentation (whether innocent or negligent), restitution or otherwise, arising under or in connection with:
 - 12.4.2.1 each Statement of Work, shall be limited to the lesser of (i) the total Charges paid the Client in respect of that Statement of Work during the 12 months preceding the event giving rise to the liability; or (ii) £50,000 (fifty thousand pounds sterling); and
 - 12.4.2.2 this Agreement, shall be limited to £1,000,000 (one million pounds sterling).
- 12.5 Unless the Client notifies Performanta that it intends to make a claim in respect of an event within the notice period, Performanta shall have no liability for that event. The notice period for an event shall start on the day on which the Client became, or ought reasonably to have become, aware of the event having occurred and shall expire 14 days from that date. The notice must be in writing and must identify the event and the grounds for the claim in reasonable detail.

13. TERMINATION AND SUSPENSION

- 13.1 Without affecting any other right or remedy available to it, Performanta may terminate this Agreement and/or any individual Statement of Work with immediate effect by giving written notice to the Client if:
 - 13.1.1 the Client commits a breach of any term of this Agreement or any Statement of Work and such breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 14 days after being notified to do so;
 - 13.1.2 the Client fails to pay any amount due under this Agreement or any Statement of Work on the due date for payment and remains in default for in excess of 14 days;
 - 13.1.3 the Client repeatedly breaches any of the terms of this Agreement in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of this Agreement;
 - 13.1.4 the Client 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 or limited liability partnership) is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986;
- 13.1.5 the Client 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 any of its creditors other than for the sole purpose of a scheme for a solvent amalgamation of the Client with one or more other companies or the solvent reconstruction of the Client;
 - 13.1.6 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 the Client 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;
 - 13.1.7 an application is made to court, or an order is made, for the appointment of an administrator, or a notice of intention to appoint an administrator is given or an administrator is appointed, over the Client;
 - 13.1.8 the holder of a qualifying floating charge over the assets of the Client has become entitled to appoint or has appointed an administrative receiver;
 - 13.1.9 a person becomes entitled to appoint a receiver over all or any of the assets of the Client or a receiver is appointed over all or any of the assets of the Client;
 - 13.1.10 a creditor or encumbrancer of the Client 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 the Clients' assets and such attachment or process is not discharged within 7 days;
 - 13.1.11 any event occurs, or proceeding is taken, with respect to the Client in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause 13.1.4 to clause 13.1.10 (inclusive); or
 - 13.1.12 the Client suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business; or
 - 13.1.13 there is a change of control of the Client.
- 13.2 The Client shall be entitled to terminate an individual Statement of Work upon not less than 7 days' notice to Performanta, and the provisions of clauses 7.1, 14.1.2 and 14.1.3 shall apply in such circumstances.
 - 13.3 If the Client fails to pay any amount due under this Agreement or any Statement of Work on the due date for payment and remains in default for in excess of 7 days, without affecting any other right or remedy available to it, Performanta may suspend the performance of any or all of its Services and other obligations under this Agreement by giving not less than 7 days' notice to the Client of its intention to do so and stating the ground or grounds on which it intends to suspend performance.
 - 13.4 In the event of a suspension in accordance with this Agreement, without affecting any other right or remedy:
 - 13.4.1 the provisions of clauses 7.1, 14.1.2 and 14.1.3 shall apply; and

- 13.4.2 the Client shall pay Performanta a reasonable amount in respect of costs and expenses reasonably incurred by Performanta as a result of any exercise of its right referred to in clause 13.3.

14. CONSEQUENCES OF TERMINATION

14.1 On termination or expiry of this Agreement:

- 14.1.1 all existing Statements of Work shall terminate automatically (unless otherwise expressly agreed in writing by the parties);
- 14.1.2 the Client shall immediately pay to Performanta all of Performanta's outstanding unpaid invoices and interest and, in respect of the Services supplied but for which no invoice has been submitted, Performanta may submit an invoice (regardless of whether any payment milestone relating to such Services has been reached), which shall be payable immediately on receipt;
- 14.1.3 where the Client has purchased any Pre-Purchased Service Days, Performanta shall be entitled to cancel any unused Pre-Purchased Service Days as at the date of termination without any liability to the Client, provided that this clause 14.1.3 shall not apply in the event that Performanta terminates this Agreement pursuant to clause 2.1.
- 14.1.4 the Client shall, return all of Performanta's Equipment. If the Client fails to do so, then Performanta may enter the Client's premises and take possession of Performanta's Equipment. Until Performanta's Equipment has been returned or repossessed, the Client shall be solely responsible for its safe keeping;
- 14.1.5 Performanta shall on request return any of the Client Materials in its possession as at the date of termination; and
- 14.1.6 the following clauses shall continue in force: clause 1 (Interpretation), clause 6 (Non-solicitation), clause 9 (Intellectual property rights), clause 10 (Data Protection), clause 11 (Confidentiality), clause 12 (Limitation of liability), clause 14 (Consequences of termination), clause 18 (Waiver), clause 19 (Severance), clause 21 (Conflict), clause 26 (Governing law) and clause 27 (Jurisdiction).

- 14.2 Termination or expiry of this Agreement shall not affect any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination or expiry, 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.

15. FORCE MAJEURE

- 15.1 Force Majeure Event means any circumstance not within a party's reasonable control including, without limitation:

- 15.1.1 acts of God, flood, drought, storm, earthquake or other natural disaster or adverse weather conditions;
- 15.1.2 epidemic or pandemic;

- 15.1.3 terrorist attack, act of terrorism, 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;
- 15.1.4 nuclear, chemical or biological contamination or sonic boom;
- 15.1.5 any law or any action taken by a government or public authority, including without limitation imposing an export or import restriction, quota or prohibition, or failing to grant a necessary licence or consent;
- 15.1.6 collapse of buildings, fire, explosion or accident;
- 15.1.7 any labour or trade dispute, strikes, industrial action or lockouts; and
- 15.1.8 non-performance by suppliers or subcontractors; and
- 15.1.9 interruption or failure of a utility service or transport services.
- 15.2 if a party is prevented, hindered or delayed in or from performing any of its obligations under this Agreement by a Force Majeure Event (**Affected Party**), the Affected Party shall not be in breach of this Agreement or otherwise liable for any such failure or delay in the performance of such obligations. The time for performance of such obligations shall be extended accordingly.
- 15.3 If the Force Majeure Event prevents, hinders or delays the Affected Party's performance of its obligations for a continuous period of more than 6 weeks, the party not affected by the Force Majeure Event may terminate this Agreement by giving 7 days' written notice to the Affected Party.
- 16. **ASSIGNMENT AND OTHER DEALINGS**
 - 16.1 The Client shall not assign, transfer, mortgage, charge, subcontract, delegate, declare a trust over or deal in any other manner with any of its rights and obligations under this Agreement.
 - 16.2 Performanta may at any time assign, mortgage, charge, subcontract, delegate, declare a trust over or deal in any other manner with any or all of its rights under this Agreement.
- 17. **VARIATION**

Subject to clause 7, no variation of this Agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).
- 18. **WAIVER**
 - 18.1 A waiver of any right or remedy under this Agreement or by law is only effective if given in writing and shall not be deemed a waiver of any subsequent right or remedy.
 - 18.2 A failure or delay by a party to exercise any right or remedy provided under this Agreement or by law shall not constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict any further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy provided under this Agreement or by law shall prevent or restrict the further exercise of that or any other right or remedy.

19. SEVERANCE

- 19.1 If any provision or part-provision of this Agreement is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this Agreement.
- 19.2 If any provision or part-provision of this Agreement is deemed deleted under clause 19.1 the parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.

20. ENTIRE AGREEMENT

- 20.1 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.
- 20.2 Each party agrees that it 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. Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this Agreement.

21. CONFLICT

- 21.1 If there is an inconsistency between any of the provisions of this Agreement and the provisions of the Schedules, the provisions of this Agreement shall prevail.
- 21.2 If there is any inconsistency between any of the provisions of this Agreement and the provisions of a Statement of Work, the provisions of the Statement of Work shall prevail.

22. NO PARTNERSHIP OR AGENCY

- 22.1 Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties, constitute any party the agent of another party, or authorise any party to make or enter into any commitments for or on behalf of any other party.
- 22.2 Each party confirms it is acting on its own behalf and not for the benefit of any other person.

23. THIRD PARTY RIGHTS

This Agreement does not give rise to any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

24. NOTICES

- 24.1 Any notice or other communication given to a party under or in connection with this Agreement shall be in writing and shall be:
- 24.1.1 delivered by hand or by pre-paid first-class post or other next Business Day delivery service at its registered office (if a company) or its principal place of business (in any other case); or
 - 24.1.2 sent by email to its main business email address.
- 24.2 Any notice shall be deemed to have been received:

- 24.2.1 if delivered by hand, on signature of a delivery receipt or at the time the notice is left at the proper address;
- 24.2.2 if sent by pre-paid first-class post or other next Business Day delivery services, at 9.00 am on the second Business Day after posting or at the time recorded by the delivery service; and
- 24.2.3 if sent if sent by email, at the time of transmission, or, if this time falls outside business hours in the place of receipt, when business hours resume. In this clause 24.2.3, business hours means 9.00am to 5.00pm Monday to Friday on a day that is not a public holiday in the place of receipt.

24.3 This clause does not apply to the service of any proceedings or any documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

25. COUNTERPARTS

- 25.1 This Agreement may be executed in any number of counterparts, each of which when executed shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.
- 25.2 Transmission of an executed counterpart of this Agreement (but for the avoidance of doubt not just a signature page) by email (in PDF, JPEG or other agreed format) shall take effect as delivery of an executed counterpart of this Agreement. If such method of delivery is adopted, without prejudice to the validity of the agreement thus made, each party shall provide the others with the original of such counterpart as soon as reasonably possible thereafter.

26. GOVERNING LAW

This Agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales.

27. JURISDICTION

Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this Agreement or its subject matter or formation.

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

Signed for and on behalf of
PERFORMANTA LIMITED

.....

Signed for and on behalf of
[CLIENT]

.....