

Private & Confidential
Subject to legal privilege

DATED _____ **200**

THE BRITISH UNITED PROVIDENT ASSOCIATION LIMITED (1)

and

(2)

SERVICES
AGREEMENT

SAMPLE DRAFT ONLY

BUPA
Group Purchasing Department
BUPA House
15- 19 Bloomsbury Way
London
WC1A 2BA

THIS AGREEMENT is dated

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and is made **BETWEEN:**

- (1) **THE BRITISH UNITED PROVIDENT ASSOCIATION LIMITED**
(registered no 00432511) whose registered office is at 15- 19
Bloomsbury Way, London WC1A 2BA ("**BUPA**"); and
- (2) [] a company incorporated in England under company number * and
whose registered office is at * (the "**Supplier**").

BACKGROUND:

- (A) The Supplier is engaged in the business of providing *[insert description of services]* particularly in relation to but not limited to [?] and has considerable skill, knowledge and experience in providing such services.
- (B) In reliance upon that skill, knowledge and experience BUPA wishes to engage the Supplier to provide the Services (as defined below) and the Supplier has agreed to the engagement on the terms set out in this Agreement.

OPERATIVE PROVISIONS:

1. DEFINITIONS & INTERPRETATION

1.1 In this Agreement unless the context otherwise requires:

Defined Terms	Their meaning
"Account Managers"	the account managers for each party, the initial persons being identified as such in Schedule 1;
"Act"	the Data Protection Act 1998 and any subordinate legislation;
"Agreement"	this agreement comprising the terms and conditions in Clauses 1 to 39 and the schedules;
"BUPA IPR"	any and all IPRSowned by BUPA or any member of the BUPA Group;
"BUPA Main Liability Cap"	the cap stated as such in Schedule 1;
"BUPA Property"	the cap stated as such in Schedule 1;

Damage Liability Cap	
“Business Day”	a day (other than a Saturday or Sunday) on which the banks are ordinarily open for business in the City of London;
“Change”	A change or addition to the Services (Including, without limitation, the Deliverables) and/or a change to the provisions of this Agreement;
“Change Control Note”	The record of a Change agreed by the parties based on the template set out in Schedule 7;
“Change Request”	has the meaning given to it in Clause 6;
“Change Proposal”	has the meaning given to it in Clause 6;
“Confidential Information”	secret or confidential commercial, financial, marketing, technical or other information, know-how, trade secrets and other information in any form or medium whether disclosed orally or in writing before or after the date of this Agreement, together with any reproductions of such information in any form or medium or any part(s) of this information (and "confidential" means that the information, either in its entirety or in the precise configuration or assembly of its components, is not publicly available);
“Control”	has the meaning specified in Section 416 of the Income and Corporation Taxes Act 1988;
“Currency”	the agreed currency for payment as set out in Schedule 3;
“Date Format”	has the meaning given in Clause 14.1.10;
“Deliverables”	any and all items created by or on behalf of the Supplier in relation to the provision of the Services including, without limitation, those items identified in Schedule 1;
“Dispute Escalation and Resolution Procedure”	means the procedure set out in Clause 7;
“Equipment”	the equipment listed in Schedule 1;
“Exit Date”	the date on which this Agreement terminates or expires, whichever is the earlier;
“Exit Plan”	the exit plan set out in Schedule 4;

“Fees”	has the meaning specified in Schedule 3;
“Group”	in relation to any company that company and every other company which is from time to time a subsidiary or holding company of that company or a subsidiary of any such holding company (and the terms " subsidiary " and " holding company " shall have the meanings given to them by Sections 736 and 736A of the Companies Act 1985);
“Guarantee”	the agreed form of guarantee as set out in Schedule 6;
“Guarantor”	the guarantor specified in Schedule 6;
“Initial Term”	the period of time stated to be such in Schedule 1;
“Interest Rate”	the agreed interest rate applicable on late payments as set out in Schedule 3;
“IPR”	any copyright, moral right, patent, database right, design right, registered design, unregistered design, trade mark, service mark, utility model or any other intellectual or industrial property rights whether registered or unregistered and including, without limitation, applications for any such right subsisting anywhere;
“Legislation”	any applicable statute, (including, without limitation, the Health & Safety at Work Act 1974, the Management of Health and Safety at Work Regulations 1992 and the Data Protection Act 1998) statutory rule, order, directive, regulation or other instrument having force of law (including, without limitation, any directive or order promulgated by any competent supra- national body), all British and European standards, UKAS (United Kingdom Accreditation Service), all other legislation for the time being in force, Codes of Practice and other requirements of any relevant government or governmental agency relating to the provision of the Services;
“Payment Period”	the time for payment of invoices by the Supplier to BUPA as defined in Schedule 3;
“Personal Data”	all data and other information about or relevant to any BUPA staff or individuals who are customers of BUPA or other individuals whose data or information would fall within the definition of “personal data” given in the Act;

“Pre- Contractual Representations”	any representation, warranty, undertaking, collateral contract, statement, promise or other assurance (whether in writing or not) made by any person (whether a party to this Agreement or not) relating to the subject matter of this Agreement except those set out in this Agreement (and any documents referred to in it);
“Processing”	has the meaning given to it in the Act and “Process” and “Processed” shall have a corresponding meaning;
“Rebates”	the rebate sums identified in Schedule 2 and which the Supplier shall pay to BUPA in accordance with the provisions of this Agreement which are as and by way of liquidated damages and which the parties agree are a genuine pre- estimate of the loss which BUPA shall suffer if the Supplier fails to meet the Service Levels;
“Records”	has the meaning given to it in Clause 8.2;
“Recoverable Losses”	the types of loss identified as such in Schedule 1;
“Route 1”	has the meaning given to it in Clause 7.3;
“Route 2”	has the meaning given to it in Clause 7.3;
“Senior Managers”	the senior managers for each party, the initial persons being identified as such in Schedule 1;
“Service Levels”	the service levels set out in Schedule 2;
“Services”	the Services to be provided by the Supplier pursuant to this Agreement as more particularly described in Schedule 2;
“Sites”	the Sites listed in Schedule 1;
“Start Date”	the date specified as such in Schedule 1;
“Technology Refresh Plan”	the plan set out in Schedule 8;

- 1.2 The headings and sub- headings to Clauses are inserted for convenience only and shall not affect the interpretation or construction of this Agreement.
- 1.3 Words expressed in the singular shall include the plural and vice versa. Words referring to a particular gender include every gender. References to a person includes an individual, company, corporation,

firm or partnership.

- 1.4 The words and phrases "other", "including" and "in particular" shall not limit the generality of any preceding words or be construed as being limited to the same class as any preceding words where a wider construction is possible.
- 1.5 References to any statute or statutory provision shall include (i) any subordinate legislation made under it, (ii) any provision which it has modified or re-enacted (whether with or without modification), and (iii) any provision which subsequently supersedes it or re-enacts it (whether with or without modification).
- 1.6 All references in this Agreement to Clauses and Schedules are to the Clauses and Schedules to this Agreement unless otherwise stated.
- 1.7 In the event of any conflict between Clauses 1 to 39 and any of the Schedules to this Agreement, the former shall prevail over the latter.

2. PROVISION OF THE SERVICES

- 2.1 **Base Obligation:** The Supplier shall provide the Services so that, as a minimum, they meet the Service Levels from the Start Date in accordance with this Agreement.
- 2.2 **Base Level:** The Supplier undertakes to provide the Services with a high level of professional skill and care and in a competent, efficient and professional manner, using suitably qualified, experienced and trained personnel. The Supplier shall at all times during the subsistence of this Agreement faithfully and diligently perform the duties and exercise such powers consistent with them which are from time to time necessary in connection with the provision of the Services.
- 2.3 **Timing Critical:** The Supplier accepts that time is of the essence in providing the Services.
- 2.4 **Most Favoured Client:** The Supplier shall give priority to the provision of the Services over all other business activities undertaken by the Supplier.
- 2.5 **Legislative Compliance:**
 - 2.5.1 The Supplier shall ensure that the Services shall fully comply with all applicable Legislation and to the extent that such regulations are advisory (compliance with which is advisable but not mandatory) the minimum compliance to be achieved by the Supplier shall be the best practice in the relevant industries.
 - 2.5.2 The Supplier shall promptly keep BUPA informed of any matter of which the Supplier is or reasonably should, as provider of the Services, be aware relating to the provision of the Services (including, without limitation, Legislation or advice from responsible or professional or

legal bodies) and the actions it has taken or proposes to take and those that BUPA should take in relation to such matters.

2.5.3 At BUPA's request the Supplier shall demonstrate that it complies with British or European Standards that are applicable to the Services by providing copies of test certificates from UKAS (United Kingdom Accreditation Service)

2.6 **General Assistance:** The Supplier shall provide BUPA with all assistance it reasonably requires in relation to the Services provided hereunder and shall promptly keep BUPA informed of any matter of which it is, or reasonably should, as provider of the Services, be aware of relating to the provision of the Services.

2.7 **Information Flow:** The Supplier shall at all times during the subsistence of this Agreement keep BUPA informed of the Supplier's activities and of any information which comes to the attention of the Supplier which the Supplier or its staff knows or ought reasonably to know would be of interest to BUPA including, without limitation, any claims or complaints against BUPA.

2.8 **Rebates & Service Levels:** In the event that the Supplier fails to meet any of the Service Levels, it shall promptly pay to BUPA the relevant applicable Rebate. The payment of such Rebates is in addition to any other rights and remedies BUPA may have pursuant to this Agreement or at law. The Supplier hereby agrees that all such Rebates represent a realistic and genuine pre- estimate of BUPA's loss in such circumstances.

2.9 Onward supply by BUPA:

2.9.1 The Supplier agrees that BUPA may, at BUPA's discretion, supply any of the Services (including, without limitation, any of the Deliverables) provided by the Supplier to BUPA pursuant to this Agreement to any third party.

2.9.2 On making any such onward supply the Supplier may make reasonable representations to BUPA.

2.9.3 The Supplier hereby agrees that BUPA may assign the benefit of all rights (in whole or in part) under this Agreement to any such third parties that receive such onward supply.

2.10 **Equipment:** The Supplier shall provide the Services in relation to each and every item of Equipment. BUPA may amend the list of Equipment from time to time on written notice to the Supplier.

2.11 **Sites:** The Supplier shall provide all the Services to all the Sites. BUPA may amend the list of Sites from time to time on written notice to the Supplier.

- 2.12 **Risk:** The Supplier will provide as appropriate all tools, equipment and machinery necessary to carry out the Services. Risk in all tools, equipment and machinery shall remain with the Supplier at all times.
- 2.13 **Minimal Interruption:** The Services will be carried out by the Supplier in such a way as to minimise if not eliminate, any interruption to BUPA and its employees.
- 2.14 **Guarantee:** The Supplier has procured and represents, warrants and undertakes that its ultimate parent company has duly and lawfully executed and entered into the Guarantee.

3. PRICE & PAYMENT

- 3.1 **The Fees:** The Fees and the terms for payment of the Fees for the supply of the Services pursuant to this Agreement are set out in Schedule 3. There shall be no increase in the level of the Fees under any circumstances.
- 3.2 **Totality of the Fees:** The Fees represent the entire amount payable by BUPA to the Supplier for the provision of the Services. The Supplier shall not be entitled to reimbursement of any expenses or any other amounts in connection with the provision of the Services, except where specifically set out in Schedule 3 or as otherwise agreed in writing between the parties.
- 3.3 **Tax:** All sums payable under this Agreement are exclusive of VAT or any other applicable tax or duty payable upon such sums which shall be added if appropriate at the rate prevailing at the relevant tax point. The calculation of any VAT or any other duties or taxes payable in respect of such sums shall be the responsibility of the Supplier.
- 3.4 **Timing & Interest on Late Payments:** BUPA shall pay the Supplier the relevant Fees within the Payment Period and provided that a valid invoice has been received. If BUPA fails to pay within such Payment Period, the Supplier may (but shall not be obliged to) charge BUPA interest on any undisputed element of the overdue amount from the due date up to the date of actual payment, at the Interest Rate.
- 3.5 **Disputed invoices:** Should BUPA have any dispute in respect of the whole or any part of any invoice then BUPA shall notify the Supplier of the nature of such dispute in writing within 30 days of receipt of the invoice giving all relevant details and thereupon shall be entitled to withhold payment of the invoice. All disputes relating to invoices shall be resolved in accordance with the procedure set out in Clause 7.
- 3.6 **Set Off:** If any sums are due to BUPA from the Supplier, then BUPA shall be entitled to exercise the right to set off such sums against any payments due to the Supplier from BUPA under or in relation to this or any other Agreement. The Supplier shall not be entitled to apply any amount due to BUPA under this Agreement in or towards payment of any sum owing by BUPA to the Supplier in relation to any matter whatsoever.

3.7 Right of Delayed Payment:

- 3.7.1 Where there is any breach of any obligation, warranty or requirement stated in this Agreement in respect of the Services, BUPA shall be entitled at its sole discretion at any time after provision of the Services and without prejudice to any other right or remedy in respect of such matters to delay payment until the requirements of this Agreement are entirely fulfilled and/or treat this Agreement as discharged by the Supplier's breach and require the repayment of any part of the price of the Services which BUPA has paid.
- 3.7.2 If BUPA exercises any right conferred by Clause 3.7.1 BUPA may at its absolute discretion raise a debit note against the Supplier's invoice for the performance costs and any other costs incurred in connection with the rejection of the Services.
- 3.8 **Nature of Group Supply:** Payment by BUPA shall be without prejudice to any claims or rights which any BUPA Group company may have against the Supplier and shall not constitute any admission by any member of the BUPA Group as to the performance by the Supplier of its obligations to such member.
- 3.9 **The Currency:** BUPA shall make all payments of the Fees in the Currency.
- 3.10 **Best price:** The Supplier warrants, represents and undertakes that no other customer with the same or similar level of business to BUPA shall obtain lower pricing than BUPA throughout the subsistence of the Agreement.
- 3.11 **Maintaining a Competitive price:** If during the subsistence of the Agreement, the Fee becomes uncompetitive in comparison to an offer received by BUPA from a third party supplier for the supply of services of equal or better specification to the Services, taking into account the same geographical coverage, prices and volumes offered by the Supplier, BUPA reserves the right to notify the Supplier in writing and the Supplier shall lower the Fee to take account of such. If as a result BUPA rejects the Suppliers' revised Fee, BUPA may terminate the Agreement immediately and source a replacement for the Services elsewhere.
- 3.12 **Passing on Fee reductions:** If during the subsistence of the Agreement, the Supplier makes a general price decrease, or because of any fall in the cost of labour, materials, fuel or transport the cost to the Supplier of supplying the Services reduces, the Supplier will promptly notify BUPA in writing and extend such decrease with immediate effect and without deduction.

4. MANAGEMENT OF THE SERVICES

- 4.1 **Regular Meetings:** The Account Managers of the Supplier and BUPA shall meet to discuss and review all aspects of the provision of the

Services and this Agreement with the frequency set out in Schedule 1. Any and all day to day issues arising from the provision of the Services shall in the first instance be addressed by the Account Managers for each party.

4.2 Re- deployment: If at any time BUPA is not reasonably satisfied with the performance or ability of any person engaged by or on behalf of the Supplier in relation to the provision of the Services, it may request the Supplier to re- deploy and replace such person so that they no longer work with BUPA. Upon such request, the Supplier shall promptly redeploy and replace such person (wholly at the Supplier's cost and expense) to give effect to BUPA's wishes in any event within 3 Business Days.

4.3 Non- availability: If any person employed or engaged by the Supplier in providing the Services is unable to carry out their duties due to illness, accident or other incapacity, which lasts for more than 2 Business Days, the Supplier shall ensure that another person of equal ability is promptly provided by the Supplier (free of charge) to continue the provision of the Services (and in any event within 2 Business Days).

5. CONTINUOUS IMPROVEMENT

5.1. The Supplier shall have an ongoing obligation to identify improvements in relation to the Services in accordance with this Clause 5 so as to support BUPA's competitive position or overall strategy. The obligation shall include, without limitation, identifying the following:

5.1.1. new or potential improvements to the Services including the [quality], [responsiveness,] [customer services,] [performance mechanisms,] and [procedures];

5.1.2. [new and emerging technologies that could improve the Services];

5.1.3. [improvements relating to the overall efficiency of, and cost reduction in relation to, the Services by examining economies of scale, combining services, and the methodologies used in providing the Services.]

5.2. The Supplier shall report on a quarterly basis to BUPA at the management meetings specified in Schedule 1 on the new or potential improvements identified pursuant to Clause 5.1. Any improvements that BUPA wishes to implement shall be agreed as a Change in accordance with Clause 6.

5.3. The Supplier shall ensure that the improvements identified pursuant to Clause 5.1 shall be at least comparable with the level of technological and organisational change and innovation being used by other businesses with similar requirements for services as BUPA.

5.4. The Supplier shall notify BUPA in writing if it implements any improvements for another customer that could also improve the Services

under this Agreement and such improvements shall be implemented as a Change.

5.5. If, as a result of any improvement implemented pursuant to this Clause 5, the Supplier's costs in providing the Services are reduced, all of the cost savings shall be passed on to BUPA by way of an immediate reduction in the Charges.

5.6. [The Supplier shall implement the Technology Refresh Plan.]

6. CHANGES TO THE AGREEMENT AND SERVICES

6.1 If at any time either party wishes to make a Change it shall notify the other in writing and shall provide as much detail as reasonably possible in relation to such proposed Change (a "**Change Request**"). Upon receipt or sending a Change Request the Supplier will within 3 Business Days provide BUPA with a brief written proposal in relation to the proposed Change (a "**Change Proposal**") which shall include but not be limited to (unless BUPA specifies otherwise):

6.1.1 Full details of the proposed Change and its impact on the Services including, without limitation, to the Service Levels;

6.1.2 A statement of the costs involved in implementing the proposed Change; and

6.1.3 A timetable for the implementation of the Change.

6.2 Upon the receipt of a Change Proposal the parties shall meet within 3 Business Days to discuss and agree (acting reasonably and in good faith) such Change. If the parties agree to the Change they shall issue a Change Control Note signed by both parties authorising the Change.

6.3 No Change shall be binding on the parties unless the requirements of this Clause 6 have been satisfied.

6.4 Any cost savings resulting from a Change shall be passed on to BUPA by way of a reduction in the Charges.

6.5 The parties shall, until such time as a Change Control Note is formally agreed and signed by both parties, continue to perform their respective obligations under this Agreement.

7. DISPUTE ESCALATION & RESOLUTION

7.1 **Level One:** Any and all disputes relating to this Agreement and/or the subject matter of it, shall in the first instance be referred to both parties' Account Managers for resolution. Upon such referral the Account Managers shall meet within 5 Business Days of such referral to resolve the issue.

7.2 **Level 2:** If the Account Managers cannot resolve the issue within 5 Business Days of their meeting over it, the matter shall be referred to both parties' Senior Managers for resolution. Upon such referral the

Senior Managers shall meet within 5 Business Days of such referral to resolve the issue.

- 7.3 **Level 3:** If the Senior Managers cannot resolve the issue within 5 Business Days of their meeting over it, the parties shall be free to refer the matter to

7.3.1 Mediation or other alternative dispute resolution procedures (“**Route 1**”); or

7.3.2 by referring the matter to a technical expert (if the dispute is of a technical or factual nature) (“**Route 2**”); or

7.3.3 the courts

as they see fit.

- 7.4 **Recording an agreement:** If, with the assistance of any mediator or other similar third party under Route 1 or with the assistance of a technical expert under Route 2, the parties reach a settlement, such settlement shall be reduced to writing and, once signed by a duly authorised representative of each of the parties, shall remain binding on the parties.

- 7.5 **Conduct of Negotiations:** Accordingly all negotiations connected with the dispute shall be conducted in strict confidence and without prejudice to the rights of the parties in any future legal proceedings.

- 7.6 **Interim Relief:** Except for any party's right to seek interlocutory relief in the courts, no party may commence other legal proceedings under the jurisdiction of the courts or any other form of arbitration until 10 Business Days after the parties have failed to reach a binding settlement by Route 1 or Route 2.

8. RECORD KEEPING, AUDIT AND INSPECTION

- 8.1 **Accounting:** The Supplier will fully account to BUPA for all Services performed and the Fees raised in respect of these Services, including, without limitation, the provision of copies of all relevant timesheets, expense claims, invoices and receipts.

- 8.2 **Records:** The Supplier shall keep at its principal place of business during and for at least 7 years after the expiry or earlier termination of this Agreement separate, full, proper, complete and accurate books of account and records together with supporting documentation of all Services performed and all transactions which relate to or affect this Agreement (“**Records**”).

- 8.3 **Inspection and Audit:**

8.3.1 The Supplier shall make the Records available for inspection and audit by BUPA and/or its agents and/or provide copies to BUPA and/or its agents.

- 8.3.2 The Supplier shall allow BUPA and/or its agents to conduct audits of the Supplier's operations, facilities, insurance policies and its quality, environmental and health and safety procedures and systems during normal working hours on reasonable notice to ensure the Supplier has the ability to and does comply with this Agreement.
- 8.3.3 To assure BUPA of its quality control the Supplier shall, during installation or performance of the Services, allow BUPA to inspect and observe the performance of the Services.
- 8.4 **Access to Premises:** Without prejudice to any other provision of this Agreement the Supplier shall grant to BUPA at all times full, free and unimpeded access to all premises of the Supplier for the purpose of satisfying itself that no breach of any provision of this Agreement has occurred or is likely to occur.
- 8.5 **Non Compliance revealed:** If any audit or other inspection by or on behalf of BUPA demonstrates any non-compliance by the Supplier of its obligations pursuant to this Agreement, the Supplier shall, without prejudice to any other rights and remedies BUPA may have:
- 8.5.1 remedy the cause of such non-compliance as soon as reasonably practicable;
- 8.5.2 promptly refund BUPA all costs and expenses relating to such audit or inspection; and
- 8.5.3 promptly pay BUPA on demand reasonable compensation in relation to such non-compliance.

9. WHERE THE SUPPLIER WISHES TO SUBCONTRACT

- 9.1 **Supplier as prime contractor:** The Supplier shall at all times be prime contractor for the provision of all of the Services and in the performance of its obligations under this Agreement. No subcontracting or other delegation of its obligations by the Supplier shall relieve the Supplier of its obligations and liabilities pursuant to this Agreement.
- 9.2 **Replacement of Subcontractors:** If at any time the Supplier does appoint any subcontractors BUPA may, at any time, request that any particular subcontractor be replaced (either by the Supplier or another subcontractor to be approved by BUPA in accordance with Clause 9.3). Upon such request the Supplier shall replace such subcontractor (wholly at the Supplier's cost and expense) as soon as reasonably practicable and in any event within 3 Business Days.
- 9.3 **Position of Supplier:** This Agreement is personal to the Supplier. The Supplier shall not sub-contract all or any of its rights and/or responsibilities under this Agreement without the prior written consent of BUPA.

10. BUPA'S RIGHTS OF REJECTION & REPERFORMANCE

10.1 Where there is any breach of any obligation, warranty or requirement stated in this Agreement in respect of any of the Services, BUPA shall be entitled at its sole discretion at any time after provision of the Services and without prejudice to any other right or remedy in respect of the matters to:

10.1.1 require the Supplier to amend or re-perform the Services (including, without limitation, the amendment of any Deliverables provided as part of the Services) forthwith without charge so that it conforms to this Agreement; and/or

10.1.2 reject any Deliverables provided as part of the Services;

10.1.3 treat this Agreement as discharged by the Supplier's breach whether or not BUPA has previously required the Supplier to amend or re-perform the Services.

11. BUPA'S RIGHTS OF STEP IN

11.1 **Step in:** Without prejudice to any of BUPA's other rights and remedies under this Agreement or at law, BUPA may, in its sole discretion, by notice in writing to the Supplier appoint a management team or a replacement supplier to manage the Services (or part thereof) where:

11.1.1 The Supplier fails to provide such replacement persons pursuant to Clause or Clause or Clause 9.2 within the timescales specified and/or such replacement person is not provided to the required standard; or

11.1.2 the Supplier is, or is reasonably likely to be, in material breach of its obligations under this Agreement or there is an event or likely to be an event that is likely to have an adverse effect on BUPA; or

11.1.3 The Supplier or Guarantor [or any parent company of the Supplier or Guarantor] undergoes a change of Control; or

11.1.4 Either party has served a notice of termination in accordance with this Agreement.

11.2 **Costs of Step In:** The Supplier shall meet all costs and expenses arising from any right of step in exercised by BUPA pursuant to Clauses 11.1.1, 11.1.2, 11.1.3 and 11.1.4 (where BUPA has terminated pursuant to Clauses 26.1 or 26.2) including, without limitation, any charges to the Supplier as BUPA deems appropriate pursuant to the exercise of the right of step in provided that it notifies the Supplier of its intention to do so within 30 Business Days of deciding to do so.

11.3 **Payment Waiver:** BUPA shall not be obliged to make any payment for that element of the Services in relation to which it has exercised any right of step in during the period that BUPA or a replacement supplier is providing such elements of the Services.

- 11.4 **Duration of Step In:** Except where BUPA has exercised its right of step in pursuant to Clause 11.1.4, BUPA's rights under this Clause 11 will cease on the earlier of the cessation or resolution of the matter giving rise to the right of step in or the date 60 days from when the step in right was exercised.
- 11.5 **Stepping Back Out:** Except where BUPA has exercised its right of step in pursuant to Clause 11.1.4, and before the cessation of the step-in right, BUPA shall notify the Supplier in writing of the date it plans to end exercising its step in right. The Supplier shall, on receipt of the notice, develop a plan to be approved by BUPA, which will ensure that the Services meet the Service Levels and are provided in accordance with this Agreement.

12. BENCHMARKING

- 12.1. **Notice to Supplier:** BUPA may, by written notice to the Supplier, require the Services, Service Levels and/or Fees (or part thereof) to be benchmarked by an independent third party and a benchmarking report produced.
- 12.2. **Appointment of Benchmarker:** The independent third party benchmarker shall be appointed by agreement between the parties. If the parties cannot agree on the independent third party within ten (10) Business Days of receipt by the Supplier of BUPA's written request and/or notice pursuant to Clause 12.1, the matter shall be referred to the Dispute Escalation and Resolution Procedure. Both parties shall co-operate fully with the benchmarker which shall include, without limitation, agreeing a benchmark plan which shall include:
- 12.2.1. a timetable of the benchmarking exercise,
 - 12.2.2. a description of the information to be provided by BUPA and the Supplier, and
 - 12.2.3. details of the entities proposed to be included in the sample comparison which shall be consolidated and agreed by the parties with the benchmarker once the information in Clause 12.2.2 has been provided to the benchmarker.
- 12.3. **Cost:** The cost of such third party benchmarker shall be met by both parties in equal shares and each party shall bear its own costs in relation to it.
- 12.4. **Improvements:** If the benchmarker (having taken a sample of entities of equivalent services to those being benchmarked, which are capable of quantitative comparison, and which have been selected by the benchmarker pursuant to Clause 12.2 and agreed by the parties) concludes in the benchmarking report that the Services, Service Levels and/or Fees are not competitive, then the Supplier shall improve the Services and Service Levels as soon as reasonably practicable but in any event within [3 months] of receipt of the benchmarking report and/or reduce the Fees immediately. Any Changes shall be effected using the

Change procedure set out in Clause 6 except that no Changes shall be made to the Fees.

12.5. Material breach: Failure by the Supplier to implement the findings of the benchmarking report within the time frames set out in Clause 12.4 shall constitute a material breach of this Agreement and BUPA shall be entitled to:

12.5.1. terminate in accordance with Clause 26.1; or

12.5.2. [exercise its step in rights pursuant to Clause 11].

12.6. No increase in Fees or reduction in Services: For the avoidance of doubt, any benchmark reports shall not result in any increase to the Fees or any decrease in the performance of any Services or Service Levels.

13. COMPLIANCE & ASSISTANCE

13.1. Awareness of BUPA Policies & Regulations: BUPA shall advise the Supplier of all relevant BUPA policies and regulations upon the written request of the Supplier.

13.2. Supplier's Compliance: The Supplier shall at all times during the subsistence of this Agreement obey (and shall ensure that all its agents and subcontractors obey) all lawful and reasonable directions of BUPA. The Supplier shall, and shall ensure that all persons engaged by or on behalf of the Supplier in relation to the Services are advised of the need to and shall, comply with:

13.2.1. all of BUPA's reasonable instructions;

13.2.2. all of BUPA's policies, rules and regulations whilst on or off any and all premises owned or controlled by BUPA; and

13.2.3. all other Legislation which applies to the Supplier and/or the in the provision of the Services.

13.3. Health & Safety: The Supplier shall at all times co-operate with BUPA for the purpose of ensuring the health and safety of all persons it brings on to any and all premises owned or controlled by BUPA to perform the Services (subject to any statutory obligation BUPA may have).

14. WARRANTIES, REPRESENTATIONS & UNDERTAKING

14.1. The Supplier hereby represents, warrants and undertakes that:

14.1.1. It has full power and authority to enter into this Agreement;

14.1.2. It has full capacity and all necessary licences, permits and consents to enter into and to perform this Agreement;

14.1.3. This Agreement has been executed by a duly authorised representative of the Supplier;

- 14.1.4. It shall provide the Services using all due skill, care & diligence to best industry practice;
- 14.1.5. It shall provide the Services using suitably qualified, trained and experienced personnel;
- 14.1.6. Any Deliverables provided as part of the Services shall conform to all relevant specifications, shall be of satisfactory quality, free from design and other inherent defects, free from defects in materials and workmanship and fit for their intended purpose (whether such purpose is expressly stated in the relevant specification or implied);
- 14.1.7. Neither the performance of its obligations under this Agreement including, without limitation, the provision of the Services (including, without limitation, the Deliverables) or BUPA's use of the Services shall infringe any IPRs;
- 14.1.8. It is and shall remain free to assign all right, interest and title in all Deliverables to BUPA without any third party claims liens charges or encumbrances of any kind and that the Supplier is free of any duties or obligations to third parties which may conflict with the terms of this Agreement and that BUPA shall have the right to quiet possession of such Deliverables;
- 14.1.9. All statements and representations made by it to BUPA are, to the best of its knowledge, information and belief, true and accurate and that it will advise BUPA of any fact, matter or circumstance of which it may become aware which would render any such statement or representation to be false or misleading;
- 14.1.10. Neither the Deliverables nor the performance of the Services will be affected by any changes to the Date Format which shall mean that:
- (a) no value for current date will cause any interruption in the provision of the Services;
 - (b) all manipulations of time related data will produce the desired results for all valid date values within the application domain;
 - (c) date elements in interfaces and data storage will permit specifying the century to eliminate date ambiguity; and
 - (d) where any date element is represented without a century, the correct century shall be unambiguous for all manipulations involving that element;

14.1.11. Neither the Deliverables nor the performance, accuracy nor functionality of the Supplier's systems relating to the provision of the Services which are dependent upon software for their operation or which contain microchip technology have been, is or will be adversely affected by any data values which may reasonably be inputted into and/or used by the Supplier's systems;

14.1.12. The performance of the Services (including, without limitation, the Deliverables) will not be affected by the introduction of European Monetary Union and, in particular, the Deliverables:

(a) are and shall be capable of performing all functions set out in their relevant specifications for more than one currency and for any common currency adopted by one or more members of the European Union (the "**Euro**");

(b) are and shall comply with all of the legal requirements applicable to the Euro in any jurisdiction including, without limitation, the rules on conversion and rounding set out in EC Regulation number 1103/97; and

(c) are and shall be capable of displaying and printing and will incorporate in all relevant screen layouts, all symbols and codes adopted by any government or any other European Union body in relation to the Euro;

14.1.13. the software used to perform its obligations under this Agreement or provided as part of the Deliverables shall be:

14.1.13.1. currently supported versions of software;

14.1.13.2. defect and error free in all respects; and

14.1.13.3. perform in accordance with its specification (if any);

14.1.14. It shall comply in all respects with the Data Protection Act 1998;

14.1.15. All material that it supplies to BUPA is free of defamatory matter or other legal restriction;

14.1.16. All software, data, or documents of any sort that are to be uploaded onto any BUPA computer or telecommunications system, internet or intranet site shall be free from any viruses or bugs;

14.1.17. The due diligence exercise undertaken by the Supplier prior to the Start Date has revealed all of the information concerning the subject matter of this Agreement that the Supplier requires in order to enter into this Agreement and as a result the Supplier acknowledges that it has obtained all information necessary to enable it to comply with its obligations under this Agreement.

15. SUPPLIER'S INSURANCE OBLIGATIONS

15.1 **Policies to be maintained:** The Supplier shall at its own cost be solely responsible for taking out and maintaining in force during the term of this Agreement and for a period of 7 years thereafter such insurance policies as are appropriate and adequate with a reputable insurance company having regard to its obligations and liabilities under this Agreement including, without limitation, the following insurances:

15.1.1 Employers' liability insurance for a minimum amount of cover of £10,000,000 on an each and every claim basis;

15.1.2 Professional indemnity insurance for a minimum amount of cover of £10,000,000 on an each and every claim basis;

15.1.3 Public liability insurance for a minimum amount of cover of £5,000,000 on an each and every claim basis; and

15.1.4 Product liability insurance for a minimum amount of cover of £5,000,000 on each and every claim basis.

(together the "**Policies**")

15.2 **Provision of Proof:** The Supplier shall, upon the written request of BUPA, provide proof of such Policies, the full policy document for Policies and on the renewal of each Policy, the Supplier shall send a copy of the premium receipt to BUPA when requested to do so in writing by BUPA.

15.3 **Non Compliance:** If the Supplier fails to maintain any of the Policies required pursuant to this Clause 15, BUPA may upon giving the Supplier 5 Business Days' notice (unless the level of risk is such that BUPA would be reasonable in doing so without notice) itself provide or arrange such insurance and may charge the cost of such insurance, together with an administration charge of 10% of such cost, to the Supplier either by way of deduction from the Fee or by recovering the same as a debt due to BUPA from the Supplier.

15.4 **No avoidance or negation:** The Supplier shall not, during the term of this Agreement and for a period of 7 years thereafter act or refrain from acting in such a way as would entitle the underwriter(s) of the Policies to avoid or negate their liability to deal with any claim(s) which would otherwise be covered.

15.5 Insurance of Subcontractors and agents: The Supplier shall ensure that any and all subcontractors or agents engaged by or on behalf of it in relation to this Agreement and/or the provision of the Services shall effect and maintain

15.5.1 all insurances required by law (including, without limitation, employer's liability insurance); and

15.5.2 all other insurances the Supplier deems necessary,

and the Supplier further agrees with BUPA that any and all deficiencies in such insurances of any subcontractors or agents shall be the sole responsibility of the Supplier.

16. DATA & DATA PROTECTION

16.1 Data Processing: Where Personal Data is Processed by the Supplier , its sub- contractors or agents under or in relation to this Agreement, the Supplier shall, and shall procure that its sub- contractors and agents shall:

16.1.1 Process the Personal data only on behalf of BUPA (and, if BUPA directs, any of the Group) for the purposes of meeting BUPA's obligations under this Agreement and only on instructions from BUPA set out in this Agreement or otherwise given by BUPA;

16.1.2 Comply with the provisions of the seventh principle set out in Schedule 1 Part 1 Paragraph 7 of the Act (which requires that appropriate, technical and organisational measures shall be taken against unauthorised or unlawful Processing of Personal Data and against accidental loss or destruction of, or damages to, Personal Data); and

16.1.3 At the direction of BUPA, return or delete all Personal Data provided by or on behalf of BUPA.

17. CONFIDENTIALITY, PUBLICITY & MARKETING

17.1 Confidentiality: All Confidential Information given by BUPA (or any of the BUPA Group) to the Supplier or otherwise obtained or developed by the Supplier relating to BUPA or any of the BUPA Group including, without limitation, as a result of the relationship of the parties under this Agreement shall be kept secret and confidential by the Supplier during the subsistence of this Agreement and for two (2) years thereafter and shall not be used or disclosed save for the purposes of the proper performance of this Agreement or with the prior written consent of BUPA. Where disclosure by the Supplier is made to any employee, supplier, sub-contractor or agent, the Supplier shall ensure that it shall be done subject to obligations equivalent to those set out in this Agreement and only to the extent necessary for performance of the Supplier's obligations under this Agreement. The Supplier shall ensure that any such employee, supplier, sub- contractor or agent complies with such obligations. The Supplier shall be responsible to BUPA in respect of any disclosure or use of such Confidential Information by the person to whom disclosure is made.

- 17.2 **Exceptions:** The obligations of confidentiality in this Clause 17 shall not extend to any matter which the Supplier can show:
- 17.2.1 is in, or has become part of, the public domain other than as a result of a breach of the obligations of confidentiality under this Agreement; or
 - 17.2.2 was in its written records prior to the Start Date; or
 - 17.2.3 was independently disclosed to it by a third party entitled to disclose the same; or
 - 17.2.4 is required to be disclosed under any applicable law, or by order of a court or governmental body or authority of competent jurisdiction.
- 17.3 **Publicity:** The Supplier shall not make any announcement or otherwise publicise the existence of or disclose to any person the terms or subject matter or any other information relating to this Agreement or the Services without the prior written consent of BUPA.
- 17.4 **Marketing & Advertising:** All marketing and advertising costs and expenses incurred by the Supplier in providing the Services shall be solely the responsibility of the Supplier. The Supplier shall ensure that all advertising campaigns relating to this Agreement do not conflict with the dates of BUPA's advertising campaigns. The Supplier shall ensure that all advertising and marketing material and any broadcasting in which reference is made directly or indirectly to BUPA or any companies within the BUPA Group shall be approved by BUPA in writing prior to publication or broadcast. Such approval shall not be taken to mean that the Supplier has complied with all appropriate marketing and advertising rules, regulations and codes of practice, compliance with which shall be the sole responsibility of the Supplier.
- 17.5 **Promotion of BUPA Interests:** The Supplier shall at all times during the subsistence of this Agreement use its best endeavours to promote the interests of BUPA and all members of the BUPA Group.

18. NON SOLICITATION OF BUPA PEOPLE

- 18.1 The Supplier shall not during the term of this Agreement or for a period of 24 months following its termination, solicit, endeavour to entice away, employ or offer or attempt to offer to employ any person who is at any time during the term of this Agreement employed by any member of the BUPA Group (whether or not such person would commit any breach of his contract of service in leaving such employment) provided that nothing in this clause shall prevent the Supplier from considering and accepting an application made by any such employee in response to a recruitment advertisement published generally and not specifically directed at employees of BUPA, or in responding to an approach made to it by such

an employee which the Supplier can establish from its written records was initiated by such an employee.

19. EMPLOYMENT & PENSION PROVISIONS

19.1 The Supplier shall fully perform and meet all its obligations in Schedule 5 in relation to employee and pension liabilities.

20. INDEMNITY FROM THE SUPPLIER

20.1 The Supplier acknowledges that BUPA places particular reliance upon the provisions of this Agreement and in addition to any other remedy available to BUPA, the Supplier irrevocably and unconditionally agrees to indemnify BUPA, its officers, employees, sub-contractors and agents (who shall have no duty to mitigate their loss) in full and on demand and keep them so indemnified against all claims, demands, actions, proceedings and all direct and indirect damages, losses, costs and expenses (including, without limitation, legal on an indemnity costs basis and other professional adviser's fees, economic loss, loss of profit, future revenue, reputation, goodwill, anticipated savings) and any consequential loss made against or incurred or suffered by any of them and whether wholly or in part resulting or arising directly or indirectly from the matters listed below whether or not such losses or the consequences of the matters listed below were foreseeable at the date of the Agreement (the "**BUPA Losses**"):

20.1.1. the provision of the Services to BUPA;

20.1.2. any breach by the Supplier, its employees, agents or sub-contractors of its obligations under the Agreement or any other act or omission (including, without limitation, negligence) of any of them in excess of the liability of the Supplier under the Agreement;

20.1.3. any royalties being payable to any third party in respect of the Services;

20.1.4. the infringement (or alleged infringement) of any third party IPRs by reason of BUPA's receipt and/or use of the Services (including, without limitation, the use and exploitation of the Deliverables).

21. DELIVERABLES & INTELLECTUAL PROPERTY RIGHTS

21.1 **Title in Deliverables:** All rights, title and interest in any Deliverables provided by the Supplier as part of the Services shall vest in and be the sole property of BUPA and the Supplier hereby assigns and shall assign to BUPA with full title guarantee all right, title and interest (including, without limitation, all IPRs) in all such Deliverables (whether existing now or in the future to the extent permitted by law). The Supplier shall take all necessary steps to ensure that he has the right to secure such vesting including, without limitation, and if so required by BUPA, that all staff employed on the Agreement sign a separate undertaking

to the effect that all such IPRs in any work undertaken by them shall vest in and be the sole property of BUPA.

- 21.2 **Safeguarding BUPA's rights in Deliverables:** The Supplier shall safeguard all of BUPA's rights, title and interest (including, without limitation, all IPRs) in the Deliverables and shall at BUPA's request assist BUPA in establishing and protecting such rights including, without limitation, and if necessary, executing documents and legal instruments and doing any other things which BUPA deems reasonably necessary for the purpose of establishing and protecting such rights.
- 21.3 **Training & Information:** The Supplier shall provide BUPA with such training and information about the Services (including, without limitation, the Deliverables) as BUPA shall reasonably require from time to time.
- 21.4 **BUPA IPRs:** All BUPA IPRs shall remain the property of BUPA or the relevant members of the BUPA Group and notwithstanding any other provision of this Agreement, no such IPRs shall transfer to the Supplier. [All BUPA IPRs in its trade marks and brands shall only be used if BUPA's prior written consent has been obtained.]
- 21.5 **IPRs Arising:** Except as provided in Clause 21.1, all IPRs arising from provision of the Services (including, without limitation, the Deliverables) shall vest in and be the sole property of BUPA and the Supplier hereby assigns and shall assign to BUPA with full title guarantee all such IPRs (whether existing now or in the future to the extent permitted by law).
- 21.6 **IPR Infringements:** Without prejudice to any other right or remedy BUPA may have, in the event that BUPA's receipt and/or use of the Services (including, without limitation, the use and exploitation of the Deliverables) is infringing or is likely to infringe any third party IPRs or if there is an allegation of such an infringement, the Supplier shall (at BUPA's option) at the earliest possible moment either:
- 21.6.1 secure at its own cost and expense the right for BUPA and the BUPA Group to continue to receive and use the Services or use and exploit the Deliverables; or
 - 21.6.2 modify the Services (or the Deliverables) so that they are no longer infringing or likely to infringe and provided that there is no substantial affect on the performance of the Services (which shall be taken to include no loss of functionality, performance, interoperability or quality of the Services or Deliverables); or
 - 21.6.3 replace the Services or the Deliverables so that they are no longer infringing or likely to infringe and provided that there is no substantial affect on the performance of the Services (which shall be taken to include no loss of functionality, performance, interoperability or quality; or
 - 21.6.4 procure a licence to allow BUPA and the BUPA Group to continue receiving and using the Services or using and exploiting the

Deliverables so that they are no longer infringing or likely to infringe and provided that there is no substantial affect on the performance of the Services (which shall be taken to include no loss of functionality, performance, interoperability or quality);
or

21.6.5 refund to BUPA all monies paid by or on behalf of BUPA to the Supplier (or any third party) pursuant to this Agreement.

22. PROVISIONS RELATING TO BUPA'S LIABILITY

22.1 Entire Liability: This Clause 22.1 together with Clauses 22.2 to 22.6 inclusive set out the entire liability of BUPA in respect of:

22.1.1. Any breach of this Agreement;

22.1.2. Any representation or statement arising under or in connection with this Agreement;

22.1.3. Any tortious act or omission (including but not limited to negligence) arising under or in connection with this Agreement.

22.2 Non-excludable Losses: Nothing in this Agreement shall in any way exclude either party's liability for

- i. death or personal injury caused by its negligence; or
- ii. for fraudulent misrepresentation; or
- iii. for any breach of any obligations implied by Section 12 of the Sale of Goods Act 1979; or
- iv. for any breach of any obligations implied by Section 2 of the Supply of Goods and Services Act 1982.

22.3 Excluded Losses: Subject to Clause 22.2, BUPA shall not be liable, whether in contract, tort (including, without limitation, negligence) or for breach of statutory duty or in any other way for any of the following losses or damage (whether or not such losses or damage were foreseen, direct, foreseeable, known or otherwise):

- i. economic losses;
- ii. loss of the use of money;
- iii. loss of revenues;
- iv. loss of actual or anticipated profits (including, without limitation, loss of profits on contracts);
- v. loss of opportunity;
- vi. loss of business;
- vii. loss of anticipated savings;
- viii. loss of goodwill;
- ix. loss of reputation;
- x. loss of, damage to or corruption of data;
- xi. any regulatory losses, fines, expenses, or other losses arising from a breach by the Supplier of any law or regulation;

- xii. any indirect, special or consequential loss or damage howsoever caused whether or not such loss is covered in Clauses 22.3 i to 22.3 xi inclusive;
- xiii. any losses arising as a result of any third party bringing a claim in respect of any of the above types of loss.

22.4 Cap on Liability for Property Damage: BUPA's liability for any physical damage to the premises or any other tangible property of the Supplier resulting from BUPA's negligence shall be limited to the BUPA Property Damage Liability Cap.

22.5 Main Liability Cap: Subject to Clauses 22.1, 22.2, 22.3, and 22.4, the total aggregate liability of BUPA arising out of or in connection with this Agreement, whether in contract, tort (including, without limitation, negligence) or for breach of statutory duty or in any other way shall not exceed the BUPA Main Liability Cap.

22.6 Interpretation of Liability Provisions: For the avoidance of doubt, each of the limitation of liabilities set out separately in Clauses 22.1, 22.2, 22.3i, ii, iii, iv, v, vi, vii, viii, ix, x, xi, xii and xiii, 22.4 and 22.5 shall be construed as separate limitations of liability.

23 LOSS RECOVERY

23.1 Losses BUPA know it will suffer: Without prejudice to any other rights and remedies BUPA may have pursuant to this Agreement or at law, the Supplier acknowledges that this Agreement is for the benefit of BUPA and the BUPA Group. The Supplier agrees that if it fails to meet its obligations pursuant to this Agreement then BUPA and/or any member of the BUPA Group may suffer losses including, but not limited to the Recoverable Losses. Without prejudice to any other rights and remedies BUPA may have pursuant to this Agreement or at law, the Supplier agrees that the Recoverable Losses are recoverable by BUPA.

23.2 Group Recovery: Any losses suffered by any member of the BUPA Group pursuant to this Agreement or the subject matter of it shall be recoverable by BUPA as if the loss had been suffered by BUPA itself and, for the purposes of this clause, losses shall include, without limitation, the BUPA Losses as defined in Clause 20.1 and the Recoverable Losses.

24 REASONABLENESS OF THIS AGREEMENT

24.1 The parties expressly acknowledge that:

24.1.1 the terms of this Agreement have been negotiated at arms length on a commercial basis in a competitive environment between parties experienced in business and reflect the agreed allocation of risk between the parties as set out herein; and

- 24.1.2 so far as applicable, the provisions of this Agreement satisfy the requirements of reasonableness specified in the Unfair Contract Terms Act 1977 (as amended) and that they shall be estopped from claiming the contrary at any future date in the event of any dispute concerning liability hereunder.

25 DURATION

- 25.1 **Basic Term:** This Agreement shall come into force on the Start Date and shall last for the Initial Term and any extension pursuant to Clause 25.3 unless terminated earlier pursuant to this Agreement or by operation of law.
- 25.2 **Continuation:** At the end of the Initial Term the Agreement shall continue in force unless and until either party gives to the other not less than [three] months' prior written notice of termination to take effect on the expiry of or after the expiry of the said Initial Term.
- 25.3 **Extension of Initial Term:** If the Supplier has failed to deliver any or all of the Services (including, without limitation, any or all of the Deliverables) by the end of the Initial Term BUPA may require the Supplier to continue to provide the Services if required by BUPA without any charge to BUPA until all such Services (including, without limitation, the Deliverables) have been provided to BUPA to BUPA's reasonable satisfaction or unless BUPA instructs the Supplier to cease provision of the Services.

26 TERMINATION

- 26.1 **Material Breach:** Either party may immediately terminate this Agreement without payment of compensation or other damages caused to the other party solely by such termination by giving notice in writing to the other party if any one or more of the following events happens:
- 26.1.1 the other party commits a material breach of any of its obligations under this Agreement which is incapable of remedy;
- 26.1.2 the other party fails to remedy, where it is capable of remedy, or persists in any material breach of any of its obligations under this Agreement (save as to payment) after having been required by written notice to remedy or desist from such breach within a period of 30 days of receipt of such notice giving full particulars of the breach;
- 26.2 **Insolvency:** BUPA may immediately terminate this Agreement without payment of compensation or other damages caused to the Supplier solely by such termination by giving notice in writing to the Supplier if any one or more of the following events happens:
- 26.2.1 the Supplier has any distress or execution levied on its assets which is not paid out within 7 days of it being levied;

- 26.2.2 the Supplier is deemed to be unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986; or
- 26.2.3 the Supplier calls a meeting for the purpose of passing a resolution to wind it up, or such a resolution is passed; or
- 26.2.4 the Supplier presents, or has presented, a petition for a winding up order; or
- 26.2.5 an application to appoint an administrator is made in respect of the Supplier or a notice of intention to appoint an administrator is filed in respect of the Supplier; or
- 26.2.6 any other steps are taken by the Supplier or any other person to appoint an administrator over the Supplier; or
- 26.2.7 the Supplier has an administrator, administrative receiver, or receiver appointed over all or any part of its business, undertaking, property or assets; or
- 26.2.8 the Supplier takes any steps in connection with proposing a company voluntary arrangement or a company voluntary arrangement is passed in relation to it;
- 26.2.9 the Supplier stops or suspends making payments (whether of principal or interest) with respect to all or any class of its debts or announces an intention to do so or the Supplier suspends or ceases or threatens to suspend or cease to carry on its business;
- 26.2.10 a secured lender to the Supplier takes any steps to obtain possession of the property on which it has security or otherwise to enforce its security;
- 26.2.11 the Supplier suffers or undergoes any procedure analogous to any of those specified above or any other procedure available in the country in which the Supplier is constituted, established or domiciled against or to an insolvent debtor or available to the creditors of such a debtor.

26.3 Change of Control: BUPA may at its sole discretion immediately terminate this Agreement without payment of compensation or other damages caused to the Supplier solely by such termination by giving notice in writing to the Supplier if the Supplier [or the Guarantor or any parent company of the Supplier or Guarantor] undergoes a change of Control;

26.4 [Withdrawal of Guarantee: BUPA may immediately terminate this Agreement without payment of compensation or other damages caused to the Supplier solely by such termination by giving notice in writing to the Supplier if the Guarantor withdraws the Guarantee or any of the events set out in Clause **c** occurs in respect of the Guarantor.]

26.5 Commercial Flexibility: BUPA may terminate this Agreement on 3 (three) months' written notice to the Supplier.

26.6 Service Levels and Rebates: BUPA may terminate this Agreement immediately by giving notice in writing to the Supplier if:

26.6.1 the Supplier commits the same or substantially similar breach of the Service Levels more than **[specify number]** times within any period of **[specify number]** consecutive months; or

26.6.2 the Rebates incurred by the Supplier in any period of **[specify number]** consecutive months exceeds £**[specify amount]**.

26.7 Accrued Rights: The termination of this Agreement shall be without prejudice to the rights and remedies of either party, which may have accrued up to the date of termination.

27 CONSEQUENCES OF EXPIRY AND TERMINATION

27.1 Exit Plan: The provisions of the Exit Plan shall apply upon the Exit Date save that BUPA can require that the provisions of the Exit Plan shall apply up to [3] months prior to the Exit Date in order to achieve a smooth end to or transition of the Services in which event the Supplier shall ensure that such requirement shall not affect the provision of the Services during that time.

27.2 Ongoing Review of Exit Plan: The parties shall meet at least once every 6 months to review and, if reasonably necessary, to amend and update Schedule 4 (**Exit Plan**). Such changes shall be processed in accordance with the terms of Clause .

27.3 Survival: Upon any termination or expiry of this Agreement for any reason whatsoever the provisions of **[Clauses 1, 3, 4, 5, 7, 8, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26-39 (inclusive)]** and any other provision which expressly or by implication are intended to come into or remain in force on or after termination or expiry shall continue in full force and effect.

28 VIRUS PROTECTION

28.1 The Supplier recognises that it is of paramount importance to BUPA that all possible care is taken to ensure that BUPA's software remains virus free. Accordingly, the Supplier shall use its best endeavours at all times to ensure that there are anti-virus procedures in place and that all appropriate software is loaded to protect BUPA's software against the introduction of any virus. The Supplier shall give BUPA access to its policies and procedures relating to this at all reasonable times.

29 ASSIGNMENT AND NOVATION BY BUPA

29.1 Assignment by BUPA: The benefit of this Agreement including, without limitation, the benefit of the warranties in this Agreement shall be freely assignable by BUPA and, in the event of any such assignment, all references in this Agreement to BUPA shall be deemed to include its assigns.

29.2 **Novation by BUPA:** The Supplier hereby consents to the novation of BUPA's rights and obligations in this Agreement in whole or in part to any third party.

29.3 **Assignment by the Supplier:** The Supplier shall not assign, delegate, novate, transfer, charge or otherwise dispose of all or any of its rights and/or responsibilities under this Agreement without the prior written consent of BUPA.

30 NO PARTNERSHIP

30.1 The Supplier shall not pledge the credit of BUPA nor represent itself as being BUPA, nor an agent, partner, employee, or representative of BUPA and the Supplier shall not hold itself out as such nor as having any power or authority to incur any obligation of any nature, express or implied, on behalf of BUPA and nothing in this Agreement shall create, or be deemed to create, a partnership or joint venture or relationship of employer and employee or principal and agent between the parties and no employee of the Supplier shall be deemed to be or have become an employee of BUPA.

31 WAIVER

31.1 The rights and remedies of either party in respect of this Agreement shall not be diminished, waived or extinguished by the granting of any indulgence, forbearance or extension of time granted by such party to the other nor by any failure of, or delay by the said party in ascertaining or exercising any such rights or remedies. Any waiver of any breach of this Agreement shall be in writing. The waiver by either party of any breach of this Agreement shall not prevent the subsequent enforcement of that provision and shall not be deemed to be a waiver of any subsequent breach of that or any other provision.

32 INVALIDITY & SEVERABILITY

32.1 If at any time any part of this Agreement (including, without limitation, any one or more of the Clauses of this Agreement or any Sub-Clause or paragraph or any part of one or more of these Clauses) is held to be or becomes void or otherwise unenforceable for any reason under any applicable law, the same shall be deemed omitted from this Agreement and the validity and/or enforceability of the remaining provisions of this Agreement shall not in any way be affected or impaired as a result of that omission.

33 THIRD PARTY RIGHTS & THIS AGREEMENT

33.1 **Right to Enforce:** All members of the BUPA Group may enforce this Agreement. Except for the members of the BUPA Group, no person who is not a party to this Agreement (including, without limitation, any employee, officer, agent, representative or sub-contractor of either party) shall have the right (whether under the Contracts (Rights of Third Parties) Act 1999 or otherwise) to enforce any term of this Agreement which expressly or by

implication confers a benefit on that person without the express prior agreement in writing of the parties which agreement must refer to this clause.

- 33.2 **Variation:** Where a person who is not a party to this Agreement (including, without limitation, any employee, officer, agent, representative or sub-contractor of either party) has a right to enforce any term of this agreement, the parties may, notwithstanding the Contracts (Rights of Third Parties) Act 1999 vary or cancel this Agreement by agreement between them without requiring the consent of such third party. Any amendment of this Agreement shall not be binding on the parties unless made in writing, expressed to amend this Agreement and signed by duly authorised representatives of the parties.

34 FURTHER ASSURANCE & ATTORNEYSHIP

- 34.1 **Further Assurance:** The Supplier shall do all acts and execute all documents in such manner and in such locations (at the Supplier's cost and expense) as BUPA may require in its sole discretion to give full effect to this Agreement and to protect perfect or enforce any of the rights granted confirmed or assigned to BUPA or any member of the BUPA Group pursuant to this Agreement
- 34.2 **Attorneyship:** As security for the performance by the Supplier of the Supplier's obligations under this Agreement, if the Supplier shall have failed following 5 days notice from BUPA to execute any document or perform any act required by BUPA pursuant to this Agreement BUPA shall have the right to do so in the place of and instead of the Supplier as the lawfully appointed attorney of the Supplier and the Supplier undertakes and warrants to confirm and ratify and be bound by any and all of the actions of BUPA pursuant to this Clause and such authority and appointment shall take effect as an irrevocable appointment pursuant to the Powers of Attorney Act 1971.

35 ENTIRE AGREEMENT

- 35.1 This Agreement constitutes the entire agreement between the parties and supersedes all previous agreements between the parties in relation to its subject matter.
- 35.2 The Supplier acknowledges that in entering into this Agreement it has not relied upon any Pre-Contractual Representations.
- 35.3 The Supplier irrevocably and unconditionally waives any rights that, but for this Clause 35, might otherwise be available to it in respect of any Pre-Contractual Representations.
- 35.4 Nothing in this Clause 33 limits or excludes any liability for fraud including, without limitation, fraudulent misrepresentation.

36 COUNTERPARTS

- 36.1. This Agreement may be entered into in the form of two counterparts, each executed by one of the parties, and, provided that both the parties shall so enter into the Agreement, each of the executed counterparts, when duly exchanged or delivered, shall be deemed to be an original but, taken together, they shall constitute one instrument.

37. NOTICES

- 37.1 Service of Notices:** Any notices sent under this Agreement must be in writing and may be served by personal delivery or by sending the notice by first class post or facsimile transmission at the address given above or at such other address as the relevant party may give for the purpose of service of notices under this Agreement and every such notice shall be deemed to have been served upon delivery if served by hand or at the expiration of 4 Business Days after despatch of the same if delivered by first class post or at ten hours am local time of the recipient on the next Business Day following despatch if sent by facsimile transmission.

- 37.2 Proof of Service:** To prove service of any notice it shall be sufficient to show in the case of a notice delivered by hand that the same was duly addressed and delivered by hand and in the case of a notice served by post that the same was duly addressed prepaid and posted in the manner set out above. In the case of a notice given by facsimile transmission, it shall be sufficient to show that it was despatched in a legible and complete form to the correct telephone number without any error message provided that a confirmation copy of the transmission is sent to the recipient by first class post in the manner set out above. Failure to send a confirmation copy will invalidate the service of any facsimile transmission.

38 JURISDICTION

- 38.1 Jurisdiction:** All disputes or claims arising out of or relating to this Agreement shall be subject to the exclusive jurisdiction of the English Courts to which the parties irrevocably submit.
- 38.2 Interim Relief:** Notwithstanding **Clause 7 and Clause 39.1**, either party may take proceedings or seek remedies before the courts or any competent authority of any country for interim or interlocutory remedies in relation to any breach of this Agreement or infringement by either party of the other party's IPRs.
- 38.3 Address for Service:** The parties' addresses for the service of any process in any proceedings in England shall be as set out at the beginning of this Agreement or at such other address as the relevant party may give pursuant to **Clause 37.1**.

39 GOVERNING LAW

- 39.1** This Agreement and any dispute or claim arising out of or in connection with it shall be governed by, and construed in accordance with, the laws of England.

SCHEDULE 1
THE KEY DETAILS

Account Managers

1. BUPA's Account Manager is:
2. The Supplier's Account Manager is:

Senior Managers

3. BUPA's Senior Manager is:
4. The Supplier's Senior Manager is:

Project Management

5. Both party's Account Managers shall meet at least [once per month] to discuss all issues relating to the provision of the Services and/or this Agreement.

Commencement and Duration

6. The Start Date is:
1. The Initial Term is: [] years commencing from the [Start Date]

Liability provisions

8. BUPA's Main Liability Cap is:
9. BUPA's Property Damage Liability Cap is:
10. The Recoverable Losses shall include:

Deliverables, Equipment & Sites

11. The Deliverables are:
12. The Equipment is as follows:
13. The Sites are as follows:

SCHEDULE 2
THE SERVICES, SERVICE LEVELS, & REBATES

1. Services

No.	Services	Service Levels	Rebate

SCHEDULE 3

THE FEES & PAYMENT TERMS

1. The **Fees** are as follows:

[insert details]

2. The **Payment Period** is
3. The **Currency** shall be
4. The **Interest Rate** shall be

SCHEDULE 4

THE EXIT PLAN

1. This Schedule sets out the arrangements that shall apply from the Exit Date (or earlier pursuant to Clause [26.11] of the Agreement) to achieve a smooth end to or transition of the Services.
2. The **Exit Plan** shall apply pursuant to Clause [26.11] of the Agreement.
3. The **Exit Plan** is as follows:

A. Delivery of Information: The Supplier shall promptly deliver or return to BUPA all Records, data, databases, Confidential Information and other business papers that it has in its possession or control relating to the Services and/or this Agreement. The Supplier shall certify that it does not retain any of BUPA's Confidential Information.

B. Work in Progress: Without prejudice to any other rights and remedies it may have, BUPA shall be entitled to have the work unperformed by the Supplier, performed by others, and to recover from the Supplier the amount by which the costs incurred by BUPA in completing such work exceed the sums due to the Supplier in respect of work properly performed by it up to the date of termination or expiry (as applicable).

C. Delivery of Deliverables: The Supplier shall promptly deliver to BUPA all Deliverables in its possession or control.

D. Transition Assistance: The Supplier shall provide to BUPA and/or any replacement suppliers engaged by BUPA all reasonable assistance, training and information to ensure a smooth transition of the supply of the Services from the Supplier to the provision of equivalent services by BUPA and/or its replacement suppliers.

E. Return of any Equipment and other items: To the extent BUPA has provided the Supplier with any Equipment or other items pursuant to this Agreement, the Supplier shall promptly return the same to BUPA.

F. Payment of Outstanding Rebates: To the extent that any Rebates are owing to BUPA, the Supplier shall immediately pay all such Rebates to BUPA in the Currency.

35.5 No further use of BUPA items: The Supplier shall not make any further use or exploitation of any Equipment, tools, plant, machinery, Confidential Information, IPRs, items, data or information owned or proprietary to BUPA or any member of the BUPA Group.

35.6 Payment:

35.7 No further use of BUPA items: The Supplier shall not make any further use or exploitation of any Equipment, tools, plant, machinery, Confidential Information, IPR, items, data or information owned or proprietary to BUPA or any member of the BUPA Group.

35.8 Continued provision of the Services: At BUPA's request, the Supplier shall continue to provide the Services to BUPA on the terms and conditions of this Agreement for a further period of **X** months.

4. Costs

- A. If any of the costs in the Exit Plan (including, without limitation, in the Activity Matrix) are stated as being met by BUPA but the activity does not require the Supplier to allocate additional resources to the activity over and above the resource already allocated by the Supplier to provide the Services on an ongoing basis, then such costs shall be met by the Supplier and not BUPA.
- B. All other costs and expenses shall be borne by the parties in accordance with the allocation in the Activity Matrix.

5. The **Activity Matrix** is as follows:

For the purposes of this Activity Matrix

"**D Day**" shall be the date of expiry or termination of this Agreement (as applicable) or an earlier date specified by BUPA pursuant to Clause **[26.1]**; and

"**Exit Period**" means a period of **X months**.

No.	Activity	Timetable	Who Pays	[Spare]
1	Each party to appoint an exit manager responsible for implementing the Exit Plan.	Within 3 Business Days of D Day.	Each party bears their own costs.	
2	BUPA shall notify the Supplier whether it intends to transition to a new supplier or take the service back in house or a mixture of both.	Within 90 Business Days of D Day	Not applicable	
3	The parties to meet and agree (acting reasonably and in good faith) a detailed plan for the implementation of this Exit Plan.	Within 6 Business Days of D Day.	Each party bears its own costs.	
4	At the request of BUPA, the Supplier shall provide BUPA with skills transfer (in a form to be agreed)	Within 20 Business Days of D Day or BUPA's request whichever is the	The Supplier shall bear all its costs.	

	from the Supplier to BUPA and any replacement suppliers.	later.		
5	The Supplier shall pay all outstanding Rebates [and/or Delay Payments] to BUPA.	Within 20 Business Days of D Day.		
6	The Supplier shall return all BUPA items, materials and equipment to BUPA in its possession or control.	Within 30 Business Days of D Day.	[sample only] [The Supplier shall bear all costs of this if BUPA has terminated the Agreement under Clauses * or *]	
7	The Supplier shall deliver to BUPA all Deliverables in its possession or control.	Within 30 Business Days of D Day.		
8	The Supplier shall deliver to BUPA all Records, data, databases, Confidential Information and other business papers which it has in its possession or control relating to the Services and/or this Agreement. The Supplier shall certify that it does not retain any of BUPA's Confidential Information.	Within 30 Business Days of D Day.		
9	The Supplier shall provide to BUPA and/or any replacement suppliers engaged by BUPA all reasonable assistance, training and information to ensure a smooth transition of the supply of the Services from the Supplier to the provision of equivalent services by BUPA and/or its replacement suppliers.	Throughout the Exit Period.		
10	The Supplier shall provide BUPA with [2] copies (in an agreed electronic format) of all archival,	Within 30 Business Days of D Day.		

	historical and operational data relating to the Services.			
11	The Supplier shall produce and deliver to BUPA printouts (in an agreed format) of any and all such archival, historical and operational data relating to the Services as BUPA requests.	Within 30 Business Days of D Day.		
12	The Supplier shall retain in its possession for a period of at least 71 years all archival, historical and operational data relating to the Services			

SCHEDULE 5

THE EMPLOYMENT & PENSION PROVISIONS

1.1 The parties intend that the Transfer of Undertakings (Protection of Employment) Regulations 1981 (the “**Transfer Regulations**”) shall not apply on the expiry or termination of this Agreement and accordingly they agree that no employee of the Supplier shall transfer from the employment of the Supplier into the employment of BUPA by virtue of the said transfer. The Supplier agrees that it will not at any time hereafter contend for any purpose whatsoever that the Transfer Regulations apply to this Agreement.

1.2 Without prejudice to Paragraph 1.1 the Supplier undertakes to indemnify BUPA and keep BUPA indemnified from and against all claims, demands, actions, proceeding, damages, compensation, tribunal awards, fines, costs, expenses and all other liabilities, howsoever and whenever arising relating to:

- (a) any contract of employment (including, without prejudice to the generality of the foregoing the termination thereof) with; or
- (b) any duty or liability of the Supplier in relation to any matter whatsoever (whether arising before or after the Exit Date) and/or in relation to the provision of the Services (or any part of them) provided hereunder howsoever the same may arise including but not limited to:
 - (i) salaries or wages, accrued holiday pay, expenses, pension benefits, life assurance, health or medical expenses insurance and all other emoluments and any PAYE tax deductions and National Insurance contributions relating to;
 - (ii) any claim for pay in lieu of notice, damages for wrongful dismissal, redundancy pay (whether under statute or common law) and compensation for unfair dismissal (including, without limitation, any such claim arising from a dismissal or constructive dismissal which is deemed to have been effected by BUPA) relating to; and
 - (iii) any award made (whether against the Supplier or BUPA) under Section 189 Trade Union and Labour Relations (Consolidation) Act 1992 or Regulation 11 of the Transfer Regulations in respect of,

any former, existing or future employee of the Supplier or any member of the Supplier's group or any trade union or staff association recognised by the Supplier or any member of the Supplier's group and which contract or liability is transferred to BUPA under the Transfer Regulations or is alleged by such employee, trade union or staff association to have been so transferred.

SCHEDULE 6
AGREED FORM OF GUARANTEE

SCHEDULE 7
CHANGE CONTROL NOTE

SCHEDULE 8
TECHNOLOGY REFRESH PLAN

IN WITNESS OF THE ABOVE the parties have signed this Agreement on the date written at the head of this Agreement.

SIGNED by)	
)
on behalf of)	Authorised Signatory
[THE BRITISH UNITED PROVIDENT ASSOCIATION LIMITED])	
)	

SIGNED by)	
)
on behalf of)	Authorised Signatory
[?])	