SHOAL COMPUTER SOLUTIONS LTD

DATTO BACKUP TERMS AND CONDITIONS

THESE TERMS are applicable from 1st March 2019.

During the term of your Datto Backup Provision with Shoal Computer Solutions Ltd ("SHOAL") it is agreed that authorised representatives of both parties have signed a separate Service Agreement detailing the services provided. The Service Agreement will be subject to and forms part of the Datto Backup standard Terms & Conditions of business, which are detailed below.

For avoidance of doubt the Services shall commence on the date stated in the relevant Service Agreement.

Annex 1   **Datto Backup General Terms and Conditions**

DEFINITIONS

In these terms and conditions, the following words shall have the following meanings:

"Account"
The Client's account with SHOAL.

"Applicable Laws"
Means (a) European Union or Member State laws with respect to any Client Personal Data in respect of which any Client Group Member is subject to EU Data Protection Laws; and (b) any other applicable law with respect to any Client Personal Data in respect of which any Client Group Member is subject to any other Data Protection Laws;

"AUP"
Means SHOAL's acceptable use policy as published at https://www.shoal-it.com/legal/ which may be modified from time to time by SHOAL

"Client Data"
Data, information and material that the Client provides, inputs, stores, accesses or transmits.

"Client Affiliate"
Means an entity that owns or controls, is owned or controlled by or is or under common control or ownership with Client, where control is defined as the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether through ownership of voting securities, by contract or otherwise;

"Client Group Member"
Means Client or any Client Affiliate;

"Client Personal Data"
Means any Personal Data Processed by a Contracted Processor on behalf of a Client Group Member;

"Contracted Processor"
Means SHOAL or a Subprocessor;

"Data Exporter"
Means Client or any Client Affiliate;

"Data Importer"
Means SHOAL or a Subprocessor;

"Data Protection Laws"

Means EU Data Protection Laws and, to the extent applicable, the data protection or privacy laws of any other country;

"Documentation"
Documentation made available to the Client by SHOAL from time to time which sets out a description of the Services and the instructions for the Services.

"EEA"
Means the European Economic Area;

"EU Data Protection Laws"
Means EU Directive 95/46/EC, as transposed into domestic legislation of each Member State and as amended, replaced or superseded from time to time, including by the GDPR and laws implementing or supplementing the GDPR;

"**Fees"**
The fees payable by the Client to SHOAL as indicated in the proposal and contract on a monthly basis, subject to any change in the Clients' required data storage requirement and to obvious error. Fees are calculated using the per unit price as stated in the proposal.

"GDPR"
Means EU General Data Protection Regulation 2016/679;

"Initial Subscription Term"
A period of one year from the creation of the relevant account.

"Initial Term"
The initial term of this Agreement being 12 months from the Effective Date or longer if denoted in the signed Service Agreement.

"Services"
The subscription services provided by SHOAL to the Client under this Agreement, as more particularly described in the Documentation.

"Software"
The software applications available and provided by SHOAL as part of the Services.

"Restricted Transfer"
Means:

a)   a transfer of Client Personal Data from any Client Group Member to a Contracted Processor; or

b)   an onward transfer of Client Personal Data from a Contracted Processor to a Contracted Processor, or between two establishments of a Contracted Processor,

in each case, where such transfer would be prohibited by Data Protection Laws (or by the terms of data transfer agreements put in place to address the data transfer restrictions of Data Protection Laws) in the absence of the Standard Contractual Clauses to be established under clause 29.d or 35 below;

"Services"
Means the services and other activities to be supplied to or carried out by or on behalf of SHOAL for Client Group Members;

"Standard Contractual Clauses"
Means the contractual clauses set out in the terms and conditions listed below,

"Subprocessor"
Means any person (including any third party, but excluding an employee of SHOAL or any of its sub-contractors) appointed by or on behalf of SHOAL to Process Personal Data on behalf of any Client Group Member; and

The terms, "Commission", "Controller", "Data Subject", "Member State", "Personal Data", "Personal Data Breach", "Processing" and "Supervisory Authority" shall have the same meaning as in the GDPR, and their cognate terms shall be construed accordingly.

"User"
A client who uses and accesses a User Environment directly.

"User Environment"
An IT (hardware and software) environment created by SHOAL for a User under the Account.

"User Subscriptions"
The User subscriptions purchased by the Client pursuant to clause 8 which entitle Users to access and use the Services via a User Environment and the Documentation in accordance with this Agreement, if a direct User Environment is required.

The word "include" shall be construed to mean include without limitation, and cognate terms shall be construed accordingly.

Clause 1 – The Services

1.1)   In consideration of the payment of the Fees by the Client, SHOAL shall use reasonable efforts to provide the Services to the Client for the Term in accordance with the terms of this Agreement.

1.2)   The Client acknowledges that the Service permits the creation of unique User Environments by SHOAL by reference to pre-defined Hardware and Software. Accordingly, each User Environment is subject to availability and therefore subject to confirmation of availability by SHOAL and likewise any requested alterations to the User Environment.

1.3)   Each User Environment may be made available to one User only. SHOAL reserves the right to terminate duplicate users.

1.4)   Each User Environment may be made available for the Initial Subscription Term. Thereafter, it will automatically renew at the end of the Initial Term for a further term of 12 months on a rolling basis (each a "Renewal Period") unless or until terminated or subsequent Renewal Period. The Initial Term together with any subsequent Renewal Period shall constitute the total Subscription Term for each environment. A User Environment may be modified or terminated by SHOAL prior to the end of the Initial Term or of any Renewal Period.

1.5)   SHOAL may amend or modify any User Environment at the request of the client subject to clause 1.2 which may result in an increase in the Fees for that User Environment.

1.6)   SHOAL provides no guarantees or other commitments regarding the timeliness within which the Services shall be provided (time not being of the essence in relation to the provision of the Services and/or the performance of any of the Client's obligations under the Agreement).

Clause 2 – User Subscriptions

2.1)   The Client shall not access, store, distribute or transmit any viruses during the course of its or their use of the Services and shall at all times comply with the Acceptable Use Policy and SHOAL reserves the right to disable the Client's access to any material that breaches the provisions of this Clause.

2.2)   The rights provided under this Clause are granted to the Client only, and shall not be considered granted to any subsidiary or holding company of the Client.

Clause 3 – Service Levels

3.1)   SHOAL shall use reasonable efforts to provide the Services in accordance with the Datto Backup Service Level Agreement. The Client's sole and exclusive remedy (if any) shall be the payment of service credits in accordance with the Datto Backup Service Level Agreement. SHOAL shall provide the Services using reasonable skill and care, however, provides no guarantees that the provision of the Services shall be uninterrupted or fault free nor does it provide any commitment regarding the availability of the Services to the Client.

3.2)   Notwithstanding anything to the contrary in the Agreement, SHOAL shall be entitled to make changes to the Services (or any part thereof) which do not have a material adverse effect on the Services and shall where SHOAL deems it practical to do so, give the Client written notification of the same.

3.3)   SHOAL shall use commercially reasonable endeavours to make the Services available in accordance with the SLA, except for, planned maintenance outside 9.00am – 5.00pm; and unscheduled maintenance performed outside 9:00am – 5:00pm provided SHOAL has used reasonable endeavours to give the Client at least 6 hours' notice in advance.

Clause 4 – Client Data

4.1)   Client Data is and at all times shall remain the Client's exclusive property and shall remain in the Client's care, custody and control.

4.2)   Except for account data, the Client is the sole controller for any personal data included in the content the Client inputs into the Service and shall be the data controller and appoints SHOAL as a processor if SHOAL processes such personal data on the Client's behalf.

4.3)   SHOAL shall not be responsible for any loss, destruction, alteration or disclosure of Client Data caused by any third party or any failure of the Service and so the Client and Users should have in place their own usual disaster recovery measures (including where relevant, insurance for the loss of such data) to secure their own back-ups of data, which are not the responsibility of SHOAL.

4.4)   SHOAL warrants and represents that, before it processes any Client Personal Data on behalf of any Client Group Member, SHOAL entry into the signed Service Agreement as an agent for and on behalf of that Client Group Member and will have been duly and effectively authorised (or subsequently ratified) to do so.

Clause 5 – Third Party Providers

The Client acknowledges that the Services may enable or assist it to access the website content of, correspond with, and purchase products and services from, third parties via third party websites and that it does so solely at its own risk. SHOAL makes no representation or commitment and shall have no liability or obligation whatsoever in relation to the content or use of, or correspondence with, any third-party website, or any transactions completed, and any contract entered into by the Client, with such third party. SHOAL does not endorse or make any representations about such third-party websites.

Clause 6 – SHOAL's Obligations

6.1)   SHOAL undertakes that the Services will be performed substantially in accordance with the Documentation and with reasonable skill and care.

6.2)   The undertaking at Clause 6.1 shall not apply to the extent of any non-conformance which is caused by use of the Services contrary to SHOAL's instructions, or modification or alteration of the Services by any party other than SHOAL or SHOAL's duly authorised contractors or agents. If the Services do not conform to the foregoing undertaking, SHOAL will, at its expense, use all reasonable commercial endeavours to correct any such non-conformance promptly, or provide the Client with an alternative means of accomplishing the desired performance. Such correction or substitution constitutes the Client's sole and exclusive remedy for any breach of the undertaking set out in Clause 6a. Notwithstanding the foregoing, SHOAL:

a)   Does not warrant that the Client's use of the Services will be uninterrupted or error-free; nor that the Services, Documentation and/or the information obtained by the Client through the Services will meet the Client's requirements; and

b)   Is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet, and the Client acknowledge that the Services and Documentation may be subject to limitations, delays and other problems inherent in the use of such communication facilities.

6.3)   This Agreement shall not prevent SHOAL from entering into similar agreements with third parties, or from independently developing, using, selling or licensing documentation, products and/or services which are similar to those provided under this Agreement.

Clause 7- Client's Obligations

7.1)   The Client shall be responsible for ensuring that any use of the Services complies with all relevant laws, and shall not contravene, and not by any act or omission, cause SHOAL to contravene any relevant laws.

7.2)   The Client consents to SHOAL co-operating with any relevant authorities in connection with any misuse or suspected misuse of the Services and agrees, without prejudice to the generality of the foregoing, that SHOAL will be entitled to divulge the name and address and account information relating to the Client to such third parties.

7.3)   The Client will be deemed to have taken any action that it permits, assists or facilitates any person or entity to take related to the Agreement or use of the Services. The Client is responsible for Users' use of the Services. If the Client becomes aware of any violation of its obligations under the Agreement, it will immediately notify SHOAL.

7.4)   The Client shall provide SHOAL with all necessary co-operation in relation to the Agreement and all necessary access to such information as may be required in order to render the Services.

7.5)   The Client shall observe the terms of the Acceptable Use Policy at all times.

Clause 8 – Charges and Payment

8.1)   The Client shall pay the Fees to SHOAL for the User Subscriptions in accordance with clause 8, on the Effective Date for the Fees payable in respect of the Initial Subscription Term and thereafter monthly for the Fees payable in respect of the Initial term and the next Renewal Period

8.2)   All amounts are payable in Sterling

8.3)   All amounts are non-cancellable and non-refundable

8.4)   All amounts payable by the Client under the Agreement are exclusive of amounts in respect of valued added tax chargeable from time to time (VAT).

8.5)   The Client shall pay all amounts due under the Agreement on demand in full without any set- off, counterclaim, deduction or withholding except as required by law. SHOAL may, without limiting its other rights or remedies, set off any amount owing to it by the Client against any amount payable by SHOAL to the Client.

8.6)   Where payment is not made in accordance with the terms of clause 8, without prejudice to any other rights and remedies, SHOAL may, without liability to the Client, disable any Client's password, account and access to all or part of the Services and SHOAL shall be under no obligation to provide any or all of the Services while the payment concerned remains unpaid.

8.7)   Where payment is not made by the due date the Client shall pay interest on any unpaid amounts calculated at 3% above HSBC Bank plc's base rate for the time being in force calculated on a daily basis.

8.8)   If, at any time while using the Services, the Client exceeds the amount of disk storage space specified in the Documentation, SHOAL shall charge the Client, and the Client shall pay SHOAL's then current excess data storage fees.

8.9)   SHOAL shall be entitled to increase the Fees upon 30 days prior notice. Further fees covering the usage of additional storage shall be invoiced monthly, pro-rata.

Clause 9 – Indemnity

9.1)   Without prejudice to any other rights of SHOAL, the Client will indemnify, keep indemnified and hold harmless SHOAL from and against all costs (including without limitation the cost of enforcement (on a full indemnity basis), liabilities, claims, damages, direct, indirect or consequential loss, expenses and/or judgments which SHOAL suffers as a consequence of the Client's use of the Services and/or Documentation.

9.2)   In no event shall SHOAL be liable to the Client to the extent that the alleged infringement is based on, modification of the Services or Documentation other than by SHOAL, and use in a manner contrary to instructions or after notice of alleged infringement by SHOAL or any appropriate authority.

9.3)   The foregoing states the Client's sole and exclusive rights and remedies, and SHOAL's entire obligations and liability, for infringement of any patent, copyright, trade mark or right of confidentiality.

Clause 10 – Limitation of Liability

10.1)   Unless otherwise stated in this Agreement, SHOAL makes no warranty in respect of the supply of the Services (or any part thereof) and all other warranties which by reason of statute or other direction, regulation or governmental authority may be implied into a contract for the supply of the Services (or any part thereof) are hereby excluded to the fullest extent possible, save for, and to the extent of, those warranties which cannot lawfully be excluded. If the Client is a consumer, this shall be without prejudice to its statutory rights.

10.2)   Nothing in this Agreement shall limit or exclude SHOAL's liability for;

a)   Death or personal injury caused by its negligence, or the negligence of its employees, agents or subcontractors;

b)   Fraud or fraudulent misrepresentation;

c)   Breach of the terms implied by section 2 of the Supply of Goods and Services Act 1982;

d)   Breach of the terms implied by section 12 of Supply of Goods Act 1979; or

e)   Defective products under the Consumer Protection Act 1987

10.3)   Subject to the above clause;

a)   SHOAL shall under no circumstances whatever be liable to the Client, whether in contract or tort (including negligence) breach of statutory duty, or otherwise, for any loss of use, data, profit, or any indirect or consequential loss arising under or in connection with this Agreement.

b)   SHOAL's total liability to the Client in respect of all other proven direct losses arising under or in connection with this Agreement, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, shall in no circumstances exceed the net amount the Client paid SHOAL in the prior (12) months for the Software or Service(s) that caused the damages or are the subject matter of the cause of action

10.4)   The terms implied by sections 13 to 15 of the Sale of Goods Act 1979 and the terms implied by sections 3 to 5 of the Supply of Goods and Services Act 1982 are, to the fullest extent permitted by law, excluded from this Agreement.

a)   Except as expressly and specifically provided in this Agreement;

b)   The Client assumes sole responsibility for results obtained from the use of the Services and the Documentation by the Client, and for conclusions drawn from such use. SHOAL shall have no liability for any damage caused by errors or omissions in any information, instructions provided to SHOAL by the Client in connection with the Services, or any actions taken by SHOAL at the Client's direction;

c)   The Services and the Documentation are provided to the Client on an "as is" basis

10.5)   SHOAL on behalf of itself and its third-party suppliers makes no and disclaims all warranties, express and implied, about the Software and Services provided hereunder. Third party software is provided on an as is basis and without warranty of any kind.

10.6)   The Client agrees that any cause of action that it may have against SHOAL must commence within 18 months after the cause of action arose, otherwise, the Client's cause of action is permanently barred.

10.7)   This clause shall survive termination of the Agreement.

Clause 11 – Term and Termination

11.1)   This Agreement shall, unless otherwise terminated as provided in this clause, commence on the Effective Date and shall continue for the Initial Term and, thereafter, this Agreement shall be automatically renewed for successive periods of 12 months (each an Extension Period) unless;

11.2)   Either party notifies the other party of termination, in writing, at least 90 days before the end of the Initial Term or any Extension Period, in which case this Agreement shall terminate upon the expiry of the applicable Initial Term or Extension Period, or otherwise terminated in accordance with the provisions of this Agreement.

11.3)   SHOAL may suspend, revoke or limit the Client's use of the Services if SHOAL determines there is a breach of Client's obligations, a security breach, or violation of law. If the cause of the suspension can reasonably be remedied, SHOAL will provide notice of the actions the Client must take to reinstate the Services. If the Client fails to take such actions within a reasonable time, SHOAL may terminate the Services.

11.4)   Either party shall be entitled to terminate this Agreement with immediate effect by giving notice in writing to the other party if;

a)   the other party commits a material breach of the terms of the Agreement and (if such breach is remediable) fails to remedy that breach within 14 days of receipt of notice in writing to do so;

b)   the other party repeatedly breaches any of the terms of the 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 the Agreement;

c)   the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or (being a company or limited liability partnership) is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986;

d)   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 other party;

e)   a creditor or encumbrancer of the other party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of its assets and such attachment or process is not discharged within 14 days;

f)   an application is made to court, or an order is made, for the appointment of an administrator or if a notice of intention to appoint an administrator is given or if an administrator is appointed over the other party;

g)   a person becomes entitled to appoint a receiver over the assets of the other party or a receiver is appointed over the assets of the other party;

h)   any event occurs, or proceeding is taken, with respect to the other party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause 11.3 to clause 11.6 (inclusive); or

i)   the other party suspends or ceases, or threatens to suspend, or cease, to carry on all or a substantial part of its business.

11.5)   On termination (or expiry) of this Agreement for any reason;

a)   all licences granted under this Agreement shall immediately terminate;

b)   each party shall return and make no further use of any equipment, property, Documentation and other items belonging to the other party;

c)   SHOAL may destroy or otherwise dispose of any of the Client Data in its possession

d)   Following receipt of all outstanding balances SHOAL will cooperate fully and use all reasonable endeavours to ensure the seamless transition of services and transfer of Client Data.

11.6)   Termination of the Contract, however arising, shall not affect any of the parties' rights and remedies that have accrued as at termination. Clauses which expressly or by implication survive termination of the Contract shall continue in full force and effect.

Clause 12 – Proprietary Rights

12.1)   The Client acknowledges and agrees that SHOAL and/or its licensors own all intellectual property rights in the Services and the Documentation. Except as expressly stated herein, this Agreement does not grant the Client any rights to, or in, patents,

copyrights, database rights, trade secrets, trade names, trade marks' (whether registered or unregistered), or any other rights or licences in respect of the Services or the Documentation.

12.2)   The Client shall not permit any third party to access the Services except as permitted herein or in an order form, or create derivate works based on the Services except as authorised herein, or reverse engineer the Services, or access the Services in order to build a competitive product or service, or copy any features, functions or graphics of the Services.

Clause 13 – Confidentiality

13.1)   Any and all information emanating from either party is confidential and proprietary and both parties agree that it shall not at any time permit the duplication or disclosure of any such confidential information to any person nor use the same in any way other than in connection with the performance of the Agreement. Each party agrees to hold this confidential/proprietary information only for the purpose expressly permitted under this Agreement and to disclose confidential information only to its employees and contractors as authorised in this Agreement and then only on a need to know basis. Each party agrees to maintain adequate control procedures to protect the confidentiality of the proprietary information as required by this Agreement, these procedures should be at least as great as their own precautions to protect their own confidential information. Neither party shall be obliged to protect information that it can document; a) is or has entered the public domain other than by breach of this Agreement, b) is in the possession of the recipient without restriction in relation to disclosure before the date of receipt from the other party, c) is obtained from a third party who is lawfully authorised to disclose such information, d) is required by law, statute or regulation, provided that the party provides the other with notice of that requirement and a reasonable opportunity for it to take action to restrict or eliminate the required disclosure, e) is developed independently without use of or reference to the confidential information.

13.2)   Upon either party terminating the Agreement, or on notice by the other party to do so, each party agrees to immediately return or (at the requesting party's option) destroy any confidential information and all materials related to, or in any way associated with, the confidential information, and if requested shall provide a certificate of compliance to the requesting party by the date specified in such notice, such date not being less than 5 working days of the date of such notice.

13.3)   Each party is entitled to injunctive relief and shall fully indemnify the other party and hold it harmless on an after tax basis against all reasonable costs (including reasonable legal costs and/or expenses), expenses, losses, damages and other liability arising out of or otherwise in connection with any unauthorised disclosure or use of the confidential information.

13.4)   This clause 13 shall survive termination of the Contract.

Clause 14 – Anti-Bribery

The Client will not take or knowingly permit any action to be taken that would cause SHOAL to be in violation of any applicable anti-bribery or anti-money laundering laws. The Client's books and records shall accurately reflect all payments in respect of transactions under the Agreement. SHOAL will terminate the Agreement in the event of a breach of this clause.

Clause 15 – Assignment and other dealings

15.1)   SHOAL may at any time assign, transfer, mortgage, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Agreement.

15.2)   The Client may not assign, transfer, mortgage, charge, subcontract, declare a trust over or deal in any other manner with all or any of its rights or obligations under the Contract without the prior written consent of SHOAL.

Clause 16 – Notices

16.1)   Any notice or other communication given to a party under or in connection with the Agreement shall be in writing, addressed to that party at its registered office or such other address as that party may have specified to the other party in writing in accordance with this clause, and shall be delivered personally, or sent by pre-paid first-class post or other next working day delivery service or commercial courier

16.2)   A notice or other communication shall be deemed to have been received: if delivered personally, when left at the address referred to in this clause; if sent by pre-paid first-class post or other next working day delivery service, at 9:00am on the second working day after posting; or, if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed;

16.3)	The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.

Clause 17 – Severance

If any provision or part-provision of the Agreement is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal or enforceable. If such modification is not possible, the relevant provision or part provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this clause shall not affect the validity and enforceability of the rest of the Agreement.

Clause 18 – Waiver

A waiver of any right or remedy under the Agreement or law is only effective if given in writing and shall not be deemed a waiver of any subsequent breach or default. No failure or delay by a party to exercise any right or remedy provided under the Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

Clause 19 – No partnership or agency

Nothing in the Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between the parties, nor constitute either party the agent of the other for any purpose. Neither party shall have authority to act as agent for, or to bind, the other party in any way.

Clause 20 – Third parties

A person who is not a party to the Agreement shall not have any rights to enforce its terms.

Clause 21 – Variation

21.1)	SHOAL may change this Agreement (General Terms and Conditions, AUP, and the Service Level Agreement) from time to time. In the event of a material adverse change SHOAL will give the Client at least thirty days' notice before the change is to take effect, save where compliance with any legal or regulatory obligation requires a shorter period of notice or no notice. The Client's continued use of the Services following any such changes shall constitute the Client's acceptance of such changes.

21.2)	Except as set out within this clause, no variations of the Agreement, including the introduction of any additional terms and conditions, shall be effective unless it is agreed in writing and signed by a Director of SHOAL.

Clause 22 – Force Majeure

22.1)	Neither party shall have any liability or responsibility for failure to fulfil any obligation under this Agreement so long as, and to the extent to which, the fulfilment of such obligations is delayed, hindered or prevented by circumstances beyond the reasonable control of the party concerned including (but not limited to) strike, lock-out, fire, explosion or any form of government intervention.

22.2)	A party claiming the benefit of this provision shall, as soon as reasonably practicable after the occurrence of a Force Majeure Event; notify the other party of the nature and extent of the event, and use reasonable endeavours to remove any such causes and resume performance under this Agreement as soon as feasible.

Clause 23 – Entire Agreement

This Agreement constitutes the whole agreement and understanding of the parties and supersedes any previous arrangement, understanding or agreement between them relating to the subject matter of this Agreement. Each party acknowledges that, in entering into this Agreement, it has not relied on any statement, representation, assurance or warranty (whether made negligently or innocently) other than those set out in this Agreement.

Clause 24 – Law of the Contract

The Agreement shall be governed by the laws of England and the parties agree to submit to the non- exclusive jurisdiction of the English Courts.

Clause 25 – Precedence over any other Terms and Conditions

These Conditions shall have precedence over any conditions of the Client including any appearing in any order forms, acknowledgements, purchase orders, etc. issued by the Client.

Clause 26 – Processing of Client Personal Data

26.1)	SHOAL shall:

a)	comply with all applicable Data Protection Laws in the Processing of Client Personal Data; and

b)	not Process Client Personal Data other than on the relevant Client Group Member's documented instructions unless Processing is required by Applicable Laws to which the relevant Contracted Processor is subject, in which case SHOAL shall to the extent permitted by Applicable Laws inform the relevant Client Group Member of that legal requirement before the relevant Processing of that Personal Data.

26.2)	Each Client Group Member:

a)	instructs SHOAL (and authorises SHOAL to instruct each Subprocessor) to:

1)	Process Client Personal Data; and

2)	in particular, transfer Client Personal Data to any country or territory which is governed under the regulatory data protection act,

as reasonably necessary for the provision of the Services; and

b)	warrants and represents that it is and will at all relevant times remain duly and effectively authorised to give the instruction set out in clause 26.a.i on behalf of each relevant Client Affiliate.

26.3)	Subject to the Proposal Document and signed Service Agreement sets out certain information regarding the Contracted Processors' Processing of the Client Personal Data as required by article 28(3) of the GDPR (and, possibly, equivalent requirements of other Data Protection Laws). Client may make reasonable amendments to the details of processing of client personal data by written notice to SHOAL from time to time as Client reasonably considers necessary to meet those requirements. Nothing in the Proposal Document and signed Service Agreement (including as amended pursuant to this clause 3.3) confers any right or imposes any obligation on any party.

Clause 27 – SHOAL Personnel

SHOAL shall take reasonable steps to ensure the reliability of any employee, agent or contractor of any Contracted Processor who may have access to the Client Personal Data, ensuring in each case that access is strictly limited to those individuals who need to know / access the relevant Client Personal Data, as strictly necessary for the purposes of the fulfilling the Service Agreement, and to comply with Applicable Laws in the context of that individual's duties to the Contracted Processor, ensuring that all such individuals are subject to confidentiality undertakings or professional or statutory obligations of confidentiality.

Clause 28 – Security

28.1)	Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of Processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, SHOAL shall in relation to the Client Personal Data implement appropriate technical and organisational measures to ensure a level of security appropriate to that risk, including, as appropriate, the measures referred to in Article 32(1) of the GDPR.

28.2)	In assessing the appropriate level of security, SHOAL shall take account in particular of the risks that are presented by Processing, in particular from a Personal Data Breach.

Clause 29 – Subprocessing

29.1)   Each Client Group Member authorises SHOAL to appoint (and permit each Subprocessor appointed in accordance with this clause 29 to appoint) Subprocessors in accordance with this clause 29 and any restrictions in these terms and conditions.

29.2)   SHOAL may continue to use those Subprocessors already engaged by SHOAL as at the date of the signed Service Agreement, subject to SHOAL in each case as soon as practicable meeting the obligations set out in clause 29.4.

29.3)   SHOAL shall give Client prior written notice of the appointment of any new Subprocessor, including full details of the Processing to be undertaken by the Subprocessor. If, within 30 days of receipt of that notice, Client notifies SHOAL in writing of any objections (on reasonable grounds) to the proposed appointment:

29.4)   SHOAL shall ensure that each Subprocessor performs the obligations under clause 26.1, 27, 28, 30.1, 31.2, 32 and 34.1, as they apply to Processing of Client Personal Data carried out by that Subprocessor, as if it were party to these terms and conditions in place of SHOAL.

Clause 30 – Data Subject Rights

30.1)   Taking into account the nature of the Processing, SHOAL shall assist each Client Group Member by implementing appropriate technical and organisational measures, insofar as this is possible, for the fulfilment of the Client Group Members' obligations, as reasonably understood by Client, to respond to requests to exercise Data Subject rights under the Data Protection Laws.

30.2)   SHOAL shall:

a)   promptly notify Client if any Contracted Processor receives a request from a Data Subject under any Data Protection Law in respect of Client Personal Data; and

b)   ensure that the Contracted Processor does not respond to that request except on the documented instructions of Client or the relevant Client Affiliate or as required by Applicable Laws to which the Contracted Processor is subject, in which case SHOAL shall to the extent permitted by Applicable Laws inform Client of that legal requirement before the Contracted Processor responds to the request.

Clause 31 – Personal Data Breach

31.1)   SHOAL shall notify Client without undue delay upon SHOAL or any Subprocessor becoming aware of a Personal Data Breach affecting Client Personal Data, providing Client with sufficient information to allow each Client Group Member to meet any obligations to report or inform Data Subjects of the Personal Data Breach under the Data Protection Laws.

31.2)   SHOAL shall co-operate with Client and each Client Group Member and take such reasonable commercial steps as are directed by Client to assist in the investigation, mitigation and remediation of each such Personal Data Breach.

Clause 32 – Data Protection Impact Assessment and Prior Consultation

SHOAL shall provide reasonable assistance to each Client Group Member with any data protection impact assessments, and prior consultations with Supervising Authorities or other competent data privacy authorities, which Client reasonably considers to be required of any Client Group Member by article 35 or 36 of the GDPR or equivalent provisions of any other Data Protection Law, in each case solely in relation to Processing of Client Personal Data by, and taking into account the nature of the Processing and information available to, the Contracted Processors.

Clause 33 – Deletion or return of Client Personal Data

33.1)   Subject to clause 33.2 and 33.3 SHOAL shall promptly and in any event within thirty [30] days of the date of cessation of any Services involving the Processing of Client Personal Data (the "Cessation Date"), delete and procure the deletion of all copies of those Client Personal Data.

33.2)   Subject to clause 33.3, Client may in its absolute discretion by written notice to SHOAL within thirty [30] days of the Cessation Date require SHOAL to (a) return a complete copy of all Client Personal Data to Client by secure file transfer in such format as is reasonably notified by Client to SHOAL; and (b) delete and procure the deletion of all other copies of Client Personal Data Processed by any Contracted Processor. SHOAL shall comply with any such written request within thirty [30] days of the Cessation Date.

33.3)   Each Contracted Processor may retain Client Personal Data to the extent required by Applicable Laws and only to the extent and for such period as required by Applicable Laws and always provided that SHOAL shall ensure the confidentiality of all such Client Personal Data and shall ensure that such Client Personal Data is only Processed as necessary for the purpose(s) specified in the Applicable Laws requiring its storage and for no other purpose.

33.4)   SHOAL shall provide written certification to Client that it has fully complied with this clause 33 within thirty [30] days of the Cessation Date.

Clause 34 – Audit rights

34.1)   Subject to clauses [34.2 to 34.4], SHOAL shall make available to each Client Group Member on request all information necessary to demonstrate compliance, and shall allow for and contribute to audits, including inspections, by any Client Group Member or an auditor mandated by any Client Group Member in relation to the Processing of the Client Personal Data by the Contracted Processors.

34.2)   Information and audit rights of the Client Group Members only arise under clause 34.1 to the extent that these terms and conditions does not otherwise give them information and audit rights meeting the relevant requirements of Data Protection Law (including, where applicable, article 28(3)(h) of the GDPR).

34.3)   A Client Group Member may only mandate an auditor for the purposes of clause 34.1 if the auditor has been mutually agreed upon with SHOAL. SHOAL shall not unreasonably withhold or delay an agreement to the appointment of an auditor.

34.4)   Client or the relevant Client Affiliate undertaking an audit shall give SHOAL reasonable notice of any audit or inspection to be conducted under clause 34.1 and shall make (and ensure that each of its mandated auditors makes) reasonable endeavours to avoid causing (or, if it cannot avoid, to minimise) any damage, injury or disruption to the Contracted Processors' premises, equipment, personnel and business while its personnel are on those premises in the course of such an audit or inspection. A Contracted Processor need not give access to its premises for the purposes of such an audit or inspection:

a)   to any individual unless he or she produces reasonable evidence of identity and authority;

b)   outside normal business hours at those premises, unless the audit or inspection needs to be conducted on an emergency basis and Client or the relevant Client Affiliate undertaking an audit has given notice to SHOAL that this is the case before attendance outside those hours begins; or

c)   for the purposes of more than one audit or inspection, in respect of each Contracted Processor, in any calendar year, except for any additional audits or inspections which:

i)   Client or the relevant Client Affiliate undertaking an audit reasonably considers necessary because of genuine concerns as to SHOAL's compliance with these terms and conditions; or

ii)   A Client Group Member is required or requested to carry out by Data Protection Law, a Supervisory Authority or any similar regulatory authority responsible for the enforcement of Data Protection Laws in any country or territory,

where Client or the relevant Client Affiliate undertaking an audit has identified its concerns or the relevant requirement or request in its notice to SHOAL of the audit or inspection.

Clause 35 – Restricted Transfers

35.1)   Subject to clause 35.3, each Client Group Member (as "data exporter") and each Contracted Processor, as appropriate, (as "data importer") hereby enter into the Standard Contractual Clauses in respect of any Restricted Transfer from that Client Group Member to that Contracted Processor.

35.2)   The Standard Contractual Clauses shall come into effect under clause 35.1 on the later of:

a) the data exporter becoming a party to them;

b) the data importer becoming a party to them; and

c) commencement of the relevant Restricted Transfer.

35.3) Clause 35.1 shall not apply to a Restricted Transfer unless its effect, together with other reasonably practicable compliance steps (which, for the avoidance of doubt, do not include obtaining consents from Data Subjects), is to allow the relevant Restricted Transfer to take place without breach of applicable Data Protection Law.

35.4) SHOAL warrants and represents that, before the commencement of any Restricted Transfer to a Subprocessor, SHOAL entry into the Standard Contractual Clauses under clause 35.1, and agreement to variations to those Standard Contractual Clauses made under clause 36.4.a, as agent for and on behalf of that Subprocessor will have been duly and effectively authorised (or subsequently ratified) by that Subprocessor.

Clause 36 – Governing law and jurisdiction

36.1) Without prejudice to clauses 37.7 (Mediation and Jurisdiction) and 37.9 (Governing Law) of the Standard Contractual Clauses:

a) the parties hereby submit to the choice of jurisdiction stipulated in these terms and conditions with respect to any disputes or claims howsoever arising under these terms and conditions, including disputes regarding its existence, validity or termination or the consequences of its nullity; and

b) all non-contractual or other obligations arising out of or in connection with it are governed by the laws of the country or territory stipulated for this purpose in these terms and conditions.

36.2) Order of precedence

Nothing within these terms and conditions reduces SHOAL obligations in relation to the protection of Personal Data or permits SHOAL to Process (or permit the processing of) Personal Data in a manner which is prohibited by these terms and conditions.

Changes in Data Protection Laws, etc.

36.3) Client may:

a) by at least 60 (sixty) calendar days' written notice to SHOAL from time to time make any variations to the Standard Contractual Clauses (including any Standard Contractual Clauses entered into under clause 35.a), as they apply to Restricted Transfers which are subject to a particular Data Protection Law, which are required, as a result of any change in, or decision of a competent authority under, that Data Protection Law, to allow those Restricted Transfers to be made (or continue to be made) without breach of that Data Protection Law; and

b) propose any other variations to these standard terms and conditions which Client reasonably considers to be necessary to address the requirements of any Data Protection Law.

36.4) If Client gives notice under clause 36.3.a:

a) SHOAL shall promptly co-operate (and ensure that any affected Subprocessors promptly co-operate) to ensure that equivalent variations are made to any agreement put in place under clause 29.4; and

b) Client shall not unreasonably withhold or delay agreement to any consequential variations to these terms and conditions as proposed by SHOAL to protect the Contracted Processors against additional risks associated with the variations made under clause 36.3.a [and/or 36.4.a].

e) If Client gives notice under clause 36.3.b, the parties shall promptly discuss the proposed variations and negotiate in good faith with a view to agreeing and implementing those or alternative variations designed to address the requirements identified in Client's notice as soon as is reasonably practicable.

Clause – 37 Data Protection

The data exporter has entered into a Service Agreement with the data importer. Pursuant to the terms, it is contemplated that services provided by the data importer will involve the transfer of personal data to data importer. To ensure compliance with Directive 95/46/EC and applicable data protection law, the controller agrees to the provision of such Services, including the processing of personal data incidental thereto, subject to the data importer's execution of, and compliance with, the terms of these Clauses.

37.1)   Definitions

a)   'personal data', 'special categories of data', 'process/processing', 'controller', 'processor', 'data subject' and 'supervisory authority' shall have the same meaning as in Directive 95/46/EC of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;

b)   'the data exporter' means the controller who transfers the personal data;

c)   'the data importer' means the processor who agrees to receive from the data exporter personal data intended for processing on his behalf after the transfer in accordance with his instructions and the terms of the Clauses and who is not subject to a third country's system ensuring adequate protection within the meaning of Article 25(1) of Directive 95/46/EC;

d)   'the subprocessor' means any processor engaged by the data importer or by any other subprocessor of the data importer who agrees to receive from the data importer or from any other subprocessor of the data importer personal data exclusively intended for processing activities to be carried out on behalf of the data exporter after the transfer in accordance with his instructions, the terms of the Clauses and the terms of the written subcontract;

e)   'the applicable data protection law' means the legislation protecting the fundamental rights and freedoms of individuals and, in particular, their right to privacy with respect to the processing of personal data applicable to a data controller in the Member State in which the data exporter is established;

f)   'technical and organisational security measures' means those measures aimed at protecting personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

37.2)   Details of the transfer

The details of the transfer and in particular the special categories of personal data where applicable are specified in the Proposal Document and signed Service Agreement which forms an integral part of the Clauses.

37.3)   Third-party beneficiary clause

a)   The data subject can enforce against the data exporter this Clause, Clause 37.4.b to 37.4.i, Clause 37.5.a to 37.5.e, and 37.5.g to 37.5.j, Clause 37.6.a and 37.6.b, Clause 37.7, Clause 37.8.b, and Clauses 37.9 to 37.12 as third-party beneficiary.

b)   The data subject can enforce against the data importer this Clause, Clause 37.5.a to 37.5.e and 37.5.g, Clause 37.6, Clause 37.7, Clause 37.8.b, and Clauses 37.9 to 37.12, in cases where the data exporter has factually disappeared or has ceased to exist in law unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity.

c)   The data subject can enforce against the subprocessor this Clause, Clause 37.5.a to 37.5.e and 37.5.g, Clause 37.6, Clause 37.7, Clause 37.8.b, and Clauses 37.9 to 37.12, in cases where both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity. Such third-party liability of the subprocessor shall be limited to its own processing operations under the Clauses.

d)   The parties do not object to a data subject being represented by an association or other body if the data subject so expressly wishes and if permitted by national law.

37.4)   Obligations of the data exporter

The data exporter agrees and warrants:

a)   that the processing, including the transfer itself, of the personal data has been and will continue to be carried out in accordance with the relevant provisions of the applicable data protection law (and, where applicable, has been notified to the relevant authorities of the Member State where the data exporter is established) and does not violate the relevant provisions of that State;

b)   that it has instructed and throughout the duration of the personal data processing services will instruct the data importer to process the personal data transferred only on the data exporter's behalf and in accordance with the applicable data protection law and the Clauses;

c)   that the data importer will provide sufficient guarantees in respect of the technical and organisational security measures;

d)   that after assessment of the requirements of the applicable data protection law, the security measures are appropriate to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing, and that these measures ensure a level of security appropriate to the risks presented by the processing and the nature of the data to be protected having regard to the state of the art and the cost of their implementation;

e)   that it will ensure compliance with the security measures;

f)   that, if the transfer involves special categories of data, the data subject has been informed or will be informed before, or as soon as possible after, the transfer that its data could be transmitted to a third country not providing adequate protection within the meaning of Directive 95/46/EC;

g)   to forward any notification received from the data importer or any subprocessor pursuant to Clause 37.5.b and Clause 37.8.c to the data protection supervisory authority if the data exporter decides to continue the transfer or to lift the suspension;

h)   to make available to the data subjects upon request a copy of the Clauses, and a summary description of the security measures, as well as a copy of any contract for subprocessing services which has to be made in accordance with the Clauses, unless the Clauses or the contract contain commercial information, in which case it may remove such commercial information;

i)   that, in the event of subprocessing, the processing activity is carried out in accordance with Clause 37.11 by a subprocessor providing at least the same level of protection for the personal data and the rights of data subject as the data importer under the Clauses; and

j)   that it will ensure compliance with Clause 37.4.b to 37.4.d.

37.5)   Obligations of the data importer

The data importer agrees and warrants:

a)   to process the personal data only on behalf of the data exporter and in compliance with its instructions and the Clauses; if it cannot provide such compliance for whatever reasons, it agrees to inform promptly the data exporter of its inability to comply, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;

b)   that it has no reason to believe that the legislation applicable to it prevents it from fulfilling the instructions received from the data exporter and its obligations under the contract and that in the event of a change in this legislation which is likely to have a substantial adverse effect on   the warranties and obligations provided by the Clauses, it will promptly notify the change to the data exporter as soon as it is aware, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;

c)   that it has implemented the technical and organisational security measures required before processing the personal data transferred;

d)   that it will promptly notify the data exporter about:

i)   any legally binding request for disclosure of the personal data by a law enforcement authority unless otherwise prohibited, such as a prohibition under criminal law to preserve the confidentiality of a law enforcement investigation,

ii)   any accidental or unauthorised access, and

iii)   any request received directly from the data subjects without responding to that request, unless it has been otherwise authorised to do so;

e)   to deal promptly and properly with all inquiries from the data exporter relating to its processing of the personal data subject to the transfer and to abide by the advice of the supervisory authority with regard to the processing of the data transferred;

f)   at the request of the data exporter to submit its data processing facilities for audit of the processing activities covered by the Clauses which shall be carried out by the data exporter or an inspection body composed of independent members and in possession of the required professional qualifications bound by a duty of confidentiality, selected by the data exporter, where applicable, in agreement with the supervisory authority;

g)   to make available to the data subject upon request a copy of the Clauses, or any existing contract for subprocessing, unless the Clauses or contract contain commercial information, in which case it may remove such commercial information, and a summary description of the security measures in those cases where the data subject is unable to obtain a copy from the data exporter;

h)   that, in the event of subprocessing, it has previously informed the data exporter and obtained its prior written consent;

i)   that the processing services by the subprocessor will be carried out in accordance with Clause 37.k;

j)   to send promptly when requested a copy of any subprocessor agreement it concludes under the Clauses to the data exporter.

37.6)   Liability

a)   The parties agree that any data subject, who has suffered damage as a result of any breach of the obligations referred to in Clause 37.3 or in Clause 37.11 by any party or subprocessor is entitled to receive compensation from the data exporter for the damage suffered.

b)   If a data subject is not able to bring a claim for compensation in accordance with paragraph 1 against the data exporter, arising out of a breach by the data importer or his subprocessor of any of their obligations referred to in Clause 37.3 or in Clause 37.11, because the data exporter has factually disappeared or ceased to exist in law or has become insolvent, the data importer agrees that the data subject may issue a claim against the data importer as if it were the data exporter, unless any successor entity has assumed the entire legal obligations of the data exporter by contract of by operation of law, in which case the data subject can enforce its rights against such entity.

c)   The data importer may not rely on a breach by a subprocessor of its obligations in order to avoid its own liabilities.

d)   If a data subject is not able to bring a claim against the data exporter or the data importer referred to in paragraphs 1 and 2, arising out of a breach by the subprocessor of any of their obligations referred to in Clause 37.3 or in Clause 37.11 because both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, the subprocessor agrees that the data subject may issue a claim against the data subprocessor with regard to its own processing operations under the Clauses as if it were the data exporter or the data importer, unless any successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law, in which case the data subject can enforce its rights against such entity. The liability of the subprocessor shall be limited to its own processing operations under the Clauses.

37.7)   Mediation and jurisdiction

a)   The data importer agrees that if the data subject invokes against it third-party beneficiary rights and/or claims compensation for damages under the Clauses, the data importer will accept the decision of the data subject:

i)   to refer the dispute to mediation, by an independent person or, where applicable, by the supervisory authority;

ii)   to refer the dispute to the courts in the Member State in which the data exporter is established.

b) The parties agree that the choice made by the data subject will not prejudice its substantive or procedural rights to seek remedies in accordance with other provisions of national or international law.

37.8) Cooperation with supervisory authorities

a) The data exporter agrees to deposit a copy of this contract with the supervisory authority if it so requests or if such deposit is required under the applicable data protection law.

b) The parties agree that the supervisory authority has the right to conduct an audit of the data importer, and of any subprocessor, which has the same scope and is subject to the same conditions as would apply to an audit of the data exporter under the applicable data protection law.

c) The data importer shall promptly inform the data exporter about the existence of legislation applicable to it or any subprocessor preventing the conduct of an audit of the data importer, or any subprocessor, pursuant to paragraph 2. In such a case the data exporter shall be entitled to take the measures foreseen in Clause 37.5.b.

37.9) Governing Law

The Clauses shall be governed by the law of the Member State in which the data exporter is established.

37.10) Variation of the contract

a) The parties undertake not to vary or modify the Clauses. This does not preclude the parties from adding clauses on business related issues where required as long as they do not contradict the Clause.

37.11) Subprocessing

a) The data importer shall not subcontract any of its processing operations performed on behalf of the data exporter under the Clauses without the prior written consent of the data exporter. Where the data importer subcontracts its obligations under the Clauses, with the consent of the data exporter, it shall do so only by way of a written agreement with the subprocessor which imposes the same obligations on the subprocessor as are imposed on the data importer under the Clauses. Where the subprocessor fails to fulfil its data protection obligations under such written agreement the data importer shall remain fully liable to the data exporter for the performance of the subprocessor's obligations under such agreement.

b) The prior written contract between the data importer and the subprocessor shall also provide for a third-party beneficiary clause as laid down in Clause 37.3 for cases where the data subject is not able to bring the claim for compensation referred to in paragraph 1 of Clause 37.6 against the data exporter or the data importer because they have factually disappeared or have ceased to exist in law or have become insolvent and no successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law. Such third-party liability of the subprocessor shall be limited to its own processing operations under the Clauses.

c) The provisions relating to data protection aspects for subprocessing of the contract referred to in paragraph 1 shall be governed by the law of the Member State in which the data exporter is established.

d) The data exporter shall keep a list of subprocessing agreements concluded under the Clauses and notified by the data importer pursuant to Clause 37.5.j, which shall be updated at least once a year. The list shall be available to the data exporter's data protection supervisory authority upon request.

37.12) Obligation after the termination of personal data processing services

a) The parties agree that on the termination of the provision of data processing services, the data importer and the subprocessor shall, at the choice of the data exporter, return all the personal data transferred and the copies thereof to the data exporter or shall destroy all the personal data and certify to the data exporter that it has done so, unless legislation imposed upon the data importer prevents it from returning or destroying all or part of the personal data transferred. In that case, the data importer warrants that it will guarantee the confidentiality of the personal data transferred and will not actively process the personal data transferred anymore.

b) The data importer and the subprocessor warrant that upon request of the data exporter and/or of the supervisory authority, it will submit its data processing facilities for an audit of the measures referred to in paragraph 1.

Annex 2   Datto Backup Service Level Agreement

1.   General

1.1   This Annex contains a service level agreement ("SLA") setting out the levels of services to be provided by SHOAL to the Client under this Agreement and compensation (as a genuine pre-estimate of loss) for failure to meet those service levels.

1.2   SLA Credits are the Client's sole and exclusive remedy for any failure to meet a specified service level.

1.3   This SLA only applies to the Services to the extent they are owned or operated by or on behalf of SHOAL.

1.4   This SLA does not apply to any third parties.

1.5   In this SLA words, abbreviations and expressions have the meanings given in the Conditions except as set out below:

"Availability"
Means all the time in any calendar month for which the lient is capable of accessing a login prompt and the Services are not subject to any Service Affecting Faults, and "Available" shall be construed accordingly;

"Business Day"
Means every day excluding Saturdays and Sunday and bank holidays in the UK;

"Service Affecting Fault"
Means an event which causes loss of external connectivity for the Services; and

"Third Party System"
Means a telecommunication system, network, indirect network carriers, exchange or any other equipment that is neither owned nor operated on behalf of SHOAL.

"Datto"
Means Datto Inc. or one of our subsidiaries or affiliates depending on where you are located.

"Resale or Reseller"
Means Shoal Computer Solutions Ltd (SHOAL).

1.6   SHOAL shall not be liable to pay compensation under this SLA where its failure to meet any of its obligations under this SLA is a caused by:

(a)   Force Majeure Events;

(b)   problems arising from Client equipment (including hardware, software, applications or Client content);

(c)   a failure of any third-party system;

(d)   any act or omission of the Client or third party acting on its or their behalf;

(e)   failure of the Client to connect to the Services, for example problems with the Clients Internet access;

(f)   failure of the Client to optimise, maintain, secure, configure, or troubleshoot the operating system or the software contained within;

(g)   Suspension of the Service as provided in the Agreement;

(h)   SHOAL performing system upgrades, enhancements or planned maintenance or unscheduled maintenance as provided in the Agreement or maintenance determined by SHOAL to be an emergency upon notice provided through the portal.

1.7   The maximum monthly credit available under this SLA is limited to an amount equal to the monthly Fee for the specific Client.

1.8   Credits or other compensation under this SLA shall only be payable where:

(a)   The Client notified SHOAL at the time of the event by submitting a ticket in a timely manner,

(b)   The Client has submitted to SHOAL a claim in writing identifying the circumstances in which The Client claims that the credit or compensation arose,

(c)   SHOAL has agreed in writing to that claim. SHOAL will review and verify the claim and SHOAL's determination of SLA Credits is final. SHOAL shall not unreasonably withhold or delay such agreement,

(d)   The Client agrees to continue to make payment in full for Services while a claim is being reviewed or SLA Credit is being determined.

1.9   All credits so payable shall be applied to the Client's next monthly bill for Service following SHOAL's agreement to the claim. All claims for credits or compensation must be submitted promptly and in any event within 10 Business Days, after the occurrence of the circumstances giving rise to the claim.

1.10   The parties acknowledge that the service credits and compensation set out in this SLA are reasonable pre-estimates of the Client's loss and are not penalties.

1.11   SHOAL reserves the right to amend the SLA from time to time. If the amendment results in a material reduction in the service levels provided or the size or nature of the compensation payments SHOAL is liable to make, the Client shall have the right to terminate the Service on 30 days' notice.

2.   Service Levels applicable to set up and installation

2.1   Set up of the account and portal will be completed within 10 working days after the receipt of the Direct Debit mandate. The first invoice for data storage will be on a monthly basis pro-rated from the date of setup. However, the data migration may take longer dependant on the Clients' internet speed and availability, which will be outside of our control.

3.   Service Levels applicable to Service Availability

3.1   SHOAL guarantees that the Service shall have 99.99% Availability, not including maintenance periods or periods caused by the events described in clause 1.6.

3.2   If the Availability falls below 99.99% in any month, SHOAL will credit the Client with one days' free service.

3.3   SHOAL shall not be obliged to pay compensation in accordance with paragraph 3.2 where Availability falls below 99.99% because of routine or emergency maintenance of the Services pursuant to Paragraph 4.

4.   Service Levels applicable to Fault handling on Datto Backup

4.1   The Client shall report all Service Affecting Faults in the Service to SHOAL on the SHOAL ticketing system. The ticket must include Service type, date and times of the issue, error messages received (if any), contact information, and a full description of the loss of Service, including logs if applicable.

4.2   First response shall be within 4 hours (within business hours) on a Datto Backup

4.3   SHOAL shall raise a trouble ticket and issue a reference number to the Client and shall repair the Service Affecting Fault within the timescales for repair as set out in Table 1 below. If SHOAL fails to repair a Service Affecting Fault within the relevant timescale, the Client may claim the compensation set out in Table 1.

4.4   Timing starts when a trouble ticket is raised and a reference number is issued to the Client.

4.5   The Client may obtain updates on the status of tickets by checking the SHOAL ticketing system and under the ticket number assigned to the matter.

4.6   SHOAL shall notify the Client by telephone or e-mail when the Service Affecting Fault has been repaired and the Service has been successfully restored. The trouble ticket will then be closed.

5.   Service Levels applicable to Network and Service Equipment Maintenance

5.1   SHOAL may suspend the Services to carry out planned maintenance or upgrade work on the Services. The parties agree that this planned suspension or diminution of the Service shall not be included in any calculation for compensation under Paragraph 3 above and will not be included as part of any service level calculations.

5.2   Except in the case of an emergency, SHOAL shall use reasonable endeavours to provide the Client with notice of any suspension of the Service under Paragraph 5.1. If it fails to provide the appropriate notice, the Client shall be entitled to a credit of one day's free Service. The Client notes and agrees that this Paragraph 5.2 is appropriate notice of the suspension of the Service under the terms of this Agreement.

5.3   SHOAL shall use reasonable endeavours to ensure that any disruption or interruption to the Services is kept to a minimum. SHOAL shall use reasonable endeavours not to suspend the Service for planned maintenance or upgrade work more than 12 times in any calendar year.

5.4   Our Backup only service is dependent on a Clients' internet connection and quantity of data. A failed Backup will be noted and, if practicable, re-run during working hours, on confirmation from the Client. If this is not practicable the Backup will be allowed to run at its next planned time slot.

6.   Additional Resale Terms

These Additional Resale terms are hereby incorporated into this Agreement for the resale of all Products involving the use of Datto, StorageCraft, Kroll or Paragon software.

6.1   Grant of Datto Licence

(a)   License. Subject to the terms and conditions of this Agreement and your payment of all fees applicable to the Product, Datto grants you a revocable, non-sublicensable, non-exclusive license during the Term of this Agreement to use the Datto Software for the purpose of using and accessing the Service within your organisation solely for your internal business purposes. The Datto Software is licensed to the Client, not sold. Except for the limited license granted in this Agreement, Datto and its licensors retain all right, title and interest in and to the Datto Software, all copies thereof, and all Intellectual Property Rights in the Datto Software. Except for the license granted herein, all rights in and to the Datto Software, Devices and Services are reserved, and no implied licenses are granted by Datto.

(b)   Third Party Components. The Product, may contain certain third party components ("Third Party Components") which are provided to you under terms and conditions which are different from this Agreement located below. Certain Third Party Components may contain or be comprised of open source software code. Each open source Third Party Component has its own copyright and its own applicable license conditions. It is your responsibility to review such additional terms before using the Datto Product and you acknowledge and agree that your use of the Datto Product shall be deemed your express consent to this Agreement and such additional terms.

(c)   Use of Data. Notwithstanding anything to the contrary contained in this Agreement, you acknowledge and agree that Datto may (a) collect, process and aggregate any data used with, stored in, or related to the Datto Product by you and create aggregate data records ("Aggregate Data") by removing personally identifiable information ("PII") from the underlying data, (b) use such Aggregate Data to improve Datto's Product, develop new products and services, understand usage, demand trends and general industry trends, develop white papers, reports, and databases summarising the foregoing, and generally for any purpose related to Datto's business, and (c) share Aggregate Data with third parties and publish any reports, white papers, and other summaries based on Aggregate Data. For clarity, Datto shall not include any PII nor otherwise identify you or any individual user of the Datto Product.

6.2   StorageCraft Minimum Provider Terms

(a)   "StorageCraft Software" means the software licensed by Datto from StorageCraft Technology Corporation, Draper, Utah ("StorageCraft") and that is available with or as part of certain Products.

(b)   Use of StorageCraft Software. The Client acknowledges and agrees that the StorageCraft Software may be used only as follows: (a) in connection with the use of a Product and not on a standalone basis; (b) in a manner authorised by and consistent with these terms and (c) pursuant to a written Agreement between SHOAL and the Client.

(c)   The Client acknowledges and agrees to the following:

1.   The StorageCraft Software is owned by and licensed from StorageCraft.

2.   SHOAL shall offer or provide use of the StorageCraft Software only to the Client as part of a Product.

3.   StorageCraft's copyright, trademark, or other proprietary rights notices contained in or on the StorageCraft Software or within the Product will not be modified, removed, or obscured.

4.   StorageCraft disclaims, to the extent permitted by applicable law, all warranties by StorageCraft and any liability by StorageCraft or its suppliers for any damages, whether direct, indirect, or consequential, arising from the use of the StorageCraft Software, except as provided in the applicable End User License Agreement.

5.   Upon termination of any Agreement between SHOAL and the Client, SHOAL will use its best efforts to remove and/or deactivate all copies of the StorageCraft Software from all of the Clients computers on which it has been installed and ensure that the Client or Administrator returns or destroys any media containing the StorageCraft Software.

6.   In the event of non-payment of fees to SHOAL for services under the Clients Agreement, then the Clients use of the StorageCraft Software may be suspended or terminated.

7.   In the event that SHOAL right to use the Product that includes the StorageCraft software terminates, the relevant portion of the Agreement with the Client will terminate.

6.3   "KROLL SOLUTION" means Kroll software available for use with the product.

(a)   Use of Kroll Technology. The Client acknowledges and agrees that the Kroll Software may be used only as part of the Kroll Solution. The Client shall not market, license, sublicense and/or distribute the Kroll Software, or any of the technology incorporated in the Kroll Software, in standalone form, either electronically or otherwise and shall resell the Product only in a manner authorised by and consistent with this Agreement. SHOAL shall not license the Kroll Software to the Client for use in a hosted environment or as software as a service (SaaS).

(b)   The Client acknowledges and agrees:

1.   SHOAL shall offer use of the Kroll Software to the Client only as part of the Kroll Solution.

2.   The Client shall not reverse engineer, reverse compile, or disassemble the object code for the Kroll Software or any third party components of the Kroll Solution.

3.   The Client is not granted any rights beyond the scope of this Agreement.

4.   SHOAL shall distribute the Product with the Kroll EULA as provided by 3rd party provider.

6.4   "PARAGON SOFTWARE" means that software licensed by Datto from Paragon Software Group Corporation, Irvine, California ("Paragon") and that is available in connection with the use of certain Products.

(a)   Use of Paragon Technology. The Client acknowledges and agrees that the Paragon Software may be used only as part of the Product. The Client shall not market, license, sublicense and/or distribute the Paragon Software, or any of the technology incorporated in the Paragon Software, in standalone form, either electronically or otherwise and shall resell the Product only in a manner authorised by and consistent with this Agreement.

(b)   The Client acknowledges and agrees:

i.   SHOAL shall offer use of the Paragon Software to the Client only as part of the Product.

ii.   The Client shall protect Paragon's proprietary rights in the Paragon Software to at least the same degree as the terms and conditions of this Agreement.

iii.   The Client shall not reverse engineer, reverse compile, or disassemble the object code for the Paragon Software or any third party components of the Paragon Software.

iv.   The Client is not granted any rights beyond the scope of this Agreement.

v.   SHOAL shall distribute the Paragon Software as part of the Product with the Paragon EULA.

7.   Standard Limited Hardware Warranty

7.1   New Datto hardware is warranted against defects in materials and workmanship under normal use, handling and installation for a warranty period, which starts on the date the associated device is linked to your account and which continues for the period of time applicable to the associated product.

7.2   In order to be eligible for warranty service, a Product must be enrolled in and current in payments for Service.

7.3   The warranty does not extend to or include any third party components or software included in the Product. Datto will at its option and expense (and as the sole remedy for breach of this warranty) either:

(a)   repair the Product using new or refurbished parts that are equivalent to new in performance and reliability;

(b)   replace the Product with a Product that is new or formed from new and/or refurbished parts that are equivalent to new in performance and reliability; or

(c)   issue a credit for the Product found by Datto to be defective during the warranty period. All warranty claims must be received by Datto within the warranty period.

7.4   Exclusions from Warranty – This warranty does not cover Products that have defects or failures resulting from (a) accident, neglect or abuse; (b) improper installation or maintenance; or (c) modifications, repairs, improvements, or any other changes to any software or hardware component of the Product that have not been authorised in writing by Datto.

7.5   You are responsible for any costs incurred by Datto related to the foregoing exclusions.

7.6   A device that has been repaired or is a replacement of a device will continue to be under warranty for a period equal to the greater of (a) the balance of the existing warranty period for the original device; or (b) sixty (60) days.