

AdaptiveComms Supply of Website Support Services Agreement Terms & Conditions

These are the terms and conditions relating to the supply of website support services agreed in the web services Agreement between the Company and the Client as defined below

BETWEEN:

- (1) Adaptive Communication Solutions Limited a company registered in England and Wales under number 4677602 whose registered office is at 11b Hoghton Street, Southport. PR9 0NS (“the Provider”) and
- (2) The Company or Partnership named in the Web Services Agreement (“the Customer”)

RECITALS:

- (1) The Customer has launched OR intends to launch a website on the Internet and is wholly dependent on the provision of support services by the Provider to the Site.
- (2) The Customer has agreed to procure and the Provider to supply support services upon the following terms and conditions.

IT IS AGREED as follows:

1. Definitions

In this Agreement, unless the context otherwise requires, the following expressions have the following meanings:

“additional services”	the services to be performed by the Provider pursuant to clause 4.1 consisting of services other than website support;
“an affiliate”	means in relation to any company: <ul style="list-style-type: none"> • any subsidiary or holding company of the company or any subsidiary of the holding company; or • any other entity controlling or controlled by the company;
“the Background Content”	the screen templates and background layouts and any other background content supplied to the Customer by the Provider (if any) under the Development Agreement as modified by the Provider from time to time;
“a business day”	a day (excluding Saturdays) on which banks generally are open for the transaction of normal banking business (other than solely for trading and settlement in euros);
“the Development Agreement”	the agreement between the Provider and the Customer for the development and provision of software and technical architecture for the Supported Website;

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- “the Documentation”** the instruction manuals, user guides and other technical information in respect of the Supported Website operation previously provided or to be made available from time to time during the term of this agreement by the Provider to the Customer in either printed or machine readable form at the Customer's discretion;
- “the Effective Date”** the commencement date for this agreement as set out in the schedule;
- “an enhancement”** any enhancement, amendment, modification or improvement to the Software or any part of it resulting in a function of the Software or any part of it being varied;
- “an error”** means any failure of the Software to conform in a significant material respect to the Documentation or to the Specification [or, if such support is expressly taken by Customer further to the schedule, a graphical error or a navigational error] provided that 'an error' excludes any such failure to conform to the extent that it results from any one or more of:
- the Customer's refusal to restore files or follow any other reasonable written (either hard copy or e-mail) recommendation by the Provider;
 - the use of any software program, package or file not specifically provided by the Provider or previously agreed in writing by the Provider;
 - a malfunction of the equipment;
 - any use of the Software outside the terms of the Development Agreement (so far as it provides for ongoing use); or
 - any event or matter that is subject to the provision of the Additional Services or the Surcharge Services;
- “an error correction”** the performance of a procedure, routine, modification or addition to the Software or (as the case may be) the Background Content that eliminates the adverse effect of an error without adversely affecting the functionality of the Software or (if relevant) the Background Content;
- “the Expenses”** those amounts calculated pursuant to clause 5.4;
- “the Extended Service Hours”** all hours outside the Service Hours;
- “the Fees”** the Provider's fees for the provision of the Services provided for at clause 3 and 5, including the Software Support;

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“a graphical error”	a failure of the Background Content to graphically conform to the Specification when reproduced on screen as a result of the operation of the Software or any part;
“the Host Equipment”	the items and components of computer hardware, operating system and peripherals recommended by the Provider for use in the operation of the Supported Website;
“the Initial Period”	the initial term of this agreement as set out in the schedule;
“intellectual property rights”	any and all patents, trade marks, rights in domain names, rights in designs, copyrights and database rights (whether registered or not and any applications to register or rights to apply for registration of any of the foregoing) rights in confidential information and all other intellectual property rights of a similar or corresponding character which may subsist now or in the future in any part of the world;
“a navigational error”	a failure of any hypertext elements of the Background Content to link or to allow data capture to occur in accordance with the Specification or the Documentation;
“new content”	content introduced to the Supported Website by the Customer or any third party;
“a release”	updates to the Software identified by a release number (e.g., Release 1.3), including error corrections and enhancements, which are distributed generally from time to time by the Provider;
“a renewal period”	has the meaning given in clause 12;
“the Service Hours”	the hours between 9am and 4pm each business day;
“the Services”	additional services, the Software Support and surcharge services;
“the Site”	the address set out in the schedule at which the Software is operated on the Host Equipment and at which the Customer may direct the Provider to provide on-site support under this agreement, or such other address as notified to the Provider in writing at which the Customer may carry on business from time to time;

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“the Software”	means: <ul style="list-style-type: none"> the Provider's proprietary software programs in object code form identified by title and reference number in the schedule, including any enhancements, adaptations, modifications, localisation and changes to them ('the Provider Software'); and the Third Party Software;
“the Software Support”	the Provider's obligations to support the Software pursuant to clause 3;
“the Specification”	the description of the facilities and functions of the Software and (if relevant) the Background Content as set out at or referred to in the Documentation or as expressly provided for under the Development Agreement's specification documents;
“the Supported Website”	the website developed and installed by the Provider under the Development Agreement and further identified (in its operational format, including by current host server) in the schedule;
“the Support Line”	the telephone number or e-mail address set out in the schedule for the reporting of an error to the Provider, which may be changed pursuant to clause 3.2;
“a support specialist”	an employee or agent of the Provider who is qualified to effect a error correction or provide other support services under this agreement;
“surcharge services”	the services to be performed by the Provider pursuant to clause 4.2 of this agreement, comprising services not included in the Software Support;
“the Terms of Payment”	the terms for payment of the Fees set out in the schedule;
“the Third Party Software”	the third party software specified in the schedule in object code form.
“Web Services Agreement”	the contract listing the details of the company or other legal entity, the fee and the term in relation to the provision of web maintenance and support services and signed in acceptance of these terms and conditions.

2. Interpretation

2.1 In this agreement unless otherwise specified:

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- 2.1.1 reference to a subsidiary or holding company is to be construed in accordance with the Companies Act 1985 section 736;
 - 2.1.2 reference to a party is reference to a party to this agreement and includes his permitted assignees and the respective successors in title to substantially the whole of his undertaking;
 - 2.1.3 reference to a person includes any person, individual, company, firm, corporation, government, state or agency of a state or any undertaking, whether or not having separate legal personality and irrespective of the jurisdiction in or under the law of which it was incorporated or exists;
 - 2.1.4 reference to a statute or statutory instrument or any of its provisions is to be construed as a reference to that statute or statutory instrument or such provision as from time to time amended or re-enacted;
 - 2.1.5 words denoting the singular shall include the plural and vice versa and words denoting any gender shall include all genders;
 - 2.1.6 reference to recitals, clauses, paragraphs or schedules is to recitals, clauses or paragraphs of or schedules to this agreement
 - 2.1.7 'control' is to be construed in accordance with the Income and Corporation Taxes Act 1988 section 416 and 'controlling' and 'controlled' shall be construed accordingly; and
 - 2.1.8 'includes' and 'including' shall mean including without limitation.
- 2.2 The schedules form part of the operative provisions of this agreement and references to this agreement shall, unless the context otherwise requires, include references to the recitals and the schedules.
- 2.3 The index to and the headings in this agreement are for information only and shall be ignored in construing it.

3. The Software Support

3.1 Agreement for Support

With effect from the Effective Date the Provider shall, in consideration of the Fees being paid in accordance with the Terms of Payment and in response to support requests from the Customer in accordance with clause 3.2 provide the Software Support and the other support services, if any, expressly identified in the schedule or otherwise agreed under this agreement.

3.2 Support Requests

The Customer will make all support calls on the Support Line. The Provider shall ensure that the Support Line telephone number will have a voicemail facility. The Provider shall be entitled to change the telephone number or e-mail address of the Support Line from time to time upon reasonable prior written notice to the Customer. A support specialist will return calls or reply to emails placed through the Support Line during the Service Hours not later than 240 minutes after:

- 3.2.1 in the case of telephone calls, the earlier of the voicemail system logging the call or the support specialist receiving the call; and
- 3.2.2 in the case of e-mail, receipt by the Support Line e-mail inbox.

The Provider is not responsible for responding to support calls or messages placed other than via the Support Line and only those members of the Customer's personnel named by the customer and agreed in writing by the company may use the Support Line.

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3.3 Errors and Corrections

During the term of this agreement, the Provider will use reasonable endeavours to correct all reproducible errors reported by the Customer through the Support Line in accordance with the following terms and conditions:

3.3.1 Immediately after reviewing a report of an error from the Customer, the Provider will, acting reasonably, with the co-operation of the Customer, categorise the error as either level 1, level 2 or level 3 and thereafter will commence and diligently seek an appropriate error correction by:

3.3.1.1 for all errors, promptly answering the Customer's questions and diagnosing errors during the Service Hours by telephone;

3.3.1.2 for all errors, promptly troubleshooting and diagnosing errors during the Service Hours by telephone, modem or other remote connection (save that the Customer shall be responsible for providing the specified equipment for the use of such devices and for implementing any temporary procedures requested by the Provider while a permanent solution is sought); and

3.3.1.3 if an appropriate error correction is not found by the first and second line support referred to above and the error cannot reasonably be dealt with remotely, providing on-site service for the Software [or the Background Content] during the Service Hours in accordance with clause 3.5.

3.3.2 The Provider will use all reasonable endeavours to resolve errors within the following time periods:

3.3.2.1 level 1 errors, within 8 business hours;

3.3.2.2 level 2 errors, within 16 business hours; and

3.3.2.3 level 3 errors, within 7 business days.

3.3.3 Notwithstanding the response times indicated above, the Provider will endeavour to reduce his response and resolution time when the Customer has properly indicated that an error correction is urgently needed, and shall continue his efforts to resolve errors beyond the target resolution times if necessary.

3.3.4 In determining which level is appropriate the following criteria shall be applied:

3.3.4.1 level 1-an error that results in the loss of a facility or function material to the proper operation of the Software and critical to the Supported Website's operation;

3.3.4.2 level 2-an error that results in loss or interrupted provision of a facility or function material to the proper operation of the Software including (without limitation) an error that results in cosmetic errors on-screen as part of the Supported Website's live operation, but does not prevent the Customer from carrying out his business using the Supported Website; and

3.3.4.3 level 3-an error that results in a minor loss of facility or functionality.

3.4 Downtime

Where the Provider recommends and the Customer agrees that the best method of error correction involves an interruption of the live operation of the Supported Website,

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the Provider shall use all reasonable endeavours to perform the support in accordance with the Customer's direction as to the timing of downtime and shall seek to minimise business disruption so far as is reasonably practicable.

3.5 On-site Software Support

If the Customer reports any suspected error that causes the Software to be inoperative or significantly impairs its functionality and, in his reasonable discretion, determines that on-site service is necessary or appropriate under the circumstances to resolve the reported error efficiently and promptly, the Provider will begin on-site troubleshooting and diagnosis of the problem so as to diligently seek an error correction as soon as reasonably practicable and will respond within the following time periods after the error level is determined:

- 3.5.1 for a level 1 error occurring within North West England, Yorkshire and North Wales, within 16 business hours; and for a level 1 error occurring outside those specified areas, within 3 business days;
- 3.5.2 for a level 2 error occurring within North West England, Yorkshire and North Wales, within 3 business days; and for a level 2 error outside those specified areas, within 4 business days; and
- 3.5.3 for a level 3 error, within 30 business days.

3.6 Supported Releases

The Provider shall be obliged to provide the Software Support only in respect of the latest release, and any assistance provided in respect of any other release shall constitute surcharge services.

3.7 Navigational and Graphical Errors

Subject to support for navigational errors or graphical errors, being expressly identified by the schedule as being taken by the Customer, and subject to the Customer identifying the error in sufficient detail via the Support Line and providing appropriate remote access, the Provider shall diligently investigate and resolve such errors as soon as reasonably practicable further to a customer request in accordance with clause 3.2.

3.8 Releases

So long as this agreement remains in full force and effect and the Customer is not in material breach of it, the Provider will, as part of the Software Support, provide the Customer with all releases generally made available to his clients. The Provider will furnish telephone assistance for installation of releases during the Service Hours as part of the Software Support. The Software Support does not include any telephone assistance provided after the Service Hours nor any training the Customer may require or request on any release, nor any additional assistance required to install and implement a release where the Customer has non-standard features in the Software. Such services are additional services and will be provided at the Provider's then current applicable hourly rate. However, the Provider will provide documentation for each release as applicable as part of the Software Support. The Provider warrants that no release will adversely affect any of the then existing facilities and functions of the Software or their interaction with the Background Content.

3.9 Management Reporting

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The Provider shall provide the Customer with service information on the Software Support every month commencing on the end of the first full calendar month following the Effective Date showing:

- 3.9.1 the number of logged calls made by the Customer;
- 3.9.2 the name of each caller;
- 3.9.3 the nature of the error or other problem;
- 3.9.4 ongoing and unresolved problems; and
- 3.9.5 achievement or otherwise by the Provider of the response and resolution times set out in this clause.

4. Other Services

4.1 Additional Services

The Provider will provide such additional services as may be agreed upon from time to time by the parties including, without limitation, the following:

- 4.1.1 software training, e.g., in connection with the use of any release, and
- 4.1.2 customisation or website or software development other than release installation or error correction implementation.

However, prior to providing any services under this clause, the Provider will obtain the Customer's request for such services and agreement as to price, time scale and the availability of any such customisation or software development to other customers.

4.2 Surcharge Services

The Provider will provide such surcharge services as the parties may agree upon from time to time. Surcharge services may include, but are not limited to, services requested because of any one or more of the following conditions:

- 4.2.1 repair, adjustment or modification of the Software, whether made or attempted, by persons other than authorised employees of the Provider;
- 4.2.2 failure of the Customer properly to follow recommended daily back-up procedures;
- 4.2.3 failure of the Customer properly to follow procedures set forth in the Documentation;
- 4.2.4 failure by the Customer to implement recommendations in respect of or solutions to errors previously advised by the Provider;
- 4.2.5 modification to or creation of new content;
- 4.2.6 use of the Software on equipment other than that specified by the Provider;
- 4.2.7 use of the Software within a network configuration other than that specified in the configuration audit carried out by the Provider and upon which the Software was first installed, unless expressly agreed to in writing by the Provider;
- 4.2.8 use of the Software for a purpose for which it was not designed;
- 4.2.9 failure of the Customer to install a release within 7 days of receipt of it;
- 4.2.10 use of operating software that does not meet manufacturer's or the Provider's specifications or which has not otherwise been approved by either of them;
- 4.2.11 misuse or accident caused by the Customer;
- 4.2.12 improper programming or improper installation by the Customer (other than in accordance with instructions received from the Provider);

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- 4.2.13 damage or problems caused in transit or reinstallation following any relocation of the equipment upon which the Software is installed or to which the Software is connected;
- 4.2.14 damage or problems caused by accessories, alterations, attachments or other devices not furnished, maintained or approved by the Provider;
- 4.2.15 failure of air conditioning, electrical power or humidity control; or
- 4.2.16 acts of God, fire, flood, earthquake, lightning strikes, riots, war, nuclear disaster or other such causes.

5. Fees and Expenses

5.1 Fees

The Customer agrees to pay the monthly Fees for web support services as set out in the web services agreement for the entire duration of the term specified in that agreement or the Initial period specified herein, whichever is longer. The Fees shall include the cost of the delivery of an error correction to the Customer and shall also include payment for the Software Support but excludes:

- 5.1.1 value added tax, which, if payable, shall be paid by the Customer; and
- 5.1.2 expenses as provided for in clause 5.4.

5.2 Surcharges

5.2.1 The Customer will pay the Provider surcharges for:

- 5.2.1.1 any software support services that the Customer requests or authorises the Provider to perform during the Extended Service Hours; and
- 5.2.1.2 any surcharge service provided by the Provider pursuant to clause 4.2.

5.2.2 Surcharges payable by the Customer to the Provider under this clause will be determined in accordance with the prevailing engineering rates available on request from the Provider with a minimum charge of £295. Any surcharge will be additional to the amounts that may be due for expenses.

5.2.3 The Provider shall be entitled to vary the rates for surcharge services set out (available on request).

5.3 Additional Services

The Customer will pay the Provider for any additional services provided by the Provider under clause 4.1 in accordance with the Provider's then current, applicable daily rate in effect at the time of the performance or such other rate as may be agreed. Any charge for additional services will be supplemental to the amounts that may be due for the Expenses.

5.4 The Expenses

The Provider shall be entitled to recover from the Customer his reasonable incidental expenses for materials used and for third party goods and services supplied in connection with the provision of the Services, subject to the following provisions:

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- 5.4.1 the Provider shall provide a monthly summary of third party expenses incurred by him, and such expenses will be invoiced on a monthly basis with reasonable supporting documentation;
- 5.4.2 any third party expense that is reasonably expected to be more than £100 in relation to any particular matter shall require the prior approval of the Customer before it is incurred; and
- 5.4.3 the third party expenses to be reasonably incurred by the Provider in connection with the Services in any month shall not exceed £500 in total; thereafter any third party expenses to be incurred by the Provider shall require the prior approval of the Customer.

6. The Customer's Responsibilities

6.1 Support Equipment

The Customer will provide at the Site a high speed modem and the appropriate telephone connection required to allow the Provider to provide support services via modem for the Software and personal computer and communicating software, as reasonably specified by the Provider. The Customer will provide the Provider with the appropriate connection information in such respect.

6.2 Relocation of Equipment

If the Customer wishes to relocate his equipment, or otherwise or transfer the operation of the Supported Website to a third party host, the Customer shall give the Provider written notice thereof at least 30 days before the relocation, modification or installation; provided that it shall only be necessary for the Customer to notify the Provider of any such network modification or installation if the modification or installation may affect or impact upon the Provider Software or the Third Party Software.

6.3 The Customer's Software Responsibilities

The Customer shall:

- 6.3.1 make daily back-up copies of all programs and files;
- 6.3.2 restore his data files from his most current backup on the Provider's recommendation;
- 6.3.3 co-operate with the Provider and provide such information and documents as are reasonably required to assist the Provider in the performance of his obligations under this agreement;
- 6.3.4 implement each release within 14 days of receipt of it;
- 6.3.5 ensure that the Software is used in a proper manner by competent trained employees only or by persons under the supervision of such employees;
- 6.3.6 not request, permit or authorise anyone other than the Provider to provide any support services in respect of the Provider Software;
- 6.3.7 make available to the Provider free of charge all information, facilities and services reasonably required by the Provider to enable the Provider to perform the Services including, without limitation, computer runs, core dumps, printouts, data preparation, office accommodation, typing and photocopying, at a time convenient to the Customer;
- 6.3.8 subject to their not damaging the performance of the Supported Website, allow the Provider to install certain utility programs to assist the Provider in providing the Services and allow the Provider to remove such utility programs upon termination of this agreement; and

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6.3.9 provide a suitable vehicle parking facility free from any legal restrictions for use by the Provider's personnel when visiting the Customer's premises.

7. Ownership of Intellectual Property Rights

7.1 The Software and the Documentation contain confidential information of the Provider and, without prejudice to the terms of the Development Agreement, all intellectual property rights in the Software and the Documentation are the exclusive property of the Provider.

7.2 The intellectual property rights in enhancements, releases and error corrections provided under this agreement shall, as between the parties, be owned by the Provider. Furthermore in each such case, subject to payment of the Fees but without further charge, upon these materials being delivered to the Customer they shall be licensed to Customer on the licensing terms applicable had they been delivered under the Development Agreement.

7.3 The Third Party Software is the property of the Provider's licensor(s).

8. Warranties

8.1 The Provider warrants and represents to the Customer that he will:

8.1.1 perform additional services, the Software Support and surcharge services and his obligations under this agreement generally with reasonable skill, diligence and care in accordance with efficient call centre practice and, in relation to error correction, good software industry practice; and

8.1.2 maintain a sufficient number of available support specialists so as to perform his obligations under this agreement.

8.2 The Customer shall give notice to the Provider as soon as he is reasonably able upon becoming aware of a breach of warranty.

8.3 Save as set out above, the Provider makes no other warranty, term, representation or condition in relation to the Software, the Background Content and the Documentation or any services provided by him under this agreement whether as to performance, functionality or otherwise and in particular, without prejudice to the foregoing, the Provider does not warrant that even subsequent to software support the operation of the Software (including where in machine readable form the Documentation) will be uninterrupted or error free.

8.4 Save as expressly set out in this agreement all representations, warranties, terms and conditions, whether oral or written, express or implied by law, custom, statute or otherwise and including but not limited to satisfactory quality or fitness for any particular purpose are excluded, save for the statutorily implied terms as to title.

9. Liability

9.1 Notwithstanding any other provision in this agreement, the Provider's liability to the Customer for death or injury resulting from his own negligence or that of his employees, agents or sub-contractors shall not be limited.

9.2 The Provider's entire liability to the Customer in respect of any breach of his contractual obligations, any breach of warranty, any representation, statement or tortious act or omission including negligence arising under or in connection with this agreement shall be limited to £1000 or 3 months average fees, whichever is the lower.

9.3 The Provider shall not be liable to the Customer for any indirect or consequential loss the Customer may suffer even if the loss is reasonably foreseeable or the Provider has been advised of the possibility of the Customer incurring it.

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10. Intellectual Property Rights Indemnity

The Customer agrees to indemnify the Provider against any and all liability, loss, damage, costs, legal costs, professional and other expenses of any nature whatsoever incurred or suffered by the Provider or by a third party whether direct, indirect or consequential arising out of any dispute or contractual, tortious or other claims or proceedings brought by a third party alleging infringement of his intellectual property rights by releases, enhancements or error correction, provided that:

- 10.1 this indemnity shall not apply to any infringement of the third party's intellectual property rights arising as a direct result of any alteration or modification to releases, enhancements or error corrections or any part of them ('new material') by the Customer or as a result of the use of new material in combination with hardware or software not supplied or approved by the Provider;
- 10.2 in addition to the above indemnity, where an injunction restraining use by the Customer of new material is, in the opinion of the Customer's legal advisers, likely to be granted by the court to the third party, and that opinion is communicated in writing to the Provider, the Provider shall either do all acts and things to render new material non-infringing without affecting any of the Provider's other duties and obligations under this agreement, or obtain a licence from the third party granting the Customer the right to continue using new material that infringes;

11. Risk in the Delivered Materials

Risk in enhancements, error corrections and releases provided under this agreement will pass to the Customer upon the date of their actual delivery to the Customer. If subsequently releases, enhancements or error corrections are (in whole or in part) destroyed, damaged or lost, the Provider will upon request supply replacements copies of the lost material, subject to the Customer paying his then prevailing charges.

12. Confidentiality

- 12.1 During the term of this agreement and after termination or expiration of this agreement for any reason for a period of 2 years starting on the signature of the web services agreement, the following obligations shall apply to the party disclosing confidential information ('the Disclosing Party') to the other party ('the Receiving Party').
- 12.2 Subject to clause 12.3, the Receiving Party:
 - 12.2.1 may not use any confidential information for any purpose other than the performance of his obligations under this agreement;
 - 12.2.2 may not disclose any confidential information to any person except with the prior written consent of the Disclosing Party; and
 - 12.2.3 shall make every effort to prevent the use or disclosure of the confidential information.
- 12.3 The obligations of confidence referred to in the provisions of this clause shall not apply to any confidential information that:
 - 12.3.1 is in the possession of and is at the free disposal of the Receiving Party or is published or is otherwise in the public domain before its receipt by the Receiving Party;
 - 12.3.2 is or becomes publicly available on a non-confidential basis through no fault of the Receiving Party;
 - 12.3.3 is required to be disclosed by any applicable law or regulation; or

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12.3.4 is received in good faith by the Receiving Party from a third party who, on reasonable enquiry by the Receiving Party claims to have no obligations of confidence to the other party to this agreement in respect of it and who imposes no obligations of confidence upon the Receiving Party.

12.4 Without prejudice to any other rights or remedies the Disclosing Party may have, the Receiving Party acknowledges and agrees that in the event of breach of this clause the Disclosing Party shall, without proof of special damage, be entitled to an injunction or other equitable remedy for any threatened or actual breach of the provisions of this clause in addition to any damages or other remedies to which he may be entitled.

12.5 The obligations of the parties under the provisions of this clause shall survive the expiry or the termination of this agreement for whatever reason.

13. Term

This agreement shall continue for the Initial Period and thereafter shall automatically continue for successive 12 month periods (each 'a renewal period') on the same terms and conditions unless and until terminated in accordance with the provisions of clause 14.

14. Termination

14.1 A party ('the Initiating Party') may terminate this agreement with immediate effect by written notice to the other party ('the Breaching Party') on or at any time after the occurrence of an event specified in clause 14.2.

14.2 The events are:

14.2.1 the Breaching Party committing a material breach of the agreement and failing to remedy the breach within 30 starting on the day after receipt of notice from the Initiating Party giving details of the breach and requiring the Breaching Party to remedy it;

14.2.2 the Breaching Party (if a company) passing a resolution for its winding up, a court of competent jurisdiction making an order for the Breaching Party's winding up or the presentation of a petition for the Breaching Party's winding up that is not dismissed within 7 days (other than, in each case, for the purposes of solvent amalgamation or reconstruction where the entity resulting from the amalgamation or reconstruction effectively agrees to be bound by or assume the Breaching Party's obligations under this agreement);

14.2.3 the making of an administration order in relation to the Breaching Party or the appointment of a receiver over or an encumbrancer taking possession of or selling an asset of the Breaching Party;

14.2.4 the Breaching Party making an arrangement or composition with his creditors generally or making an application to a court of competent jurisdiction for protection from his creditors generally.

14.3 This agreement may be terminated by the Customer upon giving not less than 90 days' notice to the Provider, such notice to expire on the last day of the Initial Period or the last day of any renewal period.

14.4 An act or omission by a person who controls, is under common control with, or is controlled by a party, that would be a breach of this agreement on his part if it were an act or omission of the party, shall be deemed to be a breach of this agreement by the party.

14.5 Termination of this agreement for whatever reason shall not affect either:

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14.5.1 the accrued rights and liabilities of the parties arising in any way out of this agreement as at the date of termination and in particular but without limitation the right to recover damages against the other; or

14.5.2 provisions expressed to survive this agreement, which shall remain in full force and effect.

15. Non-solicitation of Staff

The Customer agrees that during the term of this agreement and for an additional period of 2 years after termination, the Customer shall not directly or indirectly canvas with a view to offering or providing employment to, offer to contract with or entice to leave any employee of or contractor to the Supplier engaged in the performance of the Services without the prior written consent of the Supplier.

16. Force Majeure

16.1 Neither party shall be deemed to be in breach of this agreement or otherwise liable to the other party for any delay in performance or any non-performance of any obligations under this agreement (and the time for performance shall be extended accordingly) if and to the extent that the delay or non-performance is due to an event or circumstance beyond the reasonable control of that party ('an event of force majeure').

16.2 The party relying on this clause shall promptly notify the other party of the nature and extent of the circumstances giving rise to the event of force majeure.

16.3 If the event of force majeure in question prevails for a continuous period in excess of 3 months after the date on which it began, the Provider may give notice to the party terminating this agreement. The notice to terminate must specify the termination date, which must be not less than 30 days after the date on which the notice to terminate is given. Once a notice to terminate has been validly given, this agreement will terminate on the termination date set out in the notice. Neither party shall have any liability to the other in respect of termination of this agreement due to an event of force majeure, but rights and liabilities that have accrued before termination shall not be affected.

17. Waiver

17.1 A waiver of any term, provision or condition of this agreement shall be effective only if given in writing and signed by the waiving party and then only in the instance and for the purpose for which it is given.

17.2 No failure or delay on the part of any party in exercising any right, power or privilege under this agreement shall operate as a waiver of it, nor shall any single or partial exercise of any such right, power or privilege preclude any other or further exercise of it or the exercise of any other right, power or privilege.

17.3 No breach of any provision of this agreement shall be waived or discharged except with the express written consent of the parties.

18. Notices

18.1 Any notice, demand or other communication given or made under or in connection with the matters contemplated by this agreement shall be in writing and shall be delivered personally or sent by fax or prepaid first class post (air mail if posted to or from a place outside the United Kingdom):

in the case of the Customer to: the address set out in the Web Services Agreement and in the case of the provider; AdaptiveComms, 11b Houghton St, Southport. PR9 0NS. and shall be deemed to have been duly given or made as follows:

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- 18.1.1 if personally delivered, upon delivery at the address of the relevant party,
- 18.1.2 if sent by first class post, two business days after the date of posting;
- 18.1.3 if sent by air mail, 5 working days after the date of posting; and
- 18.1.4 if sent by fax, when despatched;

provided that if, in accordance with the above provision, any notice, demand or other communication would otherwise be deemed to be given or made after 1600 hours, it shall be deemed to be given or made at the start of the next business day.

- 18.2 A party may notify the other party to this agreement of a change to his name, relevant addressee, address or fax number for the purposes of the above clause provided that such notification shall only be effective on:
 - 18.2.1 the date specified in the notification as the date on which the change is to take place; or
 - 18.2.2 if no date is specified or the date specified is less than 5 business days after the date on which notice is given, the date falling 5 business days after notice of any such change has been given.

19. Invalidity and Severability

- 19.1 If any provision of this agreement is or becomes invalid, illegal or unenforceable in any respect under the law of any jurisdiction, whether pursuant to any judgment or otherwise:
 - 19.1.1 the validity, legality and enforceability under the law of that jurisdiction of any other provision, and
 - 19.1.2 the validity, legality and enforceability under the law of any other jurisdiction of that or any other provision,

shall not be affected or impaired in any way.

- 19.2 If any provision of this agreement is held to be void or declared illegal, invalid or unenforceable for any reason whatsoever, that provision shall be divisible from this agreement and shall be deemed to be deleted from this agreement and the validity of the remaining provisions shall not be affected. If any such deletion materially affects the interpretation of this agreement, the parties shall use their best endeavours to negotiate in good faith with a view to agreeing a substitute provision as closely as possible reflecting the commercial intention of the parties.

20. Entire Agreement and Variation

- 20.1 This agreement embodies and sets forth the entire agreement and understanding of the parties and supersedes all prior oral or written agreements, understandings or arrangements relating to the subject matter of this agreement. Neither party shall be entitled to rely on any agreement, understanding or arrangement not expressly set forth in this agreement save for any representation made fraudulently.
- 20.2 Unless otherwise expressly provided elsewhere in this agreement, this agreement may be varied only by a document signed by both of the parties.

21. Assignment

- 21.1 Subject to the provisions of clause 21.2 the Customer shall not shall assign, transfer, sub-contract, or in any other manner make over to any third party the benefit and/or burden of this agreement without the prior written consent of the other, which consent

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shall not be unreasonably withheld or delayed. In particular, and without prejudice to the foregoing generality. The Provider shall be entitled to assign, transfer, sub-contract, or in any other manner make over to any third party any of the software licensed by him to the Customer at any time.

- 21.2 The Customer, if a company, shall be entitled without the prior written consent of the Provider to assign, transfer, sub-contract or in any manner make over the benefit or burden of this agreement to an affiliate or to any company with which it may merge or to any company to which it may transfer its assets and undertaking, provided that the affiliate or other company undertakes and agrees in writing to assume, observe and perform the rights, powers, duties and obligations of the Customer under the provisions of this agreement being assigned, transferred or otherwise made over.

22. Relationship of the Parties

Nothing in this agreement and no action taken by the parties pursuant to this agreement shall constitute, or be deemed to constitute, the parties a partnership, association, joint venture, the agents of each other or any other co-operative entity.

23. Governing Law and Jurisdiction

- 23.1 This agreement, and any dispute, controversy, proceedings or claim of whatever nature arising out of or in any way relating to this agreement or its formation, shall be governed by and construed in accordance with the laws of England.
- 23.2 The parties irrevocably submit to the exclusive jurisdiction of the courts of England to hear and determine any suit, action or proceedings or settle any disputes arising out of or in connection with this agreement and to enforce any judgement against their respective assets.

24. Exclusion of third party rights

The Contracts (Rights of Third Parties) Act 1999 shall not apply to this agreement and no person other than the parties to this agreement shall have any rights under it, nor shall it be enforceable under that Act by any person other than the parties to it.