

ATTACHMENT E Essex Thameside Franchise Funding Deed

Dated 2014

- (1) [FRANCHISEE PARENT]
- (2) [FRANCHISEE]
- (3) THE SECRETARY OF STATE FOR TRANSPORT

Deed of Undertaking re: share capital and loan facility – Essex Thameside Franchise

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THIS DEED is made on

2014

BETWEEN

- (1) **FRANCHISEE PARENT** (Company No. [Number]) whose registered office is at [Address] (the "**Parent**");¹
- (2) **[FRANCHISEE]** (Company No. [Number]) whose registered office is at [Address] (the "**Franchisee**"); and
- (3) **THE SECRETARY OF STATE FOR TRANSPORT** whose principal address is at 33 Horseferry Road, London SW1P 4DR (the "**Secretary of State**").

RECITALS:

- (A) The Secretary of State and the Franchisee are proposing to enter into a franchise agreement (incorporating the conditions precedent agreement (together the "**Franchise Agreement**") contemporaneously with this Deed under which the Franchisee will provide services for the carriage of passengers by railway.
- (B) The Parent has agreed to enter into this Deed with the aim of ensuring that the Franchisee remains financially resilient and able to satisfy its obligations under the Franchise Agreement.

NOW IT IS AGREED THAT:

1. **DEFINITIONS**

Words and expressions defined in the Franchise Agreement shall have the same meanings in this Deed unless the context otherwise requires and the following expressions shall have the following meanings:

"Bond" means the bond to be provided to the Secretary of State in the form set out in Schedule 2 and as replaced or amended from time to time in accordance with clause 4.3;

"Bond Provider" means any person or persons who may provide or be obligor under the Bond from time to time and who shall, unless the Secretary of State otherwise agrees, be:

¹ Where the immediate parent of the Franchisee is a joint venture the joint venture entity will be the Parent and there will be a separate joint and several guarantee of the obligations of the Parent by the ultimate holding companies of the joint venture partners. Otherwise the Parent is expected to be the ultimate holding company of the Franchisee. Bidders will be required to confirm the identity of the Parent/guarantee providers for approval by the Department.

- (a) a Bank or
- (b) an insurance company,

and, in each case, with the Relevant Credit Rating;

“Facility”

means together the Part A Facility and the Part B Facility;

“Facility Term”

means the period commencing on the date hereof and ending 6 months after the end of the Franchise Period;

“Insolvent”

means that the Bond Provider:

- (a) has a receiver, administrator or provisional liquidator appointed;
- (b) is subject to a notice of intention to appoint an administrator;
- (c) passes a resolution for its winding-up;
- (d) has a winding up order made by a court in respect of it;
- (e) enters into any composition or arrangement with creditors;
- (f) ceases to carry on business; or
- (g) has any steps or actions taken in connection with any of these procedures;

“Liabilities”

means all obligations or liabilities (whether past present or future, actual or contingent, as principal, surety or otherwise) for the payment or repayment of money, including, for the avoidance of doubt any such obligation or liability arising as a consequence of any right of subrogation, however arising incurred by the Franchisee other than the Subordinated

Debt;

“Loans”	means the Part A Facility Loan and Part B Facility Loan and “Loan” means a Part A Facility Loan or a Part B Facility Loan ;
“Modelling Suite and Financial Structure and Funding Plan”	means the Financial Model, Operational Models, the Record of Assumptions and Operating Manual together with the “financial structure and funding plan” provided by the Franchisee to the Secretary of State in response to the invitation to tender issued by the Secretary of State on September 2013;
“Part A Facility”	means a subordinated loan facility of £[<i>amount of required loan facility</i>] (pounds sterling <i>amount in words</i>); ²
“Part A Facility Loan”	means the aggregate principal amount of all loans made by the Parent to the Franchisee under the Part A Facility which has not been repaid at any relevant time;
“Part B Facility”	means a subordinated loan facility of £[<i>amount of required loan facility</i>] (pounds sterling <i>amount in words</i>); ³
“Part B Facility Loan”	means the aggregate principal amount of all loans made by the Parent to the Franchisee under the Part B Facility which has not been repaid at any relevant time;
“Permitted Spending Purposes”	means investment capital, franchise investment and working capital expenditure purposes consistent with relevant assumptions contained in the Modelling Suite and Financial Structure and Funding Plan;
“Relevant Credit Rating”	means either a credit rating of:

2 Bidders to populate this with the with the value of Specific Purpose Additional PCS as described in the ITT and Financial Templates.

3 Bidders to populate this with the aggregate value of the Required PCS and Additional PCS less the value of Specific Purpose Additional PCS as described in the ITT and Financial Templates.

- (a) A - (or better) by Standard and Poor's Corporation or Fitch Ratings Limited in respect of long term senior debt; or
- (b) A3 (or better) by Moody's Investors Service Inc. in respect of long term senior debt; or
- (c) if any credit rating specified in paragraphs (a) or (b) ceases to be published or made available or there is a material change in the basis of any such credit rating, such other rating or standard as the Secretary of State may, after consultation with the Parent, determine to be appropriate in the circumstances;

"Right of Set-off"

means from time to time, in relation to the Parent every right (whether conferred by law or otherwise) which the Parent has to combine credit balances and debit balances, directly or indirectly, being balances which belong to the Franchisee, or are owing by the Franchisee, or are deposits by the Franchisee with the Parent;

"Subordinated Debt"

means all amounts owed by the Franchisee to the Parent under or in connection with the Facility.

2. UNDERTAKING RE SHARE CAPITAL

2.1 The Parent shall procure that:

- 2.1.1 the Franchisee's issued share capital is at least [*amount offered in Financial Model*] and that it is fully paid up in cash by the Start Date; and
- 2.1.2 such issued share capital is not reduced during the Franchise Period; and
- 2.1.3 such issued share capital is not reduced after the Franchise Period if such reduction would reduce the aggregate of the remaining issued

share capital and the Loans to less than the balance of the outstanding Liabilities.

2.2 During the Franchise Period, the Parent shall procure that none of the cash paid to the Franchisee for the above share capital and no asset acquired directly or indirectly with any of such cash, is made available to any Affiliate of the Franchisee, unless it is made available in the ordinary course of business on arms length commercial terms, or is made with the Secretary of State's prior written consent (which shall not be unreasonably withheld or delayed).

3. **UNDERTAKING TO MAKE SUBORDINATED LOAN**

3.1 **Undertaking**

3.1.1 The Parent unconditionally and irrevocably undertakes to the Franchisee and the Secretary of State to make the Facility available to the Franchisee in accordance with the terms of this Deed.

3.1.1 Any amount drawn under the Part A Facility and repaid under this Deed shall be available for reborrowing. The Part A Facility available under this Deed is £[*amount of required loan facility*] (pounds sterling *amount in words*) minus any Part A Facility Loans that have been made by the Parent, other than any Part A Facility Loans that have been subsequently repaid.

3.1.2 Any amount drawn under the Part B Facility and repaid under this Deed shall be available for reborrowing. The Part B Facility available under this Deed is £[*amount of required loan facility*] (pounds sterling *amount in words*) minus any Part B Facility Loans that have been made by the Parent, other than any Part B Facility Loans that have been subsequently repaid.

3.2 **Demand by the Franchisee and notification to the Secretary of State**

3.2.1 Subject to clause 3.3 the Franchisee may only draw on the Part A Facility:

3.2.1.1 with the prior approval of the Secretary of State; or

3.2.1.2 for the Permitted Spending Purposes

and the Franchisee shall draw on the Part A Facility for the Permitted Spending Purpose in a manner consistent with relevant assumptions contained in the Modelling Suite and Financial Structure and Funding Plan. The Franchisee shall notify the Secretary of State as soon as possible after it draws on the Part A Facility confirming the amount of the draw down and identifying its purpose by reference to relevant

assumptions contained in the Modelling Suite and Financial Structure and Funding Plan.

3.2.2 The Franchisee may only draw on the Part B Facility:

3.2.2.1 with the prior approval of the Secretary of State; or

3.2.2.2 (a) if the management accounts delivered by the Franchisee to the Secretary of State pursuant to paragraph 3.3 of Schedule 13 of the Franchise Agreement show that the:

(i) ratio of the Franchisee's Modified Revenue to its Actual Operating Costs during the preceding 13 Reporting Periods (or, prior to the end of the thirteenth such Reporting Period, during all preceding Reporting Periods) is less than 1.070:1; or

(ii) ratio of Franchisee's Forecast Modified Revenue to its Forecast Operating Costs for the next 13 Reporting Periods (or, where there are less than 13 Reporting Periods remaining in the Franchise Period, for all such remaining Reporting Periods) will be less than 1.070:1; or

(b) the Franchisee reasonably believes (and on notification to the Secretary of State he agrees) that either of the ratios in clauses 3.2.2.2(a)(i) or 3.2.2.2(a)(ii) will be less than 1.070:1 at the end of the current Reporting Period or any of the next 2 Reporting Periods,

and in the circumstances specified in this clause 3.2.2.2 the Franchisee may only draw on the Facility:

(x) in such amount or amounts as agreed in writing with the Secretary of State (or on failure to agree as determined by the Secretary of State) as being necessary to ensure that the relevant ratio remains at or is increased to above 1.070:1;

(y) where the Franchisee has complied with its obligation pursuant to clause 3.2.1 to draw on the Part A Facility for the Permitted Spending Purpose in a manner consistent with relevant assumptions contained in the Modelling Suite and Financial Structure and Funding Plan.

3.2.3 At any time that the Franchisee is permitted or required to draw on the Facility as specified in paragraph 3.2.1 or 3.2.2 it shall do so by giving the Parent notice in writing (such notice to be copied to the Secretary of State at the same time). The Parent shall then make payment, within 7 days of receipt of any such notice.

3.2.4 The Parent shall procure compliance by the Franchisee with the requirements of this Clause 3 and shall notify the Secretary of State in writing of all payments made by the Parent to the Franchisee and all repayments made by the Franchisee to the Parent pursuant to the terms of the Facility within 7 days of such payment being made identifying whether the payment or repayment is made with regard to the Part A Facility or the Part B Facility as the case may be. On the day following the last day of the Franchise Period the Franchisee shall notify the Secretary of State in writing of the undrawn amount of each of the Part A Facility and the Part B Facility.

3.3 **Demand by the Secretary of State**

If, at any time during the Franchise Period:

3.3.1 the ratio of the Franchisee's Modified Revenue to its Actual Operating Costs during the preceding 13 Reporting Periods (or, prior to the end of the thirteenth such Reporting Period, during all preceding Reporting Periods) is less than 1.070:1; or

3.3.2 the ratio of Franchisee's Forecast Modified Revenue to its Forecast Operating Costs for the next 13 Reporting Periods (or, where there are less than 13 Reporting Periods remaining in the Franchise Period, for all such remaining Reporting Periods) will be less than 1.070:1;

3.3.3 the Secretary of State reasonably believes that either of the ratios in clauses 3.3.1 or 3.3.2 will be less than 1.070:1 at the end of the current Reporting Period or any of the next 2 Reporting Periods,

the Secretary of State may require the Parent to make a loan (and the Franchisee to accept such loan) in such amount or amounts as he may reasonably believe to be necessary to ensure that the relevant ratio remains at or is increased to above 1.070:1, by giving the Parent notice in writing (in the form set out in Schedule 1). Such loan shall be made from the Part B Facility provided that:

(x) where there are no or insufficient amounts available to be drawn from the Part B Facility then the required loan (or the amount of the deficiency, as the case may be) shall be paid from the Part A Facility; and

(y) if the Franchisee has not complied with its obligation under clause 3.2.1 to draw on the Part A Facility for the Permitted Spending Purpose in a manner consistent with relevant assumptions contained in the Modelling Suite and Financial Structure and Funding Plan the Secretary of State may require that the loan shall first be made from the Part A Facility in an amount equal to the amount that should have been drawn down by the Franchisee pursuant to clause 3.2.1. If any further loan funds are required they shall be drawn from the Part B Facility.

3.4 If, at any time during the 6 months following the end of the Franchise Period, the aggregate of the Franchisee's cash and other current assets is less than the Liabilities, the Secretary of State may require the Parent to make a loan (and the Franchisee to accept such loan) under the Facility in such amount or amounts as he may reasonably believe to be necessary to increase the aggregate of the Franchisee's cash and other current assets above the Liabilities, by giving the Parent notice in writing. The Parent shall then make the payment within 7 days of receipt of such notice. For the purpose of this clause (and clause 7.4.2) the Parent shall procure that the Franchisee shall, during such 6 month period:

3.4.1 provide to the Secretary of State such information as he may from time to time reasonably require in order to ascertain whether and the extent to which the aggregate of the Franchisee's cash and other current assets are more or less than the Liabilities; and

3.4.2 notify the Secretary of State if and on each occasion when the aggregate of Franchisee's cash and other current assets are less than the Liabilities.

3.5 For the avoidance of doubt, nothing in clauses 3.3 or 3.4 shall oblige the Parent to make any loan to the Franchisee under the Facility if and to the extent that the making of such loan would cause the Loans to exceed £ [*amount of the Facility*] (pounds sterling *amount in words*).

3.6 **Costs and Charges associated with the Facility**

3.6.1 Subject to clause 3.6.2 interest may be payable by the Franchisee to the Parent at [*percentage stated in Financial Model*]% per annum (accruing on a daily basis, assuming a 365 day year) from time to time on the Loans, but any such interest shall be subject to clauses 6 and 7. No commitment fee shall be payable on the Facility.

3.6.2 No interest or other form of charge or fee or consideration whatsoever (including in respect of the Bond requirements) shall be payable by the

Franchisee in respect of the first £[*amount*⁴] (pounds sterling *amount in words*) of the Part B Facility, with the intention and effect that such sum shall be available free of charge to the Franchisee both before and after any draw down of that sum from the Part B Facility. If any amount in excess of that sum is drawn down, interest shall be payable only in respect of the excess.

3.7 **Security**

The Parent shall not be entitled to any security for any amount due to it under this Deed unless otherwise agreed by the Secretary of State and any security taken by it without such consent shall be invalid.

3.8 **Restrictions**

If there has been any draw down in respect of the Facility pursuant to Clause 3.2.2 or 3.3, then until such time as the total amount of the resulting Subordinated Debt has been repaid in accordance with and as permitted by Clause 7.4:-

3.8.1 the Franchisee shall be treated as being in a "Lock Up Period" for the purposes of paragraph 3.1 of Schedule 12 (Financial Obligations and Covenants) of the Franchise Agreement and accordingly without the consent of the Secretary of State the Franchisee shall not:-

3.8.1.1 declare or pay any dividend (equity or preference) or make any other distribution including surrendering any taxable losses to any of its Affiliates or pay any of its Affiliates in respect of taxable losses that they wish to surrender to the Franchisee;

3.8.1.2 pay management charges to any of its Affiliates in excess of those specified in the Initial Business Plan; or

3.8.1.3 make any payment under any intragroup borrowings except in accordance with and as permitted by Clause 7.4; and

3.8.2 the Parent shall procure compliance by the Franchisee with its obligations under this Clause 3.8.

4. **THE BOND**

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The amount to be inserted is the amount of the Additional PCS (as defined in the ITT and not including Specific Purpose Additional Funding also as defined in the ITT)

4.1 The Parent shall procure that there shall be a valid and effective Bond in place with effect from:

4.1.1 the date of the Franchise Agreement; and

4.1.2 throughout the Facility Term.

4.2 The Bond that the Parent shall procure is in place pursuant to clause 4.1 and any replacement Bond shall:

4.2.1 be substantially in the form of the document in Schedule 2; and

4.2.2 have a value (with regard to the first Bond of £[*amount*] (pounds sterling *amount in words*)⁵ and in relation to subsequent Bonds shall have the value calculated pursuant to clause 4.4; and

4.2.3 have a minimum duration of three years.

4.3 **Provision of Replacement Bond**

4.3.1 The Parent may replace a Bond at any time, provided that the Secretary of State receives a replacement Bond that complies with the provisions of clause 4.2.

4.3.2 The Parent shall replace any Bond at least twenty four months prior to its scheduled expiry with a replacement that complies with the requirements of clause 4.2 and 4.5.

4.3.3 If at any time the Secretary of State reasonably considers the Bond Provider under the then current Bond to be unacceptable for whatever reason (including (without limitation) because such Bond Provider no longer has the Relevant Credit Rating) or such Bond Provider becomes Insolvent, the Secretary of State may require the Parent within 20 business days to procure the execution and delivery of a new Bond by a Bond Provider acceptable to the Secretary of State.

4.4 **Value of Bonds other than the first Bond**

The value of the Bond provided pursuant to clause 4.3.2 shall be £[*same amount as at 4.2.2 amount*] (pounds sterling *amount in words*) unless the total aggregate amount available to be drawn down under the Part B Facility on the date that the Bond is to be replaced is less than £[*same amount as at 4.2.2 amount*] (pounds sterling *amount in words*) in which case the amount of the Bond shall be such aggregate amount available to be drawn down under the Part B Facility.

⁵ Amount to be 50% of the amount of the Part B Facility and shall not include the amount of the Part A Facility.

4.5 **Demands under the Bond**

4.5.1 The Secretary of State shall be entitled to make demands under the Bond in the event that the Parent fails:

4.5.1.1 to comply with its undertaking to make the Facility available to the Franchisee pursuant to the terms of clause 3.3; or

4.5.1.2 to provide a replacement Bond complying with the provisions of clause 4.2 at least twenty four months prior to the scheduled expiry of the existing Bond; or

4.5.1.3 to procure the execution and delivery of a new Bond by a Bond Provider acceptable to the Secretary of State when required to do so in accordance with the provisions of clause 4.3.3.

4.5.2 If there has been a demand under the Bond which has been paid in full by the Bond Provider to the Franchisee unless and until the Parent procures and delivers to the Secretary of State a further bond which complies with the requirements of clause 4.2 (any such bond being a Bond for the purposes of this Deed):

4.5.2.1 the Franchisee shall not be obliged to pay (and shall not pay) to the Parent all or part of the Subordinated Debt notwithstanding the fact that the Parent would otherwise be entitled pursuant to clause 7.4 to demand a repayment by the Franchisee of all or part of the Subordinated Debt because the circumstances set out in clause 7.4.1 have arisen; and

4.5.2.2 the Franchisee shall be treated as being in a "Lock Up Period" for the purposes of paragraph 3.1 of Schedule 12 (Financial Obligations and Covenants) of the Franchise Agreement and accordingly without the consent of the Secretary of State the Franchisee shall not:

(a) declare or pay any dividend (equity or preference) or make any other distribution including surrendering any taxable losses to any of its Affiliates or pay any of its Affiliates in respect of taxable losses that they wish to surrender to the Franchisee;

(b) pay management charges to any of its Affiliates in excess of those specified in the Initial Business Plan; or

(c) make any payment under any intragroup borrowings.

The Parent shall procure compliance by the Franchisee with its obligations under this Clause 4.5.2.

4.5.3 Any demand by the Secretary of State under the Bond shall not relieve the Parent of any other or future obligation under this Deed except that any payment by the Bond Provider of an amount to the Franchisee pursuant to such demand shall be deemed to have satisfied the Parent's obligation to make payment of that amount to the Franchisee pursuant to clause 3.3.

5. **FRANCHISEE'S UNDERTAKINGS**

5.1 The Franchisee undertakes that, except as otherwise expressly permitted by this Deed, it will not, at any time during the Facility Term:

5.1.1 pay any amount or make any distribution (in cash or in kind) to any person in respect of, or on account of, any Subordinated Debt;

5.1.2 discharge any Subordinated Debt by set-off;

5.1.3 purchase or otherwise acquire any Subordinated Debt;

5.1.4 provide to any person (or permit to subsist) (a) any security in respect of any Subordinated Debt or (b) any guarantee in respect of any Subordinated Debt;

5.1.5 make any gift to the Parent or enter into any other arrangement with it or for its benefit under which the Franchisee will receive no consideration or consideration the value of which to the Franchisee is significantly less than the value of the consideration provided by the Franchisee;

5.1.6 acquire any shares in, or securities issued by, the Parent; or

5.1.7 do anything (or omit to do something) if that might affect any right or obligation of the parties under this Deed.

6. **PARENT'S UNDERTAKINGS**

6.1 The Parent undertakes to procure that the Franchisee complies with the Franchisee's obligations under Clause 5, and that, except as otherwise expressly permitted by this Deed, the Parent will not, at any time during the Facility Term:

- 6.1.1 demand or receive any payment or any distribution (in cash or in kind) from any person in respect of, or on account of, any Subordinated Debt;
- 6.1.2 accelerate the due date of any such payment or distribution, including by converting any term facility into an on-demand facility;
- 6.1.3 exercise any right or remedy in connection with the enforcement or recover of any such payment or distribution, including by exercising any right of set-off or counterclaim or any right to consolidate accounts, by making any demand under any guarantee or by taking any legal proceedings;
- 6.1.4 instigate any insolvency proceedings, including the appointment of an administrator, liquidator, receiver or other similar officer in respect of the Franchisee or any of its assets;
- 6.1.5 except where such guarantee is in the form of the Bond, take or receive from any person (or permit to subsist) any security or any guarantee in respect of any Subordinated Debt; or
- 6.1.6 do anything (or omit to do something) if that might affect any right or obligation of the parties under this Deed.

7. **SUBORDINATION**

- 7.1 Subject to clause 7.4, the Parent agrees that the Subordinated Debt shall be a contingent debt of the Franchisee that shall only be due and payable if and when the Liabilities have been paid and discharged in full, except as otherwise agreed in writing by the Secretary of State.
- 7.2 For the avoidance of doubt the above clause shall continue to apply if the Franchisee goes into liquidation and subject to clause 7.4, no claim in respect of the Subordinated Debt shall be provable, or capable of being established against, the Franchisee in such winding-up unless and until all the Liabilities have been paid or otherwise satisfied in full.
- 7.3 The Parent and the Franchisee jointly and severally covenant with the Secretary of State and agree and declare that and except as otherwise agreed in writing by the Secretary of State or permitted under clause 7.4:
 - 7.3.1 the Subordinated Debt shall be subordinated to the extent and in the manner set out in this Deed;
 - 7.3.2 the Franchisee will not make any payment on account of the Subordinated Debt (whether by way of repayment, interest or

otherwise) nor will the Parent be entitled to demand or receive any such payment;

7.3.3 any payments received by the Parent in breach of clause 7.3.2 above will be held by the Parent on trust for all creditors of the Franchisee other than the Parent;

7.3.4 if the Parent receives the benefit of a Right of Set-Off or counterclaim and as a result the Subordinated Debt is reduced at a time when the Parent would not (by virtue of this Deed) be entitled to receive payment in respect of the Subordinated Debt, the Parent will hold such sum on trust for all creditors of the Franchisee other than the Parent; and

7.3.5 it is acknowledged that nothing in this Deed creates or is intended to create any security on any asset of the Parent.

7.4 Subject to clause 3.1 and clause 4.5.2, the Parent shall be entitled to demand repayment of and the Franchisee shall be obliged to pay all or part of the Subordinated Debt on receipt of such demand:

7.4.1 at any time during the Franchise Period if the ratio of the Franchisee's Modified Revenue to its Actual Operating Costs during the preceding 13 Reporting Periods (or, prior to the end of the thirteenth such Reporting Period, during all preceding Reporting Periods) was equal to or greater than 1.070:1 and if and to the extent that repayment of the Subordinated Debt (or the amount requested to be repaid, if less) can be made without the ratio of the Franchisee's Forecast Modified Revenue to its Forecast Operating Costs for the next 13 Reporting Periods (or, where there are less than 13 Reporting Periods remaining in the Franchise Period, for all such remaining Reporting Periods) falling below 1.070:1; or

7.4.2 at any time during the 6 months following the end of the Franchise Period:

7.4.2.1 if the aggregate of the Franchisee's cash and other current assets is equal to or greater than the Liabilities; and

7.4.2.2 if and to the extent that repayment of the Subordinated Debt (or the amount requested to be repaid if less) can be made without the aggregate of cash and other current assets falling below the aggregate of the Liabilities,

provided that the Parent shall not be entitled to demand any repayment of Subordinated Debt in relation to the Part A Facility until

all Subordinated Debt drawn from the Part B Facility has been repaid and further provided that the Parent will procure that:

(a) the Franchisee gives the Secretary of State not less than 7 days prior written notice of the date of any proposed repayment under this clause 7.4.2 and

(b) such notice is accompanied by a statement by each of the Parent and the Franchisee that the aggregate of the Franchisee's cash and other current assets is (and at the proposed repayment date will be) equal to or greater than the Liabilities.

8. CONTINUING LIABILITY AND INDEMNITY

8.1 The undertakings in this Deed are additional to, without prejudice to and not in substitution for, any rights or security which the Secretary of State may now or hereafter have, for the performance and observance of the obligations, commitments and undertakings of the Franchisee under the Franchise Agreement.

8.2 The Parent's liability under this Deed shall not be affected by any event or occurrence, including, without limitation:

8.2.1 any time, indulgence, concession, waiver or consent at any time given to the Franchisee or any other person including any individual, company, corporation, firm, partnership, joint venture, undertaking, association, organisation, trust, state or agency of a state (in each case, whether or not having a separate legal personality) (a "**Person**");

8.2.2 the release of any other person under the terms of any composition or arrangement with any creditor of the Franchisee;

8.2.3 any incapacity or lack of power, authority or legal personality of or dissolution or change in the member or status of the Franchisee or any other person;

8.2.4 any change in the law, rules or negotiations of any jurisdiction;

8.2.5 any present or future action of any governmental authority or court amending, varying, reducing or otherwise affecting, or purporting to amend, vary, reduce or otherwise affect any of the obligations of the Franchisee under the law;

8.2.6 any amendment or supplement to any provision of the Franchise Agreement or to any mortgage, pledge, lien, hypothecation, security interest or other charge or encumbrance ("**Security**") or guarantee;

- 8.2.7 the making or absence of any demand on the Franchisee or any other person for payment;
 - 8.2.8 the enforcement or absence of enforcement of the Franchise Agreement, of this Deed or of any Security or guarantee;
 - 8.2.9 the taking, existence or release of any Security or guarantee;
 - 8.2.10 the winding-up, amalgamation, reconstruction, administration, dissolution, liquidation, merger or consolidation of the Franchisee or any other Person or any equivalent or analogous procedure under the law of any jurisdiction ("**Winding-up**"), or any step being taken for any such Winding-up; or
 - 8.2.11 the illegality, invalidity or unenforceability of, or any defect in, any provision of the Franchise Agreement or this Deed or any guarantee or any other obligations of any of the parties under or in connection with the Franchise Agreement or this Deed or any Security or guarantee.
 - 8.2.12 any other circumstance (other than payment or performance) which might otherwise constitute a legal or equitable discharge or defence of a guarantor generally.
- 8.3 The Parent unconditionally and irrevocably agrees as a primary obligation to indemnify the Secretary of State on demand against all direct losses, liabilities, costs, charges, expenses, actions, proceedings, claims and demands which the Secretary of State may suffer through or arising from any breach by the Parent of its obligations under this Deed.

9. **REPRESENTATIONS AND WARRANTIES**

The Parent represents and warrants to the Secretary of State as follows:

9.1 **Status**

the Parent is a limited liability company, duly incorporated and validly existing under the laws of [Country], with power to enter into, exercise any rights and perform its obligations under this Deed;

9.2 **Authorisations and Consents**

all action, conditions and things required to be taken, fulfilled and done (including the obtaining of any necessary consents, the making of registrations and the like) in order:

- 9.2.1 to enable the Parent lawfully to enter into, exercise any rights and perform and comply with its obligations under this Deed; and

9.2.2 to ensure that those obligations are valid, legally binding and enforceable,

9.2.3 have been taken, fulfilled and done;

9.3 **Non-Violation etc.**

the Parent's entry into, exercise of any rights and/or performance of its obligations under this Deed do not, and will not, violate or exceed any guaranteeing or other power or restriction granted or imposed by:

9.3.1 any law to which it is subject or

9.3.2 its Memorandum or Articles of Association or

9.3.3 any other agreement to which Parent is a party or which is binding on it

or result in the existence of, or oblige it to create, any Security over all or any part of its business, undertaking, property, assets, revenues (including any right to receive revenues) and uncalled capital, wherever situated;

9.4 **Winding-up**

no meeting has been convened for the Parent 's Winding-up, no such step is intended by it and, so far as it is aware, no petition, application or the like is outstanding for its Winding-up; and

9.5 **Obligations Binding**

the Parent 's obligations under this Deed are valid, binding and enforceable.

10. **MISCELLANEOUS**

10.1 **Assignment**

This Deed shall be binding on the Parent and its successors and shall benefit the Secretary of State. Any reference in this Deed to the Parent shall be construed accordingly. The Parent may not transfer all or part its obligations under this Deed without the Secretary of State's prior written consent.

10.2 **Notices**

10.2.1 Any communication given under this Deed shall be delivered:

10.2.1.1 personally;

10.2.1.2 sent by fax transmission;

10.2.1.3 sent by recorded, special delivery or first class post; or

10.2.1.4 by electronic data transfer

to the address, facsimile number or email address of the person who is to receive such communication as set out in clause 10.2 or such other address, facsimile number, or email address as may from time to time be specified in writing by that person as its address for the purpose of this clause 10.2.

The address and facsimile number of the Parent is:

Address: [Address]

Fax number: [Number]

Email address: [Address]

For the attention of: [Title]

The address and facsimile number of the Franchisee is:

Address: [Address]

Fax number: [Number]

Email address: [Address]

For the attention of: [Title]

The address and facsimile number of the Secretary of State is:

Address: 33 Horserferry Road, London SW1P 4DR

Fax number: []

Email address: [Address]

For the attention of: []

Deemed Receipt

10.3 Any such notice or other communication shall be deemed to have been received by the party to whom it is addressed as follows:

10.3.1 if sent by hand, recorded or special delivery, when delivered;

10.3.2 if sent by pre-paid first class post, from and to any place within the United Kingdom, three business days after posting unless otherwise proven;

10.3.3 if sent by facsimile, upon sending, subject to confirmation of completed transmission to the intended recipient; and

10.3.4 if sent by electronic data transfer, upon sending, subject to receipt by the sender of a "delivered" confirmation (provided that the sender shall not be required to produce a "read" confirmation).

10.4 **Waivers and Remedies**

No failure by any party to this Deed to exercise, or delay by any party to this Deed in exercising, any right or remedy under this Deed will operate as a waiver thereof, nor will any single or partial exercise by any party to this Deed of any right or remedy preclude any other or further exercise of that or any other right or remedy. The rights and remedies provided for in this Deed are cumulative and not exclusive of any other rights or remedies which any party to this Deed may at any time have (whether provided by law or otherwise).

10.5 **Amendments**

Any provision of this Deed may be amended, supplemented or waived only if the Secretary of State (and, in the case of an amendment or supplement, the Parent and the Franchisee) so agrees in writing. Any such waiver, and any consent by the Secretary of State under any provision of this Deed, must be in writing and may be given subject to any conditions thought fit by the Secretary of State. Any waiver or consent shall be effective only in the instance and for the purpose for which it is given.

10.6 **Partial Invalidity**

The illegality, invalidity or unenforceability of any provision of this Deed under the law of any jurisdiction shall not affect its legality, validity or enforceability under the law of any other jurisdiction nor the legality, validity or enforceability of any other provision of this Deed.

10.7 **Remedies**

Without prejudice to any other rights and remedies that the Secretary of State may have, the Parent agrees that damages may not be an adequate remedy for any breach by the Parent of this Agreement. The Parent agrees that the Secretary of State will be entitled without proof of special damage to the remedies of an injunction and other equitable relief for any actual or threatened breach by the Parent of this Agreement.

10.8 **Rights of Third Parties**

The parties to this Deed do not intend that any term of this Deed will be enforceable under the Contracts (Rights of Third Parties) Act 1999 by any person other than the parties.

10.9 **Counterparts**

This Deed may be executed in any number of counterparts, each of which will constitute an original, but which will together constitute one agreement.

10.10 **Governing Law And Jurisdiction**

This Deed (and any non-contractual obligations arising out of or in connection with it) shall be governed by and construed in accordance with English Law and the parties irrevocably agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed, except as expressly set out in this Deed.

Executed as a Deed the day and year first before written:

EXECUTED as a DEED)
for and behalf of [**FRANCHISEE PARENT**])
by)

Director

Director/Secretary

EXECUTED as a **DEED**)
for and behalf of [**FRANCHISEE**])
by)

Director

Director/Secretary

SEAL REF No.

THE CORPORATE SEAL OF)
THE SECRETARY OF STATE FOR TRANSPORT)
is hereunto affixed:)

Authenticated by authority of the
Secretary of State for Transport

Schedule 1

Form of Secretary of State Notice (clause 3.3)

To [Insert name of Franchisee Parent]

For the attention of : []

[Date]

Dear Sir,

RE: Deed of Undertaking re: Share Capital and loan facility dated [•] 20[•] between the [Franchisee Parent], [Franchisee] and the Secretary of State ("Funding Deed")

We hereby give you notice pursuant to clause 3.3 of the Funding Deed that the circumstance contemplated under paragraph [3.3.1] [3.3.2] [3.3.3] [*delete as appropriate*] has occurred and by this notice the Secretary of State hereby requires you to make a loan to the Franchisee under the Facility in the amount of £[•] within 7 days from receipt of this letter.

[SoS to specify payment from either or both of the Part A Facility and the Part B Facility in accordance with his rights under paragraph 3.3]

Yours faithfully

For and on behalf of the **Secretary of State**

Schedule 2

Form of Bond

To:

Secretary of State for Transport
33 Horseferry Road
London
SW1P 4DR
(the "**Secretary of State**")

Whereas:

We are informed that you have entered into a franchise agreement dated [_____] (the "**Franchise Agreement**") with [*name of Franchisee*] (the "**Franchisee**") under which the Franchisee will provide certain railway passenger services.

We are further informed that under a deed of undertaking dated [_____] between the Franchisee, the Secretary of State and [*name of Parent*] (the "**Parent**") (the "**Deed of Undertaking**") entered into pursuant to the Franchise Agreement, it is a requirement that the Secretary of State receives a duly executed bond in the amount of [*amount*]⁶ (the "**Bond Value**") to secure the performance by the Parent of and its compliance with its obligations under the Deed of Undertaking.

Accordingly:

We hereby unconditionally and irrevocably undertake to pay to the Franchisee in full in London, immediately upon receipt of your first written demand on us in the form set out in the Appendix and, without further enquiry, the sum specified therein. Such written demand shall state:

- (a) the Call Event (as defined in clause 2 hereof) has occurred; and
- (b) the date of occurrence of such Call Event.

You may call on us for the whole or part of the amount of our liability hereunder and you may make any number of calls on us up to a maximum aggregate amount of the Bond Value. All sums payable hereunder shall be paid free of any restriction or condition and free and clear of and (except to the extent required by law) without any deduction or withholding, whether for or on account of tax, by way of set-off or otherwise.

⁶ Amount to be 50% of the amount of the Part B Facility

1. The undertaking given by us above shall operate provided that:
 - 1.1.1 our maximum liability shall be limited to a sum or sums not exceeding in the aggregate the amount of the Bond Value or such lesser amount as you may notify us of from time to time in writing, separately from any demand, shall constitute the Bond Value of this Bond; and
 - 1.1.2 notwithstanding anything contained herein, our liability hereunder shall expire on the earlier of:
 - 1.1.2.1 the date falling three years after the date of this Bond; and
 - 1.1.2.2 the last day of the Facility Term (as defined under the Deed of Undertaking)

except in respect of any written demand for payment complying with all the requirements hereof which is received by us on or before such date for either the Bond Value, or for such lesser amount which, when aggregated with any previous demands, amounts to the Bond Value or less, after which date this undertaking shall be void whether returned to us or not.
2. **Call Event** means, in this Bond, any of:
 - 2.1.1 the failure by the Parent to comply with its undertakings to make the Facility available to the Franchisee pursuant to the terms of clause 3.3 of the Deed of Undertaking; or
 - 2.1.2 the failure by the Parent to provide a replacement Bond complying with the provisions of clause 4.3.2 of the Deed of Undertaking at least twenty four months prior to the scheduled expiry of the existing Bond; or
 - 2.1.3 the failure by the Parent to procure the execution and delivery of a new Bond by a Bond Provider acceptable to the Secretary of State when required to do so in accordance with clause 4.3.3 of the Deed of Undertaking.
3. This undertaking is made to you, your successors and your assigns.
4. This undertaking shall not be discharged or released by time, indulgence, waiver, alteration or release of, or in respect to, the obligations of the Parent or the Franchisee under the Deed of Undertaking or the Franchise Agreement or any other circumstances that might operate as a release of a guarantor at law or in equity.

5. You may make demand or give notice to us under this Bond in writing by hand or facsimile transmission to us as follows:

Address: [Bond Provider's address]

Facsimile Number: [Bond Provider's fax number]

6. References in this Bond to the Deed of Undertaking and the Franchise Agreement are to the Deed of Undertaking and the Franchise Agreement as amended from time to time.
7. Where used in this Bond, capitalised terms have the same meanings as in the Deed of Undertaking.
8. This Bond and any non-contractual obligations arising out of or in connection with it are governed by English law. The parties hereby irrevocably agree that the courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Bond.

Executed as a deed this [day and month] of [year].

Executed as a deed by)
[Bond Provider])
acting by [one director][an attorney])
in the presence of:)

Signature of [director][attorney]

Witness Signature:

Witness Name:

Witness Address:

APPENDIX TO THE BOND
SPECIMEN DEMAND NOTICE

To: [name and address of Bond Provider]
[date of demand notice]

We refer to the bond issued by you on [date of Bond] (the "**Bond**") in connection with a deed of undertaking dated [Date] (the "**Deed of Undertaking**") and entered into between [name of Franchisee] (the "**Franchisee**"), the Secretary of State for Transport (the "**Secretary of State**") and [name of Parent] (the "**Parent**").

The Deed of Undertaking was entered into pursuant to a franchise agreement dated [Date] between the Secretary of State and the Franchisee on [Date] (the "**Franchise Agreement**").

We hereby notify you that the following Call Event (as defined in the Bond) occurred on [date of occurrence of Call Event]: [delete as appropriate].

- (a) [The Parent has failed to comply with its undertakings to make the Facility available to the Franchisee pursuant to the terms of clause 3.3 of the Deed of Undertaking.]
- (b) [The Parent has failed to provide a replacement Bond complying with the provisions of clause 4.3.2 of the Deed of Undertaking at least twenty four months prior to the scheduled expiry of the existing Bond.]
- (c) [The Parent has failed to procure the execution and delivery of a new Bond by a Bond Provider acceptable to the Secretary of State when required to do so in accordance with clause 4.3.3 of the Deed of Undertaking.]

We hereby demand immediate payment from you of [specify alternative amount if not Bond Value] or the Bond Value, whichever is smaller.

Please arrange for immediate payment of the relevant amount as follows:

[account details to which Bond monies to be paid into]

Where used in this Notice, capitalised terms have the same meanings as in the Deed of Undertaking.

For and on behalf of
Secretary of State for Transport