

Dated

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

Great Western Franchise Deed of Undertaking re: share capital and loan facility

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THIS DEED is made on

BETWEEN

- (1) **FRANCHISEE PARENT** (Company No. [Number]) whose registered office is at [Address] (the "**Parent**");
- (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.
- (C) The Parent has further agreed that the Secretary of State may suffer losses in the event of early termination of the Franchise Agreement as a result of the occurrence of an Event of Default and that it should make specified funds available to the Secretary of State to compensate him for such losses.

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:

"Bank Guarantee"

means the guarantee to be provided to the Secretary of State in the form set out in Schedule 2 and as replaced or amended from time in time in accordance with clause 5.3;

“Facility”

means a subordinated loan facility of £[*amount of any loan facility offered in Financial Model*]¹;

“Facility Term”

means the period commencing on the date hereof and ending 6 months after the end of the Franchise Period except that where the Franchise Agreement is terminated pursuant to Clauses 4.2(b) or 4.3(b) of the Conditions Precedent Agreement, the Facility Term shall be the period commencing on the date hereof and ending on the date of such termination;

“Guarantor”

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

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

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

“Insolvent”

means that the Guarantor:

- (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;

¹ £40m is the minimum amount which will be required by way of subordinated loan facility. Please see section 3.2.4.3 and 5.11 of the ITT which set out the circumstances in which the DFT may require provision of a larger subordinated loan facility.

- (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:

- (a) 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; and
- (b) all such obligations or liabilities (whether past present or future, actual or contingent, as principal, surety or otherwise including liabilities arising out of the issuing of any proceedings) of the Franchisee to the Secretary of State including those consequent upon the early termination of the Franchise Agreement or any failure of the Franchisee to perform or comply with any of its obligations to the Secretary of State under the Franchise Agreement (including, without limitation, damages for breach of contract);

“Loans”

means the aggregate principal amount of all loans made by the Parent to the Franchisee under the Facility (including any payment made by a Guarantor to the Franchisee under a Bank Guarantee) which are from time to time outstanding;

“Relevant Credit Rating”

means either a credit rating of:

- (a) A- (or better) by Standard and **Poor's Corporation** or Fitch Ratings 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.

3.1.2 Subject to clause 3.2.3 any amount drawn under the Facility and repaid under this Deed shall be available for reborrowing, so that the facility available under this Deed is £[*amount of any loan facility offered in Financial Model*]² at all times.

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

Subject to clause 3.2.3, the Franchisee may only draw on the Facility [in an amount in excess of £[*amount*]] ***Drafting note - this shall be customised as an amount equal to the difference between the £40m minimum Facility required by the DfT (or such higher minimum Facility that the DfT may request pursuant to paragraph 3.2.4.3 of the ITT) and the total amount of Facility proposed by the Bidder. In the event that there is no difference between the amount of Facility required by DfT and the amount of Facility proposed by the Bidder this wording will be deleted.***

3.2.1 :

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

3.2.1.2 if at any time during the Franchise Period:

(a) 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

² See footnote 1.

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 1.07:1; 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 1.07:1; or

(b) the Franchisee reasonably believes (and on notification to the Secretary of State he agrees) that either of the ratios in clauses 3.2.1.2(a)(i) or 3.2.1.2(a)(ii) will be less than 1.07:1 at the end of the current Reporting Period or any of the next 2 Reporting Periods,

and in the circumstances specified in clause 3.2.1.2 the Franchisee may only draw on the Facility in such amount or amounts as agreed 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, or is increased, above 1.07:1.

3.2.2 At any time that the Franchisee is permitted to draw on the Facility as specified in paragraph 3.2.1 the Franchisee may draw on such Facility 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.

3.2.3 The Franchisee shall not be permitted to draw on the Facility or draw further on the Facility pursuant to clause 3.2.1 following the occurrence of any of the following events in relation to the Franchisee:

3.2.3.1 the appointment of a receiver, administrator or liquidator in respect of the Franchisee or any of its assets;

3.2.3.2 the making of a winding up order by a court; or

3.2.3.3 a railway administration order being made under Sections 60 to 62 of the Act.

- 3.2.4 The Parent 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. On the last day of the Franchise Period the Franchisee shall notify the Secretary of State in writing of the undrawn amount of the Facility available for borrowing on the day which is the earlier of the last day of the Franchise Period and the day prior to the day on which the Franchisee ceased to be able to draw on the Facility pursuant to clause 3.2.3.

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 1.07:1; 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 1.07:1;
- 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 1.07:1 at the end of the current Reporting Period or any of the next 2 Reporting Periods,

the Secretary of State may (subject to clause 3.5) 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 ensure that the relevant ratio remains, or is increased, above 1.07:1, by giving the Parent notice in writing (in the form set out in Schedule 1 Part A). The Parent shall then make payment within 7 days of receipt of such notice.

- 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 (subject to clause 3.5) 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 8.4.2) 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 any loan facility offered in Financial Model*]³.

3.6 **Interest**

Interest shall be payable by the Franchisee to the Parent at [*percentage offered in Financial Model*]% per annum (accruing on a daily basis, assuming a 365 day year) from time to time on the Loans (excluding any payment made by a Guarantor to the Franchisee under a Bank Guarantee), but any such interest shall be subject to clauses 7 and 8. No commitment fee shall be payable on the Facility.

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.

4. **RIGHTS OF THE SECRETARY OF STATE ON FRANCHISE AGREEMENT EARLY TERMINATION**

4.1 In the event that the Secretary of State terminates the Franchise Agreement in accordance with the provisions of paragraph 1 of Schedule 10.2 of the Franchise Agreement in the circumstances described in paragraph 1.1(a) of that Schedule (an Event of Default having occurred) he may at any time between the date of termination of the Franchise Agreement and the date 14 days after the date of such termination serve a notice in writing (in the form set out in Schedule 1 Part B) on the Parent requiring it to pay to the Secretary of State an amount equivalent to the amount of the Facility available for borrowing by the Franchisee on the earlier of:

4.1.1 the last day of the Franchise Period; and

³ See footnote 1.

4.1.2 the day prior to any day on which the Franchisee ceased to be able to draw on the Facility pursuant to clause 3.2.3.

The Parent shall pay the amount specified in such notice to the Secretary of State within seven days of the notice being served. The obligations of the Parent pursuant to this Deed to pay further amounts to the Franchisee pursuant to the Facility shall cease on service of such notice but without prejudice to the other provisions of this Deed including in relation to the Subordinated Debt.

4.2 The Secretary of State shall be permitted to deduct and retain from the amount that he receives from the Parent pursuant to clause 4.1 above the amount of the losses, liabilities, costs or expenses which, in the reasonable opinion of the Secretary of State, the Secretary of State or a Successor Operator has incurred or suffered or may be reasonably likely to incur or suffer as a result of:

4.2.1 early termination of the Franchise Agreement; and/or

4.2.2 any failure by the Franchisee to perform or comply with any of its obligations to the Secretary of State under the Franchise Agreement or to a Successor Operator under the Supplemental Agreement

and which are not otherwise recovered by the Secretary of State (including from the Performance Bond) and the Secretary of State shall account to the Parent within a reasonable period of time for the balance of such funds transferred to him after such deductions have been made.

5. **THE BANK GUARANTEE**

5.1 The Parent shall procure that there shall be a valid and effective Bank Guarantee in place with effect from:

5.1.1 the date of the Franchise Agreement; and

5.1.2 throughout the Facility Term.

5.2 The Bank Guarantee that the Parent shall procure is in place pursuant to clause 5.1 and any replacement Bank Guarantee shall:

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

5.2.2 have a value equal to the amount of the Facility; and

5.2.3 have a minimum duration of at least three years (or until the end of the Facility Term, if earlier).

5.3 **Provision of Replacement Bank Guarantee**

- 5.3.1 The Parent may replace a Bank Guarantee at any time, provided that the Secretary of State receives a replacement Bank Guarantee that complies with the provisions of clause 5.2.
- 5.3.2 The Parent shall replace any Bank Guarantee at least six months prior to its scheduled expiry with a replacement that complies with the requirements of clause 5.2.
- 5.3.3 If at any time the Secretary of State reasonably considers the Guarantor under the then current Bank Guarantee to be unacceptable for whatever reason (including (without limitation) because such Guarantor no longer has the Relevant Credit Rating) or such Guarantor becomes Insolvent, the Secretary of State may require the Parent within 20 business days to procure the execution and delivery of a new Bank Guarantee by a Guarantor acceptable to the Secretary of State.

5.4 **Demands under the Bank Guarantee**

- 5.4.1 The Secretary of State shall be entitled to make demands under the Bank Guarantee in the event that the Parent fails:
 - 5.4.1.1 to comply with its undertaking to make the Facility available to the Franchisee pursuant to the terms of clause 3.3 or 3.4; or
 - 5.4.1.2 to comply with its undertaking to pay specified funds to the Secretary of State pursuant to clause 4.1; or
 - 5.4.1.3 to provide a replacement Bank Guarantee complying with the provisions of clause 5.2 at least six months prior to the scheduled expiry of the existing Bank Guarantee; or
 - 5.4.1.4 to procure the execution and delivery of a new Bank Guarantee by a Guarantor acceptable to the Secretary of State when required to do so in accordance with the provisions of clause 5.3.3.
- 5.4.2 If there has been a demand under the Bank Guarantee which has been paid in full by the Guarantor to the Franchisee and at any time thereafter the Parent is entitled pursuant to clause 8.4 to demand a repayment by the Franchisee of all or part of the Subordinated Debt because the circumstances set out in clause 8.4.1 have arisen, the Franchisee shall not be obliged to pay (and shall not pay) to the Parent all or part of the Subordinated Debt unless and until the Parent procures and delivers to the Secretary of State a new guarantee which

complies with the requirements of clause 5.2 and any such guarantee shall be a Bank Guarantee for the purposes of this Deed.

- 5.4.3 Any demand by the Secretary of State under the Bank Guarantee shall not relieve the Parent of any other or future obligation under this Deed except that any payment by the Guarantor of an amount to the Franchisee or the Secretary of State (as applicable) pursuant to such **demand shall be deemed to have satisfied the Parent's obligation** to make payment of that amount to the Franchisee or the Secretary of State (as applicable) pursuant to clause 3.3 or 4.1 (as applicable).

6. **FRANCHISEE'S UNDERTAKINGS**

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

- 6.1.1 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;
- 6.1.2 discharge any Subordinated Debt by set-off;
- 6.1.3 purchase or otherwise acquire any Subordinated Debt;
- 6.1.4 provide to any person (or permit to subsist) (a) any security in respect of any Subordinated Debt or (b) except where any such guarantee is the Bank Guarantee, any guarantee in respect of any Subordinated Debt;
- 6.1.5 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;
- 6.1.6 acquire any shares in, or securities issued by, the Parent; or
- 6.1.7 do anything (or omit to do something) if that might affect any right or obligation of the parties under this Deed.

7. **PARENT'S UNDERTAKINGS**

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

- 7.1.1 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;

- 7.1.2 accelerate the due date of any such payment or distribution, including by converting any term facility into an on-demand facility;
- 7.1.3 exercise any right or remedy in connection with the enforcement or recovery 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;
- 7.1.4 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;
- 7.1.5 except where such guarantee is the Bank Guarantee, take or receive from any person (or permit to subsist) any security or any guarantee in respect of any Subordinated Debt; or
- 7.1.6 do anything (or omit to do something) if that might affect any right or obligation of the parties under this Deed.

8. **SUBORDINATION**

- 8.1 Subject to clause 8.4, 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.
- 8.2 For the avoidance of doubt the above clause shall continue to apply if the Franchisee goes into liquidation and subject to clause 8.4, 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.
- 8.3 The Parent and the Franchisee jointly and severally covenant with the Secretary of State and agree and declare that except as otherwise agreed in writing by the Secretary of State or permitted under clause 8.4:
 - 8.3.1 the Subordinated Debt shall be subordinated to the extent and in the manner set out in this Deed;
 - 8.3.2 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;

- 8.3.3 any payments received by the Parent in breach of clause 8.3.2 above will be held by the Parent on trust for all creditors of the Franchisee other than the Parent;
- 8.3.4 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
- 8.3.5 it is acknowledged that nothing in this Deed creates or is intended to create any security on any asset of the Parent.
- 8.4 Subject to clause 3.1.2 and clause 5.4.2, 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:
- 8.4.1 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 1.07:1 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 1.07:1; or
- 8.4.2 at any time during the 6 months following the end of the Franchise Period:
- 8.4.2.1 if the aggregate of the Franchisee's cash and other current assets is equal to or greater than the Liabilities; and
- 8.4.2.2 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 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 8.4.2 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.

9. CONTINUING LIABILITY AND INDEMNITY

- 9.1 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.
- 9.2 The Parent's liability under this Deed shall not be affected by any event or occurrence, including, without limitation:
- 9.2.1 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**");
 - 9.2.2 the release of any other person under the terms of any composition or arrangement with any creditor of the Franchisee;
 - 9.2.3 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;
 - 9.2.4 any change in the law, rules or negotiations of any jurisdiction;
 - 9.2.5 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;
 - 9.2.6 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;
 - 9.2.7 the making or absence of any demand on the Franchisee or any other person for payment;
 - 9.2.8 the enforcement or absence of enforcement of the Franchise Agreement, of this Deed or of any Security or guarantee;

- 9.2.9 the taking, existence or release of any Security or guarantee;
- 9.2.10 subject to clause 3.2.3 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;
- 9.2.11 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; or
- 9.2.12 any other circumstance (other than payment or performance) which might otherwise constitute a legal or equitable discharge or defence of a guarantor generally.

9.3 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.

10. **REPRESENTATIONS AND WARRANTIES**

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

10.1 **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;

10.2 **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:

- 10.2.1 to enable the Parent lawfully to enter into, exercise any rights and perform and comply with its obligations under this Deed; and
- 10.2.2 to ensure that those obligations are valid, legally binding and enforceable,

have been taken, fulfilled and done;

10.3 **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:

10.3.1 any law to which it is subject; or

10.3.2 its Memorandum or Articles of Association; or

10.3.3 any other agreement to which the 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;

10.4 **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

10.5 **Obligations Binding**

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

11. **MISCELLANEOUS**

11.1 **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.

11.2 **Notices**

11.2.1 Any communication given under this Deed shall be delivered:

11.2.1.1 personally;

11.2.1.2 sent by fax transmission;

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

11.2.1.4 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 this clause 11.2 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 11.2.

11.2.2 The address and facsimile number of the Parent is:

Address: [Address]

Fax number: [Number]

Email address: [Address]

For the attention of: [Title]

11.2.3 The address and facsimile number of the Franchisee is:

Address: [Address]

Fax number: [Number]

Email address: [Address]

For the attention of: [Title]

11.2.4 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

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

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

11.3.2 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;

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

11.3.4 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**).

11.4 **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).

11.5 **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.

11.6 **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.

11.7 **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.

11.8 **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.

11.9 **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.

11.10 **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 the Laws of England and Wales and the parties irrevocably agree that the courts of England and Wales 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

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

Part A

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 [•] 2012 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 clauses [3.3.1] [3.3.2] [3.3.3] [*delete as appropriate*] of the Funding Deed 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.

Yours faithfully

For and on behalf of the Secretary of State

Part B

Form of Secretary of State Notice (clause 4.1)

To [Insert name of Franchisee Parent]

For the attention of : []

[Date]

Dear Sir,

RE: Deed of Undertaking re: share capital and loan facility dated [•] 2012 between the [Franchisee Parent], [Franchisee] and the Secretary of State ("Funding Deed")

We hereby give you notice pursuant to clause 4.1 of the Funding Deed that the circumstance contemplated under clause 4.1 has occurred and by this notice the Secretary of State hereby requires you to pay to him the amount of [£[•]] *or* [the maximum amount that the Secretary of State is permitted to require to have paid to him pursuant to clause 4.1 of the Funding Deed] within 7 days from receipt of this letter.

Yours faithfully

Schedule 2

Form of Bank Guarantee (Clause 5)

[On letterhead of Issuing Bank]

To: The Secretary of State for Transport (the "**Beneficiary**")

[Date]

Guarantee No. []

At the request of the Applicant, [Issuing Bank] (the "**Issuing Bank**") issues this Guarantee ("**Guarantee**") in your favour on the following terms and conditions.

1. **DEFINITIONS**

In this Guarantee:

"Applicant" means [Name of Franchisee Parent] (Company No. [Number]) whose registered office is at [Address].

"Deed of Undertaking" means [the Deed of Undertaking relating to share capital and loan facility dated [] between the Applicant (1), the Franchisee (2) and the Beneficiary (3)].

"Demand" means a demand for a payment under this Guarantee in the form of the Schedule to this Guarantee.

"Expiry Date" means the earlier of (a) the date falling three years after the date of this Guarantee and (b) the last day of the Facility Term (as defined under the Deed of Undertaking).

"Facility" has the meaning given to it in the Deed of Undertaking.

"Franchisee" means [Name of Franchisee] (Company No. [Number]) whose registered office is at [Address].

"Recipient" means whichever of the Franchisee or the Beneficiary is stated in the Demand as the person to whom the Guarantor is to make payment under this Guarantee pursuant to such Demand.

"Sterling" and **"£"** means the lawful currency of the United Kingdom.

"Total Amount" means £[]⁴.

2. **ISSUING BANK'S AGREEMENT**

2.1 The Beneficiary may make a demand under this Guarantee by giving to the Issuing Bank a duly completed Demand. A Demand must be received by the Issuing Bank by no later than [5.30] pm (London time) on the Expiry Date.

⁴ Amount to reflect the amount of the Facility as defined in Clause 1 (*Definitions*) of the Deed of Undertaking.

- 2.2 Subject to the terms of this Guarantee, the Issuing Bank unconditionally and irrevocably undertakes to the Beneficiary that, forthwith on receipt by it of a Demand, it must pay to the Recipient the amount demanded in that Demand and any such amount 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.
- 2.3 The Issuing Bank will not be obliged to make a payment under this Guarantee to the extent that this would result in the aggregate of all payments made by it under this Guarantee exceeding the Total Amount.
- 2.4 The Beneficiary may only make a demand under this Guarantee where the Applicant has:
- 2.4.1 failed to comply with its undertaking to make the Facility available to the Franchisee pursuant to the terms of clause 3.3 of the Deed of Undertaking; or
 - 2.4.2 failed to comply with its undertaking to make payment to the Secretary of State pursuant to clause 4.1 of the Deed of Undertaking; or
 - 2.4.3 as required by clause 5.3.2 of the Deed of Undertaking, failed to provide to the Beneficiary a replacement Bank Guarantee complying with the provisions of clause 5.2 of the Deed of Undertaking at least six months prior to the scheduled expiry of the existing Bank Guarantee; or
 - 2.4.4 failed to procure the execution and delivery of a new Bank Guarantee by a Guarantor acceptable to the Beneficiary when required to do so in accordance with clause 5.3.3 of the Deed of Undertaking.

3. **EXPIRY**

- 3.1 The obligations of the Issuing Bank under this Guarantee shall cease at the end of the day (London time) on the Expiry Date except in respect of any Demand validly presented hereunder that remains unpaid.
- 3.2 When the Issuing Bank is no longer under any further obligations under this Guarantee, the Beneficiary must return the original of this Guarantee to the Issuing Bank.

4. **PAYMENTS**

All payments under this Guarantee shall be made in Sterling and for value on the due date to the account of the Beneficiary specified in the Demand.

5. **DELIVERY OF DEMAND**

Each Demand shall be in writing, and, unless otherwise stated, may be made by letter delivered by hand or facsimile transmission and must be received in legible form by the Issuing Bank at its address and by the particular department or office (if any) as follows:

Address: [];

Facsimile Number [];

6. **GOVERNING LAW AND JURISDICTION**

This Guarantee shall be governed by and construed in accordance with the laws of England and Wales and the parties irrevocably agree that the courts of England and Wales are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Guarantee, except as expressly set out in this Guarantee.

Yours faithfully

[Issuing Bank]

By:

SCHEDULE

Form of Demand

To: [Issuing Bank]

[Date]

Dear Sirs

Guarantee no. [] issued in favour of the Secretary of State for Transport (the "Guarantee")

We refer to the Guarantee. Terms defined in the Guarantee have the same meaning when used in this Demand.

1. We certify that the Applicant has: [*Delete as appropriate*]

[failed to comply with its undertaking to make the Facility available to the Franchisee pursuant to the terms of clause 3.3 of the Deed of Undertaking]; or

[failed to comply with its undertaking to make payment to the Secretary of State pursuant to the terms of clause 4.1 of the Deed of Undertaking]; or

[failed to procure the execution and delivery of a new Bank Guarantee by a Guarantor acceptable to the Beneficiary when required to do so in accordance with the provisions of clause 4.3.3 of the Deed of Undertaking]; or

[failed to provide a replacement Bank Guarantee complying with clause 4.2 of the Deed of Undertaking at least six months prior to the scheduled expiry of the existing Bank Guarantee].

2. We therefore demand payment of the sum of £[] is made to the [Franchisee][Beneficiary⁵][*delete as appropriate*] whose account details are set out in clause 3 of this Demand.

3. Payment should be made to the following account:

Name: [*insert [Franchisee][Beneficiary] Name*]

Account Number: [*insert [Franchisee's][Beneficiary's] Account Number*]

Sort Code: [*insert [Franchisee's][Beneficiary's] Sort Code*]

Bank: [*insert name of [Franchisee's][Beneficiary's] Bank*]

4. The date of this Demand is not later than the Expiry Date.

Yours faithfully

(Authorised Signatory)

(Authorised Signatory)

⁵ Refer to the Beneficiary where demand is made under Clause 4.1 otherwise refer to the Franchisee.

for the Secretary of State for Transport