Performance guarantee of services agreement

This template Performance Guarantee is drafted under English law. It is for use where the Guarantor is guaranteeing the performance by a service provider (typically a subsidiary of the Guarantor) of the service provider's obligations under a services agreement.

*This document is intended only as a starting point for drafting and must be carefully considered in the context of the specific transaction.* *This document is not a substitute for detailed advice on specific transactions and should not be taken as providing legal advice on any of the topics discussed, nor should it be taken as creating a solicitor-client relationship between the reader and Fieldfisher.*

**THIS DEED OF GUARANTEE** is made the [     ●     ] day of [     ●     ] 20[●]

**BETWEEN:**

1. [ **●**] a company incorporated and registered in England and Wales with company number [     ●     ] whose registered office is at [     ●     ] (the "**Guarantor**"); and
2. [**●** ] a company incorporated and registered in England and Wales with company number [     ●     ] whose registered office is at [     ●     ] (the "**Customer**").

**BACKGROUND**

1. The Customer has entered into an agreement dated [*insert date*] **OR** [on or about the date of this Guarantee] with [*insert name and other details of the supplier*] (the "**Supplier**") under which the Supplier will provide certain [*insert brief description of the services*] to the Customer (the "**Services Agreement**").
2. [The Guarantor is the Supplier's parent company.]
3. It is a condition precedent of the Services Agreement that the Guarantor guarantees the supplier's performance of the supplier's obligations under the Services Agreement.
4. Therefore, the Guarantor has agreed to guarantee, on the terms and conditions of this Deed of Guarantee ("**Guarantee**"), the supplier's performance of the supplier's obligations under this Services Agreement.

**IT IS AGREED** as follows:

1. Definitions and interpretation
   1. In this Guarantee, unless the contrary intention appears:
   2. "**Business Day**" means a day (other than a [*Saturday*] or [*Sunday*]) on a public holiday in [*insert country*];
   3. "**Guaranteed Obligations**" means all present and future obligations and liabilities of the Supplier under or in connection with the Services Agreement (including such obligations and liabilities as they may be varied, replaced or supplemented in accordance with the Services Agreement from time to time);
   4. "**Insolvency**" in relation to a person, means where that person ceases or threatens to cease to carry on business, is found unable to pay its debts within the meaning of the Insolvency Act 1986 section 123, has an administrator, receiver, administrative receiver or manager appointed over the whole or any part of its assets, enters any composition with creditors generally, or has an order made or resolution passed for it to be wound up (otherwise than in furtherance of any scheme for solvent amalgamation or solvent reconstruction) or undergoes any similar or equivalent process in any jurisdiction;
   5. "**Losses**" means costs, damages, demands, expenses, fines, liabilities, losses, penalties and sanctions (including amounts paid in settlement, out-of-pocket expenses and interest); and
   6. "**Release**" has the meaning given in Clause 7.1.
   7. In this Guarantee:
      * 1. a reference to a provision of law is a reference to that provision as extended, applied, amended or enacted from time to time and includes any subordinate legislation;
        2. the singular includes the plural and vice versa;
        3. words denoting persons include bodies corporate and unincorporated associations of persons;
        4. references to this Guarantee or any other agreement or document are to this Guarantee or such other agreement or document as it may be varied, amended, supplemented, restated, renewed, novated or replaced from time to time, (in each case, other than in breach of the provisions of this Guarantee);
        5. the word "including" is by way of illustration and emphasis only and does not operate to limit the generality or extent of any other words or expressions;
        6. references to Clauses and Schedules refer to clauses of and schedules to this Guarantee;
        7. the headings in this Guarantee do not affect its interpretation;
        8. "writing" or "written" includes faxes; and
        9. any obligation in this Guarantee on a person not to do something includes an obligation not to agree or allow that thing to be done.
2. Guarantee
3. The Guarantor guarantees to the Customer the due, proper and punctual performance of the Guaranteed Obligations strictly in accordance with the Services Agreement.
4. Indemnity
   1. As a separate and independent obligation, the Guarantor indemnifies and shall keep the Customer indemnified on demand from and against all Losses incurred or suffered by the Customer as a result of:
      * 1. the Supplier's failure to perform or discharge any of the Guaranteed Obligations;
        2. breach of any of the Guaranteed Obligations; and/or
        3. any other breach of the Services Agreement by the Supplier.
   2. [The Guarantor's liability under this indemnity shall be no greater than the Supplier's liability would have been under the Services Agreement in respect of the relevant failure to perform or discharge, or breach, as referred to in Clause 3.1]
5. Obligation to enter into a new contract
   1. If the Services Agreement is terminated for any reason [(other than termination for convenience by the Customer pursuant to Clause [*insert clause number from the Services Agreement* )]], or if the Services Agreement is disclaimed by a liquidator or administrator of the Supplier or if any of the Guaranteed Obligations are declared by a court to be void or voidable for any reason, then:
      * 1. the Guarantor will, or will procure that an affiliate of the Guarantor [acceptable to the Customer] will, at the request of the Customer enter into a contract with the Customer in terms *mutatis mutandis* the same as the Services Agreement;
        2. the obligations of the Guarantor or affiliate under such substitute agreement shall be the same as if the Guarantor or the affiliate had been the original obligor under the Services Agreement or under an agreement entered into on the same terms and at the same time as the Services Agreement with the Customer; and
        3. where the substitute agreement is entered into by an affiliate of the Guarantor, the Guarantor shall enter into a guarantee of the affiliate's performance of such substitute agreement on terms *mutatis mutandis* the same as the terms of this Guarantee.
6. Customer protections
   1. This Guarantee is a continuing guarantee. Accordingly this Guarantee shall remain in full force and effect until all Guaranteed Obligations have been satisfied or performed in full. This Guarantee may be enforced by the Customer as often as the need may arise.
   2. The Guarantor shall not be released from liability under this Guarantee by any act, omission, matter or other thing including, without limitation and whether or not known to the Guarantor:
      * 1. any grant of time or other indulgence or any extension, renewal, acceptance, forbearance or release in respect of any of the Guaranteed Obligations;
        2. any advance payment or additional payment by the Customer to the Supplier;
        3. any waiver or release of any right or option of the Customer under the terms of the Services Agreement;
        4. any variation, novation or replacement of, or supplement to, the terms of the Services Agreement, no matter how fundamental and of whatever nature;
        5. any irregularity, defect or lack of formality in the Services Agreement;
        6. any legal limitation, disability or incapacity of the Supplier or lack of authority or capacity of any director, manager, official or any other person appearing to be acting for the Supplier;
        7. any transfer or assignment of rights or obligations under the Services Agreement;
        8. any corporate reorganisation, reconstruction, amalgamation, dissolution, merger, acquisition of or other alteration in the corporate existence or structure of the Supplier;
        9. any composition or arrangement made by the Customer with the Supplier or any other person;
        10. any dealing with, exchange, modification or abstention from perfecting, taking up or enforcing any right or security held or intended to be held by the Customer from or against the Supplier or any other person; and/or
        11. any Insolvency of the Customer, Supplier or any other person;
   3. The Guarantor waives any right it may have to require the Customer (or any trustee or agent on its behalf) to proceed against or enforce any other right or claim for payment against any person before claiming from the Guarantor under this Guarantee.
   4. Unless the Customer otherwise directs in writing, the Guarantor shall not exercise any security or other rights which it may have by reason of performance by the Guarantor of its obligations under this Guarantee, whether such rights arise by way of set-off, counterclaim, subrogation, indemnity or otherwise.
   5. If, notwithstanding Clause 5.4, the Guarantor receives any benefit, payment or distribution in relation to the security or rights mentioned in Clause 5.4, it shall hold that benefit, payment or distribution to the extent necessary to enable the Guaranteed Obligations to be satisfied in full on trust for the Customer and shall promptly pay or transfer the same to the Customer for application in or towards discharge of the Guaranteed Obligations.
7. Changes to the Services Agreement
   1. The Guarantor authorises the Supplier and the Customer to make changes to the Guaranteed Obligations and/or the Services Agreement at any time without having to obtain the Guarantor's consent to any such changes. [***Drafting note: There is case law that indicates that this type of provision might not always be effective. To avoid the risk of the courts deciding that a variation to the Services Agreement discharges the Guarantor's liability under the Guarantee, it is advisable for the Customer to obtain the Guarantor's consent to all Services Agreement variations (unless the variation is very minor and has no impact on the Guarantor)***.]
8. Conditional discharge
   1. If there is any release, discharge or settlement between the Customer and the Guarantor ("**Release**"), then such Release shall be conditional, on an ongoing and continuing basis, upon no security, disposition or payment to the Customer by the Guarantor, the Supplier or any other person being void, avoided, set aside or ordered to be refunded pursuant to any enactment or law relating to breach of duty by any person or Insolvency.
   2. If the condition referred to in Clause 7.1 is not fulfilled, or if having been fulfilled, the condition later ceases to be fulfilled, then the Customer shall be entitled to enforce this Guarantee against the Guarantor as if such release, discharge or settlement had not occurred and any such security, disposition or payment had not been made.
9. Payments
   1. All sums payable by the Guarantor under this Guarantee shall be paid in full to the Customer in [*insert currency*], free and clear of any deductions or withholdings of any kind, except for those required by any law or regulation binding on the Guarantor.
   2. If a payment due from the Guarantor to the Customer under this Guarantee is subject to tax (whether by way of direct assessment or withholding at its source) or any other deduction by law or regulation binding on the Guarantor, then the Customer shall be entitled to receive from the Guarantor, and the Guarantor shall pay to the Customer, such amount as will ensure that the Customer receives, after the application of the relevant tax or other deduction, in respect of the payment, the same net amount as the Customer would have received were the payment not subject to such tax or other deduction.
   3. The Guarantor shall pay interest on any amount due under this Guarantee at the rate of [*insert number*]% per annum above the base lending rate of [*insert bank*] from time to time. Such interest shall accrue on a daily basis from the due date until the date of actual payment of the overdue amount, whether before or after judgment.
10. Costs
    1. The Guarantor shall indemnify the Customer and keep the Customer indemnified and pay to the Customer on demand all legal and other costs and expenses (including any value added tax on those costs and expenses) which the Customer incurs in connection with:
       * 1. the enforcement or exercise of any rights under this Guarantee;
         2. the preservation of any rights under this Guarantee; and/or
         3. any discharge or release of this Guarantee.
11. Representations and warranties
12. The Guarantor represents and warrants to the Customer that:
    * + 1. it has all necessary, power and authority to enter into, and perform its obligations under this Guarantee;
        2. it has taken and shall take all requisite corporate and other action to approve the execution, delivery, entering into and performance of this Guarantee and shall provide evidence of that action to the Customer on request;
        3. there are no actions, suits, proceedings or regulatory investigations pending or, to the Guarantor's knowledge, threatened against or affecting the Guarantor before any court or administrative body or arbitration tribunal that might affect the ability of the Guarantor to meet and carry out its obligations under this Guarantee;
        4. once duly executed, this Guarantee will constitute legal, valid and binding obligations on the Guarantor;
        5. neither entering into nor performing this Guarantee will cause the Guarantor to be in breach of any other contract to which it is a party or of any statutory or other legal requirement.
13. Assignment
    1. The Customer may assign or transfer its rights and benefits under this Guarantee to any person by notice in writing to the Guarantor.
    2. This Guarantee shall inure to the benefit of and be enforceable by the Customer and its successors, transferees and assigns.
    3. The Guarantor may not assign or transfer all or any part of its rights and/or obligations under this Guarantee.
14. General
    1. *Illegality/Severance:* If any provision of this Guarantee is declared by any competent court or body to be illegal, invalid or unenforceable under the law of any jurisdiction, or if any enactment is passed that renders any provision of this Guarantee illegal, invalid or unenforceable under the law of any jurisdiction, this shall not affect or impair the legality, validity or enforceability of the remaining provisions of this Guarantee.
    2. *Notices:* Any notice to be given under this Guarantee must be in writing and given by first class post or personal delivery. Notices to the Customer shall be sent to [*name*] at [*address*], and notices to the Guarantor shall be sent to [*name*] at [*address*], or to such other place as the relevant party shall have notified to the other pursuant to this Clause. Any notice given shall be deemed effective (a) when left at the address mentioned above (if delivered personally) or (b) two Business Days after posting by first class post addressed as required above (if given by post).
    3. *Variations:* No purported amendment or variation of this Guarantee shall be effective unless it is in writing and duly executed by or on behalf of each of the parties.
    4. *Waiver:* The failure to exercise or delay in exercising a right or remedy of a party under this Guarantee shall not constitute a waiver of that right or remedy, and no waiver by a party of any breach of this Guarantee shall constitute a waiver of any subsequent breach of the same or any other provision.
    5. *Further Assurance*: Each party shall (at its own expense) promptly execute and deliver all such documents, and take all such actions, or procure the execution and delivery of all documents and taking of all such actions, as are required to give full effect to this Guarantee.
    6. *Counterparts*: This Guarantee may be executed in any number of counterparts, each of which when executed and delivered shall constitute an original of this Guarantee, but all the counterparts shall together constitute the same agreement.
    7. *Third Party Rights:* Apart from the Customer's assigns and successors, a person who is not a party to this Guarantee has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or to enjoy the benefit of any term of this Guarantee.
    8. *Entire Agreement:* This Guarantee constitutes the entire agreement and understanding between the parties relating to its subject matter and supersedes any other agreement or understanding (written or oral) between the parties relating to the same.
    9. *No reliance:* Each party acknowledges and agrees that it does not rely on, and shall have no remedy in respect of, any promise, assurance, statement, warranty, undertaking or representation made (whether innocently or negligently) by any other party or any other person except as expressly set out in this Guarantee in respect of which its sole remedy shall be for breach of contract.
    10. *Fraud and fraudulent misrepresentation.* Nothing in Clauses 12.8 or 12.9 or elsewhere in this Guarantee shall operate or be construed to exclude or limit any liability of any person for fraud, including fraudulent misrepresentation.
    11. *Governing Law and Jurisdiction*:  This Guarantee and any dispute or claim arising out of or in connection with this Guarantee or its subject matter or formation (including non-contractual disputes or claims) shall be governed by English law. The parties submit to the non-exclusive jurisdiction of the English courts for all purposes relating to and in connection with this Guarantee and any such dispute or claim.

**EXECUTED** as a deed and delivered on the date stated at the beginning of this document

[*Insert suitable execution clauses*]]