

## DEED OF GUARANTEE AND INDEMNITY

This Deed of Guarantee & Indemnity (the “Deed”) is executed on this [.] day of [.] , 2017

### BY

[FULL COMPANY NAME] a company incorporated and registered in India with CIN [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (hereinafter “**Guarantor**” which expression shall unless be repugnant to the context or meaning hereof be deemed to mean and include its successors-in-interest, permitted assigns and validly appointed nominees)

### IN FAVOUR OF

[FULL COMPANY NAME] a company incorporated and registered in India with CIN [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (hereinafter “**Customer**” which expression shall unless be repugnant to the context or meaning hereof be deemed to mean and include its successors-in-interest, assigns and validly appointed nominees)

### CONFIRMED BY

[FULL COMPANY NAME] a company incorporated and registered in India with CIN [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (hereinafter “**Supplier**” which expression shall unless be repugnant to the context or meaning hereof be deemed to mean and include its successors-in-interest, permitted assigns and validly appointed nominees)

### WHEREAS<sup>1</sup>

- (A) The Supplier has agreed to supply [products **OR** services] to the Customer on the terms and conditions of the Supply Agreement.
- (B) [As a condition precedent to the Supply Agreement,] the Guarantor has agreed to guarantee the due performance of the Supply Agreement by the Supplier.

### 1. INTERPRETATION

1.1 The definitions and rules of interpretation in this clause apply in this guarantee.

**Business Day:** a day (other than a Saturday, Sunday or public holiday) when banks in [Kolkata] are open for business.

**Guaranteed Obligations:** has the meaning given in Clause 2.1.

**Supplier:** [FULL COMPANY NAME OF SUPPLIER], a company incorporated and registered in India with CIN [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS].

**Supply Agreement:** the supply of [goods **OR** services] agreement between the Customer and the Supplier, dated on or about the date of this guarantee.

1.2 Clause [, schedule and paragraph] headings shall not affect the interpretation of this

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<sup>1</sup> Recitals shall change on the basis of goods or services.

guarantee.

- 1.3** A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality) [and that person's legal and personal representatives, successors and permitted assigns].
- 1.4** [The schedules form part of this guarantee and shall have effect as if set out in full in the body of this guarantee and any reference to this guarantee includes the schedules.]
- 1.5** A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.
- 1.6** Unless the context otherwise requires, words in the singular shall include the plural and vice versa.
- 1.7** Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.
- 1.8** A reference to a statute or statutory provision:
- (a)** is a reference to it as [amended, extended or re-enacted from time to time OR it is in force as at the date of this Deed];
  - (b)** shall include all subordinate legislation made [from time to time OR as at the date of this Deed] under that statute or statutory provision.
- 1.9** A reference to writing or written includes fax but not email.
- 1.10** Any obligation on a party not to do something includes an obligation not to allow that thing to be done.
- 1.11** [A reference to this Deed or to any other agreement or document referred to in this Deed is a reference to this Deed or such other agreement or document as varied or novated (in each case, other than in breach of the provisions of this Deed) from time to time.]
- 1.12** References to clauses [and schedules] are to the clauses [and schedules] of this guarantee [; references to paragraphs are to paragraphs of the relevant schedule].
- 1.13** Where any statement is qualified by the expression **so far as [PARTY] is aware** or **to [PARTY]'s knowledge** or any similar expression, that statement shall be deemed to include an additional statement that it has been made after due and careful enquiry.
- 1.14** Unless otherwise exempted, a reference to any party shall include that party's personal representatives, successors and permitted assigns.
- 1.15** Any words following the terms including, include, in particular, for example or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.

## **2. PERFORMANCE GUARANTEE AND INDEMNITY**

- 2.1** In consideration of the Customer entering into the Supply Agreement, the Guarantor

guarantees to the Customer [and its successors, transferees and assigns] the due and punctual performance of all present and future obligations of the Supplier under [or in connection with] the Supply Agreement if and when they become performable in accordance with the terms of the Supply Agreement (**Guaranteed Obligations**).

**2.2** The Guarantor as principal obligor and as a separate and independent obligation and liability from its obligations and liabilities under Clause 2.1 agrees to indemnify and keep indemnified the Customer, its directors, officers, employees, agents, stockholders and Affiliates (collectively, "Indemnified Parties") from and against all claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses (including without limitation reasonable attorney's fees and costs), whether or not involving a third party claim, which arise out of, relate to or result from:

- (a) any failure of the Supplier to perform or discharge the Guaranteed Obligations [except where the Supplier's failure to perform or discharge the Guaranteed Obligations results from the Customer's failure to comply with its obligations under this guarantee or the Supplier contesting any payment or part of a payment in good faith];
- (b) any of the Guaranteed Obligations being or becoming totally or partially unenforceable by reason of illegality, incapacity, lack or exceeding of powers, ineffectiveness of execution or any other matter;
- (c) any breach of any representation or warranty of Supplier contained in the Supply Agreement;
- (d) any breach of any covenant or other obligation or duty of Supplier under the Supply Agreement.

but the Guarantor's liability under this indemnity shall be no greater than the Supplier's liability (of any nature whatsoever) under the Supply Agreement was (or would have been, had the relevant obligation been fully enforceable).

### **3. CUSTOMER PROTECTIONS**

**3.1** This guarantee is a continuing guarantee which shall remain in full force and effect until all the Guaranteed Obligations have been satisfied or performed in full, notwithstanding any intermediate satisfaction or performance of the Guaranteed Obligations by the Supplier, the Guarantor or any other person.

**3.2** The liability of the Guarantor under this guarantee shall not be reduced, discharged or otherwise adversely affected by:

- (a) any act, omission, matter or thing which would not have discharged or affected the liability of the Guarantor had it been a principal obligor instead of a guarantor; or by
- (b) any other act or omission except an express written release [by deed] of the Guarantor by the Customer.

**3.3** 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.

**3.4** Until all amounts which may be or become payable by the Supplier under or in connection with this guarantee have been irrevocably paid in full, and 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 it of its obligations under this guarantee, whether such rights arise by way of set-off, counterclaim, subrogation, indemnity or otherwise.

**3.5** This guarantee is in addition to and shall not affect nor be affected by or merge with any other judgment, security, right or remedy obtained or held by the Customer from time to time in respect of the discharge and performance of the Guaranteed Obligations by the Supplier.

#### **4. ADDENDUM OR VARIATION TO THE SUPPLY AGREEMENT**

By this guarantee the Guarantor authorises the Supplier and the Customer to make any addendum or variation to the Supply Agreement, and agrees to guarantee the due and punctual performance of the Guaranteed Obligations as so amended or varied in accordance with the terms of this guarantee.

#### **5. [CONDITIONAL DISCHARGE**

**5.1** Any release, discharge or settlement between the Guarantor and the Customer in relation to this guarantee shall be conditional on no right, security, disposition or payment to the Customer by the Guarantor, the Supplier or any other person being avoided, set aside or ordered to be refunded pursuant to any enactment or law relating to breach of duty by any person, bankruptcy, liquidation, administration, protection from creditors generally or insolvency or for any other reason.

**5.2** If any such right, security, disposition or payment is avoided, set aside or ordered to be refunded, the Customer shall be entitled subsequently 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.]

#### **6. PAYMENTS**

**6.1** All sums payable by the Guarantor under this guarantee shall be paid in full to the Customer [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.

**6.2** If the Guarantor is legally obliged to make any deduction or withholding from any payment under this deed, it shall also pay whatever additional amount is necessary to ensure that the Customer receives the full amount otherwise receivable had there been no deduction or withholding obligation.

**6.3** [If the Guarantor fails to make any payment due to Customer under this Deed by the due date for payment, then Guarantor shall pay interest on the overdue amount at the rate of [4]% per annum above [FULL NAME OF BANK]'s base rate from time to time. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment. Guarantor shall pay the interest together with the overdue amount.

**6.4** The Customer shall not be entitled to recover any amount in respect of interest under both this guarantee and any arrangements entered into between the Supplier and the Customer

in respect of any failure by the Supplier to make any payment in respect of the Guaranteed Obligations.

## **7. COSTS**

**7.1** The Guarantor shall on a full indemnity basis pay to the Customer on demand the amount of all costs and expenses (including legal and out-of-pocket expenses and any value added tax on those costs and expenses) which the Customer incurs in connection with:

- (a) the preservation, or exercise and enforcement, of any rights under or in connection with this guarantee or any attempt so to do; and
- (b) any discharge or release of this guarantee.

**7.2** Each party shall pay its own costs in connection with the negotiation, preparation, and execution of this guarantee, and all documents ancillary to it.

## **8. GUARANTOR REPRESENTATIONS AND WARRANTIES**

The Guarantor represents and warrants to the Customer that:

- (a) the Guarantor has all requisite power and authority, and has taken all necessary corporate action, to enable it to enter into and perform this guarantee;
- (b) its obligations under this guarantee shall, when executed, constitute legal, valid, and binding obligations enforceable in accordance with the terms of this guarantee;
- (c) the Guarantor does not require the consent, approval or authority of any other person to enter into or perform its obligations under this guarantee;
- (d) the Guarantor's entry into and performance of its obligations under this guarantee will not constitute any breach of or default under any contractual, governmental or public obligation binding on it; and
- (e) the Guarantor is not engaged in any litigation or arbitration proceedings which might affect its capacity or ability to perform its obligations under this guarantee and to the best of its knowledge no such legal or arbitration proceedings have been threatened or are pending against it.

## **9. ASSIGNMENT**

The Customer may assign its benefits under this guarantee to any person by notice in writing to the Guarantor.

## **10. GENERAL PROVISIONS**

### **10.1 Confidentiality**

- (a) Each party undertakes that it shall not at any time disclose to any person any confidential information concerning the business, affairs, customers, clients or suppliers of the other party [or of any member of the group of companies to which the other party belongs], except as permitted by Clause 10.1(b) below.

- (b) Each party may disclose the other party's confidential information to its employees, officers, representatives or advisers who need to know such information for the purposes of carrying out the party's obligations under this Deed, and as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority.
- (c) No party shall use any other party's confidential information for any purpose other than to perform its obligations under this Deed.
- (d) Each party shall ensure that its employees, officers, representatives or advisers to whom it discloses the other party's confidential information comply with this Clause 10.1.

**10.2** 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 [reasonably] required to give full effect to this guarantee.

**10.3** Severance

- (a) If any provision or part-provision of this Deed is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this clause shall not affect the validity and enforceability of the rest of this Deed.
- (b) If [one party gives notice to the other of the possibility that] any provision or part-provision of this Deed is invalid, illegal or unenforceable, the parties shall negotiate in good faith to amend such provision so that, as amended, it is legal, valid and enforceable, and, to the greatest extent possible, achieves the intended commercial result of the original provision.

**10.4** Variation.

No variation of this Deed shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

**10.5** Waiver

- (a) A waiver of any right or remedy under this Deed or by law is only effective if given in writing and shall not be deemed a waiver of any subsequent breach or default.
- (b) A failure or delay by a party to exercise any right or remedy provided under this Deed or by law shall not constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict any further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy provided under this Deed or by law shall prevent or restrict the further exercise of that or any other right or remedy.
- (c) A party that waives a right or remedy provided under this Deed or by law in relation to one party, or takes or fails to take any action against that party, does not affect

its rights in relation to any other party.

**10.6** Third party rights.

Nothing expressed or referred to in this Deed will be construed to give any person other than the parties to this Deed any legal or equitable right, remedy or claim under or with respect to this Deed or any provision of this Deed. This Deed and all of its provisions are for the sole and exclusive benefit of the parties to this Deed and their successors and permitted assigns.

**10.7** Announcements.

No party shall make, or permit any person to make, any public announcement concerning this Deed without the prior written consent of the other parties (such consent not to be unreasonably withheld or delayed), except as required by law, any governmental or regulatory authority (including, without limitation, any relevant securities exchange), any court or other authority of competent jurisdiction.

**10.8** Rights and remedies.

[Except as expressly provided in this Deed, the **OR** The] rights and remedies provided under this Deed are in addition to, and not exclusive of, any rights or remedies provided by law.

**10.9** Further assurance.

[At its own expense, each **OR** Each] party shall, and shall use all reasonable endeavours to procure that any necessary third party shall, [promptly] execute and deliver such documents and perform such acts as may [reasonably] be required for the purpose of giving full effect to this Deed.

**10.10** Consequences of discharge.

- (a) Any provision of this Deed that expressly or by implication is intended to continue in force on or after discharge of this Deed shall remain in full force and effect.
- (b) Discharge of this Deed shall not affect any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of discharge, including the right to claim damages in respect of any breach of the Deed which existed at or before the date of discharge].

**11. NOTICES**

**11.1** [For the purposes of this clause, but subject to Clause 11.7, notice includes any other communication.]

**11.2** A notice given to a party under or in connection with this deed:

- (a) shall be in writing [and in English [ or accompanied by an accurate translation into English]];
- (b) [shall be signed by or on behalf of the party giving it;]

- (c) shall be sent to the party for the attention of the contact and at the address [, fax or DX number] listed in Clause 11.3;
- (d) [shall **OR** may] be sent by a method listed in Clause 11.5; and
- (e) [unless proved otherwise] is deemed received as set out in Clause 11.5 if prepared and sent in accordance with this clause.

**11.3** The parties' addresses and contacts are as set out in this table:

Party	Contact	Address	Fax number	DX number
[NAME OF PARTY]	[POSITION OF CONTACT]	[ADDRESS]	[FAX NUMBER]	[DX NUMBER]
[NAME OF PARTY]	[POSITION OF CONTACT]	[ADDRESS]	[FAX NUMBER]	[DX NUMBER]
[NAME OF PARTY]	[POSITION OF CONTACT]	[ADDRESS]	[FAX NUMBER]	[DX NUMBER]

**11.4** A party may change its details given in the table in Clause 11.3 by giving notice, the change taking effect for the party notified of the change at [9.00 am] on the later of:

- (a) the date, if any, specified in the notice as the effective date for the change; or
- (b) the date [five] Business Days after deemed receipt of the notice.

**11.5** This table sets out:

- (a) delivery methods for sending a notice to a party under this deed; and
- (b) for each delivery method, the corresponding delivery date and time when delivery of the notice is deemed to have taken place provided that all other requirements in this clause have been satisfied and subject to the provisions in Clause 11.6:

Delivery method	Deemed delivery date and time
Delivery by hand.	On signature of a delivery receipt [or at the time the notice is left at the address].
Pre-paid first class [recorded delivery] post or other next working day delivery service [providing [proof of postage <b>OR</b> proof of delivery]].	[9.00 am] on the [second] Business Day after posting [or at the time recorded by the delivery service].
Pre-paid airmail [providing [proof of postage <b>OR</b> proof of delivery.]]	[[9.00 am] on the [fifth] Business Day after posting [or at the time recorded by the delivery service.]  <b>OR</b> [INSERT TIME AND DATE].
Fax.	At the time of transmission.
Document exchange (DX).	[9.00 am] on the [second] Business Day after being put into the DX.



**11.6** For the purpose of Clause 11.5 and calculating deemed receipt:

- (a) all references to time are to local time in the place of deemed receipt; and
- (b) if deemed receipt would occur in the place of deemed receipt on a Saturday or Sunday or a public holiday when banks are not open for business, deemed receipt is deemed to take place at 9.00 am on the day when business next starts in the place of receipt.

**11.7** This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

**11.8** A notice given under [or in connection with] this deed is not valid if sent by email.

## **12. ENTIRE AGREEMENT**

**12.1** This Deed constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

**12.2** Each party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Deed. Each party agrees that it shall have no claim for innocent or negligent misrepresentation [or negligent misstatement] based on any statement in this Deed.

## **13. COUNTERPARTS**

**13.1** This Deed may be executed in any number of counterparts, each of which when executed [and delivered] shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.

**13.2** [Transmission of [an executed counterpart of this Deed (but for the avoidance of doubt not just a signature page) **OR** the executed signature page of a counterpart of this Deed] by (a) fax or (b) email (in PDF, JPEG or other agreed format) shall take effect as delivery of an executed counterpart of this Deed. If either method of delivery is adopted, without prejudice to the validity of the Deed thus made, each party shall provide the others with the original of such counterpart as soon as reasonably possible thereafter.]

**13.3** [No counterpart shall be effective until each party has executed [and delivered] at least one counterpart.]

## **14. GOVERNING LAW**

This Deed and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the laws of India.

## **15. JURISDICTION**

Each party irrevocably agrees, for the sole benefit of the Customer that, subject as provided below, the courts at Kolkata shall have exclusive jurisdiction over any dispute or claim arising out of or in connection with this Deed or its subject matter or formation (including

non-contractual disputes or claims). Nothing in this clause shall limit the right of the Customer to take proceedings against Guarantor in any other court of competent jurisdiction, nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdictions, whether concurrently or not, to the extent permitted by the law of such other jurisdiction.

This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.

**[SIGNATURE PAGE FOLLOWS]**

SIGNED, SEALED AND DELIVERED BY [.] , [.]  
FOR AND ON BEHALF OF [.] AUTHORISED BY  
RESOLUTION PASSED BY THE BOARD OF  
DIRECTORS OF [.] ON [.]

SIGNED, SEALED AND DELIVERED BY [.] , [.]  
FOR AND ON BEHALF OF [.] AUTHORISED BY  
RESOLUTION PASSED BY THE BOARD OF  
DIRECTORS OF [.] ON [.]

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