malinko

INTELLIGENT SCHEDULING SYSTEM

1. DEFINITIONS

1.1. In this Agreement unless the context otherwise requires the following terms shall have the meanings given to them below:

Agreement means the Order Form, these terms and conditions and any schedules and Statements of Work hereto;

Applicable Law the laws of England and Wales and the European Union and any other laws or regulations, regulatory policies, guidelines or industry codes which apply to the provision of the Service;

Charges means the Licence Charge(s) and Professional Charges payable to Malinko by the Customer under this Agreement;

Commencement Date means the date of this Agreement; as specified in the Order Form;

Confidential Information means all information designated as confidential by either party, together with all such other information which relates to the business affairs, finance, products or services, customers or suppliers of that party; data, software programs, specifications, documentation, developments, trade secrets and know how; and all information which may reasonably be regarded as the confidential information of the disclosing party;

Content means all content either supplied by the Customer to Malinko to be displayed on the Service, or which is uploaded directly by the Customer onto the Service, including all text, images, photographs, artwork, brands, logos and other material of any type;

Customer Data means any data provided by the Customer to Malinko under this Agreement, which may include Personal Data;

Customer Responsibilities means the responsibilities of the Customer under this Agreement, including those set out in condition 7;

Customer's Service Desk means the Customer's internal service desk providing first line support to Named Users relating to use of the Service;

Data Protection Legislation: means all applicable data protection and privacy legislation, regulations and guidance including: (i) prior to the GDPR Enforcement Date, the Data Protection Act 1998 and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (as amended, updated or re-enacted from time to time); and (ii) with effect from the GDPR Enforcement Date onwards Regulation (EU) 2016/679 (the "**General Data Protection Regulation**" or "**GDPR**") and the Privacy and Electronic Communications (EC Directive) Regulations 2003;

Documentation the documents made available to the Customer by Malinko which sets out a description of the Service and the user instructions for the Service;

Extended Term has the meaning set out in condition 2;

Force Majeure Event means any event or circumstance arising which is beyond the reasonable control of the affected Party (including without limitation war, civil war, armed conflict or terrorism, strikes or lock outs, riot, fire, flood or earthquake);

GDPR Enforcement Date means the date on which the GDPR is in full force and effect in the UK;

Hosting Partner means the third party providing the Hosting Services, as specified in the Order Form;

Hosting Services means the hosting and management of the Software using cloud infrastructure of the Hosting Partner;

Initial Term has the meaning set out in condition 2.1;

Intellectual Property means patents, utility models, rights to inventions, copyright and related rights, trade-marks and service marks, trade names and domain names, rights in get-up, goodwill and the right to sue for passing off or unfair competition, rights in designs, rights in computer software, database rights, rights to preserve the confidentiality of information (including know-how and trade secrets) and any other intellectual property rights, including all applications for (and rights to apply for and be granted), renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist, now or in the future, in any part of the world;

IP Claim shall have the meaning given in Condition 13;

Key Performance Indicators means the metrics for the performance of the Service set out in Schedule 1;

Malinko Helpdesk means the single point of contract between Malinko, the Users, and the Customer's Service Desk respectively, to which Users may report incidents and make service requests, and which handles respective communications with the Users and the Customer's Service Desks in accordance with Schedule 1;

Malinko Software means the software which is proprietary to Malinko, which is licensed to and made available to the Customer pursuant to this Agreement;

Named User Account means authorisation for online access of a Named User to the Service, whether actually used or not;

Named Users means the Personnel of the Customer that have access to the Services as designated by the Customer;

Nominated Officer means the person nominated by each Party in accordance with the Order Form;

Open Source Software means open-source software as defined by the Open Source Initiative (http://opensource.org) or the Free Software Foundation (http://www.fsf.org);

Order Form means where applicable the order form attached to this Agreement, which contains details of the Customer's order for the Services;

Party means a Party to this Agreement and "Parties" shall be construed accordingly;

Personnel means the employees, contractors and agents of either Party as the context so provides;

Professional Services means those professional services specified in the Order Form and more particularly described in a Statement of Work;

Professional Services Charge means any charges paid or payable by the Customer to Malinko in respect of Professional Services, details of which are set out in a Statement of Work;

Quarterly Meeting means the meetings held on a quarterly basis between Malinko and the Customer reviewing the Services, on each 3 month anniversary of the Commencement Date or such other date as agreed by the Parties;

Remediation Notice means a notice served by the Customer on Malinko pursuant to condition 23.1 relating to a failure by Malinko to perform the Services in accordance with its obligations under this Agreement;

Remediation Plan means a plan produced by Malinko following receipt of a Remediation Notice, setting out how it intends to remedy a performance failure relating to the Services;

Response times means the response times set out in Schedule 1 within which Malinko is obliged to respond to calls, or to endeavour to resolve an incident or complete the provision of a service;

Service means the making the functionality of the Malinko software available as a service to the Customer using cloud infrastructure of the Hosting Partner and where applicable making the software available via the world wide web. The Service is more particularly described in the Documentation. For the avoidance of doubt, unless expressly stated otherwise, Third Party Services are part of the Service;

Service Charges means the Charges paid or payable to Malinko in respect of the Service;

Statement of Work means a statement of work in the form agreed between the parties, which describes the details of any Professional Services requested by the Customer, and Professional Services Charges;

Support Services means the support and Malinko Helpdesk services provided by Malinko pursuant to condition 5 and Schedule 1, in respect of the Service and as the context requires shall include the provision of the facilities, equipment, online staff and services necessary to operate a helpdesk service;

System Administrator means the named contact under the employment of the customer who is responsible for ensuring the smooth running of the Customer Service Desk.

Term means the Initial Term of this Agreement and any Extended Term under condition 2;

Third Party Services means the Hosting Services, Third Party Software and or Open Source Software, as applicable;

Third Party Services Conditions means the relevant contract terms and conditions, available via the links set out in the Order Form under which the specific Third Party Services are to be provided by the relevant Third Party Supplier to Malinko and subject to which such Third Party Services are to be passed on from Malinko to the Customer;

Third Party Software means the software which is proprietary to third parties and licensed to Malinko, further details of which are set out in the Order Form;

Third Party Supplier means the relevant third party supplier supplying Third Party Services; and

Working Day means a day (other than a Saturday or Sunday) on which banks are open for domestic business in the City of London.

1.2. In this Agreement references to any person shall include natural persons and partnerships, firms and other incorporated bodies and all other legal persons of whatever kind and however constituted and their successors and permitted assignees or transferees.

1.3. Words in the singular number include the plural and vice versa.

1.4. Headings to the conditions and sub-conditions in this Agreement are for reference purposes only and shall not affect their interpretation.

1.5. The words "include", "includes" and "including" are to be construed as if they were immediately followed by the words "without limitation";

1.6. The contents page, headings and sub-headings in this Agreement are for ease of reference only and do not affect the meaning of this Agreement.

1.7. References to one gender include all genders.

1.8. A reference to a party is to a party to this Agreement and includes the respective successors and permitted assigns of the original parties.

1.9. General words do not have a restrictive meaning because they are preceded by or followed by specific words indicating a type, class or category.

1.10. A reference to a condition, paragraph or schedule is to a condition or paragraph of or schedule to this Agreement and a reference to this Agreement includes the Order Form and the Schedules and Statements of Work.

1.11. A reference to legislation is a reference to all legislation having effect in the United Kingdom from time to time.

1.12. A reference to legislation is a reference to that legislation as amended, modified, consolidated, re-enacted or replaced from time to time and to all subordinate legislation made under it from time to time.

1.13. In the event of any conflict or inconsistency between these conditions, the schedules, the order form and any other document mentioned in this Agreement, the following order of precedence shall apply:

1.13.1. the Order Form;

1.13.2. the conditions;

1.13.3. the Schedules;

1.13.4. a Statement of Work; and

1.13.5. any other document referred to in this Agreement.

2. TERM

2.1. This Agreement shall commence on the Commencement Date and shall continue, (unless terminated earlier in accordance with condition 21) for the Initial Term.

2.2. Unless either party gives 12 months' written notice to the other party prior to the end of the Initial Term, following the end of the Initial Term, the Agreement shall automatically continue on a rolling 12 month basis (the "**Extended Term**") until terminated by either party giving 12 months' written notice.

3. THE SERVICE

3.1. Subject to the payment of the Service Charges, Malinko undertakes during the Term to provide the Service pursuant to and subject to term terms of this Agreement.,

3.2. Malinko grants to the Customer a non-exclusive, revocable, non-transferable licence for the Customer to use the Service and the Documentation during the Term, for its own business purposes.

3.3. A Named User Account can only be assigned to one individual who is a named living identifiable individual being a Named User. Named User Accounts may not be shared. The Customer may provision Named User Accounts between individuals without increasing the total number of Named Users in the event that a previously authorised Named User permanently ceases to be assigned a Named User Account. The Customer is responsible for enabling and disabling Named User Accounts using user administration functionality of the Service. Named Users Accounts that have been enabled but are inactive will be billed in

accordance with this Agreement. Named Users are permitted to access and use the Service an unlimited number of times during the Term. The Customer shall remain responsible for the acts and omissions of Named Users at all times.

3.4. The Customer shall follow all reasonable instructions given by Malinko from time to time with regard to use and access to the Service. The Customer shall ensure that the Service are used only for lawful purposes.

3.5. The Customer shall not, and shall not permit any third party, to:

3.5.1. access or attempt to access the Service, (or any part) or any related systems or networks that are not intended or made available for public use, or access and/or engage in any use of the Service for fraudulent or illegal purposes;

3.5.2. decompile, disassemble, reverse engineer, or otherwise attempt to reconstruct or discover underlying ideas or algorithms in connection with any aspect of the Service (or any part), except to the extent permitted by Applicable Law;

3.5.3. probe, scan or test the vulnerability of the Service or any related systems or networks, or breach the security or authentication measure of the Service any network or systems connected to the Service;

3.5.4. circumvent, disable or defeat any of the security features or components (such as encryption) that protect the Service;

3.5.5. directly or indirectly copy the Service (or any part) except for backup and archival purposes or for copying data, nor modify, translate, or alter in any manner, the Service (or any part), or create derivative works based on the Service (or any part);

3.5.6. republish, upload, post, transmit, disclose, or distribute (in any format) the Service (or any part) except as permitted herein;

3.5.7. access or use (in any format) the Service (or any part) through any time-sharing service, service bureau, network, consortium, or other means;

3.5.8. rent, lease, sell, sublicense, assign, or otherwise transfer the Customer's licence rights to any third party, whether by operation of law or otherwise;

3.5.9. remove, relocate, or otherwise alter any proprietary rights notices from the Service (or any part); and

3.5.10. perform or attempt to perform any actions that would interfere with the proper working of the Service or prevent access to or use of the Service by other users. or graphics of the Service.

3.6. The Customer will connect to the Service via the internet. The Customer is responsible for providing its own ISP connection to the internet. Malinko shall seek to make the Service available to the Customer but save as expressly stated in this Agreement, Malinko does not make any warranty, condition, representation or guarantee as to such availability (whether express or implied).

3.7. Availability and permitted maintenance of the Service shall be in accordance with the SLA set out at Schedule 1, and the applicable Third Party Services Conditions. The Customer agrees that Malinko may contact the Customer in order to assist the Customer with the Service and to obtain information needed to identify and fix any errors.

3.8. The Service may automatically download and install updates from time to time from Malinko. These updates are designed to improve, enhance and further develop the Service and may take the form of bug fixes, enhanced functions, new software modules and completely new versions. The Customer agrees to receive such updates.

3.9. During the Term Malinko shall from time to time provide to the Customer details of Malinko's security procedures in effect from time to time and the Customer shall comply with the same.

4. WARRANTY FOR THE SERVICE

4.1. During the Term, Malinko warrants that the Service will comply in all material respects with the Documentation and that the features and functionality of the Service will not materially reduce during the Term.

4.2. Malinko may from time to time during the Term, change the features and functionality of the Service.

5. SUPPORT SERVICES

Malinko shall provide Support Services in respect of the Service in accordance with the terms set out at Schedule 1.

6. PROFESSIONAL SERVICES

6.1. In return for receiving the Professional Services Charges, Malinko shall provide such Professional Services as are agreed by the parties, as indicated on the Order Form, and in accordance with a Statement of Work.

6.2. The Professional Services shall be performed using reasonable skill and care.

7. HOSTING SERVICES

The Hosting Partner shall be responsible for providing the Hosting Services and the supply of the said hosting shall be subject to the terms of the applicable Third Party Services Conditions (as updated from time to time) as set out in the Order Form.

8. DATA BACKUP

8.1. All IT systems will be subject to Malinko's specified back up strategy.

8.2. To this end Malinko shall carry out the following back up strategy:

8.2.1. the Service will be incrementally backed up every 4 hours;

8.2.2. the Service will be backed up fully every day;

8.2.3. both the daily and incremental backups will be backed up to a separate physical backup storage device;

8.2.4. backups will be periodically checked to ensure that they can be successfully restored in the event of a Service failure.

9. CUSTOMER RESPONSIBILITIES

9.1. The Customer shall:

9.1.1. be responsible for all activities that occur in respect of Customer's Named User Accounts;

9.1.2. be responsible to maintain the security and confidentiality of all Named User Account usernames and passwords;

9.1.3. be responsible for providing all equipment and software necessary to make (and maintain) a connection to the internet or world wide web;

9.1.4. appoint a Senior Sponsor who will ensure overall support and coordination;

9.1.5. be responsible for: password access, internet access, and browser software required to access the Service;

9.1.6. appoint a Project Manager who will coordinate the day-to-day work. The Project Manager is the primary liaison for the development of the solution with Malinko. Adequate time must be allocated to the project;

9.1.7. appoint an IT Security Manager who will coordinate IT security assessments and technical due diligence;

9.1.8. accept Malinko's provision of any milestones, tasks and or deliverables in connection with the Professional Services, and or as otherwise specified in a Statement of Work in accordance with the timescales as specified in a Statement of Work , and where not specified therein, upon delivery of the same by Malinko;

9.1.9. appoint a post launch 'Champion Group' consisting of a leader and at least one further member that will be responsible for system administration, ongoing support and training; and

9.1.10. be responsible for allocating and reallocating Named User Accounts;

9.1.11. not send or store viruses, worms, time bombs, Trojan horses and other harmful or malicious code, files, scripts, agents or programs in violation of any Applicable Law; and

9.1.12. use all reasonable endeavours to prevent any unauthorised access to, or use of, the Service and or the Documentation and, in the event of any such unauthorised access or use, promptly notify Malinko.

10. CHARGES AND PAYMENT

10.1. The Customer shall pay to Malinko the Service Charge in full , together with any other charges payable by the Customer in accordance with this Agreement within 30 (thirty) days of receipt of a valid invoice (the "**Due Date**") submitted by Malinko in accordance with this condition 10 and the Order Form. Except as specified in the Order Form, Malinko shall be entitled to invoice the Customer monthly in advance.

10.2. The Service Charge and any other charges payable by the Customer under this Agreement shall be exclusive of VAT at the prevailing rate which shall be payable by the Customer.

10.3. Malinko shall be entitled at any time during the Term to adjust the Service Charge by reference to the percentage change in the Retail Price Index (RPI) over the most recent 12 months for which published data is available at that point in time.

10.4. Without limit to the right of Malinko to increase the Service Charge and any other charges payable under this Agreement in accordance with condition 10.3 above, Malinko shall be entitled to increase the Service Charges to take into account any increase in the costs of Third Party Services by the relevant Third Party Supplier as are notified to Malinko from time to time. Malinko shall notify the Customer in writing of the increase, if any, in the Service Charge or any other charges payable.

10.5. Notwithstanding the provisions of condition 10.4 the Service Charge and any other charges payable by the Customer under this Agreement shall be reviewed by Malinko in the event that:

10.5.1. the Agreement enters an Extended Term in accordance with condition 2; and/or

10.5.2. the Parties agree to a change in the scope or execution of the Service in accordance with condition 30.

11. CONFIDENTIAL INFORMATION

11.1. Except to the extent set out in this condition or where disclosure is expressly permitted elsewhere in this Agreement, each Party shall:

11.1.1. treat the other Party's Confidential Information as confidential and safeguard it accordingly; and

11.1.2. not disclose the other Party's Confidential Information to any other person without the other Party's prior written consent.

11.2. All Malinko Personnel that have access to the Customer Data will have a valid Disclosure and Barring Service (DBS) check in place.

11.3. Condition 11.1 shall not apply to the extent that:

11.3.1. such information was in the possession of the Party making the disclosure without obligation of confidentiality prior to its disclosure by the information owner;

11.3.2. such information was obtained from a third party without obligation of confidentiality;

11.3.3. such information was already in the public domain at the time of disclosure otherwise than by a breach of this Agreement; or

11.3.4. it is independently developed without access to the other Party's Confidential Information.

11.4. Malinko may only disclose the Customer's Confidential Information to its Personnel who are directly involved in the provision of the Service and who need to know the information, and shall ensure that such Personnel are aware of and shall comply with these obligations as to confidentiality.

11.5. Both parties shall not, and shall procure that their respective Personnel do not, use any of Confidential Information of the other Party otherwise than for the purposes of this Agreement.

11.6. Nothing in this condition 11 shall prevent either Party from using any techniques, ideas or expertise gained during the performance of the Agreement in the course of its normal business to the extent that this use does not result in a disclosure of the other Party's Confidential Information or an infringement of Intellectual Property Rights.

12. INTELLECTUAL PROPERTY RIGHTS

12.1. Ownership of the Intellectual Property Rights in the Software, Service and Third Party Services shall remain vested in and the sole ownership of Malinko or Third Party Suppliers licensors as applicable. The Customer shall not obtain ownership of any Intellectual Property Rights in the same under this Agreement.

12.2. The Customer shall promptly enter into such documentation as is reasonably required by Malinko to vest ownership of Intellectual Property Rights in accordance with this condition 12.

13. IP CLAIMS

13.1. Malinko shall indemnify and keep the Customer indemnified from and against all actual incurred loss, damages, liabilities, settlements, judgments, costs and expenses arising out of or that are awarded or adjudged by a court or arbitration panel with competent jurisdiction in connection with any third party claim that the use of the Service by the Customer in accordance with the terms of this Agreement infringes any United Kingdom Intellectual Property Rights of any third party ("**IP Claim**"), provided that:

13.1.1. the Customer gives written notice to Malinko of the IP Claim(s) immediately following receipt;

13.1.2. the Customer makes no admission of liability and gives Malinko sole authority to defend or settle the IP Claim(s) at Malinko's cost and expense;

13.1.3. the Customer gives Malinko all reasonable help in connection with the IP Claim(s); and

13.1.4. the IP Claim(s) has not arisen as a result of the Content that the Customer has supplied or the use of the Service in combination with any material not supplied by Malinko.

13.2. In dealing with any IP Claim, Malinko may at its own expense and option:

13.2.1. pay for the Customer's right to continue using the Service; or

13.2.2. make any changes to the Service without materially reducing its functionality or purpose; and / or

13.2.3. replace the Service with other functional equivalents (with the same performance capability).

13.3. The indemnity at Condition 13.1 is the Customer's sole and exclusive remedy against Malinko in respect of any IP claim(s).

13.4. Notwithstanding any other provision in this Agreement, condition 13.1 shall not apply to the extent that any claim or action referred to in that condition arises directly or indirectly through the possession or use of any Open Source Software or through the breach of the applicable Third Party Services Conditions by the Customer.

14. PERSONAL DATA

14.1. In this condition, the terms "data controller", "data processor", "data subject", "personal data", "sensitive personal data" and “process” or "processing" have the respective meanings given to them in the Data Protection Legislation. For the purposes of this Agreement, the parties acknowledge that, in respect of Personal Data in Customer Data, the Customer shall be a data controller and Malinko shall be a data processor.

14.2. Malinko shall:

14.2.1. only carry out processing of Personal Data on the Customer’s instructions and only to the extent necessary to perform Malinko's obligations under this Agreement;

14.2.2. put in place appropriate technical and organisational measures to protect any Personal Data against any unauthorised or unlawful processing and against accidental loss or destruction or damage;

14.2.3. take reasonable steps to ensure the reliability of employees who will have access to the Personal Data.

14.3. With effect from the GDPR Enforcement Date, the remainder of this condition 14 shall apply in addition to above sub-conditions 14.1 to 14.2 inclusive. In the event of any conflict or inconsistency between the provisions of above sub-conditions 14.1 – 14.2 inclusive and the remainder of condition 14 below, the latter shall prevail.

14.4. Malinko shall Process the Personal Data only in accordance with documented instructions from the Customer, including with regard to transfers of Personal Data to a third country, save where such instructions are unlawful, and / or where such instructions would cause Malinko to breach its obligations under this Agreement or any other agreement with a third party, and / or otherwise where such instruction delays or prevents performance, in which case Malinko shall be granted relief from liability hereunder. Where Malinko can reasonably demonstrate that such instructions have affected the cost of providing the Service, any increase in the Service Charges shall be implemented in accordance with condition 30.

14.5. Malinko shall ensure that all Malinko Personnel who are involved in the Processing of Personal Data have committed themselves to confidentiality or are under statutory obligations of confidentiality concerning the Personal Data;

14.6. Malinko shall not provide any third party with access to the Personal Data or sub contract any of its obligations under this Agreement that involve Processing Personal Data without the prior written approval of the Customer, not to be unreasonably withheld or delayed.

14.7. Malinko shall comply with its obligations under Article 32 of the GDPR;

14.8. Taking into account the nature of the Processing, Malinko shall assist the Customer (at the Customer’s cost) by appropriate technical and organisational measures to enable the Customer to comply with its obligations under the Data Protection Legislation to respond to requests from Data Subjects (insofar as this is possible).

14.9. Malinko shall assist the Customer, at the cost of the Customer, to comply with the following obligations under the GDPR, taking into account the nature of Processing and information available to Malinko:

14.9.1. Article 32 (Security of Processing);

14.9.2. Article 33 (Notification of a Personal Data breach to the supervisory authority) and Article 34 (Communication of a Personal Data breach to the Data Subject) – although the parties acknowledge that Malinko shall only be required to communicate with the Customer regarding such data breaches;

14.9.3. Article 25 (Data protection impact assessment); and

14.9.4. Article 36 (Prior consultation).

14.10. Malinko shall make available to Customer, at the cost of the Customer, all information necessary to demonstrate compliance with the obligations imposed on Malinko under this condition and/or the Data Protection Legislation and allow for and contribute to audits, including inspections, conducted by the Customer or another auditor mandated by the Customer (but not being a competitor of Malinko) for the purposes of demonstrating such compliance. Malinko may apply its reasonable charges associated with the provision of information and access as aforesaid.

14.11. With regard to sub-condition 14.10, Malinko shall immediately inform the Customer if in its opinion, an instruction received from the Customer infringes the Data Protection Legislation.

14.12. Malinko shall ensure that any sub-contract entered into by Malinko (where Personal Data is Processed by such sub-contractor) contains provisions which comply with the Data Protection Legislation and in any event are no less onerous than those imposed under this condition 14.

14.13. Unless required by law, Malinko shall, upon termination or expiry of this Agreement for whatever reason, at the option of the Customer (but in either event, at the Customer's cost), either securely delete or return all of the Personal Data to the Customer. Malinko shall determine the method by which the said obligation is met.

14.14. Customer warrants that it shall not upload any Customer Data onto the Service which would place Malinko in breach of Applicable Law and the Customer shall hereby indemnify Malinko in full and shall hold Malinko indemnified in full against all and any liability, cost or loss in connection with a breach of this condition 14.14.

15. THIRD PARTY SERVICES

15.1. The following provisions apply in respect of Third Party Services. Where the Customer purchases. Third Party Services the provisions of the Third Party Services Conditions shall apply, where applicable to such Third Party Services, and shall be incorporated into the terms of this Agreement. This condition 15 shall only apply to Third Party Services.

15.2. For the avoidance of doubt, whilst Third Party Services are part of the Service delivered by Malinko pursuant to this Agreement, notwithstanding any provision to the contrary, except as stated in this condition 15, the terms of this Agreement shall not apply to such Third Party Services. .

15.3. Subject to Conditions 15.4 and 15.5, unless otherwise specified in the Order Form, all Third Party Services supplied to the Customer by Malinko under the Agreement during the Term shall be provided solely upon the basis of and to the standards and subject to the restrictions set out in the relevant Third Party Services Conditions, and the Customer shall be entitled to any benefits arising from the terms of the relevant Third Party Services Conditions as if the Customer were named in and bound by the relevant Third Party Services Conditions in the place of Malinko, and as if Malinko were named in the place of the applicable Third Party Supplier. The Customer acknowledges and agrees that it has reviewed and read the Third Party Services Conditions available to review at the relevant link set out in the Order Form. Accordingly the Customer agrees to comply with the Third Party Services Conditions (and agrees to abide by any restrictions contained therein) and agrees that it shall not by its acts or omissions cause a breach of the same. The Customer acknowledges and agrees that the extent of any contractual remedy pursuant to the Third Party Services Conditions shall apply (on a back-to-back basis) between Malinko and the Customer in respect of such Third Party Services. If the Order Form specifies any licensing and / or use restrictions in respect of the Third Party Software and or Open Source Software, the Customer shall, in addition to the obligations set out herein, comply with such restrictions. Any rights or remedies conferred on Malinko pursuant to this Agreement shall supplement those provided for by the Third Party Services Conditions.

15.4. The Customer shall be responsible for complying with the terms of, any agreements required for the receipt of Third Party Services. The Customer shall hereby indemnify Malinko in full and shall hold Malinko indemnified in full against all and any liability, cost or loss in connection with any breach of the terms of any agreements required for the receipt of such Third Party Services that the Customer enters into hereunder, including the Third Party Services Conditions.

15.5. The Parties agree that:

15.5.1. for the avoidance of doubt, all terms in any Third Party Services Conditions relating to the reporting of incidents, errors and / or defects that the Customer encounters in Third Party Services shall be deemed to refer to the reporting of incidents, errors and / or defects by the Customer to Malinko (on the terms and basis set out in such Third Party Services Conditions) with which the Customer agrees to promptly comply and in sufficient time to enable Malinko to report such incidents, errors and / or defects upwards to the applicable Third Party Supplier within any deadlines imposed in such Third Party Services Conditions, with Malinko then reporting such notified faults upwards to the applicable Third Party Supplier as soon as reasonably practicable (on the terms and conditions and basis set out in such Third Party Services Conditions);

15.5.2. in the event of any delay or failure in the provision of any Third Party Services which is related to services that Malinko will be relying on the applicable Third Party Supplier to provide, Malinko shall inform the Customer of the delay or failure and take all reasonable steps available to it under the relevant Third Party Services Conditions to require the re-instatement of such Third Party Services as soon as is reasonably practicable, or in the event of complete failure of delivery, to source alternative suitable services to such Third Party Services as soon as is reasonably practicable for the Customer; and

15.5.3. subject to condition 15.5.2, the Customer shall not be entitled to any type or level of contractual remedy from Malinko in respect of any Third Party Services to which Malinko is not itself entitled and able to recover from the applicable Third Party Supplier under the relevant Third Party Services Conditions, and the Customer agrees and acknowledges that limitations on liability apply between the applicable Third Party Supplier and Malinko.

15.6. In the event of a conflict or consistency between any provisions of this Agreement and the terms of the relevant Third Party Services Conditions and or in the event that the relevant Third Party Services Conditions are held to be ineffective in respect of the provision of any Third Party Services, the following order of precedence shall apply but only to the extent of such conflict or inconsistency:

15.6.1. the terms of Condition 20 and Condition 21;

15.6.2. the terms of this Condition 15;

15.6.3. Third Party Services Conditions; followed by

15.6.4. the remaining provisions of this Agreement.

15.7. In the event that the Customer breaches this Agreement and Malinko is properly required to pay cancellation charges or liquidated damages to any Third Party Supplier in respect of any related Third Party Services, including but not limited to the licensors of any of the Third Party Software, the Customer shall promptly upon demand refund to Malinko all such cancellation charges or liquidated damages, to the extent that they are incurred by Malinko as a result of such a breach by the Customer, and the Customer hereby indemnifies Malinko in full and holds Malinko indemnified in full against all such cancellation charges or liquidated damages.

16. OPEN SOURCE SOFTWARE

16.1. The Customer acknowledges that any Open-Source Software provided by Malinko is provided "as is" and expressly subject to the disclaimer in condition 16.2.

16.2. The Customer shall comply with any Open Source Software licence terms as referred to in the Order Form.

16.3. All other conditions, warranties or other terms which might have effect between the parties or be implied or incorporated into this licence or any collateral contract, whether by statute, common law or otherwise, are hereby excluded, including the implied conditions, warranties or other terms as to satisfactory quality, fitness for purpose or the use of reasonable skill and care.

17. ASSIGNMENT AND SUB-CONTRACTING

Neither party shall assign, novate, sub-contract, transfer its rights or obligations under this Agreement to a third party, without the prior consent in writing of other party, such consent not to be unreasonably withheld or delayed.

18. WAIVER

The failure of either Party to insist upon strict performance of any provision of this Agreement or the failure of either Party to exercise any right or remedy shall not constitute a waiver of that right or remedy and shall not cause a diminution of the obligations established by this Agreement.

19. MONITORING AND REPORTING

19.1. The Parties shall have Quarterly Meetings to monitor and review the performance of this Agreement, to discuss any changes proposed in accordance with condition 30 and to discuss the performance of Malinko as against the Key Performance Indicators set out in Schedule 1. These meetings shall be minuted by Malinko and copies of those minutes shall be circulated to, and approved by, both parties.

19.2. Before each Quarterly Meeting, the Customer shall notify Malinko, and vice versa, of any problems relating to the provision of the Service for discussion at the Quarterly Meeting. At the Quarterly Meeting, the parties shall agree a plan to address such problems. In the event of any problem being unresolved or a failure to agree on the plan, the matter shall be resolved in accordance with the process set out in condition 25. Progress in implementing the plan shall be included in the agenda for the next Quarterly Meeting.

20. LIABILITY

20.1. Neither party shall exclude or limit its liability for: (a) death or personal injury caused by its negligence; and or (b) fraudulent misrepresentation.

20.2. Malinko shall not be liable for

20.2.1. any loss of profit (whether direct, indirect, or otherwise);

20.2.2. loss of revenue (whether direct, indirect, or otherwise);

20.2.3. loss of income (whether direct, indirect, or otherwise);

20.2.4. loss of anticipated savings (whether direct, indirect, or otherwise);

20.2.5. loss of data (including Customer Data);

20.2.6. loss of goodwill; and

20.2.7. any indirect or consequential loss;

("**Excluded Losses**") arising under or in connection with this Agreement, except where Excluded Losses arise under Condition 20.1.

20.3. The Customer agrees that it will have no remedy in respect of any untrue statement or representation made to it upon which it relied in entering into this Agreement and that its only remedies can be for breach of contract (unless the statement was made fraudulently).

20.4. Malinko's Contractual Liability to the Customer shall not exceed a figure equivalent to the greater of: either £50,000 (fifty thousand pounds) or 100% of the total value of the Service Charges paid or payable to Malinko at the date of the Claim. "**Claim**" shall mean the first occasion on which written notification of a particular liability hereunder is provided. For these purposes "**Contractual Liability**" means aggregate liability howsoever arising under or in relation to this Agreement (including under the indemnity at Condition 13.1) that is not excluded pursuant to Condition 20.2 above.

20.5. Except as stated expressly in this Agreement, to the extent that any such limitations or exclusions of liability are permitted by law, Malinko's liability to the Customer (whether arising in contract, tort (including negligence), statute or otherwise) arising out of or in connection with Malinko's use of Third Party Services in accordance with this Agreement shall be subject to the same limitations and exclusions set out in this condition 20.

21. TERMINATION

21.1. Without prejudice to any other rights or remedies which the Parties may have, either Party may terminate this Agreement without liability to the other immediately on giving notice to the other if:

21.1.1. the other Party commits a material breach of any of the terms of this Agreement and either such breach is irremediable or (if such a breach is remediable) it fails to remedy that breach within thirty (30) days of that Party being notified in writing of the breach; or

21.1.2. an order is made or a resolution is passed for the winding up of the other Party, or circumstances arise which entitle a court of competent jurisdiction to make a winding-up order of the other Party;

21.2. Malinko may terminate this Agreement immediately in writing where an undisputed invoice remains unpaid by the Customer for a period exceeding 60 days beyond the Due Date.

22. CONSEQUENCES OF TERMINATION OR EXPIRY

22.1. On expiry or termination of this Agreement:

22.1.1. the Customer's access to and use of the Service, Documentation, Support Services and Third Party Services shall immediately cease;

22.1.2. the rights and duties created by Conditions 11 (Confidential information), 20 (Liability), 21 (Termination), 22 (Consequences of Termination or expiry), and conditions 26 (Non-Solicitation) to 32 (General Provisions) inclusive shall survive.

22.2. Within thirty (30) days of termination or expiry of this Agreement, the Customer may request that Malinko shall provide an extract of the Customer Data to the Customer (in such file format as Malinko shall determine). Malinko hereby reserves the right to charge a fee to the Customer for providing the said extract in accordance with its then current applicable charges for such service. If the Customer fails to request the return of Customer Data within the thirty (30) day timeframe, then, to the extent permitted by Applicable Law, Malinko reserves the right to delete all Customer Data in its possession.

22.3. In the event of termination or expiry of this Agreement (for whatever reason), Malinko shall (for a period not exceeding 60 (sixty) Working Days after the date of termination or expiry) provide the Customer with reasonable co-operation to enable the Customer to make arrangements for the transition of the supply of the Service to an alternative provider. Malinko shall be entitled to charge the Customer at its prevailing day rate (as notified to the Customer from time to time) in respect of such assistance and co-operation.

23. FORCE MAJEURE

23.1. Neither Party shall be in breach of this Agreement if there is any total or partial failure of performance by it of its duties and obligations under this Agreement occasioned by a Force Majeure Event.

23.2. A Party's obligations under this Agreement shall be suspended during the period for which a Force Majeure Event continues and as soon as it is reasonably practicable after the cessation of a Force Majeure Event that Party shall give written advice to the other Party of that fact. If such reason continues for a period of more than 180 (one hundred and eighty) days either Party shall have the right to terminate this Agreement upon giving 14 (fourteen) Working Days' notice in writing of termination to the other Party.

24. DISPUTE RESOLUTION PROCEDURE

24.1. Both Parties accept that it would be in their best interests for any disagreement to be resolved locally, first by the respective Deputy Nominated Officers on behalf of each party.

24.2. If the Parties are unable to resolve a disagreement by using the process set out in condition 25.1, the Parties shall each use all reasonable endeavours to resolve any dispute or difference arising out of or in connection with this Agreement ("**Dispute"**) by prompt discussion in good faith between the respective Nominated Officers of each Party.

24.3. This procedure is invoked by either Party giving notice to the other, setting out the issues in the Dispute and referring to this condition.

24.4. If the Parties are unable to settle any Dispute by negotiation under condition 25.2 within 14 (fourteen) days of commencement of negotiations, the Dispute will be escalated for prompt discussion in good faith between the Chairman on behalf of Malinko, and Chairman on behalf of Customer.

24.5. In the event that the parties fail to resolve the Dispute in accordance with condition 25.4, then the Dispute shall be referred to mediation, using the Centre for Effective Dispute Resolution's Model Mediation Procedure. The costs of mediation shall be borne equally by the parties.

24.6. Notwithstanding the above, if and to the extent that the parties do not resolve any Dispute or any issue in the course of any mediation, either party may commence or continue court proceedings in respect of such unresolved Dispute or issue.

24.7. Any Party wishing to escalate a Dispute for discussion at this level shall submit a written request for dispute resolution to the Nominated Officers, containing the following:

24.7.1. the names and addresses of the Parties;

24.7.2. a copy of this Agreement; and

24.7.3. a brief statement describing the circumstances and nature of the Dispute.

25. NON-SOLICITATION

25.1. During the Term and for a period of 12 months after the expiry or termination of this Agreement (howsoever arising), neither Party shall solicit any employee engaged in the provision of the Service without the other Party's prior written consent.

25.2. Neither Party shall be considered to be in breach of their obligations in condition 26.1 where an individual becomes an employee of, or engaged by, a Party as a result of a response by that individual to an advertisement placed by or on behalf of the relevant Party for the recruitment of staff and where it is apparent from the wording of the advertisement, the manner of its publication or otherwise that the principal purpose of the advertisement was equally likely to attract applications from individuals who were not Personnel of the relevant Party.

26. ENTIRE AGREEMENT

26.1. This Agreement constitutes the entire agreement between the Parties relating to the subject matter of this Agreement. This Agreement supersedes all prior negotiations, representations and undertakings whether written or oral, except that this condition shall not exclude liability in respect of any fraudulent misrepresentation.

26.2. 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 Agreement. Each Party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this Agreement.

27. COUNTERPARTS

27.1. This Agreement may be executed in counterparts, each of which when executed and delivered shall constitute an original but all counterparts together shall constitute one and the same instrument.

28. NOTICES

28.1. Except as otherwise expressly provided within this Agreement, no notice or other communication from one Party to the other shall have any validity under this Agreement unless made in writing by or on behalf of the Party concerned.

28.2. Any notice or other communication which is to be given by either Party to the other shall be given by letter (sent by hand, post or recorded delivery), by facsimile transmission or electronic mail (confirmed in either case by letter). Such letters shall be addressed to the other party's Nominated Officer. Provided the relevant communication is not returned undelivered, the notice or communication shall be deemed to have been given two (2) Working Days' after the day on which the letter was posted, or 4 (four) hours, in the case of electronic mail or facsimile transmission or sooner where the other Party acknowledges receipt of such letters, facsimile transmission or item of electronic mail.

28.3. Either Party may change its address for service by serving a notice in accordance with this condition.

29. VARIATION

No variation of the terms and conditions of this Agreement shall be effective unless it is in writing and signed by the respective Nominated Officers of the Parties.

30. APPLICABLE LAW AND JURISDICTION

30.1. This Agreement 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) are governed by the law of England and Wales.

30.2. The Parties irrevocably agree that the courts of England and Wales have exclusive jurisdiction to determine any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

31. GENERAL

31.1. The termination of this Agreement for any reason shall be without prejudice to any rights or obligations which shall have accrued or become due between the Parties prior to the date of termination.

31.2. The termination of this Agreement for any reason shall not affect the coming into force or the continuation in force of any provision of this Agreement which is expressly or by implication intended to come into or continue in force on or after such termination.

31.3. If any provision of this Agreement is held by any competent authority to be invalid or unenforceable in whole or in part the validity of the other provisions of this Agreement and the remainder of the provision in question shall not be affected thereby.

31.4. Nothing in this Agreement shall create, or be deemed to create, a partnership or joint venture or relationship of employer and employee or principal and agent between the Parties.

31.5. The rights and remedies of the parties in connection with this Agreement are cumulative and, except as expressly stated in this Agreement, are not exclusive of any other rights or remedies provided by law or equity or otherwise. Except as expressly stated in this Agreement (or at law or in equity in the case of rights and remedies provided by law or equity) (any right or remedy may be exercised (wholly or partly) from time to time).

31.6. Each Party shall do and execute, or arrange for the doing and executing of, any other act and document reasonably requested of it by the other Party to implement and give full effect to the terms of this Agreement.

31.7. A person who is not a party to this Agreement has no rights, express or implied, under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

SCHEDULE 1 – SUPPORT SERVICES

1. **DESCRIPTION OF SUPPORT SERVICES**

1.1. To provide support and maintenance for the Service to the Customer within the Term of this Agreement.

1.2. It has been agreed with the Customer that all issues with the Service will initially be directed to the Customer's Service Desk. The Customer's Service Desk will look to first of all resolve any queries that relate to:

1.2.1. General Service access issues. These are issues preventing Named Users from accessing the Service (i.e. viewing the login screen of the Service) or issues with a device (PC, Laptop, tablet, mobile) that is being used to attempt to access the Service. These incidents will be dealt with by the Customer's Service Desk as first line support, under the Customer's existing internal procedures and are not within scope of the Support Services provided by Malinko under this Agreement.

1.2.2. Where following investigation of a general Service access issue, it is thought that the issue exists due to a connectivity issue between the Customer site and the Malinko or Hosting Partner datacentre, the issue may be escalated to Malinko Helpdesk for further investigation to be carried out. This investigation may involve Malinko Helpdesk collaborating with the Hosting Partner to resolve the issue.

1.3. Where queries or issues relating to the Service not described in paragraph 1.2.1 of this Schedule 1 occur they will be escalated to the Malinko Helpdesk. These queries or issues include but will not be limited to:

1.3.1. queries on general Service use, i.e. queries where Named Users wish to be educated in any aspect of using the Service for its intended purpose. Note that there will be a System Administrator under the employment of the Customer, who may participate at their discretion in assisting the Named Users of the Service in educational matters. Training of all required initial Named Users of the Service will be delivered by Malinko in accordance with the Order Form and a Statement of Work. Recurrent training will not be delivered by Malinko;

1.3.2. general management of Customer Data in terms of managing local fields (data fields that a Customer wishes to collect over and above the core Service datasets) including setup and disablement of such fields. Note that this general management of Customer Data (local field management) is an intended System Administrator task;

1.3.3. general management of commissioned or other targets within the Service limited to amending target values; Note that this general management of commissioned or other targets within the Service is an intended System Administrator task;

1.3.4. where general Service issues arise that are results of Malinko software defects.

1.4. In addition to the Support Services detailed in paragraphs 1.2 and 1.3 of this Schedule 1, Malinko will also provide as part of the Agreement during the Term:

1.4.1. on-site monitoring of the Service comprising: a representative of Malinko visiting each Customer site weekly (at least once subject to availability) for the first 2 weeks of any system deployment. These visits will not attract any further payment of any kind over and above that covered by this Agreement; and

1.4.2. Software changes to ensure continued alignment of the Service's core datasets to any changes required as a result of regional or national audit requirements, and therefore any additional Malinko software releases to support such major changes as required are included within this Agreement.

1.5. Malinko will hold quarterly user forums covering the Service as a means to acquire feedback in respect of that discussed in paragraph 1.4 of this Schedule 1 at Malinko's expense, (excluding the expenses of any attendees of such a forum).

1.6. Training delivery for the Service will be provided, to a maximum of 2 training days. This is training delivery beyond that which will be provided as part of any Service deployment.

2. **SERVICE LEVEL AGREEMENT**

2.1. Hours of Business (Standard Support Plan): Malinko Helpdesk is open and contactable on Working Days between 09:00 and 17:00 (Service Hours) for all helpdesk calls.

2.2. As described in paragraph 1.2 of this Schedule 1, Named Users will raise all calls initially to the Customer's Service Desk, who will escalate such calls as appropriate to the Malinko Helpdesk. System Administrators may contact Malinko Helpdesk at any time during Service Hours.

2.3. Registration: The SLA process begins (and time for the Response Times starts to run) when the Named User or the Customer Service Desk subsequently contacts the Malinko Helpdesk. Contact can be made with Malinko Helpdesk in any of the following ways:

2.3.1. In Person

2.3.2. By Telephone to: 0161 8500111 or any other number given by Malinko

2.3.3. Via E-Mail to: support@malinkoapp.com

2.3.4. Via the Service's 'Contact Technical Support Link'

2.3.5. Once contact has been made, the Malinko Helpdesk team will log the call and record all the required information.

2.4. **Assessment**: Once the call has been logged Malinko Helpdesk team will determine the severity of the call and assign it a priority based on the call categorisation it receives. It should be noted that Malinko Helpdesk team will attempt to fix every call at the time when the call is logged (**First Time Fix**) so as to minimise the level of disruption experience by the Subscribed Users. For larger, more serious or complex issues it may not be possible to provide a First-Time Fix, in which case a priority will be assigned to the call. Call priorities are defined as follows:

Immediate (Severity 1)	Where a call priority is Immediate, Malinko will respond to the call within 1 hour during Service Hours. e.g. Service Failure / Unavailability of the Service affecting a large number of users across 1 or multiple sites.
Urgent (Severity 2)	Where a call priority is Urgent, Malinko will respond to the call within 4 hours during Service Hours. e.g. Service Failure / Unavailability of the Service affecting a small number of users at 1 or more sites.
Normal (Severity 3)	Where a call priority is Normal, Malinko will respond to the call within 1 Working Day. e.g. Non-urgent Service defect for which a workaround can be provided affecting 1 or more users.
Non-urgent software issue	Non-urgent Service defects (those defects inherent within the Service but for which a workaround is available) that are affecting 1 or more users will be logged and be deployed in a future software release subject to the terms laid out within paragraph 1.4 of this Schedule 1.
Educational Support	Where a call is purely an educational request, Malinko will respond to the call within 1 hour during Service Hours with a target fix time of 4 hours. e.g. "how do I record Thrombolysis data?"

Once the Severity and Priority have been assigned and assuming that the call cannot be resolved at the time when it is first placed (as a First Time Fix) Named Users will be notified by e-mail of the job number, severity and priority.

Note that all response times are to be made within the Service Hours and the Working Days of Malinko Helpdesk as defined in paragraph 2.1 within this Schedule 1.

2.5. **Resolution**: In every case Malinko Helpdesk team will attempt to resolve the call at the time when it is first placed. Where a call cannot be resolved by Malinko Helpdesk team, and the call relates to any issues as outlined in paragraph 1.2.1 within Schedule 1 of this Agreement, the call will be resolved as a result of a collaboration between Malinko Helpdesk and the Hosting Partner.

2.6. Malinko shall alert the Customer as soon as is reasonably practicable if any part of the Service becomes unavailable so that the Customer and Named Users may implement their local 'Business Continuity Plans' if required (as the Customer shall in its sole discretion decide). All agreed Business Continuity Plans for the purposes of the Term are to revert to paper data collection and fall back on other existing systems as agreed with each Customer's relevant clinical teams.

3. **SERVICE LIMITATIONS**

3.1. The Service will operate with the following limitations:

3.1.1. Support Services will only be available on Working Days between Service Hours.

3.1.2. All system administration and account creation within the Service is the responsibility of the Customer except where specific assistance is required under Educational Support.

3.1.3. All ongoing Named User training is the responsibility of the Customer except where covered by paragraph 1.4.1.5 in this Schedule 1.

3.1.4. All Named User desktop and mobile hardware is the responsibility of the Customer.

4. **KEY PERFORMANCE INDICATORS AND REPORTING**

4.1. The Key Performance Indicators detailed in paragraph 4.2 will be applied to measure the performance of Malinko.

4.2. The Response Times together with measurement period and reporting frequency are detailed below:

Descriptor	Target	Measurement Period	Reporting Frequency
Severity 1 Response (within 1 hour)	99%	Monthly	Quarterly
Severity 2 Response (within 4 hours)	90%	Monthly	Quarterly
Severity 3 Response (within 1 day)	90%	Monthly	Quarterly
Non-Urgent Software Issue Response (with 1 working day)	90%	Monthly	Quarterly
Educational Support Response (within 1 hour)	95%	Monthly	Quarterly

4.3. The following details the Availability Management targets for Uptime of the Service during Service Hours:

Descriptor	Target Uptime (in service hours)	Measurement Period	Reporting Frequency
Malinko Systems	99.99% (excluding planned maintenance set out in the Hosting Service Terms)	Monthly	Quarterly

5. **PLANNED MAINTENANCE**

5.1. The Service is subject to a planned maintenance strategy. Planned maintenance where possible will be accommodated outside of Service Hours without impacting the availability of the Service to Named Users.

5.2. All planned maintenance will be subject to agreed change control procedures and will be communicated to the Customer within a reasonable notice period. A copy of change control procedures can be provided on the request of the Customer.