



# Fraxion (Pty) Ltd

## Software Licence Agreement

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## Software Licence Agreement

### 1. Parties

1.1 The parties to this agreement are –

1.1.1 Fraxion (Proprietary) Limited hereinafter referred to as "Fraxion"

and

1.1.2 You

1.2 The parties agree as set out below.

### 2. Introduction

2.1 Fraxion has developed and is the proprietor of Software technology relating *inter alia* to the management of internal expenditure and is referred to as the Software;

2.2 You wish to obtain a licence to use the Software in accordance with the terms and conditions as set out in this Agreement; and

2.3 By installing the Software you agree that you have read, understand and are bound by this Agreement.

2.4 Your use of the Software indicates your acceptance without modification of this Agreement, which will constitute a legal agreement between you and Fraxion. If you do not want to be bound by the terms, you must not use or install the Software.

2.5 No sales representative, dealer, agent, officer or employee of Fraxion has the authority to change or modify this Agreement, except pursuant to an official revised version of this Agreement, and you may not rely on any such change or modification. This Agreement cannot be changed by you and our activation or provision of any licence or services to you does not indicate our acceptance of any changes made by you to our Agreement.

### 3. Definitions

3.1 In this Agreement, unless the context indicates the contrary:

3.1.1 "Agreement" means this written document together with all written appendices, annexures, exhibits or amendments attached to it from time to time as agreed by the Parties;

3.1.2 "Business Day" means 08h30 to 17h00 any day other than a Saturday, Sunday or public holiday officially recognised as such in the Republic of South Africa;

3.1.3 "Commencement Date" shall mean: the date of signature of the Purchase Order in terms of which the Software licence was purchased;

3.1.4 "Confidential Information" shall mean: any information of whatever nature which has been or may be contained by either of the Parties from the other, whether in writing or in electronic form or pursuant to discussions between the Parties or which can be obtained by examination, testing, visual inspection or analysis, including without limitation, scientific, business or financial data, know-how, formulae, processes, designs, sketches, photographs, plans, drawings, specifications, sample reports, models, customer lists, price lists, studies, findings, computer software, inventions or ideas;

3.1.5 analyses, concepts, studies and other material prepared by or in possession or control of compilations, or recipient which contain or otherwise reflect or are generated from any such information as is specified in this definition; disputes between the Parties resulting from this Agreement; the Software.

3.1.6 "Copyright" shall mean all rights of Copyright whether existing now or in the future in and to the Software and Software Documentation including initial drawings, sketches, flow charts and designs relating thereto;

3.1.7 "ECT Act" shall mean the Electronic Communications and Transactions Act, 25 of 2002 (as amended from time to time).

3.1.8 "Enhancements" shall mean significant changes to the Software resulting in the addition of a feature or capability not present in the current Software;

3.1.9 "Fraxion" means Fraxion (Proprietary) Limited, a company duly registered and incorporated according to Company Laws of the Republic of South Africa, with registration number 2000/026408/07 and address: 4<sup>th</sup> Floor Waterford House, Waterford Road, Diep River, Cape Town, South Africa;

3.110 "Intellectual Property Rights" shall mean all present and future rights in the Software and Software Documentation and any other rights which may in the future be based thereon, including but not limited to Copyright, patents, trademarks and logos (registered and unregistered in any form and/or nature whatsoever whether now used or adopted in the future), service marks, designs, design rights, together with all related know-how, source codes, inventions, trade secrets, Confidential Information and all other rights of a similar character whether registered or capable of registration and all applications and rights to apply for protection of any of the same;

3.111 "Know-How" means all confidential information of whatever nature relating to the Intellectual Property and its exploitation, implementation and use including technical information, manufacturing techniques, designs, specifications, formulae, systems, processes and any information regarding materials and hardware;

3.112 "Licence Fees" shall mean the Licence Fees payable for the granting of this Licence as detailed in the signed Purchase Order in terms of which the Software licence was purchased.

3.113 "Modifications" shall mean changes, improvements or customisation of or to the Software which may be required to adapt the Software to your requirements;

3.114 "Notice" shall mean a written notice;

3.115 "Parties" shall mean Fraxion and you;

3.116 "Personal Information" shall have the meaning ascribed to it in POPIA.

3.117 "POPIA" shall mean the Protection of Personal Information Act 4 of 2013 or any further amendments to this Act as may replace and/or supersede it or the Act, once promulgated; and all references to "POPIA" in this Agreement shall accordingly refer to this legislation as finally promulgated as from the date of promulgation;

3.118 "Project Charter" means a statement of the scope, objectives and participants in a project that provides a preliminary delineation of roles and responsibilities, outlines the project objectives, identifies the main stakeholders, and defines the authority of the project manager, serving as a reference of authority for the future of the project;

3.1.19 "Software" shall mean the Spend Management Software as detailed in the Project Charter or elsewhere, including Fraxion Connect, and shall include any Upgrades, Enhancements or Modifications thereto;

3.1.20 "Software Documentation" shall mean those visually readable materials developed by Fraxion containing instructions pertaining to the use of the Software and setting out the operation of the Software;

3.1.21 "Special Personal Information" shall have the meaning ascribed to it in POPIA.

3.1.22 "Specifications" shall mean the written document defining the product specifications available on request;

3.1.23 "Spend" shall mean any discretionary operating expenditure within an organisation which includes procurement, capex, expense claims, travel claims and your internal expenditure;

3.1.24 "Upgrade" shall refer to releases of new versions of the Software subsequent to the Commencement Date which incorporate changes, modifications, enhancements or improvements to the Software which relate to or affect the operating performance of the Software or an aspect of the Software but which do not change the basic operation or functioning of the Software; and

3.1.25 "You" and "your" shall mean a person or entity that installs and /or uses the Software in any way.

3.2 A number of days shall be counted exclusively of the first and inclusively of the last day unless the last day is not a business day in which case the last day shall be the immediately following business day.

3.3 Where any provision of this agreement expressly or by implication operates after expiration or termination of the agreement, it shall continue to have effect thereafter.

3.4 Any annexure referred to herein form part of this Agreement.

3.5 In this Agreement, references to a "person" includes an individual, sole trader, partnership, body corporate, an unincorporated association of persons and any other legal entity; technical expressions shall have the relevant meaning commonly attributed to them in the computer software business sector in South Africa, provided that if the Parties cannot agree, the technical expression shall have the meaning ascribed to such expression in the technopedia internet dictionary; the use of the word "including" and similar expressions will be construed as illustrative and not exhaustive; notwithstanding

the fact that hyperlinks in this Agreement to notices and legislation should be deemed part of this Agreement in terms of section 11 of the ECT Act, the fact that some or all of the hyperlinks may be non-operational from time to time shall not play a role in determination of the validity and interpretation of this Agreement; any reference to the word days will be construed as Business Days.

#### **4. Grant and nature of licence**

4.1 Fraxion hereby grants a non-exclusive licence to you to use the Software in the terms and conditions set out in this Agreement for the purpose of conducting your business until termination of this Agreement;

4.2 The Licence granted in terms of clause 4.1 is a single instance and non-transferable Licence;

4.3 You shall not have the right to sub-licence or transfer the Licences or the Software in any way, either in whole or in part, to any third party except with the prior written consent of Fraxion;

4.4 You shall not copy or permit any party to copy the Software, except to make a single copy solely for backup or archival purposes;

4.5 You shall not modify, de-compile, disassemble or otherwise reverse-engineer the Software or any application program interface of the Software or attempt to do any of these;

4.6 You shall allow Fraxion, upon reasonable notice, access to your premises to audit your compliance with the terms and conditions of this Agreement and you shall further allow Fraxion access to your premises on reasonable notice during any Notice Periods referred to in clause 12 for the purpose of exercising its rights under this Agreement;

4.7 No Software shall be provided to you prior to the acceptance of this Agreement.

#### **5. Support and maintenance**

5.1 Support and maintenance of the Software shall be regulated in terms of a separate Support and Maintenance Agreement to be entered into between the Parties attached hereto as Annexure A to the Agreement.

5.2 In the event that you do not elect that Fraxion provide Installation Services in respect of the Software or any Software component, you will be solely responsible for the installation of the Software in respect thereof and, other than the delivery of a copy of the Software, Fraxion will have no



obligations in respect of the installation thereof and in particular will have no obligation to participate in Acceptance Testing of any kind.

## 6. Duration

6.1 This Agreement shall commence on the Commencement Date and shall remain in force unless otherwise terminated in accordance with the terms of this Agreement;

## 7. Licence fee

7.1 In consideration of all the non-exclusive rights derived by you under this Agreement with respect to use of the Software, you shall pay to Fraxion the applicable Licence Fees detailed in the Purchase Order in terms of which the Software was purchased.

7.2 The Licence Fee is exclusive of VAT and any other statutory levies, taxes and imposts as may be levied, which additional amounts shall, if applicable, be borne by you.

7.3 You shall pay to Fraxion the Licence Fee within thirty (30) days following receipt of an original invoice by you, in full, without any right of set-off or deduction. All fees, plus VAT, shall be payable in South African Rands (ZAR) to the Licensor. The payment of the fees shall be made by direct transfer into the bank account of the Licensor, which bank details shall be stipulated on your invoice.

7.4 Any amount due and owing by you to the Licensor shall carry interest reckoned at the Prime Rate plus 4% from the due date until payment thereof has been received by the Licensor in full. For the purposes of this clause, the Prime Rate shall mean the prime bank overdraft rate as charged by the Standard Bank Limited to its corporate customers in respect of overdraft facilities, calculated and compounded monthly in arrears, as certified by any manager of such bank whose appointment and authority shall not be necessary to prove.

## 8. Your rights and obligations

8.1 You hereby undertake that will at all times during the continuation in force of this Agreement observe and perform according to the terms and conditions set out in this Agreement and in particular shall:

8.1.1 provide a hardware platform and such hardware that will meet the minimum requirements as determined by Fraxion from time to time,

8.1.2 not hinder Fraxion in the performance of its obligations in terms of this Agreement or instruct any third party to do so;

8.1.3 use your best endeavours to promote and optimize the commercial and technological potential of the Software;

8.1.4 in all matters act in such a manner as you reasonably consider to be most beneficial to Fraxion's best interests

8.1.5 not make any representations or give any warranties regarding the Software other than those agreed to by Fraxion in writing;

8.1.6 not assign, transfer, charge or in any matter make over, or purport to assign, transfer, charge or make over, any rights under or in terms of this Agreement or any part thereof without obtaining the previous written consent of Fraxion;

8.1.7 allow Fraxion, at any time and with reasonable Notice given to you, access to your premises, hardware and network for the purposes of obtaining detailed copies of the log files and effect changes and or upgrades in accordance with this Agreement relating to the Software installed at these premises and / or other agreed locations as well as for the purpose of monitoring the Software and the performance of your obligations in terms of this Agreement;

8.1.8 ensure that a comprehensive data backup procedure is in place at all times;

8.1.9 appoint an appropriately skilled and responsible person who shall be the primary point of contact and communication with Fraxion and shall be responsible for your activities relevant to the Software;

8.1.10 not adapt, translate or reproduce any of the Software, nor shall you permit, whether directly or indirectly, any third party including any subsidiaries and associates, directors, shareholders, agents, representatives and employees, to do any of the foregoing;

8.1.11 not rent, lease, sell, sub-licence, assign or otherwise transfer any of the Software which is limited to your premises;

8.1.12 not remove any proprietary notices or labels on the Software or Software Documentation.

8.2 You warrant that you have the contractual capacity to enter into this Agreement with Fraxion. If the Agreement is signed by a person acting in a representative capacity on behalf of you, the signing party hereby warrants that all of the information relating to the entity, partnership, association or other person whom he/she represents and which he/she has supplied to Fraxion at any time will be true, accurate and complete. Fraxion reserves the right to treat all misrepresentations by you as a fraud and you indemnify Fraxion against any loss or damage that Fraxion may sustain resulting from such misrepresentation.

## 9. Intellectual property

9.1 You acknowledge:

9.1.1 that existing and future Intellectual Property Rights inclusive of inventions, Know-How, Copyright and Confidential Information including source code used or embodied in connection with the Software or Software Documentation will at all times vest in Fraxion;

9.1.2 that any enhancements, modifications or improvements made by Fraxion to the Software will be owned by Fraxion;

9.1.3 that the Software was developed and designed by Fraxion and shall acknowledge this in all its dealings by including, *inter alia*, reference to Fraxion as the developer and the designer in all written documentation and/or verbal communications relating to the Software;

9.1.4 that Fraxion is entitled to sell or transfer in whatsoever manner any and all of the Intellectual Property vested in Fraxion subject to this Licence Agreement and you agree to provide full co-operation where necessary to effect any such transaction.

9.2 You shall not at any time in any way question and/or dispute the ownership of Fraxion of any such item and undertake not to infringe or prejudice any rights of Fraxion in and to the Software or Software Documentation.

9.3 All Intellectual Property developed by Fraxion during the course of this Agreement shall belong to Fraxion.

## 10. Rights and obligations of Fraxion

Notwithstanding any other right and / or obligation that Fraxion may have in terms of this Agreement, Fraxion:

10.1.1 shall provide the you with access to all future Upgrades of the Software as and when they become generally available from time to time for the duration of this Agreement;

10.1.2 shall appoint a responsible person who shall be the primary point of contact and communication with you;

10.1.3 in all matters act in such a manner as Fraxion reasonably considers to be most beneficial to your best interests

10.1.4 shall be entitled to publish any announcement of this Agreement through any of the media an shall be entitled, from time to time, to publish notification of the existence of this Agreement in any list indicating the identities of licensees of Fraxion in respect of the Software or Software Documentation.

## 11. Limitation of liability

11.1 Fraxion gives no warranties and makes no representations regarding the Software or Software Documentation and accordingly shall not be bound by any warranty, representation or other communication not specifically recorded herein. Fraxion provides the Software “as is” and “as available” and does not warrant or guarantee that the Software will at all times be free of errors or interruptions, be always available, fit for any purpose, not infringe any third-party rights, be secure and reliable, or will conform to your delivery timeline requirements.

11.2 You shall be responsible for the consequences of the use of the Software and the Software Documentation. To the extent permitted by law, Fraxion shall not be liable for any indirect or consequential loss, damage, cost or expense of any kind whatever, whether arising under contract, delict or otherwise, including without limitation, for loss of data, loss of profits or of contracts, loss of operation time and loss of goodwill. To the extent that a competent court or tribunal finally determines, notwithstanding the limitation contained in this clause, that Fraxion is liable to you for any damages, Fraxion’s liability to you for any damages howsoever arising shall be limited to the amounts paid by you under this Agreement in consideration for the Software during the immediately preceding 12 (twelve) month period.

## 12. Breach and termination

Should a party:

12.1 Commit any breach of their warranties and/or representations and/or undertakings in terms of this Agreement and/or any other terms and/or conditions hereof, such breach not being due to force majeure, and fail to remedy such breach within a period of ten (10) days after receipt of written notice requiring it to do so; or

12.2 Commit an act of insolvency and/or be placed under liquidation or judicial management, whether provisionally or finally then in all or any such events, the other party shall be entitled, without prejudice to any other claims which it may have, to prematurely terminate this agreement without prior notice other than the notice required in the case of clause 12.1 provided that:

12.2.1 this Agreement may not be cancelled unless the breach complained of is a material breach which goes to the root of this Agreement;

12.2.2 any such termination shall be without prejudice to any other rights or remedies which the innocent party may have in law, including the right to damages.

12.2.3 Notwithstanding cancellation or termination of this Agreement for whatever reason, any provisions contemplated to continue after termination of this Agreement shall be deemed to have survived the termination of the Agreement, which provisions shall include, without limitation, any outstanding payment obligations, duties of confidentiality and all rights to Intellectual Property.

## 13. Force majeure

13.1 Neither of the Parties shall be liable for a failure to perform any of its obligations insofar as it proves:

13.1.1 that the failure was due to an impediment beyond its control;

13.1.2 that it could not reasonably be expected to have taken the impediment and its effects upon the party's ability to perform into account at the time of the conclusion of this Agreement; and

13.1.3 that it could not reasonably have avoided or overcome the impediment or at least its effects.

13.2 An impediment, as aforesaid, may result from events such as the following, this enumeration not being exhaustive:

13.2.1 war, whether declared or not, civil war, civil violence, riots and revolutions, acts of sabotage;

13.2.2 natural disasters such as violent storms, cyclones, earthquakes, tidal floods, destruction by lightning;

13.2.3 explosions, fires, destruction of machines, factories and of any kind of installation;

13.2.4 boycotts, strikes and lock-outs of all kinds, go-slows, occupation of factories and premises and work stoppages;

13.2.5 acts of authority, whether lawful or unlawful, apart from acts from which the party seeking relief has assumed the risk by virtue of any other provisions of this Agreement.

13.3 For the purposes of this clause "impediment" does not include lack of authorisations, licences, permits or approvals necessary for the performance of this Agreement and to be issued by the appropriate public authority.

13.4 Relief from liability for non-performance by reason of the provisions of this clause shall commence on the date upon which the party seeking relief gives Notice of the impediment relied upon and shall terminate on the date upon which such impediment ceases to exist;

provided that if such impediment continues for a period of more than sixty (60) days either of the Parties shall be entitled to terminate this Agreement.

## 14. Indemnity

14.1 You hereby unconditionally and irrevocably indemnify Fraxion and agree to hold Fraxion harmless against all loss, damages, claims, liability and/or costs, of whatsoever nature, howsoever and whensoever arising, suffered or incurred by Fraxion or instituted against Fraxion as a result of (without limitation) your use of the Software.

## 15. General

15.1 This document and any annexure(s) thereto contains the entire agreement between the parties in relation to the subject matter hereof.

15.2 Fraxion reserves the right to amend this Agreement from time to time. Any new version of the Agreement will be displayed on our website together with the date on which it will become effective,

which will never be less than 30 (thirty) days after the date on which it is first published. It is your obligation to visit our web site on a regular basis in order to determine whether any amendments have been made.

15.3 The amount due and payable by you to Fraxion in terms of this Agreement between us at any time, shall be determined and proved by a certificate signed by one of Fraxion's directors, whose appointment, qualification and authority need not be proved. Such certificate shall be deemed to be a liquid document for the purpose of obtaining summary judgment, provisional sentence and/or any other judgment against you,

15.4 No party shall have any claim or right of action arising from any undertaking, representation or warranty in relation to the subject matter hereof not included in this agreement.

15.5 No failure by a party to enforce any provision of this agreement shall constitute a waiver of such provision or affect in any way a party's right to require the performance of such provision at any time in the future, nor shall a waiver of a subsequent breach nullify the effectiveness of the provision itself.

15.6 Insofar as more than one contract is entered into in this agreement, each such contract shall be deemed to be divisible from the other(s) in all respects.

15.7 This Agreement shall be governed and construed in accordance with the laws of the Republic of South Africa and the Parties submit to the jurisdiction of the Western Cape High Court. The Parties agree that any costs awarded will be recoverable in accordance with the High Court tariff, determined on an attorney-and-own-client scale.

## **16. Arbitration**

16.1 The Parties shall first use reasonable endeavours to resolve any disputes that may arise under this Agreement through good faith negotiations. This entails one of the Parties inviting the other in writing to meet, either in person or by means of telephone or video conferencing facilities, and to attempt to resolve the dispute within 5 (five) Business Days from date of written invitation. In the event that such negotiations do not result in a mutually acceptable resolution within 5 (five) Business Days of the commencement thereof, the dispute shall be handled in accordance with clause 16.2.

16.2 Subject to clause 16.1, any dispute or difference arising out of or relating to this Agreement, its termination or cancellation shall be referred to arbitration and finally resolved in accordance with the

rules of the Arbitration Foundation of Southern Africa. Such arbitration shall be held in Cape Town, and conducted in the English language before one arbitrator appointed in accordance with the said rules. Any award will be final and not subject to appeal. This agreement to arbitrate shall be enforceable in, and judgement upon any award may be entered in any court of any country having appropriate jurisdiction. A dispute shall be deemed to have arisen when either Party notifies the other Party in writing to that effect. These provisions shall not prevent either Party from approaching any court or other judicial forum in any country having appropriate jurisdiction to obtain timely interim or other relief in cases of urgency.

## 17. POPIA

17.1 The Parties hereby undertake to comply with the provisions of POPIA in their dealings with personal information and acknowledge that they are familiar with and undertake to comply with the provisions of POPIA.

17.2 You acknowledge that any Personal information collected or received from You by Fraxion shall be processed in accordance with POPIA requirements.

17.3 The Parties acknowledge and agree that some Customer Data provided by You to Fraxion, or to which Fraxion may become privy pursuant to this Agreement, shall constitute Personal Information and where applicable, is the Intellectual Property belonging to You.

17.4 Where one Party (the "Responsible Party") supplies Personal Information to the other Party (the "Operator"), the Operator will:

17.5 ensure that such personal information is only used for purposes authorised by the Responsible Party and in terms of this agreement;

17.6 notify the Responsible Party of any request it receives from third parties for access to or changes to the Personal Information;

17.7 not transfer the Personal Information in any manner to any third party other than in accordance with the terms of this Agreement;

17.8 not send Personal Information outside South Africa without prior authorization from the Responsible Party other than as set out in this Agreement.



17.9 comply with all applicable laws, policies and procedures relating to the protection, storage, handling, privacy, processing and retention of Personal Information as well as the destruction of Personal Information.

17.10 take appropriate and reasonable technical and organisational security measures to prevent the loss of, damage to or unauthorised destruction of Personal Information, and the unlawful access to or processing of Personal Information. The measures taken must at all times be at least of a minimum standard required by all applicable laws and be of a standard no less than the standards which are in compliance with the best industry practice for the protection, control and use of data.

17.11 take steps to identify all reasonably foreseeable internal and external risks posed to data under its possession or control and establish and maintain appropriate safeguards against any risks identified. The receiving party shall regularly verify that the safeguards are effectively implemented, and keep a record of such verification. The safeguards shall be updated continually in response to new risks or deficiencies in previously implemented safeguards.

17.12 provide a level of security appropriate to the harm that might result from any unauthorised or unlawful processing or accidental loss, destruction or damage to the Personal Information and also to the nature of the Personal Information being protected. Any act or omission that compromises the security, confidentiality or integrity of Personal Information or the safeguards used to protect the security, confidentiality or integrity of Personal Information, or a receipt of or a complaint in respect of the security practices of the Operator or a breach or alleged breach of any of the undertakings in relation to POPIA imposed on the Operator by this agreement or of obligations imposed on the Operator in terms of POPIA, will be deemed to be a breach for purposes of this Agreement. In the event of breach or suspected breach, the Operator will notify the Responsible Party, within 7 (seven) days of becoming aware of the breach.

17.13 ensure, if required, the necessary audit procedures are in place to deal with the requirements of POPIA and this clause.

17.14 implement any other measures and procedures to ensure that the Operator's obligations in terms of this clause 17 and POPIA are met.

17.15 The Responsible Party warrants that it has obtained all necessary consents, where required, from its suppliers, employees or any other third parties when requesting their Personal Information.

17.16 The Operator warrants, represents and undertakes that it shall ensure that all its systems and operations which it uses to provide the Services including all systems on which Personal Information is processed as part of providing the Hosted Application(s) and Website, shall at all times be of a minimum standard required by all applicable laws and be of a standard no less than the standards which are in compliance with the best industry practice for the protection, control and use of data.

## 18. Notices and domicilia

18.1 Each of the Parties chooses domicilium citandi et executandi ("domicilium") for the purposes of the giving of any notice, the payment of any sum, the serving of any process and for any other purposes arising from this Agreement at their respective addresses set forth on the signed Purchase Order in terms of which the Software licence was purchased.

18.2 Each of the Parties shall be entitled from time to time, by written notice to the others to vary its domicilium to any other address within the Republic of South Africa which is not a post office box or poste restante.

18.3 Any notice given and any payment made by a Party to any of the others ("the addressee") which:

18.3.1 is delivered by hand during the normal business hours of the addressee at the addressee's domicilium for the time being shall be presumed, until the contrary is proved by the addressee, to have been received by the addressee at the time of delivery;

18.3.2 is posted by prepaid registered post from an address within the Republic of South Africa to the addressee at the addressee's domicilium for the time being shall be presumed, until the contrary is proved by the addressee, to have been received by the addressee on the 7TH (seventh) day after the date of posting.

18.4 Where, in terms of this Agreement any communication is required to be in writing, the term "writing" shall include communications by facsimile. Communications by facsimile shall, unless the contrary is proved by the addressee, be deemed to have been received by the addressee one hour after the time of transmission.

18.5 Notwithstanding the foregoing, any notice or communication actually received by the executive director, chief operating officer, or senior management of a Party or a natural person that is Party to this Agreement, shall be a valid notice or communication for the purposes of this Agreement

## 19. Assignment, cession and delegation

19.1 Fraxion shall be entitled to assign, cede, delegate or transfer any rights, obligations, share or interest acquired in terms of this Agreement, in whole or in part, to any third party.

19.2 You shall not be entitled to assign, cede, delegate or transfer any rights, obligations, share or interest acquired in terms of this Agreement, in whole or in part, to any third party without the prior written consent of Fraxion, which consent will not be unreasonably delayed or withheld.

## 20. Confidentiality

20.1 The Parties shall hold in confidence all Confidential Information received from each other and not divulge the Confidential Information to any person, including any of its employees, save for employees directly involved in the execution of this Agreement.

20.2 The Parties shall prevent disclosure of the Confidential Information, except as may be required by law.

20.3 Within one (1) month of the termination of this Agreement for whatever reason, the recipient of Confidential Information shall return same, or at the discretion of the owner thereof, destroy such Confidential Information, and shall not retail copies, samples or excerpts thereof.

20.4 It is recorded that the following information will, for the purposes of this Agreement, not be considered to be Confidential Information:

20.4.1 Information known to either of the Parties prior to the date that it was received from the other Party; or

20.4.2 Information known to the public or generally available to the public prior to the date that it was disclosed by either of the Parties to the other; or

20.4.3 Information which becomes known to the public or becomes generally available to the public subsequent to the date that it was disclosed by either of the Parties to the other, through no act or failure to act on the part of the recipient of such information.

20.4.4 For the purpose of this clause, the Party who makes the allegation carries the burden of proof thereof.

## Annexure A

### Fraxion maintenance and support agreement

#### 1. Introduction

1.1 Fraxion has developed and is currently licensing the use of the Software to you by way of a Licence Agreement; and

1.2 You wish to obtain the Services of Fraxion to support the Software so licensed and Fraxion agrees to provide such services to you at your Premises, on the terms set out in this Agreement; and

1.3 Whereas this Maintenance and Support Agreement forms part of the Licence Agreement. The terms defined in the Licence Agreement will also apply to this Maintenance and Support Agreement.

**Now therefore** the Parties are entering into this Agreement to record the terms and conditions of the Services as follows:

#### 2. Definitions

2.1 Unless the contrary is clearly indicated, the following words and/or phrases used in this Agreement shall have the following meaning:

2.2 "your Equipment" shall mean the computer hardware, operating system, supporting software and network infrastructure designated by you from time to time;

2.3 "Licence Agreement" / "Licence" shall mean the Licence Agreement entered into between you and Fraxion on the Commencement Date in terms of which Fraxion granted to you a non-transferable and non-exclusive right to use the Software and Software Documentation and to which this Agreement forms Annexure A;

2.4 "Premises" shall mean the venue where Fraxion will be installing the Software for use by you and rendering the Services to you situated as set out on the purchase order for the Services;

2.5 "Services" shall mean the services to be provided to you in terms of Clause 8 of this Agreement;

2.6 "Services Fee" means the fees payable by you to Fraxion for services rendered in terms of this Agreement and which are detailed in the Purchase Order in terms of which the Software licence was purchased.

2.7 "Severity Levels " shall mean:

2.7.1 Severity 1 - Critical Business Impact: The installed Software fails so that there is a complete loss of service or resources for which no workaround (including a manual workaround) exists and your work cannot reasonably continue;

2.7.2 Severity 2 - Serious Business Impact: The installed Software is causing significant or degraded loss of your service or resources. A major product flaw, or a minor product flaw without a workaround (including a manual workaround);

2.7.3 Severity 3 - Some Business Impact: The installed Software causes minor loss of your service or resources (in other words some users can work). A product flaw with a workaround (including a manual workaround);

2.7.4 Severity 4 – Minor Business Impact: Your work is not being impeded at this time, and most of the users can use the Software. Information is requested or reported, or an isolated problem has occurred;

### **3. Appointment**

3.1 You hereby appoint Fraxion as your exclusive service provider, with effect from the Commencement Date to render the Services as set out in this Agreement and Fraxion hereby accepts this appointment.

### **4. Commencement and duration**

4.1 This Agreement shall commence upon the Commencement Date and will continue in force for a minimum compulsory period of 1 (one) year and thereafter shall automatically be extended for further periods of 1 (one) year on the same terms and conditions set out herein, unless terminated earlier by you giving 30 (thirty) days written notice of termination, or in accordance with the provisions of clause 12 or in terms of any law;

4.2 For the avoidance of doubt, should you choose not to renew the Agreement you will receive no support or upgrades of any kind for the Software.

### **5. Payment**

5.1 In consideration of the Services rendered by Fraxion to you, you shall pay to Fraxion the applicable Service Fees detailed in the Purchase Order in terms of which the Software was purchased.

5.2 The Service Fee is exclusive of VAT and any other statutory levies, taxes and imposts as may be levied, which additional amounts, including disbursements shall, if applicable, be borne by you.

5.3 You shall pay to Fraxion all fees for the Services rendered within 30 (thirty) days following receipt of an original invoice by you, in full, without any right of set-off or deduction. All fees, plus VAT, shall be payable in South African Rand (ZAR) to Fraxion. The payment of the fees shall be made by direct transfer into the bank account of Fraxion, which bank details shall be stipulated on the invoice to you.

5.4 Any amount due and owing by you to Fraxion shall carry interest reckoned at the Prime Rate plus 4% (four percent) from the due date until payment thereof has been received by Fraxion in full. For the purposes of this clause, the Prime Rate shall mean the prime bank overdraft rate as charged by Standard Bank Limited to its corporate customers in respect of overdraft facilities, calculated and compounded monthly in arrear, as certified by any manager of such bank whose appointment and authority shall not be necessary to prove.

5.5 Fraxion reserves the right to increase its Service Fees. Fraxion will provide you with 30 (thirty) days advance written notification of any increase in its Service Fees. For the avoidance of any doubt, such increase shall be at Fraxion's sole and absolute discretion.

## **6. Rights and obligations of the parties**

6.1 Fraxion, shall, with effect from the completion of the installation of the Software and after the Commencement Date, render the Services in accordance with this Agreement.

6.2 You shall undertake to provide and maintain remote access to Fraxion to the live Software server on the Premises at all times, and you shall ensure that at all times, your staff working on the Fraxion system are suitably trained.

## **7. Services**

7.1 Fraxion shall provide you with:

7.1.1 telephone and remote support to an authorised representative, during normal working hours (08h30 to 17h00) on Business Days for issues listed under clause 7.1

7.1.2 upgrades or any bug fix releases of the Software as and when same are made generally available. For the avoidance of any doubt, this will only include the Software component, and any services with regards to installing the Software shall be charged for on a time and material basis by Fraxion;

7.1.3 on-site support with regards to Severity 1 and 2 issues, or remote support if applicable; and

7.1.4 the elimination of any system bugs or defects in the Software which adversely affects the use of the Software as described in the Project Charter;

7.2 Fraxion may at its sole and absolute discretion, provide you with services that are not expressly included in Clause 7.1. These services will be charged by Fraxion on a time and material basis. These services shall include but are not limited to:

7.2.1 on-site support for issues that are not Severity 1 and 2;

7.2.2 additional support services that may be needed by you due to the changes made to other peripheral software and hardware affecting the Software that was not affected by Fraxion. This includes upgrades or any changes to all software with which the Software integrates (including the operating system);

7.2.3 the removal of the Software from your premises to another premises designated by you;

7.2.4 data backup retrieval and restoration (rectification of lost or corrupted data arising for any reason other than as a result of Fraxion's own negligence);

7.2.5 on site remedial maintenance during normal working hours, in respect of business related problem calls or error in your setup, or in the case of Severity 3 and 4 issues;

7.2.6 organisational measures such as definition and configuration of parameters of specific business flows, which includes any organisational change affecting lines or approval limits;

7.2.7 inspection of and changes to the Software configuration in your environment, for example extensions of partitions and database configurations; and

7.2.8 system tuning after system changes and extensions, where such changes or extensions have been implemented by third parties.

7.2.9 support of any other licensed material other than the Software licensed to you, accessories, attachments, machines, peripheral equipment, systems or other devices not supplied by Fraxion;

7.2.10 support services of any changes, alterations, additions, modifications or variations, not performed by Fraxion, to the Software;

7.2.11 attendance to faults caused by using the Software outside design or other specifications or outside the provisions laid down in any Software Documentation supplied with the Software to you;

7.2.12 diagnosis and/or rectification of problems not directly associated with the Software; and

7.2.13 repairs or replacements necessitated by accidental damage, operator errors, abnormal operating conditions, the connection of unauthorised peripheral equipment, improper use, misuse, neglect or abuse of the Software, assistance on hardware usage or service calls necessitated by causes external to the Software such as failures in the hardware on which the Software is operational.

## **8. Procedure for upgrades**

8.1 At regular stages Fraxion will require you to upgrade their Software to the latest version of the Software, in order for Fraxion to continue to provide the Services.

8.2 Although there will not be any additional licence fee for any upgrades to the Software, there will be a services cost associated with the upgrade.

8.3 If a specific problem has been rectified in a new version of the Software, and you choose not to upgrade the Software and then require that specific problem fix, you will pay separately for such development.

8.4 Fraxion does not guarantee that they will continue indefinitely to provide support for old versions of the Software.

## **9. Procedure for requesting services**

9.1 You will, whenever you require Fraxion to perform the Services as set out in Clauses 7.1 and 7.2 of this Agreement, follow the procedure set out below:

9.1.1 you will inform Fraxion of any faults or problems in or in respect of the Software within 24 (twenty-four) hours of such fault or problem having been discovered and will, should on-site access be required,



provide Fraxion's personnel with reasonable access to your Equipment on which the Software is operating, upon arrival of the personnel of Fraxion at the Premises;

9.12 you will appoint a representative(s) who is/are authorised to request Services. You may replace your authorised representative(s) from time to time by Notice to Fraxion;

9.13 Fraxion shall not be required to provide Services unless requested to do so by your representative(s);

9.14 your authorised representative(s) shall furnish Fraxion with a Notice in requesting the Services of Fraxion;

9.15 you shall provide, at you own cost, such material and information as may be required by Fraxion to render the Services, which material shall include but not be limited to magnetic media, reference manuals, hardware, the requirement to remove any customer database offsite and the like; and

9.16 Fraxion's personnel will endeavour to resolve the problem immediately. Should Fraxion's personnel not be able to resolve the problem immediately, Fraxion shall give you an estimate of how long the problem may take to resolve. Fraxion shall keep you informed of the progress of problem resolution by means of Fraxion's then current standard progress report schedule.

## 10. Intellectual property

10.1 You acknowledge:

10.1.1 that existing and future Intellectual Property rights in and to the Software and Software Documentation inclusive of inventions, Know-How, Copyright and Confidential Information including source code shall at all times vest in Fraxion;

10.1.2 that any enhancements, modifications or improvements made by Fraxion to the Software will be owned by Fraxion;

10.1.3 that the Software was developed and designed by Fraxion and shall acknowledge this in all your dealings by including, inter alia, reference to Fraxion as the developer and the designer in all written documentation and/or verbal communications relating to the Software and Software Documentation;

10.1.4 that Fraxion is entitled to sell or transfer in whatsoever manner any and all of the Intellectual Property vested in Fraxion or any of its rights or obligations under this Agreement;

10.15 You shall not at any time in any way question and/or dispute the ownership of Fraxion of any such Intellectual Property and undertake not to infringe or prejudice any rights of Fraxion in and to the Software or Software Documentation.

10.16 All Intellectual Property developed by Fraxion during the course of this Agreement shall belong to Fraxion.

## **11. Limitation of liability**

11.1 Fraxion gives no warranties and makes no representations regarding the Software or Software Documentation and accordingly shall not be bound by any warranty, representation or other communication not specifically recorded herein. Fraxion provides the Software “as is” and “as available” and does not warrant or guarantee that the Software will at all times be free of errors or interruptions, be always available, fit for any purpose, not infringe any third party rights, be secure and reliable, or will conform to your delivery timeline requirements.

11.2 You shall be responsible for the consequences of the use of the Software and the Software Documentation. To the extent permitted by law, Fraxion shall not be liable for any indirect or consequential loss, damage, cost or expense of any kind whatever, whether arising under contract, delict or otherwise, including without limitation, for loss of data, loss of profits or of contracts, loss of operation time and loss of goodwill. To the extent that a competent court or tribunal finally determines, notwithstanding the limitation contained in this clause, that Fraxion is liable to you for any damages, Fraxion’s liability to you for any damages howsoever arising shall be limited to the amounts paid by you under this Agreement in consideration for the Software during the immediately preceding 12 (twelve) month period.

## **12. Breach and termination**

12.1 Should either party

12.1.1 Commit any breach of their warranties and/or representations and/or undertakings in terms of this Agreement and/or any other terms and/or conditions hereof, such breach not being due to force majeure, and fail to remedy such breach within a period of ten (10) days after receipt of written notice requiring it to do so; or

12.1.2 Commit an act of insolvency and/or be placed under liquidation or judicial management, whether provisionally or finally

12.2 then in all or any such events, the/any other party shall be entitled, without prejudice to any other claims which it may have, to prematurely terminate this agreement without prior notice other than the notice required in the case of clause 12.1 provided that:

12.2.1 this Agreement may not be cancelled unless the breach complained of is a material breach which goes to the root of this Agreement;

12.2.2 any such termination shall be without prejudice to any other rights or remedies which the innocent party may have in law, including the right to damages.

12.2.3 Notwithstanding cancellation or termination of this Agreement for whatever reason, any provisions contemplated to continue after termination of this Agreement shall be deemed to have survived the termination of the Agreement, which provisions shall include, without limitation, any outstanding payment obligations, duties of confidentiality and all rights to Intellectual Property.

12.3 This Agreement shall automatically terminate upon termination of the Licence Agreement.

### **13. Confidentiality**

13.1 The Parties shall hold in confidence all Confidential Information received from each other and not divulge the Confidential Information to any person, including any of its employees, save for employees directly involved with the execution of this Agreement.

13.2 The Parties shall prevent disclosure of the Confidential Information, except as may be required by law.

13.3 Within one (1) month after the termination of this Agreement, for whatever reason, the recipient of Confidential Information shall return same or at the discretion of the original owner thereof, destroy such Confidential Information, and shall not retain copies, samples or excerpts thereof.

13.4 It is recorded that the following information will, for the purpose of this Agreement, not be considered to be Confidential Information:

13.5 information known to either of the Parties prior to the date that it was received from the other Party; or

13.5.1 information known to the public or generally available to the public prior to the date that it was disclosed by either of the Parties to the other; or

13.5.2 information which becomes known to the public or becomes generally available to the public subsequent to the date that it was disclosed by either of the Parties to the other, through no act or failure to act on the part of the recipient of such Information; or

13.5.3 information which either of the Parties, in writing, authorises the other to disclose.

13.6 For the purpose of this clause, the Party who makes the allegation carries the burden of proof thereof.

#### **14. Publicity**

Fraxion shall be entitled to publish any announcement of this transaction through any of the media and shall be entitled, from time to time, to publish notification of the existence of this Agreement in any list indicating the identity of customers of Fraxion utilising the Software.

#### **15. Force majeure**

15.1 Neither of the Parties shall be liable for a failure to perform any of its obligations insofar as it proves:

15.1.1 that the failure was due to an impediment beyond its control;

15.1.2 that it could not reasonably be expected to have taken the impediment and its effects upon the party's ability to perform into account at the time of the conclusion of this Agreement; and

15.1.3 that it could not reasonably have avoided or overcome the impediment or at least its effects.

15.2 An impediment, as aforesaid, may result from events such as the following, this enumeration not being exhaustive:

15.2.1 war, whether declared or not, civil war, civil violence, riots and revolutions, acts of sabotage;

15.2.2 natural disasters such as violent storms, cyclones, earthquakes, tidal floods, destruction by lightning;

15.2.3 explosions, fires, destruction of machines, factories and of any kind of installation;

15.2.4 boycotts, strikes and lock-outs of all kinds, go-slows, occupation of factories and premises and work stoppages;

15.2.5 acts of authority, whether lawful or unlawful, apart from acts from which the party seeking relief has assumed the risk by virtue of any other provisions of this Agreement.

15.3 For the purposes of this clause "impediment" does not include lack of authorisations, licences, permits or approvals necessary for the performance of this Agreement and to be issued by the appropriate public authority.

15.4 Relief from liability for non-performance by reason of the provisions of this clause shall commence on the date upon which the party seeking relief gives Notice of the impediment relied upon and shall terminate on the date upon which such impediment ceases to exist; provided that if such impediment continues for a period of more than sixty (60) days either of the Parties shall be entitled to terminate this Agreement.

## **16. Assignment, cession and delegation**

16.1 Fraxion shall be entitled to assign, cede, delegate or transfer any rights, obligations, share or interest acquired in terms of this Agreement, in whole or in part, to any third party.

16.2 You shall not be entitled to assign, cede, delegate or transfer any rights, obligations, share or interest acquired in terms of this Agreement, in whole or in part, to any third party without the prior written consent of Fraxion, which consent will not be unreasonably delayed or withheld.

## **17. Arbitration**

17.1 The Parties shall first use reasonable endeavours to resolve any disputes that may arise under this Agreement through good faith negotiations. This entails one of the Parties inviting the other in writing to meet, either in person or by means of telephone or video conferencing facilities, and to attempt to resolve the dispute within 5 (five) Business Days from date of written invitation. In the event that such negotiations do not result in a mutually acceptable resolution within 5 (five) Business Days of the commencement thereof, the dispute shall be handled in accordance with clause 17.2.

17.2 Subject to clause 17.1, any dispute or difference arising out of or relating to this Agreement, its termination or cancellation shall be referred to arbitration and finally resolved in accordance with the rules of the Arbitration Foundation of Southern Africa. Such arbitration shall be held in Cape Town, and conducted in the English language before one arbitrator appointed in accordance with the said rules. Any award will be final and not subject to appeal. This agreement to arbitrate shall be enforceable in, and judgement upon any award may be entered in any court of any country having appropriate jurisdiction. A dispute shall be deemed to have arisen when either Party notifies the other Party in writing to that effect. These provisions shall not prevent either Party from approaching any court or other judicial forum in any country having appropriate jurisdiction to obtain timely interim or other relief in cases of urgency.

## **18. Notices and domicilia**

18.1 Each of the Parties chooses domicilium citandi et executandi (“domicilium”) for the purposes of the giving of any notice, the payment of any sum, the serving of any process and for any other purposes arising from this Agreement at their respective addresses set forth on the signed Purchase Order in terms of which the Software licence was purchased.

18.2 Each of the Parties shall be entitled from time to time, by written notice to the others to vary its domicilium to any other address within the Republic of South Africa which is not a post office box or poste restante.

18.3 Any notice given and any payment made by a Party to any of the others (“the addressee”) which:

18.3.1 is delivered by hand during the normal business hours of the addressee at the addressee’s domicilium for the time being shall be presumed, until the contrary is proved by the addressee, to have been received by the addressee at the time of delivery;

18.3.2 is posted by prepaid registered post from an address within the Republic of South Africa to the addressee at the addressee’s domicilium for the time being shall be presumed, until the contrary is proved by the addressee, to have been received by the addressee on the 7TH (seventh) day after the date of posting.

18.4 Where, in terms of this Agreement any communication is required to be in writing, the term “writing” shall include communications by facsimile. Communications by facsimile shall, unless the contrary is proved by the addressee, be deemed to have been received by the addressee one hour after the time of transmission.

18.5 Notwithstanding the foregoing, any notice or communication actually received by the executive director, chief operating officer, or senior management of a Party or a natural person that is Party to this Agreement, shall be a valid notice or communication for the purposes of this Agreement

## **19. General**

19.1 This Agreement and any annexures hereto contains the entire agreement between the Parties in relation to the subject matter hereof.

19.2 No party shall have any claim or right of action arising from any undertaking, representation or warranty in relation to the subject matter hereof not included in this Agreement.

19.3 Fraxion reserves the right to amend this Agreement from time to time. Any new version of the Agreement will be displayed on our website together with the date on which it will become effective, which will never be less than 30 (thirty) days after the date on which it is first published. It is your obligation to visit our web site on a regular basis in order to determine whether any amendments have been made.

19.4 The amount due and payable by you to Fraxion in terms of this Agreement between us at any time, shall be determined and proved by a certificate signed by one of Fraxion’s directors, whose appointment, qualification and authority need not be proved. Such certificate shall be deemed to be a liquid document for the purpose of obtaining summary judgment, provisional sentence and/or any other judgment against you,

19.5 No failure by a party to enforce any provision of this agreement shall constitute a waiver of such provision at any time in the future, nor shall a waiver of a subsequent breach of the effectiveness of the provision itself.

19.6 Insofar as more than one contract is entered into in this Agreement, each such contract shall be deemed to be divisible from the other(s) in all respects.

19.7 This Agreement shall be governed and construed in accordance with the laws of the Republic of South Africa and the Parties submit to the jurisdiction of the Western Cape High Court