


Transport Agreement

- (1) McCain Foods (G.B.) Limited
- (2) NewCold Transport Limited

Dated 27 September 2021

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This Agreement is made on

2021

Between:

- (1) **McCain Foods (G.B.) Limited**, a company registered under the laws of England and Wales (Company registration: 00733218) whose registered office is at Havers Hill, Eastfield, Scarborough, N Yorks, YO11 3BS (the "**Customer**"); and
- (2) **NewCold Transport Limited**, a company registered under the laws of England and Wales (Company registration: 09369761) whose registered office is at Headways Newmarket Lane, Stanley, Wakefield, West Yorkshire, United Kingdom, WF3 4FE ("**NewCold**").

Background:

- (A) NewCold Corby Limited (an Associate of NewCold) has agreed to provide warehousing services to the Customer at the Warehouse in respect of goods owned by the Customer on the terms and conditions set out in the Operational Services Agreement.
- (B) NewCold Limited (also an Associate of NewCold) is party to an operational services agreement under which it provides warehousing services to the Customer at the Wakefield Warehouse.
- (C) NewCold has agreed to provide transport services to the Customer in respect of Products inbound from their factories, outbound from the Warehouse, and between the Warehouse and the Wakefield Warehouse on the terms of this Agreement. The Customer has appointed NewCold to provide those transport services on a non-exclusive basis.

It is agreed as follows:

1. **Definitions and interpretation**

- 1.1 In this Agreement, unless the context otherwise requires, the following definitions shall apply:

"**Affected Party**" has the meaning given to it in clause 20.2;

"**Agreement**" means this agreement including its Schedules and appendices;

"**Applicable Legislation**" means any applicable legislation including any statute, statutory instrument treaty, regulation, directive or by-law relating to the Services in force from time to time in the Territory or such equivalent laws or civil codes together with all codes of practice having force of law;

"**Associate**" means any person that, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with a party to this Agreement. A person will be deemed to control another person for the purposes of this definition, if the first person possesses, directly or indirectly, the power to appoint a majority of the directors of the second person, or to otherwise direct or cause the direction of the management or policies of the second person, whether through the ownership of voting securities, by contract or otherwise;

"**Best Industry Standards**" means standards, practices, methods and procedures in accordance with the degree of skill, care, efficiency and timeliness as would reasonably be expected from a well-managed cold-store warehousing and logistics provider, performing services substantially similar to the Services in the Territory;

"**BRC Global Standard for Storage and Distribution**" means the BRC Global Standard for Storage and Distribution in force from time to time (including any replacement or successor standard);

"**Business Day**" means any day other than a Saturday, Sunday, or public holiday in the Territory;

"Change Request" has the meaning given to it in clause 8;

"Charges" means each of the charges for the Services as set out in Schedule 2;

"Charges Review Date" has the meaning given to it in Schedule 2 Part 4;

"Confidential Information" has the meaning given to it in clause 22.1;

"Consumer Prices Index" means the Consumer Prices Index as published by the United Kingdom's Office for National Statistics (or any index that replaces it);

"Customer's Factories" means the Customer's factories in Scarborough, Whittlesey, Wombourne, Grantham and Hull;

"Customer Group" means the Customer and any company which it controls, is controlled by or is in common control with, where 'control' means directly or indirectly owning or controlling the voting rights attached to not less than 50% of the issued ordinary share capital, or controlling directly or indirectly the appointment of a majority of the board of management, and references to a member of the Customer Group shall be construed accordingly;

"Customer IPR" means patents, trademarks, design rights, copyright (including rights in computer software and databases), know-how and moral rights and other intellectual property rights of any member of the Customer Group, in each case whether registered or unregistered and including applications for, and the right to apply for, the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing which may subsist anywhere in the world;

"Delivered out of NewCold's Custody" has the meaning given to it in clause 12.2;

"Discloser" has the meaning given to it in clause 22.1;

"Dispute" means any dispute or difference between the parties arising out of or in connection with this Agreement;

"Dispute Resolution Procedure" means the procedure for resolving disputes set out in clause 21;

"Forecast" has the meaning given to it in Clause 6.1;

"Force Majeure Event" means any event or circumstance outside the control of the Affected Party which wholly or partly prevents or delays the performance of any material obligation arising under this Agreement, including without limitation:

- (a) fire, flood, earthquake, lightning strike, windstorm, epidemic, pandemic or other natural disaster;
- (b) war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, breaking off of diplomatic relations or similar actions;
- (c) terrorist attack, civil war, civil commotion or riots;
- (d) any organized labour dispute, including but not limited to strikes, industrial action or lockouts affecting the cold storage industry or the Warehouse (save for strikes solely affecting NewCold's or any of its Associates' own workforce);
- (e) significant interruption of road transport (for example, due to material adverse weather conditions) or shortage of road fuel on a national or regional basis (for example, due to oil refinery blockade or fuel depot blockade);

- (f) explosion or accidental damage; and
- (g) interruption or failure of a utility service, including but not limited to electric power, gas or water,

provided always that such a circumstance outside the control of the Affected Party shall not include any duty to comply with Applicable Laws, any cause which is attributable to the affected party's wilful act or negligence, or any cause which merely increases its cost of performing its obligations;

- (h) **"Initial KPIs"** means each of the key performance indicators applicable to the Services during the Initial Period, as set out in

Schedule 3 Part 2;

"Fuel Price Index" means the road fuel price per litre (excluding VAT) as published by the Department for Business, Energy and Industrial Strategy on a weekly basis (or any index that replaces it);

"Initial Period" means the period of 6 months after the Services Commencement Date;

"Initial Term" has the meaning set out in clause 3.1;

"Insolvency Event" means, in respect of a party to this Agreement, any of the following events:

- (a) that party passing a resolution for its winding up, or a court of competent jurisdiction making an order for it to be wound up or dissolved, or that party being otherwise dissolved;
- (b) the appointment of an administrator of, or the making of an administration order in relation to, that party, or the appointment of a receiver or administrative receiver of, or the appointment of a liquidator (both provisional and following a winding up), or other similar officer appointed in respect of itself or an encumbrancer taking possession of or selling, the whole or any part of that party's undertaking, assets, rights or revenue;
- (c) that party entering into an arrangement, compromise or composition in satisfaction of its debts with its creditors or any class of them, under Part 26 of the Companies Act 2006 or Part I of the Insolvency Act 1986 or taking steps to obtain a moratorium, or making an application to a court of competent jurisdiction for protection from its creditors;
- (d) that party suspends or ceases to carry on all or a material part of its business;
- (e) a party is insolvent or unable (or admits its inability) to pay its debts as they fall due or stops or suspends payment of any of its debts;
- (f) subject always to a de minimis threshold of £50,000, any expropriation, attachment, sequestration, distress, execution, enforcement of security or other legal process is levied, enforced or sued out on or against, or affects, any of a party's assets and is not discharged or stayed within 21 days; or any event similar to any of the above events occurring in respect of that party in any other jurisdiction, provided that any event that takes place as part of a solvent reconstruction, amalgamation, merger, or consolidation, on terms approved in writing by the other party beforehand and in compliance with those terms is excluded from this definition;

"Losses" means all losses, claims, demands, actions, proceedings, damages, compensation awards, penalties, fines, interest and other payments (including without limitation those made under any settlement arrangements), charges, costs, expenses and other liabilities of any kind,

including reasonable attorney's legal and other professional fees together with VAT thereon and "Loss" shall be construed accordingly;

"Minimum Performance Targets" means the Initial KPIs and/or the Standard KPIs;

"Non-Affected Party" has the meaning given to it in clause 20.2;

"ODOT Figure" means the percentage figure for orders delivered on time as set out in Schedule 3 Part 1;

"Operational Services Agreement" means the operational services agreement between the parties dated on or around the same date as this Agreement for the provision by NewCold or one of its Associates of warehousing and associated services for the Products to the Customer at the Warehouse;

"Operating Specification" means the specification set out in Schedule 2 Part 2 and Part 3 of the Operational Services Agreement setting out the procedures and standards to be adhered to by NewCold Corby Limited in its performance of the warehousing services;

"Pallet" means a pallet with the maximum specifications set out in the Operating Specification in the Operational Services Agreement;

"Products" means frozen food products that have been stored at the Warehouse on behalf of the Customer;

"Proposed Change" has the meaning given to it in clause 8.2;

"Recipient" has the meaning given to it in clause 22.1;

"Relief Event" means a breach by the Customer (or by any of the Customer's Representatives, suppliers or contractors) of its obligations under this Agreement which prevents, hinders or delays NewCold from performing the Services in accordance with the terms of this Agreement and which, as a result, causes a Service Failure;

"Representatives" means the employees, consultants, agents, contractors, subcontractors and other representatives from time to time of the party concerned and the employees, staff, other workers, agents and consultants who are engaged by a party or by any of the foregoing in the supply or receipt of the Services;

"Service Failure" a failure by NewCold to supply the Services in accordance with the requirements of this Agreement save for any such failure arising as a result of a Force Majeure Event or a Relief Event;

"Services" means the transport services to be provided by or on behalf of NewCold as set out in Schedule 1;

"Services Commencement Date" means the date on which NewCold Corby Limited first accepts Pallets at the Warehouse;

"Signature Date" means the date of signature of this Agreement;

"Standard KPIs" means each of the key performance indicators applicable to NewCold's supply of the Services from the end of the Initial Period, as set out in Schedule 3 Part 1;

"Term" means the Initial Term and any continuation of the term of this Agreement pursuant to clause 3;

"Territory" means England, Wales and Scotland;

"VAT" means value added tax chargeable under the Value Added Tax Act 1994 and any other tax based on sales of goods or services such as sales taxes of a similar nature;

"Wakefield Warehouse" means the warehouse in Wakefield operated by NewCold or one of its Associates;

"Warehouse" means the warehouse to be built at Corby and to be operated by NewCold or one of its Associates; and

"Year" means the period of 12 months from the Services Commencement Date, and each subsequent 12 month period from an anniversary of the Services Commencement Date.

2. Appointment of NewCold

- 2.1 The Customer hereby appoints NewCold, and NewCold hereby accepts appointment, as an independent contractor to provide the Services to the Customer on a non-exclusive basis with effect from the Services Commencement Date, subject to the terms and conditions of this Agreement.

3. Term

- 3.1 This Agreement shall come into force on the Signature Date and shall (unless terminated at an earlier date in accordance with its terms) continue in force for an initial term of 2 (Two) years from the Services Commencement Date (the **"Initial Term"**).
- 3.2 Either party shall be entitled to terminate this Agreement by providing not less than 3 months' written notice to the other such notice to expire at any time after the expiry of the Initial Term.

4. Services to be provided by NewCold

- 4.1 NewCold shall provide the Services to the Customer with effect from the Services Commencement Date in accordance with the terms of the Agreement and the Standard KPIs save that, during the Initial Period, NewCold shall provide the Services to the Customer in accordance with the Initial KPIs instead of the Standard KPIs.
- 4.2 NewCold shall carry out the Services in accordance with Best Industry Standards and the BRC Global Standard for Storage and Distribution.
- 4.3 NewCold shall observe all health, safety and security rules and procedures applicable at the Warehouse or required under Applicable Legislation or this Agreement, and shall procure that its Representatives engaged in the provision of the Services do the same.
- 4.4 NewCold shall deliver the Products in accordance with the Daily Delivery Profile in Part 2 of Schedule 1.

5. Continuous Improvement

- 5.1 NewCold shall continuously explore and propose to the Customer new technology, management and operational developments, improvements and trends which may improve either the standard of performance of this Agreement and/ or the quality, effectiveness or cost efficiency of the Services.

6. Forecasts

- 6.1 Within each Initial Forecast, Annual Forecast and Rolling Forecast provided by the Customer to NewCold pursuant to Clause 8 of the Operational Services Agreement (those terms defined therein), the Customer shall identify anticipated inbound volumes by factory and outbound volumes by warehouse for the Services to be performed by NewCold under this Agreement.

- 6.2 The Customer shall provide NewCold with a weekly forecast of anticipated outbound volumes on the Friday of the preceding week (the "Forecast") with an accuracy of + or – 20%.
- 6.3 The Customer shall provide NewCold, at the earliest convenience, with the outbound volumes, communicated to them by the Customer's customers (e.g. pre advice from Tesco).
- 6.4 NewCold shall perform the Services for the volumes identified in the Forecast and shall use reasonable endeavours to provide the Services for volumes in excess of the Forecast.

7. Payment and taxation

- 7.1 In consideration of the provision by NewCold of the Services, the Customer shall pay to NewCold the Charges. The Charges shall be payable in accordance with the terms of this clause 7. Invoices submitted by NewCold shall contain the information set out in Schedule 2 Part 5.
- 7.2 NewCold shall present to the Customer, within 1 week of the end of each week, an invoice for the Charges incurred in the preceding week together with details (in a form as reasonably specified by the Customer from time to time) of all the Products delivered during the preceding week. The detailed calculation of Charges based on the activities provided in a given week and information necessary for any service credit calculation shall be attached to the invoice.
- 7.3 The Customer shall pay NewCold the Charges and any other payments due to NewCold within 60 days from the date of NewCold's valid invoice.
- 7.4 If there is a bona fide disagreement regarding any invoice, the Customer shall notify NewCold in writing within 10 Business Days of receipt of such invoice and the Customer shall not be liable for and shall be under no obligation to pay the amount which is disputed until the resolution of the disagreement. NewCold shall cancel the original invoice and issue separate invoices for any undisputed amount and for the disputed amount. Provided NewCold has provided the Customer with a revised undisputed invoice within 5 Business Days of being informed of a disputed amount, the Customer shall make payment of the revised undisputed invoice on the original due date and otherwise within 60 days from the date of NewCold's revised valid invoice.
- 7.5 The Charges shall be reviewed in accordance with Schedule 2 Part 4.
- 7.6 The Charges and any other payments due to NewCold are to be in Pounds Sterling and exclusive of VAT or any other applicable sales tax or duty payable upon, or in respect of, such sums, and VAT or other applicable sales tax or duty payable shall be added if appropriate at the rate prevailing at the relevant tax point, or paid in addition of the sum due.

8. Service Change Procedure

- 8.1 Subject to Schedule 2 Part 4 (Charges Review Principles) and clause 6.1, this Agreement may only be varied from time to time with the written agreement of each Party. Any variations, supplements or amendments to this Agreement shall be invalid unless made in writing.
- 8.2 If either Party wishes to make any changes to the Services or any part thereof (a "**Proposed Change**"), it shall notify the other Party in writing of the same, including within such notice reasonable details in relation to the nature of, and the reasons for wishing to make, such Proposed Change ("**Change Request**"). Promptly following receipt of the Change Request by the other Party, the Parties shall enter into negotiations with a view to agreeing (acting reasonably and in good faith) whether such Proposed Change shall be implemented and the terms upon which such Proposed Change shall be implemented (including any amendment required to this Agreement).
- 8.3 NewCold may, from time to time and without notice, change the Services in order to comply with any applicable safety or statutory requirements, provided that such changes do not materially affect the nature or scope of the Services, or the Charges.

9. Warranties

9.1 NewCold warrants to the Customer that:

- (a) this Agreement constitutes valid and binding obligations on NewCold and that NewCold has full power and authority to enter into and perform its obligations under this Agreement and has taken all necessary corporate and other actions to approve and authorise the transactions contemplated by this Agreement and neither the entering into nor the performance by it of its obligations under this Agreement will constitute or result in any breach of any contractual or legal restriction binding on itself or its assets or undertakings;
- (b) it has and shall have throughout the Term reasonable skill, experience and knowledge to perform the Services in accordance with the terms of this Agreement;
- (c) it has obtained BRC Global Standard for Storage and Distribution certification for the storage and distribution services it provides and shall comply with, and maintain, such certification requirements during the Term;
- (d) it shall perform the Services in accordance with all Applicable Legislation and in compliance with all licences, permits and authorisations required under such Applicable Legislation;
- (e) it shall ensure that the Products are kept away from any goods and products of third parties which may damage or contaminate the Products and shall transport the Products in such a way to ensure that they are clearly identifiable as the Customer's property;
- (f) subject to clause 20, if there is a Service Failure, or it is reasonably foreseeable that there may be one, it shall as soon as possible notify the Customer of the nature of the Service Failure and the action that it proposes to take to minimise its adverse effects on the Customer (including to minimise any Losses or adverse publicity). Such notification shall be in writing or, if given orally, shall be confirmed in writing as soon as reasonably practicable;
- (g) it shall minimise the impact of any Service Failure and resume normal supply of the Services as soon as possible. NewCold may not charge for any work carried out by it in connection with remedying a Service Failure or for Services which are not supplied properly because of a Service Failure save to the extent that the Service Failure arises from a breach of this Agreement by the Customer; and
- (h) provision and receipt of the Services will not infringe the rights of any third party (including in respect of any third party intellectual property rights).

9.2 The Customer warrants to NewCold that:

- (a) this Agreement constitutes valid and binding obligations on the Customer and that the Customer has full power and authority to enter into and perform its obligations under this Agreement;
- (b) all Products will only consist of frozen food products that have been manufactured, packaged and transported in accordance with all relevant Applicable Legislation;
- (c) save as expressly set out in this Agreement including the Operating Specification, there are no special requirements for the distribution of the Products and accordingly NewCold shall have no liability in the event of any deterioration, loss or damage to any Products arising from any such requirement not so set out in this Agreement including the Operating Specification;

- (d) it will give NewCold written details of the manner in which the Products are to be handled, which will be consistent with the Operating Specification.
- 9.3 NewCold shall notify the Customer in advance if NewCold anticipates that it will incur additional costs and expenses as a result of the Customer's or its Representatives' failure to comply with its obligations under this Agreement, or errors or omissions in respect of the Customer's Confidential Information. Subject to the prior agreement of the Customer (acting reasonably), all additional evidenced costs and expenses reasonably incurred by NewCold under this clause 9.3 shall be passed through to the Customer and paid promptly by the Customer provided always that NewCold use all reasonable endeavours to mitigate any additional costs.
- 9.4 If at any time during the Term NewCold ceases to hold BRC Global Standard for Storage and Distribution certification in respect of the Services, NewCold shall promptly notify the Customer in writing.
- 10. Personnel**
- 10.1 NewCold shall:
- (a) engage all personnel necessary to carry out the Services during the term of this Agreement;
 - (b) ensure that a sufficient number of the personnel are available to provide the Services in accordance with this Agreement;
 - (c) be responsible for the payment of wages, salaries, training costs, contributions, taxes and any other remuneration, compensation, taxes, benefits or other amounts due to or in respect of NewCold's Representatives; and
 - (d) ensure (and warrants) that all personnel engaged in the performance of the Services shall be appropriately skilled, experienced, trained and qualified for the roles they perform.
- 10.2 If this Agreement is terminated, or is modified by the Customer in accordance with clause 8 (Service Change Procedure), the Customer shall unless agreed otherwise in writing by NewCold indemnify, defend and hold harmless NewCold and its Associates against all Losses which NewCold and its Associates incur in relation to any claims for redundancy made by NewCold's employees or Representatives arising out of such termination or modification provided that such claims are notified by NewCold to the Customer within 3 months of NewCold being notified of such a claim from an Employment Tribunal or other court, as applicable. NewCold shall use all reasonable endeavours to ensure that any such redundancies are carried out fairly within the meaning of section 98 of the Employment Rights Act 1996 and NewCold shall take all reasonable steps to mitigate such Losses including, without limitation, following the reasonable and lawful instructions of the Customer in connection with the management of such claims.
- 10.3 The Customer and NewCold agree that the terms and conditions in Schedule 4 shall apply in relation to any employees of the Customer and NewCold and both parties shall comply with the provisions of Schedule 4.
- 11. Customer IPR**
- 11.1 NewCold shall not (and shall procure that none of its Representatives), without the prior written consent of the Customer, utilise any Customer IPR for its own advertising purposes or apply or display any Customer IPR at the Warehouse or on any plant, vehicles, premises or equipment. If such consent is given by the Customer, the Customer IPR in question shall only be used for the specific purpose set out by the Customer in its consent.
- 11.2 NewCold acknowledges that the Customer IPR is owned by members of the Customer Group and that NewCold has no and does not by virtue of this Agreement obtain any, proprietary rights in or to the Customer IPR and NewCold undertakes that it will make no claim to any such rights.

- 11.3 NewCold shall not (and shall procure that none of its Representatives), without the prior written consent of the Customer, in any way alter the packaging or labelling of Products or alter, remove or tamper with any trade mark on any Products or affix any other trade mark or logo on any Products or any labels on, or on the packaging of, any Products.

12. **Delivery**

- 12.1 Risk of loss of Products transported by NewCold from the Warehouse shall remain with NewCold until the Products are Delivered out of NewCold's Custody (as such term is defined in clause 12.2). NewCold shall be liable for the loss of or damage to the Products due to its negligence, wilful default or breach of this Agreement until those Products are Delivered out of NewCold's Custody except to the extent the loss or damage has been caused by the Customer or its Representative.
- 12.2 Products are deemed "**Delivered out of NewCold's Custody**" when they have been delivered at the delivery address and the relevant paperwork accompanying such Products has been signed by the receiver.

13. **Indemnity**

- 13.1 The Customer shall indemnify NewCold against any third-party claim arising in connection with the Products (including in relation to any recall of Products) save to the extent such third party claim arises from any negligence or breach of this Agreement or the Operational Services Agreement by NewCold or its Associates or Representatives.
- 13.2 Subject to clause 15.1, 15.2 and 15.4, NewCold shall indemnify the Customer against all Losses incurred or suffered by the Customer as a result of:
- (a) any breach of this Agreement and/or negligence of NewCold or its Representatives which causes damage to persons or property (other than the Products); and
 - (b) loss or damage to Products for which NewCold is liable under this Agreement,
- provided always that the Customer shall use reasonable endeavours to mitigate any Losses which it may incur or suffer.

14. **Audits**

- 14.1 NewCold shall ensure that proper records are kept relating to the provision of the Services and the Charges and that all such records are kept for a minimum period of 6 years from (as the case may be) such Products being Delivered Out of NewCold's Custody or such Charges being invoiced. Subject to clause 14.4 NewCold shall make such documentation available for examination and copying by the Customer to the extent the same relate to the Services and its Representatives at any time during such period on reasonable notice save that, where such documentation relates to any third party to whom NewCold owes a duty of confidentiality, NewCold shall be entitled to make it available to the Customer on the basis that any information relating to the third party is redacted. NewCold shall maintain records relating to the Customer's Products in the format specified in the Operating Specification.
- 14.2 If an audit identifies that the Customer has overpaid any Charges, NewCold shall pay to the Customer the amount overpaid within 20 Business Days or if it prefers the Customer may deduct the relevant amount from sums payable to NewCold.
- 14.3 If an audit identifies that the Customer has underpaid any Charges, the Customer shall pay to NewCold the amount of under paid Charges less the cost of the audit incurred by the Customer if the underpayment was due to an error by NewCold in relation to its invoicing) within 20 Business Days.

- 14.4 Nothing in this clause 14 shall give the Customer access to any records of NewCold to the extent that they concern third party goods or products stored at the Warehouse, or any other Confidential Information of NewCold or any third party.

15. Liability

- 15.1 Nothing in this Agreement shall be deemed to limit or exclude the liability of a party (the "Defaulting Party"):

- (a) for death or personal injury caused by the Defaulting Party's negligence or the negligence of the Defaulting Party's Representatives;
- (b) for fraud or fraudulent misrepresentation of the Defaulting Party or its Representatives;
- (c) for any other type of liability which cannot be validly limited or excluded at law;
- (d) in respect of an obligation in this Agreement to indemnify a party or any other person; or
- (e) for any breach by either party of clauses 22, 25 or 33; or
- (f) for wilful abandonment of this Agreement by either party.

- 15.2 Subject to clause 15.1, neither party shall be liable, whether in contract, tort (including negligence), breach of statutory duty or otherwise in connection with or arising from this Agreement for any:

- (a) loss of profits, revenues or business opportunities;
- (b) depletion of goodwill or loss of reputation;
- (c) loss or damage in connection with claims against the other party by a third party;
- (d) loss of actual or anticipated savings; or
- (e) any indirect or consequential loss.

If for any reason all or part of this clause 15.2 is or becomes invalid or unenforceable, either party's liability for heads of loss and damage referred to in this clause 15.2 shall not exceed £200,000 in the aggregate.

- 15.3 NewCold shall have no liability:

- (a) for any loss of or damage to Products for which it would otherwise have been liable unless it is advised in writing of such loss or damage by the Customer within 30 days of the date on which the Customer was aware of that loss or damage, or such longer period as is reasonable in the circumstances, where the customer was not in fact aware of that loss or damage; or
- (b) for any shortfall of Products contained within sealed containers or packaging.

- 15.4 Subject to clause 15.1, NewCold's total aggregate liability, whether in contract, tort (including negligence), breach of statutory duty or otherwise in connection with or arising from this Agreement shall be limited:

- (a) for loss or damage to Products, to the manufacturing cost of such Products (including without limitation any associated transportation costs applicable to those Products), as determined by an independent auditor approved by NewCold (acting reasonably); and

- (b) for failure to comply with the Minimum Performance Targets, to the service credits calculated in accordance with Schedule 3 Part 3; and
- (c) in all circumstances in aggregate to the lower of:
 - (i) the sum of two million pounds sterling (£2,000,000); or
 - (ii) 100% of the Charges paid or payable in aggregate by the Customer under or in connection with this Agreement,

save that during the first Year of this Agreement, the cap in clause 16.4(c)(i) shall be an amount equivalent to the Charges payable for the provision of the Services for the outbound volumes specified in the Initial Forecast.

- 15.5 Nothing in clause 15.2 shall preclude the Customer from claiming the losses referred to in clause 15.6 in respect of the period from the date of termination of this Agreement to the date falling five years after the Services Commencement Date, up to the caps stated in clause 15.4 and subject always to the Customer using reasonable endeavours to mitigate its losses.
- 15.6 The recoverable losses referred to in clause 15.5 are the additional charges (that is, the charges in excess of the charges that would have been payable to NewCold) paid by the Customer to a replacement provider engaged to provide transport services equivalent to the Services (including, without limitation, as to KPIs, scope of the services, volumes, limitations on liability and contract term), where the Customer terminates this Agreement in accordance with its rights under clause 23.
- 15.7 The Customer acknowledges that NewCold's Charges are predicated on the exclusions and limitations of liability set out in this clause 15 and the levels of insurance cover specified in clause 16.
- 15.8 Subject to clause 15.1, the Customer's total aggregate liability, whether in contract, tort (including negligence), breach of statutory duty or otherwise in connection with or arising from this Agreement shall be limited to 100% of the Charges paid or payable in aggregate during the 12-months immediately prior to the initial breach giving rise to such claim.
- 15.9 No provision of this Agreement shall be construed to provide any party an indemnity for, or otherwise allow recovery of, any costs, damages, or other amounts to which that party is entitled and for which that party has been compensated or otherwise reimbursed (whether by NewCold, NewCold Corby Limited or any other Associate of NewCold) under this Agreement, under the Operational Services Agreement, under any other agreement or action at law or equity.
- 16. **Insurance**
- 16.1 NewCold shall take out and maintain throughout the Term adequate and proper insurance with reputable insurers (which complies with all applicable statutory requirements) in respect of:
 - (a) employer's liability for all of its personnel who perform any obligations of NewCold under this Agreement of not less than £10m per event;
 - (b) public liability and third party cover for all persons working at or entering the Warehouse for business purposes of not less than £5m per event; and
 - (c) all liability for loss or damage to Products occurring during distribution for which NewCold may be liable under this Agreement in an amount of not less than the manufacturing cost of the Products.
- 16.2 The foregoing policies in sub-clauses 16.1(b) and 16.1(c) shall name the Customer as an additional insured and shall include a severability of interests clause providing that, except with

respect to coverage limits, insurance applies to each insured as though a separate policy were issued to each.

- 16.3 Each party shall inform the other as soon as reasonably practicable (and in any event within 5 Business Days of the relevant occurrence) of the occurrence of any event connected with the Services which could give rise to an insurance claim under NewCold's insurance policy. If the Customer is claiming under any insurance policy of NewCold, the Customer shall provide such assistance as NewCold may reasonably require in order to progress the claim. NewCold will keep the Customer regularly informed of the progress of any such claim.
- 16.4 On receipt of the Customer's reasonable written request from time to time, NewCold shall promptly provide to the Customer:
- (a) written details or copies of the insurance policies it is required to maintain pursuant to clause 16.1; and
 - (b) written evidence, reasonably satisfactory to the Customer, of the continuing validity of such insurance policies and that all premiums payable in respect of such insurance have been paid and are up to date.

17. Service Credits

- 17.1 During the Term, NewCold shall provide the Services so as to satisfy all the Minimum Performance Targets.
- 17.2 Failure by NewCold to meet the Minimum Performance Targets shall give rise to service credits in accordance with Schedule 3 Part 3.
- 17.3 The parties acknowledge that the service credits specified in Schedule 3 Part 3 do not operate by way of penalty and are proportionate when considering the Customer's legitimate interest in the Services meeting the Minimum Performance Targets.

18. Remedial Plan

In the event of NewCold's persistent failure to provide the Services, or to comply with its obligations, in all material respects in accordance with this Agreement (save for any such failure arising as a result of a Force Majeure Event or a Relief Event), the Customer may (acting in its reasonable discretion) require NewCold (without additional charge to the Customer) to produce a remedial plan setting out the steps NewCold proposes to take to avoid further failures, including details of the deployment of such reasonable additional resources and taking such reasonable remedial action as is necessary to rectify or to prevent such failure or non-compliance from recurring.

19. Disaster Recovery and Business Continuity

- 19.1 NewCold shall, on or before the Services Commencement Date, put in place a preliminary customary and commercially reasonable plan of the recovery arrangements and procedures to be followed by NewCold in the event of a Disaster (as such term is defined in clause 19.2 below) ("**Disaster Recovery Plan**"). This preliminary version shall be replaced by a final version within 30 days of the Services Commencement Date. The Disaster Recovery Plan shall meet any reasonable requirement set by the Customer and shall be designed to ensure that as far as reasonably practicable despite any Disaster or Force Majeure Event, the Services continue to be performed without interruption or derogation and in accordance with this Agreement.
- 19.2 If NewCold becomes aware of any event or circumstances which has or may lead to circumstances likely to affect NewCold's ability to provide all or part of the Services (which is likely to have an adverse effect on the Customer) in accordance with this Agreement (a "**Disaster**"), it shall (save where the event is a Force Majeure Event to which the notice provisions in clause 20 apply instead) notify the Customer as soon as practicable and indicate the expected duration of such effect.

- 19.3 If the Customer receives a notice in accordance with clause 19.2 and NewCold cannot implement the Disaster Recovery Plan, the Customer may take over control of the provision and supply of the affected Services itself or appoint an alternative third party supplier to do so; provided that any affected Services provided by the Customer or a third party under this clause 19.3 will be terminated upon delivery by NewCold to the Customer of written notice of its intent to resume provision of the Services, such termination to take effect on the date notified by NewCold as being the date on which it will resume provision of the Services.
- 19.4 NewCold shall, if the Customer so requests, use reasonable endeavours to assist the Customer in procuring an alternative third-party supplier pursuant to clause 19.3. Any reasonable and necessary increased rates incurred by the Customer in obtaining these services from a new supplier shall be borne by NewCold, less any costs that could have been mitigated by the Customer or which would have been payable to NewCold as Charges had NewCold provided the Services in accordance with the terms of this Agreement, subject always to the limitations of liability in clause 15.2. At the request of the Customer, NewCold shall also reasonably co-operate in good faith and provide all assistance and information reasonably required by the Customer or the third-party supplier for such purpose (including the necessary know-how and access to applicable Representatives and records of NewCold) to ensure the satisfactory provision of the Services.
20. **Force Majeure**
- 20.1 Neither the Customer nor NewCold will be liable to the other for any delay, hindrance or failure to comply with all or any of its obligations under this Agreement (save for an obligation to pay money) to the extent that such delay, hindrance or failure is attributable to a Force Majeure Event, provided always that the Affected Party has complied with the provisions of this clause 21.
- 20.2 The party affected by a Force Majeure Event (the "**Affected Party**") will as soon as possible and in any event within 1 Business Day after commencement of the Force Majeure Event, notify the other party (the "**Non Affected Party**") in writing of the Force Majeure Event and such notice shall state the effects of the Force Majeure Event on the Affected Party's ability to perform its obligations under the Agreement and contain an estimate as to how long the Affected Party believes the Force Majeure Event will continue.
- 20.3 The Affected Party shall use all reasonable endeavours to mitigate the effect of the Force Majeure Event on the performance of its obligations under this Agreement and ensure the continuity of the performance of the Services including invoking the Disaster Recovery Plan and Business Continuity Plan.
- 20.4 NewCold shall, within a reasonable period of notifying the Customer of a Force Majeure Event in accordance with clause 20.2, put forward reasonable proposals to the Customer for alternative arrangements for performing its obligations under this Agreement. Following consideration of each proposal made by NewCold together with any reasonable proposals of its own (which may include allowing a third party to perform the relevant Service on NewCold's behalf), the Customer shall select the proposal which is, in its reasonable opinion, the most suitable for its requirements. NewCold shall, if reasonably required by the Customer, be obliged to implement such proposal as soon as reasonably practicable following its selection by the Customer.
- 20.5 During the continuation of the Force Majeure Event in which NewCold is the Affected Party, the Customer shall be entitled to a proportional reduction in the Charges for the Services affected by the Force Majeure Event, such that Charges shall remain payable for Services which the NewCold continues to provide (or the provision of which it procures from a third party in accordance with the terms of this Agreement) but shall not be payable for Services to the extent that, due to the Event of Force Majeure, they are not provided or procured.
- 20.6 As soon as reasonably practicable and in any event within 21 Business Days after the cessation of the Force Majeure Event, the Affected Party shall notify the Non Affected Party in writing of

the cessation of the Force Majeure Event and shall resume performance of the suspended obligations under this Agreement.

- 20.7 If the Force Majeure Event continues for more than 3 months, either party may immediately terminate this Agreement on written notice.

21. Dispute Resolution

- 21.1 Any Dispute under this Agreement shall be treated in accordance with the provisions of this clause 21.

- 21.2 The Customer and NewCold undertake that upon a Dispute arising a senior representative of each of the Customer and NewCold (and, where required, the sub-contractor), who shall each have authority to settle the Dispute, meet in good faith as soon as reasonably practicable and in any event no later than 10 Business Days after a written request from either party to the other, and use all reasonable endeavours to resolve the Dispute.

- 21.3 If the Dispute cannot be resolved by negotiation as set forth in clause 21.2 above, then either party may initiate mediation before a commercial mediator by serving a written notice requesting mediation. The mediator shall not have the authority to require, and neither party may be compelled to engage in, any form of discovery prior to or in connection with the mediation. Mediation shall be conducted within 30 Business Days of such notice.

- 21.4 All negotiations and mediation shall be conducted in compliance with each party's obligations of confidentiality under clause 22. Those negotiations and mediation shall be without prejudice to the rights of the parties and shall not be used in evidence or referred to in any way without the prior written consent of both parties in any future court proceedings except in so far as necessary to enforce any compromise agreement entered into by the parties.

- 21.5 If the Dispute has not been resolved as a result of negotiations and mediation referred to in clause 21.2 and 21.3 then either party may pursue formal resolution of that Dispute pursuant to clause 37.

- 21.6 Nothing in this clause 21 shall prevent any party from seeking injunctive or other relief against the other at any time.

22. Confidentiality

- 22.1 The parties acknowledge that in the course of their performance of this Agreement (and the negotiation of it or any variation to it) each party ("**Discloser**") will disclose or make available to the other party (the "**Recipient**") information about or relating to its business including information relating to products (including in relation to the Customer and the Products), prices, work methods, organisation, business ideas, business strategies, practices, plans, forecasts handling, costs, markets, inventory information, customers, technology, and operational and administrative systems ("**Confidential Information**").

- 22.2 The Recipient will keep the Discloser's Confidential Information strictly confidential and not disclose any of it to any person save as permitted under this clause 22. The Recipient will not use any of the Confidential Information for any purpose other than the discharge of its obligations under this Agreement and only use it during the Term. Nothing in this clause 22 shall grant the Recipient any right or licence over any Confidential Information of the Discloser.

- 22.3 The Recipient will make available the Discloser's Confidential Information only to its relevant Representatives (including, in the case of NewCold, its employees, its direct and indirect shareholders and their respective employees, direct and indirect investors, auditors, consultants, advisors, bankers and prospective providers of finance or insurance) and its Associates on a need to know basis and all persons to whom the Confidential Information is made available will be made aware of the strictly confidential nature of the Confidential Information and the restrictions imposed under this clause on the use of it and will be bound by

similar requirements not to disclose the Confidential Information. The Recipient will be and remains liable for any breach of this clause by such persons.

22.4 Clauses 22.2 and 22.3 shall not apply to any Confidential Information for which the Recipient can prove by written records that it:

- (a) was lawfully in its possession prior to such disclosure and was not acquired under an obligation of confidence;
- (b) was already in the public domain at the time of disclosure or is or becomes public knowledge through no fault of the Recipient;
- (c) is information furnished to the Recipient without restriction by any third party having a bona fide right to do so;
- (d) was developed wholly independently by the Recipient without reference to Confidential Information of the Discloser; or
- (e) is required (and only to the extent required) to be disclosed by the law, court or regulatory body of any relevant jurisdiction provided (to the extent legally permissible) prompt written notice of this is given to the Discloser so the Discloser can attempt to object to such disclosure.

22.5 All Confidential Information shall be returned to the Discloser or destroyed at its direction. The obligations of confidentiality set out in this Agreement shall survive the termination of this Agreement in whole or in part for 5 years except for obligations related to trade secrets, for which the obligations of confidentiality shall be indefinite.

23. Termination

23.1 The Customer shall (without limiting its other rights under this Agreement or at law) have the right at any time during the Term to terminate this Agreement with immediate effect or at a later specified date by giving written notice to NewCold if an Insolvency Event occurs in relation to NewCold.

23.2 Subject to clause 23.3, the Customer shall (without limiting its other rights under this Agreement or at law) be entitled to terminate this Agreement by written notice to NewCold if NewCold commits a material breach of this Agreement that is not remedied within 30 days of receipt of a written notice from the Customer specifying the breach.

23.3 If the ODOT Figure is below 92.5% for any continuous period of 16 weeks, the Customer shall be entitled to terminate this Agreement by providing not less than 30 days written notice to NewCold and neither party shall have any liability to the other in respect of such termination.

23.4 NewCold shall (without limiting its other rights under this Agreement or at law) be entitled to immediately terminate or suspend the Services by written notice to the Customer if:

- (a) an Insolvency Event occurs in relation to the Customer; or
- (b) the Customer commits a material breach of this Agreement that is not remedied within 30 days of receipt of a written notice from the Customer specifying the breach.

23.5 This Agreement shall automatically terminate on termination or expiry of the Operational Services Agreement.

24. Consequences of termination

24.1 Termination of this Agreement or any of the Services:

- (a) will not affect any accrued rights or liabilities of either party at the date of termination and shall be without prejudice to any other rights or remedies that either party may have under this Agreement or at law; and
- (b) will not affect the continuance in force of any provision of this Agreement to the extent it is expressed or by implication intended to continue in force after termination including, but not limited to, clause 1 (Definitions and interpretation), 6 (Forecast); clause 10.2 (Personnel); clause 15 (Liability); clause 17.3 (Service Credits); clause 20.1 (Force Majeure); clause 23 (Dispute Resolution); clause 22 (Confidentiality); clause 24 (Consequences of termination); clause 26 (Invalidity); clause 27 (Set-Off and Third Party Rights); clause 29 (Language); clause 32 (Entire Agreement); clause 33 (Announcements); clause 34 (Waiver); and clause 37 (Governing Law and Jurisdiction).

24.2 On termination or expiry of this Agreement for any reason:

- (a) each party shall return to the other, as soon as reasonably practicable, all physical and electronic copies of Confidential Information of the other, except to the extent the other party requests in writing that such physical or electronic copies be destroyed and/or deleted;
- (b) any provisions dealing with the Parties' exit from the arrangements described in this Agreement and/or handover to a new contractor on termination or expiry shall apply and NewCold shall co-operate in good faith and provide reasonable assistance and information required by a new third party supplier of services (substantially the same as the Services) to the Customer following the termination of this Agreement; and
- (c) NewCold shall immediately refund to the Customer any amount which it may have been paid in advance in respect of Services that have not been supplied.

25. **Bribery and other Corruption**

25.1 NewCold agrees with the Customer that it shall:

- (a) comply with all applicable laws, statutes, regulations and codes relating to bribery and other corruption ("**Anti-Corruption Requirements**") including the Bribery Act 2010.
- (b) not take or knowingly permit any action to be taken that would or might cause or lead the Customer to be in violation of any Anti-Corruption Requirements including under section 7 of the Bribery Act 2010;
- (c) not bribe or attempt to bribe (which shall include any offer or form of payment, gift or other inducement, reward or advantage (whether of money or anything of value)) the Customer or any of the Customer's employees, officers, agents, representatives, affiliates or persons acting on the Customer's behalf;
- (d) at the Customer's reasonable request and cost, provide the Customer with any reasonable assistance to enable it to:
 - (i) perform any activity required by any relevant government or agency in any relevant jurisdiction for the purpose of complying with Anti-Corruption Requirements; and
 - (ii) undertake any risk assessments and/or review its policies relating to Anti-Corruption Requirements.

25.2 NewCold agrees with the Customer that it shall establish and at all times during the term of this Agreement maintain and implement adequate policies and procedures to prevent any breach of clause 25.

25.3 NewCold warrants to the Customer that:

- (a) it has not bribed or attempted to bribe:
 - (i) any person in order to obtain and/or retain any business, or advantage in the conduct of business, for the Customer whether in connection with this Agreement; or
 - (ii) any person described in clause 25.1(c) for any purpose whatsoever;
- (b) all information supplied by NewCold in the course of the Customer's due diligence, risk assessment and background checks pertaining to bribery and other corruption prior to entering into this Agreement was, and remains, true, complete and accurate;
- (c) NewCold has not:
 - (i) been convicted of any offence involving bribery or corruption; or
 - (ii) been or is the subject of any investigation, inquiry or enforcement proceedings regarding any offence or alleged offence under Anti-Corruption Requirements;

and NewCold undertakes to notify the Customer immediately if any of the warranties in this clause 25.3 would not be true and accurate if repeated at any time during the term of this Agreement.

25.4 NewCold agrees that its books, records and all accounts shall accurately reflect any and all payments in respect of transactions of NewCold, under this Agreement.

25.5 NewCold shall ensure that each person who is performing services in connection with this Agreement (each such person being an "**Associated Person**") is a party to a contract with NewCold which imposes on and secures from such Associated Person terms equivalent to those imposed on NewCold in this clause 25 ("**Equivalent Terms**") and NewCold shall be directly liable to the Customer for any breach of any of the Equivalent Terms.

25.6 If this Agreement is terminated due to a breach of this clause 25, NewCold shall not be entitled to any compensation on termination or to any further remuneration.

25.7 Without prejudice to the rights of the Customer to be indemnified under this Agreement, the Customer shall not be required to make any payment to NewCold that might otherwise be due from the Customer if such payment is related to a transaction in connection with which NewCold has breached this clause 25.

25.8 In this clause 25;

- (a) the meaning of "**adequate procedures**" shall be determined in accordance with section 7(2) of the Bribery Act 2010 (and any guidance issued under that Act);
- (b) whether a person is "**associated**" with another person shall be determined in accordance with section 8 of the Bribery Act 2010; and

the meaning of "**Foreign public official**" shall be determined in accordance with sections 6(5) and 6(6) of the Bribery Act 2010.

26. Invalidity

If at any time any provision (or part of a provision) of this Agreement is or becomes illegal, invalid or unenforceable in any respect then that shall not affect the legality, validity or enforceability of any other provision of this Agreement (or the remainder of that provision).

27. Set-Off and Third-Party Rights

- 27.1 Save as set out in clause 14.2, all payments due under this Agreement shall be made in full without deduction, withholding or deferment in respect of any set-off or counterclaim.
- 27.2 No person who is not a Party to this Agreement is entitled to enforce any of its terms, whether under the Contracts (Rights of Third Parties) Act 1999 or otherwise.

28. Transfer of the Agreement and Management Continuity

- 28.1 Save as otherwise permitted by this clause 28 neither party shall assign or otherwise dispose of any of its rights or obligations under this Agreement.
- 28.2 NewCold may assign, novate or sub-contract any of its rights and obligations under this Agreement (in whole or in part) to any of its Associates, provided that:
- (a) where NewCold assigns or novates any of its rights and obligations to an Associate, NewCold shall notify the Customer in writing in advance of such assignment or novation; and
 - (b) where NewCold sub-contracts any of its rights and obligations to an Associate, NewCold shall remain liable for the acts and omissions of the sub-contractor as fully as if they were the acts and omissions of NewCold unless the Customer consents otherwise (such consent shall not be unreasonably withheld, delayed or conditioned),
- 28.3 For the avoidance of doubt, where any of NewCold's rights and obligations are assigned, novated or sub-contracted to an Associate, such Associate will have the same rights as NewCold to assign, novate or sub-contract the Agreement as permitted by clause 28.2.
- 28.4 NewCold may:
- (a) assign its rights under this Agreement (in whole or in part) to any third party, which is not an Associate, provided that NewCold shall notify the Customer in writing in advance of such assignment; and
 - (b) novate or sub-contract this Agreement (in whole or in part) to any third party, which is not an Associate, provided that NewCold obtains the prior written consent of the Customer (such consent not to be unreasonably withheld, conditioned or delayed and, in any event, such consent shall be deemed to have been given in full if no written objection is received by NewCold within 14 days of its notice to the Customer of its intention to novate or sub-contract).
- 28.5 The Customer may assign its rights under this Agreement to a company in the Customer Group by giving written notice to NewCold provided that:
- (a) such assignment shall not relieve the Customer of its obligations under this Agreement and the Customer shall remain liable for the acts and omissions of the Customer Group member as fully as if they were the acts and omissions of the Customer; and
 - (b) if the assignee ceases to be a company in the Customer Group it shall immediately assign its rights under this Agreement back to the Customer or to another company within the Customer Group.
- 28.6 The Customer may assign its rights in connection with the sale of all or substantially all of the Customer's business provided that the Customer receives NewCold's prior written consent, which shall not be unreasonably withheld, conditioned or delayed after taking into account the creditworthiness and solvency of the Customer's assignee (which shall be no less than that of the Customer as at the Signature Date).

29. Language

All notices and other communications relating to or in respect of this Agreement shall be in the English language.

30. Notices

All notices expressed to be given by any party to this Agreement shall be in writing and shall be deemed to have been validly given on the date of delivery to the address referred to below, if delivered by hand, by post or courier. Any notice which would otherwise be deemed to be given outside the times of 9.30 a.m. and 5.30 p.m. on a normal Business Day shall be deemed to be given or made at 9.30 a.m. on the next normal Business Day. Notices shall be directed to the addresses set out at the end of this Agreement. Either party may change such details by giving the other notice in accordance with this clause 30.

31. Further Assurance

Each party shall at its own expense use commercially reasonable efforts to do or procure the doing of all things as may reasonably be required to give full effect to this Agreement including the execution of all deeds and documents.

32. Entire Agreement

This Agreement represents the whole and only agreement between the parties in relation to the subject matter of this Agreement and supersedes any previous agreement between the parties in respect of its subject matter. Neither party shall have any liability or remedy in respect of any representation, warranty or other statement (other than as set out in this Agreement) being false, inaccurate or incomplete unless it was made fraudulently. Each party acknowledges that in entering into this Agreement it has placed no reliance on, nor has any party given any, representation, warranty, statement or promise relating to the subject matter of this Agreement other than as set out in this Agreement. Each party irrevocably and unconditionally waives any right it may have to rescind this Agreement because of breach of any warranty or representation not contained in this Agreement unless such misrepresentation was made fraudulently.

33. Announcements

No press release or other public announcement or communication concerning this Agreement or any part of it or the parties' relationship shall be made by either Party without prior written consent of the other.

34. Variation

This Agreement may only be varied from time to time with the written agreement of the authorised Representatives of each party. Any variations, supplements or amendments to this Agreement shall be invalid unless made in writing.

35. Waiver

No delay in exercising, non-exercise or partial exercise by any party of any of its rights, powers or remedies provided by law or under or in connection with this Agreement shall operate as a waiver or release of that right, power or remedy. Any waiver or release must be specifically granted in writing signed by the party granting it. The waiver or release shall only operate as a waiver or release of the particular breach specified and not of further breaches of the same or any other type, unless expressly stated otherwise.

36. Independence

NewCold is an independent contractor engaged by the Customer to supply the Services. Nothing in this Agreement shall make either party the legal representative or agent of the other

nor shall either party have the right or authority to assume, create or incur any liability or obligation of any kind, express or implied, against, in the name of or on behalf of, the other party.

37. Governing Law and Jurisdiction

37.1 This Agreement and any dispute, claim or obligation (whether contractual or non-contractual) arising out of or in connection with it, its subject matter or formation shall be governed by the laws of England and Wales.

37.2 The parties each submit to the exclusive jurisdiction of the Courts of England and Wales.

38. Counterparts

This Agreement may be executed in any number of counterparts and by the parties on separate counterparts, but shall not be effective until each party has executed at least one counterpart. Each counterpart shall constitute an original of this Agreement, but all the counterparts shall together constitute one and the same instrument.

39. Participation of the Parties

The parties acknowledge that this Agreement, and all matters contemplated herein, have been negotiated by the parties and that each party has participated in the drafting and preparation of this Agreement from the commencement of negotiations at all times through the execution hereof. If any provision of this Agreement requires judicial or other interpretation, it is agreed that the court interpreting or construing it shall not apply a presumption that the terms of this Agreement are to be more strictly construed against one party by reason of the rule of construction that a document is to be more strictly construed against a party who by itself or through its agents prepared the document, it being agreed that all parties to this Agreement participated in the preparation of this Agreement.

40. Attorney Fees and Costs

40.1 Except as otherwise provided in this Agreement, each party shall be responsible for and shall bear its own costs, charges and expenses incurred in connection with the preparation, completion and maintenance of this Agreement.

This Agreement has been signed on the date appearing at the head of page 1.

Schedule 1

(Services)

Part 1

(Scope of Services)

1. The scope of the Services includes collection from Customer's Factories, movement of stock between the Warehouse and the Wakefield Warehouse, and transportation of Products from the Warehouse and the Wakefield Warehouse to the Customer's customer locations in England, Wales and Scotland as set out in the Delivery Day Profile and in the Operational Specification, to be agreed between the parties.
2. All vehicles used for the transportation of Products and packaging shall be suitable for the purpose, maintained in good repair and in a hygienic condition. All trailers will be checked prior to loading for hygiene and correct operation. Any non-confirming trailers will be rejected until suitably cleansed or repaired.
3. Refrigerated transport shall be capable of maintaining product temperature within specification, under maximum load, whilst the product is stored on the vehicle. If any issues are identified with equipment on pre-se checks these will be detected and defects rectified.
4. Appropriate systems for recording vehicle temperature shall be in place and records of temperatures maintained. These shall be downloaded during vehicle/trailer servicing and appropriate records maintained.
5. Documented maintenance procedures shall be provided for all vehicles.
6. Measures shall be in place to verify hygiene and temperature of vehicles prior to loading where appropriate. Documented hygiene procedures shall be maintained for all vehicles. Records of hygiene and temperature checks shall be maintained.
7. In general, before loading commenced the vehicle/trailer is checked for:
 - 7.1 damage/defect
 - 7.2 leaks/holes
 - 7.3 debris, cleanliness
 - 7.4 pests
 - 7.5 odour, hygiene
 - 7.6 potential contaminants etc.
 - 7.7 correct operation of refrigeration (where relevant)
 - 7.8 fuel/oil in refrigeration (where relevant)
 - 7.9 refrigeration system set to correct temperature e.g. -22C for frozen loads (where relevant)
8. Trailers will be checked for cleanliness during servicing and steam cleaned where relevant.
9. Trailers will not be used to transport goods that are incompatible with food products e.g. hazardous goods, oil, automotive batteries, glass, and loads with strong odour/taint risks.
10. All trucks leave with security seals with a reference to the shipment papers.

11. Products are to be delivered on the delivery dates agreed by NewCold with the Customer's customers, in line with agreed lead times as follows:
 - (a) Retail customers Day 1 order for Day 2 delivery.
 - (b) Other customers Day 1 order for Day 3 delivery.
12. Delivery days vary by customer group, as set out in the Delivery Day Profile.
13. This Agreement is only applicable to Services performed by or organized by NewCold as part of this Agreement and are not applicable for transport services by other hauliers arranged by Customer (e.g. collection by retailers as part of a backhaul operation).

Part 2

(Delivery Day Profile)



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11 Delivery Day Profil

Schedule 2

Part 1

(Charges)

The Charges shall be invoiced in accordance with the Customer Distribution Matrix Activities in Part 2 of this Schedule.

1. The Charges are based on the following assumptions:
 - 1.1 Fuel at 100 pence per litre;
 - 1.2 At the Signature Date, the following customers can be delivered on any of the 7 days in a week (these being Tesco, ASDA, Sainsburys, Morrisons, Iceland, Co-Op, Aldi, LIDL and Waitrose);
 - 1.3 Any other customers ordering 26 pallets on one delivery can be delivered on any of the 7 days in a week. If any multi-warehouse customers have locations close enough to enable a 2-3 drop consolidated load that is deliverable in a working day, NewCold will use reasonable endeavours to implement any day delivery; and
 - 1.4 All other customers (excluding those specified at paragraph 1.2 above) ordering less than 26 pallets on one delivery will have 2 nominated delivery days per week, divided by postcode as per the Delivery Day Profile which is included as an excel file in this Schedule.

Part 2

(Customer Distribution Matrix Activities)



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Transport Tariffs.xls>

Part 3

(Invoicing and Payment)

- 1.1 The delivery charge (the "**Delivery Charge**") is payable for pallets delivered by NewCold to the delivery locations in accordance with the Delivery Day Profile.
- 1.2 Returns or refusals will be returned to site, and the Delivery Charge is applied if NewCold is not at fault for the return or rejection.
- 1.3 Charges shall be reviewed and adjusted in accordance with the Charges Review Mechanism as set out in Part 4 of this Schedule 2.
2. Charges are rounded to 3 decimal places.
3. Charges and any other payments set out in this Agreement and/or due to NewCold are exclusive of VAT or any other taxation (if any) which shall be payable by the Customer subject to receipt of a tax invoice.
4. Invoices sent by NewCold shall contain the details as set out in Part 5 of this Schedule 2.
5. Save as set out in clause 14.2, all payments due under this Agreement shall be made in full without deduction, withholding or deferment in respect of any set-off or counterclaim.

Part 4

(Charges Review Mechanism)

- 1.1 35% of each of the Charges in the Customer Distribution Matrix Activities are based on fuel and will be subject to further adjustments based on the varying price of fuel, as follows:
- (a) the Charges are based on an average fuel price of £1.00 per litre excluding VAT (the "Base Fuel Rate"); and
 - (b) at the Services Commencement Date 35% of the Charges shall be adjusted by a percentage equal to the percentage difference between the Base Fuel Rate and the road fuel price per litre (excluding VAT) published in the then current Fuel Price Index; and
 - (c) on a rolling weekly basis after the Services Commencement Date 35% of the Charges shall be adjusted by the percentage increase or decrease in the Fuel Price Index in the previous week.
- 1.2 The remaining 65% of each of the Charges shall be adjusted:
- (1) around 6 weeks (the exact date to be determined by NewCold acting reasonably and in good faith) before the Services Commencement Date (the "Initial Review Date"), by the percentage change in the Consumer Prices Index over the previous 6-month period; and
 - (d) thereafter on 31 December 2022 and each anniversary of that date (each such date a "Charges Review Date"), by the percentage change in the Consumer Prices Index over the period since the previous Charges Review Date, save that on the first Charges Review Date 65% of each of the Charges shall be adjusted by the percentage change in the Consumer Prices Index over the period since the Initial Review Date.
- 1.3 The Charges are based on red diesel for the refrigeration which is scheduled to be replaced by white diesel in the near future, resulting in an adjustment of the Charges. Parties will then discuss and mutually agree (each acting reasonably) on the rate adjustment based on evidenced cost increases.

Part 5

(Invoice details)

- 1.1 Invoices submitted by NewCold shall detail the following:
- (a) Customer contact details;
 - (b) NewCold contact details;
 - (c) Period covered by the invoice;
 - (d) Due date of invoice;
 - (e) Description of services;
 - (f) Amounts charged, split by type of service;
 - (g) Payment terms;
 - (h) VAT payable (if any); and

- (i) Other information reasonably requested by the Customer.

Schedule 3

Part 1

(Standard KPIs)

1. The Standard KPI shall be measured on a daily basis and reported monthly in a consolidated form.
2. **Orders Delivered On Time (ODOT): 98.50%**
 - (a) Definition: "the percentage of cases that are accepted by the Customer's customer under the original order number and delivered within the agreed delivery window" ("**ODOT Figure**").
 - (b) Defect: an order refused by the Customer's customer for late delivery and returned with a new delivery required.
 - (c) Formula:

$$\text{KPI} = \frac{\text{N}^{\circ}\text{of cases accepted} - \text{N}^{\circ}\text{of cases refused for late delivery}}{\text{N}^{\circ}\text{of cases to be delivered}} \times 100$$

3. The Operational Managers of each party shall have regular monthly meetings to monitor and review the achievement of the ODOT KPI. Such meetings shall be minuted by the Customer's Operational Manager and copies of those minutes shall be circulated to and approved by both parties.
4. Before each monthly meeting, the Customer's Operational Manager shall notify NewCold's Operational Manager, and vice versa, of any issues relating to the achievement of the ODOT KPI for discussion at the monthly meeting. At the meeting, the parties shall agree a plan to address such issues.
5. The parties expect that improvements to the ODOT KPI shall occur during this Agreement. The Customer and NewCold shall review the ODOT KPI every 12 months throughout the Term and make such changes as are agreed.

Part 2

(Initial KPIs)

1. During the Initial Period, the following Initial KPIs will apply:
 - 1.1 Orders Delivered On Time: 96.50%

Part 3

(Service Credits)

1. Service Credits for the Services shall be calculated solely on the basis of the ODOT KPI performance. If the performance level for the month after the Initial Period is below the Standard level, a service credit will be payable based on the table below except where a Service Failure is caused by:
 - (a) A Relief Event;
 - (b) Force Majeure;

- (c) Incorrect information supplied by the Customer or its customer in respect of any order;
or
 - (d) volumes for any week varying by 10% or more from the relevant Forecast.
2. If the Forecast is outside the accuracy bandwidth of 10% then in case of a higher volume on a day, the ODOT Figure for that day is not included in the monthly calculation unless the standard KPI was still met.
 3. The parties will on a monthly basis evaluate the Forecast and the consequences on the KPI's.
 4. If the ODOT Figure is below 92.5% for any continuous period of 6 weeks, NewCold shall pay the Customer £10,000.
 5. If the ODOT Figure is below 92.5% for any continuous period of 12 weeks, NewCold shall pay the Customer £20,000 (which shall be in addition to the sum stated in paragraph 4 above).
 6. If the ODOT Figure is below 92.5% for any continuous period of 16 weeks, NewCold shall pay the Customer £30,000 (which shall be in addition to the sums stated in paragraphs 4 and 5 above) and the Customer shall have the right to terminate this Agreement in accordance with clause 24.3.
 7. In addition, if NewCold fails to provide the Services in accordance with the Minimum Performance targets for a prolonged period, Representatives of the parties will meet to discuss what if any additional compensation should be payable from NewCold to the Customer.

Schedule 4

(Employment)

1. Definitions

- 1.1 In this Schedule, unless the context otherwise requires, the following words and phrases shall have the following meanings:

"Employees" means those individuals employed by a Previous Supplier who are wholly or mainly assigned to carrying out the Services and will be so assigned immediately before the Services Commencement Date;

"New Supplier" means any person (including but not limited to the Customer) who, from a Service Transfer Date, provides any or all Services which immediately prior to a Service Transfer Date were provided pursuant to this Agreement;

"Previous Supplier" means the supplier(s) of the Services before the Services Commencement Date (including any Sub-Contractor);

"Service Transfer Date" means the date on which NewCold ceases to provide all or part of the Services whether pursuant to Regulations 3(1)(a) and/or 3(1)(b) of TUPE or otherwise;

"Sub-Contractor" means any contractor, agency and/or other third party engaged by NewCold to provide all or part of the Services;

"Supplier Employee" means any person who is or was employed or engaged by NewCold and/or any Sub-Contractor and who is or was concerned with all or any of the Services or any part thereof;

"Transferring Supplier Employee" means those individuals employed by NewCold and/or any Sub-Contractor are wholly or mainly assigned to carrying out the Services and will be so assigned immediately before the Services Transfer Date.

"TUPE" means the Transfer of Undertakings (Protection of Employment) Regulations 2006 or equivalent legislation

2. Services Commencement Date

- 2.1 The parties agree that TUPE may apply at the Services Commencement Date and that the contracts of employment of the Employees may transfer to NewCold on the Services Commencement Date in accordance with TUPE.
- 2.2 The Customer shall use its reasonable endeavours to procure that the Previous Supplier(s) shall cooperate with NewCold to affect an orderly transfer of the Employees so that their employment transfers at the Services Commencement Date to NewCold.
- 2.3 NewCold shall comply with its obligations to inform and consult under TUPE.
- 2.4 The Customer shall use its reasonable endeavours to procure that the Previous Supplier shall discharge all contractual and statutory obligations (including in respect of salaries, benefits, holiday pay, bonuses, contributions and incentive payments) in respect of each Employee due or accrued as at the Services Commencement Date.
- 2.5 NewCold shall fully indemnify and hold the Customer harmless against any Losses which the Customer incurs in connection with or arising out of:

- (a) the change in identity of the Employees' employer or any measures which NewCold may consider taking on or after the Services Commencement Date, including claims for constructive dismissal or pursuant to regulations 4(9) or 4(11) of TUPE; and
 - (b) any failure by NewCold to comply with its obligations under TUPE.
- 2.6 Without prejudice to NewCold's indemnity in paragraph 2.5, the Customer shall fully indemnify and hold NewCold harmless against all Losses incurred or suffered by NewCold in relation to:
 - (a) any Claim made at any time by or on behalf of an employee (including but not limited to an Employee) of the Customer or of any Previous Supplier against NewCold in relation to either to their employment or the termination of their employment by the Customer (or any Previous Supplier); and
 - (b) any failure by a Previous Supplier to comply with its obligations under TUPE.
- 3. From the Services Commencement Date to a Service Transfer Date**
- 3.1 NewCold shall be solely responsible for all emoluments and outgoings in respect of the Supplier Employees including (without limitation), the payment of all National Insurance and tax contributions and deductions on behalf of Supplier Employees and all wages, bonuses, commissions and all arrangements relating to holiday pay, pension, sickness and other benefits in respect of Supplier Employees.
- 3.2 NewCold shall fully indemnify and hold harmless the Customer and any New Supplier against all Losses which the Customer or any New Supplier may suffer or incur on account of or arising from or in respect of:
 - (a) the employment or termination of employment of any Supplier Employee from the Services Commencement Date up to and including the Service Transfer Date relating to any fact or matter concerning his or her employment with NewCold or its Associates;
 - (b) any failure or alleged failure by NewCold to discharge its duties to inform and consult in accordance with Regulation 13 of TUPE save where such failure or alleged failure arises from any failure by the Customer or any New Supplier to comply with its or their obligations under Regulation 13 of TUPE; and
 - (c) any claim arising out of any failure by NewCold to provide the Customer and/or any New Supplier with employee liability information pursuant to Regulation 11 of TUPE.
- 3.3 Within 30 Business Days of being so requested in writing by the Customer but not more than once each year during the first 2 years of this Agreement and twice during the 12-months preceding any Service Transfer Date, NewCold shall fully and accurately (to the date on which such information is supplied) disclose to the Customer in writing the following information (so far as is legally permissible):
 - (a) the identity, age, job title, length of continuous service and notice of each Supplier Employee;
 - (b) details of any Supplier Employee whose right to work in the UK is restricted, time limited or where they are subject to sponsorship;
 - (c) copies of all offer letters, contracts of employment, particulars of employment relating to all Supplier Employees and which an employer is obliged to give to an employee pursuant to section 1 of the Employment Rights Act 1996, staff handbooks, policies and procedures relating to each Supplier Employee;
 - (d) details of all salaries, bonuses, overtime and pension and other benefits applicable to each Supplier Employee (whether contractual or otherwise);

- (e) information concerning any:
 - (i) disciplinary action (including warnings, suspension with or without pay, demotion and performance management or monitoring);
 - (ii) grievance raised by any Supplier Employee including details of the procedure followed and action taken and copies of all correspondence with such Supplier Employee, investigations carried out, notes or minutes of meetings held and other associated documentation within the previous 12-months;
 - (f) details of any court or tribunal case, claim or action:
 - (i) brought by any Supplier Employee against NewCold within the previous 2 years including copies of relevant correspondence, pleadings, orders and judgements and other associated documentation; or
 - (ii) that the Supplier has reasonable grounds to believe that a Supplier Employee may bring against the Customer and/or any New Supplier after the Service Transfer Date arising from the termination of this Agreement or as a consequence of TUPE including copies of all relevant correspondence and other associated documentation.
 - (g) details of any collective agreement which could have an effect between a Supplier Employee and the Customer and/or any New Supplier after the Service Transfer Date;
 - (h) the total payroll bill for Supplier Employees;
 - (i) the total number and description of Supplier Employees;
 - (j) the number and description of any Supplier Employees who have been dismissed in the period of 6 months prior to the request by the Customer for information pursuant to this paragraph 3.3.
- 3.4 NewCold shall permit the Customer to use and disclose the information provided in paragraph 3.3 (so far as is legally permissible) for informing any potential New Supplier and benchmarking companies subject to such persons entering into a confidentiality agreement with the requiring any New Supplier to keep such information confidential.

4. Service Transfer

- 4.1 If TUPE applies on a Service Transfer Date such that all or any part of the Services transfer to a New Supplier ("**Service Transfer**") then:
- (a) the parties shall reasonably endeavour to comply with all reasonable requests from the other with regard to arrangements connected with the Service Transfer Date provided that each party reasonably endeavours to reduce any Losses which the other party or any New Supplier may incur as a result of the Service Transfer; and
 - (b) the Customer shall accept or shall reasonably endeavour to procure that a New Supplier accepts (as is applicable) the transfer of employment of the Transferring Supplier Employees on the Service Transfer Date to it or the New Supplier, as the case may be.
- 4.2 If any person other than a Transferring Supplier Employee asserts that they have transferred to a New Supplier, whether pursuant to TUPE or otherwise, on a Service Transfer Date, the Customer shall notify NewCold in writing of the name of such person and his or her claim or assertion within 15 Business Days of the Customer receiving notice of any such claim or assertion. Thereafter NewCold shall have 15 Business Days within which to procure the re-employment or re-engagement of the person(s) or procure settlement(s) with them and following the expiry of the 15-day period the New Supplier may terminate the employment of any such

person in which case NewCold shall indemnify the New Supplier against all Losses incurred by the New Supplier in relation to the employment and dismissal of such person provided always that the New Supplier shall use reasonable endeavours to ensure that any such dismissals are carried out fairly within the meaning of section 98 of the Employment Rights Act 1996 and in accordance with the ACAS Code of Practice on Disciplinary and Grievance Procedures and the employee's contract of employment.

- 4.3 NewCold undertake that where TUPE applies on a Service Transfer Date in relation to the Transferring Supplier Employees:
- (a) it shall provide any New Supplier employee liability information in compliance with Regulation 11 of TUPE, and which is accurate up to and including the Service Transfer Date;
 - (b) full written details of all shares, bonuses, overtime payment, stock options, retirement, death or disability benefit schemes or similar obligations and all overtime payments shall be provided to the New Supplier and shall be accurate as at the Service Transfer Date; and
 - (c) it shall comply with its obligations under Regulation 13 of TUPE;
- 4.4 After notice has been given by either party to terminate this Agreement:
- (a) NewCold shall not, and shall procure that no other employer (other than the Customer) shall, without the written permission of the Customer (such consent not to be unreasonably withheld or delayed):
 - (i) amend or vary the contract of employment (including pay) of any Supplier Employee or propose to do;
 - (ii) redeploy, or terminate the employment of any Supplier Employee or serve notice of doing so;
 - (iii) recruit any person for employment in connection with or assign any additional employee to, all or any of the Services.
 - (b) NewCold shall co-operate (and procure co-operation from any other employer) in the orderly transfer of employment to a New Supplier of the Transferring Supplier Employees on the Service Transfer Date.
- 4.5 No later than 14 days following a Service Transfer Date NewCold shall provide to the Customer or any New Supplier as appropriate, updated payroll information following the final payroll run and P45 details in respect of the Supplier Employees whose employment has transferred to a New Supplier.
- 4.6 For a period of 6 months after the Service Transfer Date NewCold shall within 21 days of receipt forward to the Customer and/or any New Supplier as directed by the Customer any notices, correspondence, information or enquiries which relate to any Transferring Supplier Employees who are employed or engaged by the Customer and/or any New Supplier after the Service Transfer Date.
- 4.7 Where TUPE applies on any Service Transfer Date, the Customer shall fully indemnify and hold NewCold harmless against all Losses which NewCold may incur arising out of or in connection with:
- (a) any claim or allegation relating to the employment and/or dismissal of any Transferring Supplier Employee whose employment has transferred to the New Supplier pursuant to TUPE) by the New Supplier on or following the Service Transfer Date;

- (b) any claim or allegation made by or on behalf of any Transferring Supplier Employee) pursuant to and/or falling within Regulations 4(9) and/or 4(11) of TUPE;
- (c) any failure or alleged failure by any New Supplier to comply with Regulation 13 of TUPE (including without limitation Regulation 13(4)).

Signed by)
for and on behalf of)
McCain Foods (G.B.))
Limited)
in the presence of:)

Signature of witness:

Name:

Address:

Occupation:

Address to which Notices are to be sent:

[McCain to provide address for notices]


Attention:

Tel:

Facsimile:

E-mail:

Signed by
for and on behalf of
NewCold Transport Limited
in the presence of:

) Jonathon Miles
) 
) 12th October 2021

Signature of witness:

Name:

Address:

Occupation:

Address to which notices are to be sent:


Gravinnen van Nassau Boulevard 105

4811 BN Breda

The Netherlands

- (b) any claim or allegation made by or on behalf of any Transferring Supplier Employee) pursuant to and/or falling within Regulations 4(9) and/or 4(11) of TUPE;
- (c) any failure or alleged failure by any New Supplier to comply with Regulation 13 of TUPE (including without limitation Regulation 13(4)).

Signed by
for and on behalf of
McCain Foods (G.B.) Limited
in the presence of:

) 
) **ANDREW BATES**
)
)

Signature of witness: 

Name: **Barry Puri**

Address: **12 KINGSPOW WAY**
YORK
YO1 2NB

Occupation: **FINANCIAL DIRECTOR**

Address to which Notices are to be sent:

[McCain to provide address for notices]

Havers Hill
CAJTON
SCARBOROUGH
YO11 3BS

Attention: **manuela roeh**


Tel: **07446 935778**

Facsimile:

E-mail: **manuela.roehr@mccain.co.uk**

Signed by
for and on behalf of
NewCold Transport Limited
in the presence of:

) 
) **ROY HOGE**
)
) **27 September 2021**

Signature of witness: 

Name: **ROSS HUNTER**

Address: **PRIORY HOUSE**
2 MAIN STREET
NETHER PARRETONS
YORK YO26 6HS

Occupation: **MANAGER**

Address to which notices are to be sent:

Gravinnen van Nassau Boulevard 105
4811 BN Breda
The Netherlands

Attention: VP Business Development

Tel: +31 880 601 400

E-mail: info@newcold.com

