KELLOGG NORTH AMERICA WAREHOUSE SERVICES AGREEMENT

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KELLOGG NORTH AMERICA WAREHOUSE SERVICES AGREEMENT

This *Warehouse Services Agreement* (“Agreement”), entered into on (“Effective Date”), is made by and between having its registered office at (together with its Affiliates, individually and collectively referred to as “Service Provider”); and Kellogg Sales Company, having its registered office at One Kellogg Square, Battle Creek, Michigan 49017 (together with its Affiliates, individually and collectively, referred to as “Kellogg”). Service Provider and Kellogg may also hereinafter be referred to individually as a “Party” and collectively as the “Parties”.

As referenced herein, “Affiliates” means, with respect to an entity, any entity that Controls, is Controlled by, or is under common Control with, that entity, and will include any such entity that meets this test whether before or after the Effective Date. For the purpose of the definition of “Affiliates”, “Control” (including with correlative meanings, the terms “Controlling”, “Controlled by”, and “under common Control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether through the ownership of voting securities, by trust, management agreement, contract or otherwise.

BACKGROUND

1. Kellogg manufactures and distributes a variety of branded food products.

1. Service Provider is a provider of third-party logistics services, to include the management of all distribution activities related to the storage and handling of goods.

1. Kellogg desires to engage Service Provider to provide such services according to the terms and conditions set forth herein.

The Parties agree as follows.

AGREEMENT

1. General Terms and Conditions

1.1 This Agreement will commence on the Effective Date and will continue for an initial period of five years (“Initial Term”) unless earlier terminated as provided herein or unless extended by written agreement of both Parties.

i. The Initial Term and any extension thereof is referred to as the “Term”. Notwithstanding the foregoing, any extension or application of this Agreement to warehouse services required by Kellogg for overflow goods or other logistics services will be in Kellogg’s sole discretion and may be governed under the terms and conditions of a separate agreement.

1.2 Service Provider will occupy Kellogg-leased or -owned buildings, including supporting parking, yard and vehicle access areas as set out in Schedule 1, or such other premises as agreed between the Parties in writing (each a “Facility” or “Facilities”; the singular and plural may be used interchangeably herein). Service Provider represents and warrants that the Facility is food-grade and properly maintained for the receipt and storage of packaged food products and Kellogg Goods (defined hereafter) in accordance with this Agreement and in compliance with “Applicable Laws” (being any law applicable to the Facility, Services or Goods and includes without limitation common law, statute, statutory, instrument, proclamation, bye-law, directive, decision, regulation, rule, order, ordinance, notice, code (including code of practice and code of conduct), rule of court, instruments, or delegated or subordinate legislation).

i. Service Provider will permit relevant regulatory officials, upon presentation of appropriate credentials, to enter and inspect the entire Facility and its premises upon demand and without notice for the purpose of providing any relevant authority with access to the Facility for inspections as required under Applicable Laws. Service Provider will promptly notify Kellogg (via phone and email) of any such inspection of the Facility.

ii. Service Provider will be responsible for registration with the Food and Drug Administration under its own name for the Term.

1.3 Service Provider will provide all distribution activities and services related to the receipt, storage, and handling of Kellogg Goods as set forth in this Agreement at the Facility (“Services”), and is responsible for the Goods from the time they are received at the Facility (which will include Kellogg Goods in dropped trailers in the Facility yard) to the time they are loaded into trailers for departure from the Facility and trailers depart the Facility yard. Service Provider will receive, store and ship Goods in a food-grade environment in accordance with this Agreement and all Schedules, Appendices or Exhibits, and/or as otherwise directed by Kellogg. The Goods and specifications for storage, handling, shipping, quality, safety, sanitation, and inventory control will be in accordance with this Agreement and all other Kellogg standards and guidelines applicable to the Services, which standards and guidelines are provided in writing to Service Provider by Kellogg, or may be accessed electronically by Service Provider via access granted by Kellogg.

i. “Services” expressly include but are not limited to: all associated management and administrative activities; the identification and implementation of industry best practices, continuous improvement and efficiency initiatives; maintaining the Facility in good operating order (subject to the obligations of landlord and Kellogg under the lease) and in food-grade condition per Kellogg instructions and standards; sanitation services; placing Goods in storage; returning Goods to the warehouse door; loading outbound trailers and/or intermodal containers; spotting services all as provided in this Agreement.

ii. “Goods” is defined as any food product or merchandise manufactured or distributed by Kellogg, its subsidiaries or Affiliated entities, and includes but is not limited to any ingredients, premiums, finished goods, packaging, or other product or materials used in connection with the business of Kellogg. Kellogg represents and warrants to Service Provider that, to the best of its knowledge: (i) all Goods will be safe for storage and handling provided Service Provider stores and handles Kellogg Goods in accordance with current industry practices and standards, and all reasonable instructions in that regard given by Kellogg to Service Provider; (ii) Kellogg Goods are not comprised of, do not contain nor are packaged in any dangerous, noxious or illegal substance; and (iii) Goods tendered for storage are not infested with pests or otherwise present a danger to others or the Facility.

iii. Service Provider agrees to comply with this Agreement and all Schedules, Appendices or Exhibits attached herein in the fulfillment of the Services.

1.4 Subject to Service Provider's warehouseman's lien, title and ownership of the Goods will at all times remain with Kellogg. All risk, including the risk of damage to or loss of all Goods will pass to Service Provider upon taking possession of the Goods and will remain with Service Provider until such time as Goods are dispatched from the Facility in accordance with this Agreement.

i. Service Provider will not allow any third party lien (consensual or otherwise), security interest, claim, charge, personal property lien, or other encumbrance of any kind (“Encumbrances”) to be imposed on the Goods through Service Provider or as a result of Service Provider’s actions. If an Encumbrance of any nature is imposed on the Goods through Service Provider or as a result of Service Provider’s actions, Service Provider will, to the extent permitted by applicable law, immediately take all actions at its sole cost and expense, which is necessary or as may be reasonably requested by Kellogg to remove such Encumbrance.

ii. In accordance with the Uniform Commercial Code, Service Provider will not be liable for any loss or damage to Kellogg Goods stored unless such loss or damage results from the failure of Service Provider to exercise such care in regard to the Goods as a reasonable careful person would exercise under like circumstances.

iii. Service Provider is and will be an independent contractor, and in no event will any employee or independent contractor hired or retained by Service Provider be, or be considered, an employee, or agent of Kellogg. Service Provider is not granted any right or authority to create any obligations, express or implied, on behalf of Kellogg or to bind Kellogg in any manner whatsoever other than for the Services specified in this Agreement.

1.5 Service Provider may be required to work with other third-party service providers within the Facility(ies) as designated by Kellogg, which may include but are not limited to overflow space providers, value-added services and/or co-packer providers. The Parties will document mutually agreed upon procedures regarding Service Provider’s responsibilities necessary to support activities related to such other third-party providers within the Facility(ies).

1.6 Service Provider will comply at all times during the Term with the terms of the Kellogg Supplier Code of Conduct, a copy of which has been delivered to Service Provider prior to execution of this Agreement. Upon request from Kellogg, Service Provider will reaffirm such compliance on an annual basis, either by execution of a written reaffirmation or by such electronic means as Kellogg may reasonably designate.

1.7 Service Provider will support Kellogg Company’s Supplier Diversity Program through its use of commercially reasonable efforts to target a minimum of 15% of the spend with respect to the purchase of goods and services required of or provided by Service Provider in its performance of Services hereunder from Certified Diverse Businesses, where such businesses provide efficient performance and economically equivalent goods and services. Service Provider may be asked to report to Kellogg any amounts paid to Certified Diverse Businesses in a form reasonably requested by Kellogg on a regular basis. Further, Service Provider may be asked to reasonably participate, on Service Provider’s own accord and/or with Kellogg, in Certified Diverse Businesses outreach efforts (such as conferences and trade shows) related to achieving compliance with this Section and Kellogg diversity and inclusion efforts. Service Provider will use commercially reasonable efforts to competitively bid work performed under this Agreement, where appropriate, to promote the use of small businesses and those owned by women, ethnic minorities, persons with disabilities, veterans and others. As used in this Agreement, “Certified Diverse Businesses” means diverse organizations or enterprises verified or certified by an independent third-party certification organization which include, but may not be limited to, the following types of organizations or enterprises: disabled persons owned businesses; disabled veteran owned businesses; lesbian, gay, bisexual or transgender owned businesses; minority owned businesses; small disadvantaged owned businesses; women owned businesses; veteran owned businesses.

1.8 Compensation, fees and commercial details (“Charges”) for Services provided hereunder are set forth in Schedule 3.

i. Service Provider’s management fee (further defined in Schedule 3) will remain fixed for the Initial Term.

ii. In order to ensure Services are provided consistently at or below budget, drive continuous improvement and avoid cost overruns, the Parties have agreed to implement a cost-plus, open-book financial model, including a gainshare/painshare incentivization program, which is defined in Schedule 3. This compensation model will encompass all of Service Provider’s actual Charges incurred for the performance of Services during each Kellogg fiscal month, including its management fee as provided in Schedule 3.

iii. The Parties will mutually develop a budget for a/the Facility(ies) each calendar year, expected to be completed by the end of each calendar year, for the subsequent year and such budget will be amended to this Agreement on an annual basis.

1.9 Service Provider represents and warrants that its Charges will be derived from its Detailed Transaction Report (“DTR”), which is generated from its general ledger in accordance with generally accepted accounting principles (“GAAP”). Service Provider will furnish the DTR to Kellogg each fiscal month and Kellogg may audit the DTR upon request in accordance with Section 14 of this Agreement. The format of Service Provider’s DTR provided to Kellogg will be in a format mutually agreed upon by the Parties, and will clearly provide details regarding the following cost components which align to the Facility(ies) budget:

i. Variable Cost Components: direct labor; direct benefits; direct temporary labor; other variable expenses

ii. Fixed Cost Components: building and warehouse operation expenses; equipment leases; indirect benefits and labor; management; office expenses; depreciation below the line; other income and expenses.

1.10 For Services rendered, Service Provider will invoice Kellogg, on a per Facility basis, for all Charges in accordance with Schedule 3.

i. On the first day of each Kellogg fiscal month, Service Provider will provide Kellogg with its estimated Charges in an approved billing format established for the upcoming fiscal month for Kellogg financial accrual purposes. Kellogg’s fiscal calendar for the corresponding year will be provided on an annual basis.

ii. Within the first ten (10) business days of each fiscal month, Service Provider will invoice any adjusted amount from the prior fiscal month to account for any differences between the budgeted and actual Charges, plus any approved Extraordinary Costs (defined hereafter) as incurred. Invoice date will be no sooner than the first day of the upcoming monthly interval. Service Provider will provide supporting documentation for all non-budgeted Charges.

1.11 Kellogg will pay all properly presented and undisputed amounts within 120 calendar days from the invoice date; provided, however, that Kellogg has received such invoice within five business days from the invoice date (“Due Date”). In the case of a good faith dispute of an invoice, Kellogg will timely pay the undisputed portion of the invoice and, before the Due Date, notify Service Provider in writing (email is acceptable) of the specific item that Kellogg believes was billed in error and will provide supporting detail as needed. The due date for these disputed sums will then be extended for 10 business days (or such later time as both parties may agree) from the Due Date of the applicable invoice to give the Parties time to evaluate and resolve the billing error.

1.12 Service Provider commits to implementation of continuous improvement programs to offset annual inflation , with annual targets or requirements mutually agreed upon by the Parties. If savings result from a capital investment by either Party, the savings will be applied first to reimburse the Party who made the relevant capital investment. Improvements that arise from Kellogg sourcing activities will not be deemed to be continuous improvement efforts. Should Kellogg be the originator of any continuous improvement initiative that would lead to adjustments in Charges as defined in Schedule 3 in its favor, such adjustments will be reviewed and implemented as part of the annual budget development process. The Parties will designate appropriate resources to support such projects, and continuous improvement efforts will be reviewed formally no less than quarterly. If continuous improvement targets are not met, the Parties will meet to discuss appropriate remedial strategies, including but not limited to adjustments to incentives defined in Schedule 3.

2. Facility Operations and Goods Handling Responsibilities

2.1 Service Provider is responsible for all operations of the Facility and must keep the designated Kellogg contact advised and current with all operational activities associated with the Kellogg account. Service Provider will ensure full access is given to Kellogg employees and its authorized representatives for the purposes of monitoring Service Provider’s compliance with this Agreement and its use and maintenance of the Facility. Such access will include extemporaneous review of Service Provider’s compliance with its maintenance obligations and a right of physical access to the Facility by Kellogg or any third party on Kellogg’s behalf to carry out any inspections or work Kellogg may in its sole discretion consider necessary. Service Provide will deliver all documents related to the Services, the Goods, or the Facility as required by Kellogg (or its third party) in advance of or throughout such visits.

2.2 Service Provider will consult with Kellogg in any decisions relating to the procurement of third-party services, such as utilities, material handling equipment, office materials, etc., when it affects Charges, potential credits or incentives to Kellogg, or is otherwise related to the Services or Goods. Any increases to the Facility budget as a result of the approved procurement of third-party services or materials must be approved by Kellogg in writing in advance of such procurement. Unless waived by Kellogg on a case-by-case basis, any third-party contracts, agreements, or equipment leases, having a term exceeding six months in length, or an aggregate amount exceeding $5,000, will include a provision allowing assignment to Kellogg, in its sole discretion, and/or will allow for termination in the event this Agreement is terminated.

2.3 Service Provider is responsible for establishing, maintaining and demonstrating effective use of cost control measures, which will include but not be limited to the following:

i. Service Provider will demonstrate utilization of competitive local and/or national (as the case may be) procurement processes, using no less than three competitive bids (if available) to qualify and select vendors for services performed at the Facility(ies), for such third-party services that may include but not be limited to HVAC maintenance, janitorial service, pest control, landscaping, snow removal, dock-door maintenance, electricity provider, natural gas supplies, waste removal, etc.

ii. Service Provider will employ a manpower planning tool to determine hiring requirements.

iii. Service Provider will demonstrate sound management of costs and usage for, and monitoring service levels of, all costs that are directly paid by Kellogg, and will be responsible for the accuracy, tracking, and reconciliation of all costs paid directly by Kellogg to various vendors for the use of supplies or equipment in the operation of the Facility by Service Provider.

iv. Service Provider will utilize productivity and equipment utilization monitoring systems in support of service and continuous improvement efforts.

v. Service Provider will document all maintenance requests and work performed on material handling equipment, whether such equipment is owned or leased by Service Provider, another third party, or Kellogg. All such maintenance records will be available for review by Kellogg or its designee as requested.

vi. Service Provider will maintain an up-to-date fixed asset list for all mobile and fixed equipment, which includes but is not limited to racking, case cutters, and stretch wrappers, whether such equipment is owned or leased by Service Provider, another third-party, or Kellogg; such list will be available to Kellogg upon request.

vii. Up-to-date employee roster including a list of names, hire date, position and salary; such list will be available to Kellogg upon request.

2.4 Service Provider will immediately notify Kellogg in the event of labor unrest, strike, or organized labor campaign affecting Service Provider at any Kellogg Facility operated by Service Provider. Service Provider will be responsible for all legal fees that it may incur in the event of such unrest, strife or strike, unless such incident is a result of Kellogg or Kellogg’s other third-party providers.

2.5 Service Provider is responsible for developing process documentation, training of all its personnel on such processes, providing continuity of personnel at the Facility, and minimizing turnover for all positions, salaried and hourly, at Service Provider’s sole cost and expense. At a minimum, Service Provider will:

i. Provide adequate staffing expertise to prevent service interruptions.

ii. Maintain an adequate transition plan that provides for backup of all personnel positions to ensure continuity of service. Service Provider will provide such documentation to Kellogg upon request.

iii. Provide all personnel positions with detailed job descriptions and process documentation to outline their accountabilities. Service Provider will provide such documentation to Kellogg upon request.

2.6 Service Provider will use commercially reasonable efforts to avoid detention charges in accordance with Kellogg’s transportation accessorial program (specifically, detention for trailer and driver/power) as included in Appendix I. Kellogg will provide Service Provider with general or carrier-specific detention approval criteria for its transportation carriers. Service Provider will use Kellogg-provided tools (i.e. yard management software, SAP, WMS yard reporting, Tableau scorecards, etc.) to validate and respond to Kellogg transportation carrier claims for detention within **(i)** ten (10) business days of receipt of request for trailer detention and (ii) within 48 hours of receipt of request for driver detention. Service Provider will maintain all information and supporting documentation specific to detention charges in order for Kellogg to approve or reject any request received from it's carriers and for audit purposes.

i. On a daily basis, Kellogg will set the prioritization between inbound and outbound schedule based the capacity of the Service Provider for that day. Should the Service Provider not follow the prioritization directly by Kellogg for that day, the Service Provider may be responsible for any resulting detention charges.

ii.

iii. Any disputes between the Parties with respect to detention charges will be resolved as follows:

a. The Parties’ designated on-site representation will act in good faith and use reasonable efforts to resolve any disputes.

b. Should such efforts require further management escalation, Kellogg will designate either its Senior Director of Customer Distribution or its Senior Director, Kellogg North America Distribution and Service Provider will designate its corresponding counterpart as the representatives in additional negotiations.

c. If further escalation is necessary, the Parties will resolve in accordance with the Dispute Resolution Process.

2.7 As an operational provider to Kellogg, Service Provider must initiate and provide supporting data and documentation for claims against transportation carriers or other third parties responsible for damaging the Goods or the Facility to reduce Kellogg’s or Service Provider’s financial exposure to losses caused by such other parties. Service Provider will make commercially reasonable efforts to perform this function in accordance with Kellogg claims procedures or guidelines.

2.8 Kellogg and Service Provider agree to conduct a complete audit of the Facility on an annual basis, which will establish and confirm the agreed-upon condition and quantity of equipment located in the Facility (the “Warehouse Audit”). For all purposes under this Agreement, including but not limited to assessing liability for damage or destruction to the Facility or loss of equipment, and setting forth maintenance obligations, the Parties will use the Warehouse Audit as the baseline inventory of equipment and condition of the Facility as of the effective date of the applicable Warehouse Audit, with the initial Warehouse Audit being the baseline as the Effective Date. Service Provider is liable and responsible for all equipment owned by other parties while on Facility premises that is within the exclusive control of Service Provider except to the extent Service Provider can prove that any loss or damage to such equipment is caused by the negligent acts or omissions of the other parties.

2.9 Service Provider, as the operator of the building, has the primary responsibility for the condition, maintenance, and repair of the Facility, including compliance with and performance of the building maintenance functions as required under the applicable terms and conditions of Kellogg’s lease for the Facility (“Lease”) pursuant only to a list of such responsibilities that will be provided by Kellogg to Service Provider. Service Provider will designate an on-site individual with sufficient operating authority to oversee Facility maintenance and ensure compliance with the terms and conditions set forth in this Agreement, as well as taking all reasonable steps necessary to prevent damage, destruction or contamination of Kellogg Goods from Facility-related sources (i.e. water leaks, dust infiltration, etc.). In accordance with the terms set out herein and the Kellogg Property Audit Inspection Report, Service Provider will physically inspect the Facility, to include the roof, as well as maintain monthly maintenance logs. Service Provider must use its best efforts to prevent damage to the Facility by its own personnel and equipment and the personnel and equipment of outside third parties, including but not limited to contract shippers/transportation carriers and service providers, Kellogg’s customers (making a customer pick up), rail service providers (if applicable), and all other vendors, guests and invitees. Kellogg must review and approve all Facility maintenance and repair work to be performed by Service Provider or Service Provider’s designee. Service Provider will be responsible for and will promptly repair at its sole cost and expense any damage to the Facility caused by Service Provider, including but not limited to damage or destruction to columns, damage or destruction of racking uprights and protectors, or other forms of damage or destruction that impact the structural integrity of the Facility, normal wear and tear excepted. For purposes of the foregoing, normal wear and tear is defined as damage that would occur during normal distribution activities over time. Maintenance or repairs of a routine or emergency nature, not caused by Service Provider’s neglect or damage, will be reimbursed to Service Provider; provided, however, that Service Provider will make commercially reasonable efforts to contact Kellogg to determine if Kellogg’s landlord is responsible for such maintenance or repairs prior to incurring any costs. Service Provider will not make any alterations or modifications to the Facility or its contents without express written permission from an authorized Kellogg representative having knowledge of any applicable underlying Lease, which permission shall not be unreasonably withheld or denied. Service Provider will forward all correspondence, bills, invoice copies and statements, of both a routine and unique nature, relating to Facility maintenance and/or repair, to Kellogg within thirty (30) calendar days of receipt of invoice.

2.10 Service Provider is responsible for all Kellogg owned or leased equipment in the Facility, which includes but is not limited to storage racks, stretch wrappers, material handling equipment, lift trucks, platform change equipment, electronics, etc. Service Provider is responsible for ensuring that all equipment used in the Facility is properly maintained and in safe working condition. Should equipment maintenance or replacement costs be estimated to exceed $1,000, prior to authorizing any such work, Service Provider is required to obtain Kellogg’s written approval. Kellogg will review and approve all maintenance and repair work performed on the equipment. Service Provider will **(i)** perform and document daily visual inspections of all equipment used at the Facility and **(ii)** report any equipment failures promptly after such occurrence. Service Provider will be liable and responsible for repairing and/or replacing any Kellogg equipment damaged or lost by Service Provider at its sole cost and expense to the extent such damage or loss is caused by Service Provider’s misuse, intentional or negligent act(s) or omissions.

2.11 Service Provider is liable and responsible for ensuring that the Facility, its contents, and the equipment used in or at the Facility are consistent with Applicable Laws, Kellogg standards and are in the proper condition to ensure a safe environment for the Parties’ employees, contractors, third-party providers, or any visitors or guests to the Facility. Service Provider has the authority and responsibility to stop any unsafe or dangerous acts immediately. Service Provider must have in place a documented safety program that is administered such that all workforce activity and Facility conditions are managed and maintained in a safe environment. Service Provider will make any reporting required of Service Provider by Applicable Law (including but not limited to OSHA metric reporting) available to Kellogg upon request. Service Provider must ensure that “Lift Drivers Daily Equipment Safety Checklists” are performed and kept on record. Service Provider must prepare and share any safety or other incident reports with Kellogg both as they occur and as requested by Kellogg. Service Provider must notify Kellogg of any inspections and results of such inspections or visits and is required to pass all such inspections. Failure to perform in accordance with this Section is considered a material breach and any damages incurred by Kellogg as a result of such material breach will be the responsibility of Service Provider to remedy at its sole cost and expense. Notwithstanding the foregoing, in the event Kellogg dedicates an area in the Facility specifically for the performance of services by Kellogg or another third-party provider, Service Provider will not be liable or responsible for ensuring a safe environment for non-Service Provider employees in such area to the extent Service Provider does not control the area or contribute directly to any unsafe condition therein.

2.12 Service Provider will be required to follow the guidelines from Kellogg Quality as set out in Appendix I and to provide all Services in accordance with the performance standards set out in Schedule 2. In addition, Service Provider is required to follow American Institute of Baking (“AIB”) Consolidated Standards for Food Distribution Centers, as outlined in their booklet (copyright @2013 or any subsequent updates) Sections 1 (Operational Methods and Personnel Practices), 2 (Maintenance for Food Safety), 3 (Cleaning Practices), 4 (Integrated Pest Management), and 5 (Adequacy of Prerequisite and Food Safety Programs). Periodic sanitation inspections may also be done by Kellogg Quality and other Kellogg personnel.

i. AIB audits (or similar audits by alternative Kellogg-approved third-party auditors) will be performed at Kellogg’s direction. Costs for these audits will be paid by Kellogg directly to AIB. If the Facility requires improvements to meet AIB standards, Kellogg will pay those costs unless such costs are a result of Service Provider’s failure to maintain the Facility in accordance with this Agreement, in which case such costs will be the sole responsibility of Service Provider. If any AIB rating falls below 935 as a result of Service Provider's actions, follow-up AIB audits will be scheduled every sixty calendar days until the 935 rating is achieved. Service Provider will be required to pay for such follow-up audits.

2.13 Service Provider will immediately notify Kellogg in the event of an inspection of Service Provider or any Facility or any other premises used in the provision of the Services by a representative of any regulatory agency. Subject to applicable law, Service Provider will provide Kellogg any and all reports issued by, or correspondence received from, any regulatory agency that conducts any such inspection during the term of this Agreement as soon as reasonably practicable after receiving any such report or correspondence and will provide Kellogg a copy of any correspondence filed by Service Provider in response to such inspection.

2.14 All Kellogg Goods delivered to the Facility must be received, properly segregated, marked, and packaged for handling. A manifest will be furnished to Service Provider identifying the Goods and specifying, consistent with the terms of this Agreement, the warehouse procedures or type of storage or other services to be performed. If Kellogg requires Service Provider to conform to any special handling or inventory procedures not previously agreed upon, Kellogg will inform Service Provider in writing and Service Provider will comply with such procedures provided that they are made timely, reasonable, and not economically burdensome.

2.15 Kellogg will ship Goods to the Facility as inbound stock, in quantities and frequencies determined by Kellogg. Kellogg does not intend to ship its Goods to Service Provider as named consignee. However, if this occurs, Kellogg must notify the transportation carrier in writing prior to shipment that the named consignee is Service Provider and that Service Provider has no beneficial title or interest in the Goods. Shipments of Kellogg Goods will be consigned to Kellogg Sales Company, in care of Service Provider. If Kellogg fails to notify the transportation carrier as described in herein, Service Provider may refuse to accept Goods shipped to Service Provider as named consignee, without liability of any kind for any loss, injury or damage to Goods so shipped, with immediate notice to Kellogg of such refusal to accept Goods and the reason for their refusal. This notification will be made by Service Provider verbally within two hours of refusal during first shift operating hours and will be followed by Service Provider’s written confirmation within two days (email is acceptable). For refusals occurring during other operating hours, notification will occur by 9:00 AM on the next business day.

2.16 Kellogg and Service Provider will set the priorities for receiving and shipping Goods. Appointments will be scheduled for all inbound and outbound shipments utilizing a dock schedule (provided by Kellogg or its designated representative) that will include slots for both live and drop equipment. Kellogg will provide guidance regarding live slot requirements needed to support Kellogg business from the Facility. Service Provider must provide appointment times for all inbound loads within the day of request, recognizing that the number of inbounds requested for drop may exceed normal unloading capability for any given day. Exceptions to scheduling process may be requested by Service Provider in its reasonable judgment in order to drive out cost or increase service; however, such exceptions will be limited by Kellogg’s final determination in the case of specific customer requirements. Kellogg is responsible for the selection of inbound and outbound transportation carriers and the routing guide for the Facility and will supply a list of such carriers to Service Provider. Service Provider is responsible for monitoring the compliance of carriers for adherence to appointments and Kellogg will take the prompt corrective action it deems appropriate with respect to carrier non-compliance.

2.17 Upon receipt of Goods shipments, Service Provider will notify Kellogg of cases received, and damage or loss (if any) through Kellogg’s designated warehouse management system. This notification will be made via an appropriate receiving report, noting (i) shipper’s number; (ii) ship date; (iii) receipt date; (iv) carrier; (v) car or trailer number; (vi) cases received, by case code; (vii) cases damaged, by case code; (viii) cases damaged, by category and type (warehouse, inbound, customer return, etc.). This receiving report will be electronically transmitted to Kellogg as per Kellogg instructions.

2.18 Kellogg will notify Service Provider of criteria to use in determining if Goods are damaged or unsalable. Service Provider must identify and report all damage categories (i.e., warehouse, inbound, customer returns, product or quality holds, etc.) using Kellogg’s designated system within twenty-four (24) hours of identification. Service Provider must utilize Kellogg damage criteria in reviewing and removing damaged or unsalable Goods promptly. Service Provider will segregate, store and dispose of all damaged or unsalable Goods (including, without limitation, product subject to quality holds) only as directed by Kellogg, and Kellogg will advise Service Provider of disposition of such Goods. Failure to perform in accordance with this Section 3.5 is considered a material breach and any damages incurred by Kellogg as a result of such material breach will be the responsibility of Service Provider to remedy at its sole cost and expense. Service Provider must maintain all inventory records and provide access as required in Section 14.2.

2.19 Should any Kellogg Goods be delivered to the Facility in an unsafe condition, in a condition which violates any Applicable Law, or which could present a health or environmental hazard to person or property, Service Provider agrees to hold such Goods following the guidelines and procedures detailed in the appropriate policy (or policies) provided by Kellogg. Service Provider agrees to give prompt written notice to Kellogg of the arrival of any such Goods, and Kellogg will promptly notify Service Provider upon becoming aware of any unsafe condition, any condition which violates any Applicable Laws, or any condition which could present a health or environmental hazard to person or property regarding the Goods on inbound trailers. Kellogg will promptly provide Service Provider with full details of the manner in which such Goods are to be reviewed, investigated and/or dispositioned.

2.20 If, in the reasonable judgment of Service Provider, Kellogg Goods in its custody have caused or might cause infestation, contamination or damage to property or injury to person, or which have characteristics which make their storage illegal or hazardous, Service Provider may request Kellogg to remove such Goods within such time as Service Provider believes reasonable under the circumstances. If Service Provider reasonably determines that the condition of the Goods is such that it must act promptly, it may remove the Goods at Kellogg’s reasonable cost with immediate notice to Kellogg by telephone or email. In all events where Service Provider acts reasonably and in good faith, Service Provider will not be liable by reason of such removal whether by it, Kellogg or others.

2.21 Kellogg Goods must be handled by the appropriate material handling equipment in accordance with Kellogg guidelines. For example, tray shrink packaging cannot be clamped. Kellogg will notify Service Provider of the specific storage characteristics of the Goods, but generally Goods should be stacked in accordance with the Facility’s system settings. It is Service Provider’s responsibility to understand which Goods can be handled with which type of material handling equipment.

2.22 Service Provider will use all best efforts to deliver Kellogg Goods in accordance with instructions received from Kellogg. Such instructions to Service Provider to deliver Goods in its custody will not be effective until received in writing by Service Provider; provided, however, that Kellogg may, by a written notice, authorize and instruct Service Provider to rely on electronically transmitted instructions from Kellogg as to where and when to deliver the Goods. Service Provider will not be liable for any loss or error in connection with the delivery of Kellogg Goods, which results from an error in such electronically transmitted instructions from Kellogg.

2.23 If Kellogg determines, in its sole discretion, that it will undertake a market withdrawal or recall of any Goods, Service Provider will provide Kellogg with assistance with such withdrawal or recall as directed by Kellogg. Kellogg will be responsible for the cost of any such withdrawal or recall; provided, however, if and to the extent such withdrawal or recall arises directly out of or relates to Service Provider’s breach of this Agreement or negligent acts or omissions in performing its obligations under this Agreement, Service Provider will pay all reasonable costs and expenses associated with withdrawing, recalling, recovering, repackaging, and/or destroying any affected Goods and reimburse, or at Kellogg’s election, credit Kellogg’s account or permit Kellogg to offset from any sums owed by Kellogg to Service Provider all costs incurred by Kellogg in connection with any such withdrawal or recall, including without limitation the cost of all inventory used in making the affected Goods and the sales cost of the affected Goods.

3. Inventory Management, Damages and Allowances

3.1 The financial book inventory, as maintained in SAP, is the official statement of inventory for Kellogg. Service Provider will compare warehouse management system (“WMS”) and SAP inventories and resolve any inventory record discrepancies daily. Service Provider will keep accurate inventory records on all Goods regardless of status (i.e., aged/damaged/quality hold) or storage locations (i.e., full bay/part load bay/recoup/repack/module & shipper builds). The appropriate electronic transactions within the WMS must be used to ship, receive, donate, or destroy Goods, and such transactions must accurately be reflected in Kellogg’s SAP system.

3.2 Kellogg agrees, at its sole cost and expense, to maintain its WMS and SAP systems consistent with industry standards including performing routine maintenance, providing upgrades, maintaining back-ups, providing "help desk" support, and maintaining systems disaster recovery plans. Kellogg will also ensure its WMS (i) has the ability to segregate inventories of its Goods between Service Provider and any other third-party provider co-located at the Facility, and (ii) has the ability to provide visibility for all changes made within the WMS and SAP by any user . Service Provider will not be liable for any WMS or SAP service failure, failure to meet any performance requirements or any inability to provide service under this Agreement resulting from (i) any system failures, slowdowns or outages, or (ii) Kellogg’s failure to maintain its WMS and SAP systems consistent with industry standards, unless such WMS or SAP failure at the Facility is due to Service Provider’s gross negligence or intentional misconduct.

3.3 Kellogg, in its sole discretion, may change, upgrade or otherwise modify its WMS. Any such change will be performed and installed at Kellogg’s expense. Implementation of a new system, including training of warehouse personnel in use of such, will be accomplished by Service Provider at Kellogg’s expense. Service Provider will utilize the system as directed by Kellogg. Any subsequent productivity gain or loss from use of a new system, as rationalized in the system financial justification reviewed and approved by Service Provider, will be recognized and Charges adjusted accordingly.

3.4 Service Provider will perform at least (i) one physical inventory count of all Goods in the Facility once per quarter or (ii) a physical inventory cycle count of all bays once per quarter. Service Provider will submit records of such physical inventory counts to Kellogg following the close of such quarter. At the time of any physical inventory, Service Provider will be responsible for the book inventory quantities as reported in SAP. The Parties will coordinate physical inventories at a frequency determined by Kellogg. Service Provider will be responsible for all losses determined as a result of such physical inventories as defined hereafter.

3.5 For purposes of this Agreement, the following definitions will apply:

i. “Damage Allowance: percentage of total fiscal quarter case Throughput

ii. “Kellogg Standard Case Cost”: the actual, manufactured cost per case of a/the affected SKU(s)

iii. “Shrinkage”: a discrepancy (i.e. shortages or damages) between the quantity and quality of Goods recorded in the WMS and the quantity and/or quality of Goods counted during a physical inventory or other type of physical count (i.e. cycle); Shrinkage does not include inventory discrepancies (to include but not be limited to loss, damage or destruction) due to the negligent or intentional acts or omissions of Service Provider

iv. “Shrinkage Allowance”: percentage of the total value of Facility Throughput as calculated on a fiscal quarter basis

v. “Throughput”: the sum of the total cases of Goods received at the Facility plus all cases of Goods shipped from the Facility

3.4 Subject to Section 3.7, Kellogg will allow Service Provider a 0.04% allowance (the “Shrinkage Allowance”) for inventory losses and a 0.04% allowance (the “Damage Allowance”) for warehouse damage. All losses will be reported on a fiscal month basis and reconciled quarterly.

i. Inventory losses will be the net of overs and shorts for the SAP cycle count variances and SAP physical inventory variances (both in dollars, netted together). The 0.04% Shrinkage Allowance will then be applied, and if a net shortage results, Service Provider will compensate Kellogg for such shortage as calculated at the Kellogg Standard Case Cost within 120 calendar days of acknowledgement of Kellogg’s written claim notice for such losses.

ii. Cycle counts and/or physical inventories, as directed by Kellogg in its sole discretion, will be conducted by Service Provider at Service Provider’s sole cost and expense following Service Provider’s failure to maintain an inventory accuracy level of 99.96%, as measured on a fiscal quarter basis. The inventory variance will be calculated as follows:

*1 - (Net cases in variance)/Throughput for financial period*)

iii. The total amount of Kellogg Goods, as calculated and reported on a fiscal quarter basis at the Kellogg Standard Case Cost and any transportation expenses tied to Goods replacement, that are damaged, destroyed or stolen due to the fault of Service Provider in excess of the Tolerance Allowance, will be paid to Kellogg quarterly.

iv. Service Provider shall not be liable for the value of lost or damaged Goods that were received with concealed damage, or for Goods not received on inbound Equipment upon reconciliation or unload, so long as such loss, damage or non- receipt is noted on the bill of lading or escalated to Kellogg and noted during daily inventory reconciliation.

v. Should Kellogg Goods move through the Facility that require special handling or may be designed or shipped to the Facility in such a way that the potential or risk for incidental damage is increased (i.e. “kones”, totes, etc.) and the handling of those specific Goods leads to inventory losses above and beyond the 0.04% allowance provided herein, Kellogg agrees to review such inventory losses during each quarterly inventory review in conjunction with Service Provider to potentially adjust such results out of any final reconciliation calculations.

vi. In the event undisputed amounts owed by Service Provider are not received by Kellogg, then Kellogg reserves the right to off-set such amount against payments due Service Provider with no less than thirty (30) calendar days’ written notice of such pending invoice offset action.

3.5 Kellogg agrees that inventory records will not be adjusted in its WMS by its employees, representatives and/or contractors once Service Provider becomes liable for loss, except to the extent it has received notification of such adjustments in writing from Kellogg (email is acceptable) and such adjustments have been confirmed by Service Provider.

3.6 Other claims for lost or damaged Goods will be subject to the following procedures: (i) Kellogg will give written notice to Service Provider of any such loss or damage (email is acceptable) within 75 business days from the date of discovery; (ii) the Parties agree to utilize the Dispute Resolution Process as outlined herein to resolve any disputes related to the claim; and (iii) in the event Kellogg is due payment from Service Provider, it must be received within 60 calendar days of final resolution. In the event amounts owed by Service Provider are not received by Kellogg, then Kellogg reserves the right to off-set such amount against payments due Service Provider with no less than thirty (30) calendar days’ written notice of such pending invoice offset action.

3.7 For the avoidance of doubt, in the event of loss, damage or destruction of inventory due to an individual event, then the Shrinkage or Tolerance Allowances as provided herein will not apply to such loss, damage or destruction of inventory which results in a claim value in excess of $25,000.

4. Default and Termination

4.1 If Kellogg materially breaches any of its obligations hereunder and fails to cure such breach within 60 calendar days after written notice by Service Provider made in accordance with this Agreement, Service Provider will have the right to require immediate payment of all unpaid and undisputed Charges owed to it by Kellogg and may, upon a separate 60 calendar days’ prior written notice to Kellogg, terminate this Agreement. If there is a good faith dispute over an invoice, Kellogg will give notice and pay the undisputed portion as provided in this Agreement.

4.2 If Service Provider materially breaches any of its obligations under this Agreement, Kellogg will give written notice thereof (“Default Notice”) to Service Provider. If Service Provider does not (i) deliver to Kellogg within five business days after the date Service Provider receives the Default Notice (the “Notice Date”) a plan and timetable to cure all breaches, in form and substance reasonably acceptable to Kellogg, but in any event providing for cure within 60 calendar days from the Notice Date, (ii) begin to implement said plan within 15 calendar days after the Notice Date, and (iii) cure all breaches of this Agreement in accordance with such plan, Kellogg will have the right to terminate this Agreement upon 60 calendar days’ written notice. Kellogg will have the right to (a) require immediate payment of all unpaid and undisputed charges, costs, and expenses owed to it by Service Provider and (b) take any other legal or equitable action against Service Provider as it deems appropriate or necessary to recover the damages it has incurred as a result of Service Provider’s breach, including, but not limited to, any delays or failures in service to Kellogg and/or its customers.

4.3 Either Party may terminate this Agreement upon 30 business days’ prior written notice to the other Party in the event that such other party is adjudicated bankrupt, files a voluntary petition in bankruptcy, makes an assignment for the benefit of creditors, seeks protection against creditors under any Applicable Laws, or undergoes a Change of Control. For purposes of this Agreement, "Change in Control" means the completion of one or more transactions by which any person or unaffiliated entity becomes the beneficial owner of more than 50 percent of the voting power of such Party’s equity interests or by which such Party sells substantially all of its assets to an unaffiliated third party.

4.4 Notwithstanding anything to the contrary herein, either Party may terminate this Agreement, or part of the Agreement related to one or more Facilities at any time without cause or liability upon 180 calendar days’ written notice to the other Party; provided, however, that neither Party may exercise this right within the first twenty-four (24) months of the Initial Term. The termination of part of the Agreement related to one Facility will not impact the Agreement in respect of all other Facilities.

4.5 Intentionally Omitted.

4.6 If the Parties cannot mutually agree on an annual Facility budget, either Party may exercise its right to terminate this Agreement with no less than 180 calendar days’ written notice to the other Party. The Parties agree that if rights hereunder are exercised, the gainshare/painshare portion of this Agreement will be set aside for the remainder of the Term.

4.7 Upon termination of this Agreement for any reason, Service Provider will:

i. Co-operate with Kellogg in effecting a smooth transition to Kellogg or its new warehouse service provider.

ii. If requested by Kellogg, Service Provider will assign and Kellogg will assume all ongoing leases of equipment (including without limitation, capital leases), contracts and other obligations assumed by Service Provider or entered into by Service Provider in accordance with the terms of this Agreement and relating to the provision of Services.

iii. If Service Provider purchases any equipment in order to perform the Services, Kellogg may elect to purchase such assets from Service Provider at the then-present market price, which will be no lower than the net book value, and will take title to such assets after paying Service Provider in full.

iv. Service Provider will restore the Facility at its expense to its original condition at the time of occupancy by Service Provider, normal wear and tear excepted.

4.8 All documented costs identified by Kellogg for disruptions in service or damages to the Facility or Goods due to Service Provider’s failure to comply with this Section will be charged back to Service Provider.

4.9 Upon termination, Kellogg will pay Service Provider for Services that have been ordered pursuant to this Agreement and completed by Service Provider prior to the termination date. Service Provider will return all Goods in the possession of Service Provider at the termination date to Kellogg. In the event Kellogg terminates this Agreement in accordance with either Section 4.2 or 4.3, Service Provider will return all Goods in the possession of Service Provider at the termination date to Kellogg at Service Provider’s sole cost and expense and Kellogg will have no further obligations to Service Provider in respect of this Agreement after the termination date.

5. Warranties

5.1 Kellogg represents, warrants and covenants that: (i) Kellogg is duly formed in its jurisdiction of organization, and the individual(s) executing the Agreement on behalf of Kellogg have the requisite authority necessary to bind Kellogg to the performance of its obligations hereunder; and (ii) Kellogg owns all right, title, and interest in and to, or has full and sufficient right and authority to use in the manner required by this Agreement, any materials or data required to be furnished by Kellogg to Service Provider in connection with Service Provider’s performance of the Services.

5.2 Service Provider represents, warrants and covenants that: (i) Service Provider is duly formed in its jurisdiction of organization, and the individual(s) executing the Agreement on behalf of Service Provider have the requisite authority necessary to bind Service Provider to the performance of its obligations hereunder; (ii) Service Provider is financially capable of fulfilling all requirements of this Agreement; (iii) there are no legal proceedings pending or threatened against Service Provider that could reasonably be expected to prevent Service Provider from performing the Services; (iv) Service Provider is not prohibited by any loan, contract, financing arrangement, third party contract, or otherwise from entering into this Agreement; (v) Service Provider will perform the Services and all of its duties and obligations under this Agreement in a manner that is in compliance with, and will not violate, any Applicable Laws with jurisdiction or authority over Kellogg or Service Provider; (vi) it has and will maintain adequate equipment and a duly qualified staff as necessary to perform the Services in an efficient, professional, diligent, timely and workmanlike manner and as described in this Agreement; (vii) its Services will be performed by personnel possessing competency consistent with highest applicable industry standards and are experienced in the performance of the Services contemplated by this Agreement; and (viii) Service Provider will make all commercially reasonable efforts not introduce into any of Kellogg’s systems any virus, worm, Trojan horse, automatic restraint, time bomb, or any other feature or function that may, intentionally or unintentionally, cause: (a) erasing, destroying, corrupting, or modifying any software or data of Kellogg without the prior express written consent of Kellogg; or (b) bypassing any internal or external software security measure to obtain access to software or data of Kellogg without the prior express written consent of Kellogg. Service Provider’s obligation in the event of a breach of the preceding warranty will be to assist Kellogg in eradicating and mitigating the effects of any virus or other harmful code, at Service Provider’s sole cost and expense.

6. Indemnification and Damages

6.1 Each Party will defend, indemnify and hold the other, its parent company, directors, officers, subsidiaries, Affiliates, employees, and agents, (collectively, the “Indemnified Party”) harmless from any and all losses, claims, demands, causes of action, proceedings lawsuits, fees, government-imposed fines or penalties, liabilities, damages, judgments, settlements, costs, and expenses (including all reasonable attorney’s fees and legal costs) (collectively, “Losses”) brought or asserted by a third party resulting from (i) alleged patent, trademark or copyright infringement or unfair competition in connection with the actions contemplated in this Agreement; or (ii) breach of any Applicable Law in connection with this Agreement.

6.2 To the greatest extent permitted by Applicable Law, Service Provider will indemnify, defend and hold harmless Kellogg, its parent, subsidiaries, and Affiliated companies, and their respective directors, officers, shareholders, members, managers, partners, employees, agents, attorneys, other representatives, and permissible successors or assigns (individually and collectively, the “Kellogg Indemnified Party”) from and against any and all Losses brought, imposed, incurred by or alleged against any Kellogg Indemnified Party relating to, resulting from or arising out of (i) Service Provider’s, its employees’, agents’, contractors’, or subcontractors’ violation of law; (ii) breach of any duty of confidentiality; or (iii) the negligent, willful or fraudulent act or omission of Service Provider or any of their employees, agents, contractors, or subcontractors; and/or (iv) actions brought by third parties that are based, in whole or in part, on the acts or failures to act of Service Provider. For the avoidance of doubt, Losses as used in this Section also include claims, demands, actions, proceedings, lawsuits, liabilities, losses, damages, judgments, settlements, costs, and expenses (including all reasonable attorneys’ fees) arising from or due to any damage to property, personal injury or death. These indemnity and hold-harmless obligations include claims of Service Provider’s employees, agents, contractors and subcontractors . Notwithstanding the foregoing, Service Provider’s obligation to indemnify, defend, and hold a Kellogg Indemnified Party harmless does not apply when such claims, causes of action, loss, or damages are caused by the negligent acts or intentional misconduct of a Kellogg Indemnified Party, or its employees. Kellogg will have the right to approve or select counsel for defending Kellogg or any Kellogg Indemnified Party against any and all Losses covered by this indemnity provision. The indemnification obligations under this Section are not limited in any way by insurance limits or any limitation on the amount or type of damages, compensation, or benefits payable by or for Service Provider or anyone, directly or indirectly, employed by them under workers’ compensation acts, disability benefits acts, or other employee benefit acts.

6.3 To the greatest extent permitted by Applicable Law, Kellogg will indemnify, defend and hold harmless Service Provider, its parent, subsidiaries, and Affiliated companies, and their respective directors, officers, shareholders, members, managers, partners, employees, agents, attorneys, other representatives, and permissible successors or assigns (individually and collectively, the “Service Provider Indemnified Party”) from and against any and all Losses brought, imposed, incurred by or alleged against Service Provider or any Service Provider Indemnified Party relating to, resulting from or arising out of (i) the negligence, willful misconduct, bad faith, or fraud of Kellogg, or any of its employees, agents, contractors, or subcontractors,﻿ (ii) breach of any duty of confidentiality, and (iii) any third party claim that a Kellogg proprietary system violates any third party’s rights, including the infringement, misappropriation, or other violation of any third party’s patent, trademark, trade secret, copyright or other intellectual property rights. Kellogg’s obligation to indemnify Service Provider will not apply to the extent Service Provider’s Losses arise out of or relate to (a) Kellogg’s position as leaseholder; (b) negligent selection or supervision of Service Provider; and/or (c) anything for which Kellogg may seek indemnification from Service Provider.

6.4 Service Provider acknowledges and agrees that Kellogg may, from time to time, hire third-party service providers to perform services in the Facility. Kellogg will indemnify and hold Service Provider and its employees, contractors, agents, assigns, guests and invitees harmless from any and all Losses brought or asserted by Service Provider or a third party to the extent resulting from the negligent acts or omissions of such provider, unless any such claim is a result of: (i) an order or directive from Service Provider (including its employees, contractors, agents, assigns, guests or invitees) to such Kellogg third-party provider that is not consistent with Kellogg policies, procedures or Applicable Law; or (ii) a negligent or intentional act(s) or omission of Service Provider or any of its employees, contractors, agents, assigns, guests, or invitees.

6.5 Notwithstanding any other provisions of this Section 6 to the contrary, where both Parties (or their agents and employees) have each, through their negligence and/or willful misconduct, contributed to the injury, neither Party will be liable to the other to the extent of such contributory negligence or willful misconduct.

6.6 The Parties acknowledge and agree that the following will be considered direct damages if suffered by Kellogg or any of its Affiliates and that Service Provider will not assert that they are types of damages that are excluded under Section 6.7 to the extent they result from the failure of Service Provider (or entities or persons for whom Service Provider is responsible) to perform in accordance with the Agreement: (i) costs and expenses of recreating or reloading any lost, stolen, corrupted or damaged Kellogg data; (ii) costs and expenses of implementing a work-around in respect of Service Provider’s failure to provide or perform any Services as required under this Agreement; (iii) costs and expenses of replacing lost, stolen or damaged Kellogg equipment, software or materials; (iv) straight time, overtime and related expenses incurred by Kellogg or its Affiliates, including allocations of overhead for employees, wages and salaries of additional employees, travel expenses, overtime expenses, telecommunications charges and similar charges, incurred in connection with clauses (i) through (iii) above due to Service Provider’s failure to provide or perform any Services as required in accordance with this Agreement; (v) costs and expenses incurred for Kellogg or its Affiliates to cure or to bring the Services in-house or to contract to obtain services similar to the Services from an alternate source, including the costs and expenses associated with the retention of external consultants and legal counsel to assist with any re-sourcing; (vi) costs, expenses, fines, and penalties of notification, remediation, and corrective actions required in connection with a breach related to Kellogg personal data (including the cost of credit monitoring services and identity theft insurance for individuals whose Kellogg personal data is disclosed as a result of a breach and the costs of creating and distributing any legally-required notices following an unauthorized disclosure of Kellogg personal data); (vii) bank charges, interest, and reasonable operational and administrative costs and expenses necessarily incurred by Kellogg or third parties as a result of a breach of this Agreement by Service Provider or a negligent act or omission of Service Provider; (viii) fines and penalties imposed by any governmental authority; and (ix) ex-gratia payments that Kellogg or its Affiliates are required to pay to customers as a result of a breach of this Agreement by, or a negligent act or omission of, Service Provider.

6.7 SUBJECT TO THE PROVISIONS OF SECTION 6.6 AND TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAWS, NEITHER PARTY, NOR ITS AFFILIATES OR ITS OR THEIR RESPECTIVE EQUITYHOLDERS, DIRECTORS, OFFICERS, EMPLOYEES, AGENTS, SUB-CONTRACTORS, OR LICENSORS, WILL BE LIABLE TO THE OTHER PARTY FOR ANY SPECIAL, INCIDENTAL, OR EXEMPLARY, OR CONSEQUENTIAL DAMAGES (“SPECIAL DAMAGES”), INCLUDING DAMAGES FOR LOSS OF SAVINGS OR LOSSES BY REASON OF COST OF CAPITAL, CONNECTED WITH PERFORMANCE OR LACK OF PERFORMANCE UNDER THIS AGREEMENT, EVEN IF SUCH DAMAGES WERE FORESEEABLE OR THE PARTY SOUGHT TO BE HELD LIABLE WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND REGARDLESS OF WHETHER A CLAIM IS BASED ON CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE OR STRICT LIABILITY), VIOLATION OF ANY APPLICABLE DECEPTIVE TRADE PRACTICES ACT, OR ANY OTHER LEGAL OR EQUITABLE PRINCIPLE OF ANY KIND. THE EXCLUSION OF CERTAIN DAMAGES SET FORTH IN THIS SECTION WILL NOT APPLY TO DAMAGES, CLAIMS, LIABILITIES, COSTS, EXPENSES, OR LOSSES CONNECTED WITH, ARISING OUT OF, OR RELATING TO EITHER PARTY’S: (i) BREACH OF SECTION 9; (ii) UNAUTHORIZED USE OR DISCLOSURE OF THE OTHER PARTY’S PERSONAL DATA; (iii) INDEMNIFICATION OBLIGATIONS AS SET FORTH IN THIS AGREEMENT; (iv) COMMISSION, INCLUDING BY OMISSION, OF GROSS NEGLIGENCE, WILLFUL MISCONDUCT, BAD FAITH, OR FRAUD; OR (v) VIOLATION OF APPLICABLE LAWS.

7. Insurance

7.1 Service Provider will maintain insurance coverage in the amounts set forth below. Such insurance requirements will be maintained by Service Provider at all times during the performance of this Agreement, and the errors and omissions insurance described herein will be maintained for a further period of one year thereafter. Service Provider’s costs for insurance (by category) must be made available for Kellogg’s review upon request.

i. Occurrence form of comprehensive general liability insurance including completed operations, broad form property damage, premises/operations, blanket contractual, independent contractor coverage, and fire legal liability coverage. Required coverages and combined bodily injury and property damage single limit per occurrence will be no less than USD $5,000,000.

ii. Comprehensive automobile liability insurance covering all Service Provider-owned or non-owned vehicles used by Service Provider on or relating to the Agreement with a bodily injury and property damage combined single limit per occurrence of no less than USD $5,000,000.

iii. Employer’s liability insurance with limits of USD $1,000,000 for each accident, USD $1,000,000 disease-policy limit and USD $1,000,000 disease- each employee

iv. Workers’ compensation insurance as prescribed by law in any state which Service Provider employees will perform any work in connection with this Agreement. Workers’ compensation insurance will be included in the total benefit percentages paid in various categories such as handling rate and employee salaries

v. Warehouseman’s Legal Liability: Service Provider will carry no less than $10,000,000 in Warehouseman’s Legal Liability insurance

vi. Errors and omissions insurance will have a minimum, on a per-claim basis, in the amount of $5,000,000 per occurrence.

7.2 The insurance identified above must be provided by an insurance company with an A.M. Best Rating of A-X (10) or better and in a form acceptable to Kellogg. Service Provider will provide Kellogg with a certificate of insurance certifying the coverage required hereunder prior to execution of this Agreement. To the extent of the indemnities agreed between the Parties under this Agreement, all such certificates will (i) name Kellogg as an additional insured under the policies identified in (i) and (ii) above, including as an insured with respect to third party claims or actions made or brought directly against Kellogg or against Kellogg and Service Provider as co-defendants and arising out of, resulting from, or otherwise in connection with this Agreement; (ii) contain a provision that Kellogg, although named an insured, will nonetheless be entitled to recovery for any loss suffered by Kellogg as a result of Service Provider’s negligence; (iii) specify that such policy is a primary policy not contributing with any other coverage which Kellogg may carry; and (iv) stipulate that Kellogg will receive reasonable prior written notice from such insurance provider of any cancellation or reduction in insurance coverage.

7.3 Service Provider will furnish Kellogg’s insurance compliance vendor, no less than semi-annually during the Term, the certificate(s) of insurance executed by the Service Provider’s insurer(s) or agents evidencing the existence or issuance of all of the insurance referred to herein, via mail or email at the following:

Ebix BPO Insurance Compliance

P.O. Box 100085 – QK

Duluth, GA 30096

Email: kellogg@ebix.com

8. Dispute Resolution Process

8.1 The Parties will resolve any disputes or misunderstandings regarding the intent or specific content within this Agreement according to the terms of this Section unless provided otherwise herein.

8.2 If a dispute arises under this Agreement which cannot be resolved by the personnel directly involved (a “Dispute”), either Party may invoke the dispute resolution procedure set forth below by giving written notice to the other party of the Dispute (a “Dispute Notice”) and Kellogg will designate either its *Vice President, Customer Service & Logistics*  (or other Kellogg designee), and Service Provider will designate its (or his/her designee), as the representatives in negotiations relating to the Dispute. These negotiating representatives of both parties, acting in good faith and using reasonable efforts, will work toward a reasonable and equitable resolution of the Dispute within 30 business days without the necessity of any formal proceeding. Except where clearly prevented by the nature of the Dispute, both Parties agree to continue performance of this Agreement during such 30-day period or for as long as the Parties may mutually agree, unless and until this Agreement expires or is terminated in accordance with its terms.

8.3 If these Party representatives cannot reach a decision, then the Parties may choose one of the following options:

i. Participation in non-binding mediation conducted by a single mediator, chosen by mutual agreement from a panel provided by JAMS. The mediator will be solicited to review the issue, related documents and data, and conduct a mediation, and will forward their recommendation to the above parties. A decision is required within four weeks of submission of findings, and any fees will be divided equally among the Parties. The mediation will take place in Chicago, IL.

ii. Exercise their rights consistent with Sections 13.2 and 13.3.

9. Confidentiality

Neither Party will use for its own benefit or divulge to any others any proprietary trade secrets or confidential information concerning the other party or its Affiliates obtained directly or indirectly as a result of the relationship between the Parties contemplated in this Agreement, including without limitation, Service Provider’s management and control of the Facility, interaction with Kellogg officers, employees, agents, representatives, assigns, or any third parties, use of Kellogg’s computer systems and programs (e.g., Kellogg’s SAP and WMS programs), and the existence of this Agreement (collectively, “Confidential Information”). In addition, Service Provider will comply with all rules, processes, procedures, and guidelines provided by Kellogg relating to the Confidential Information. Kellogg acknowledges that material and information which Kellogg may acquire about Service Provider’s computer software programs and systems and Service Provider’s procedures and processes relating to the Services being provided hereunder have been developed at considerable cost to Service Provider and are valuable to Service Provider. Each Party will hold all such Confidential Information in confidence and the receiving Party will not reveal or use any such information without the disclosing Party’s prior express written consent. Neither Party will disclose such Confidential Information or material to others except to those employees, agents, subcontractors, attorneys, accountants, consultants, lenders, bankers, and other advisors who have a legitimate “need to know” in connection with the performance of this Agreement and that owe an obligation to the receiving Party to protect such Confidential Information similar to the receiving Party’s confidentiality obligations under this Agreement; provided, however, that the receiving Party will be liable for any violation of the terms of this Agreement by such parties. The Parties will have no obligation with respect to any information which: (i) was publicly known and made generally available in the public domain prior to the time of disclosure; (ii) becomes publicly known and made generally available after disclosure to the receiving Party through no fault of the receiving Party; (iii) is already in the possession of the receiving Party at the time of disclosure as shown by the receiving Party’s files and records immediately prior to the time of disclosure; (iv) is obtained by the receiving Party from a third party without a breach of such third party's obligations of confidentiality; or (v) is independently developed by the receiving Party without use of, or reference to, the disclosing Party’s Confidential Information. The provisions of this Section will survive the termination of this Agreement for a period of five years; provided, however, the receiving Party’s obligation to protect any Confidential Information that constitutes a trade secret will continue for as long as such Confidential Information remains a trade secret.

10. Warehouse Records and Audit

10.1 Kellogg or its agents or representatives have the right to audit any Facility and/or inspect all of Service Provider’s relevant books and records, including without limitation Service Provider’s employee rosters and invoices paid (“Records”), for the purpose of verifying the accuracy of any invoice submitted by Service Provider and to verify Service Provider’s compliance with this Agreement; provided, however, that Service Provider will not be required to disclose any material which is prohibited by Applicable Law or which jeopardizes the privacy of Service Provider’s employees or the confidentiality of its other customers.

i. Notwithstanding anything to the contrary contained in this Agreement, the rates and charges for employee benefits will be reviewed and mutually agreed upon annually as part of the budget process.

ii. Except for 401(k) employer contributions, which will be passed through as such costs are actually incurred, the mutually agreed upon annual rates and charges for employee benefits shall not be subject to increase or decrease until the next annual budget cycle, unless the Parties mutually agree otherwise.

iii. If during an audit, Kellogg finds that Service Provider has improperly invoiced Kellogg for any Charges, then Service Provider will reimburse Kellogg for the over payment.

iv. If the results of any such audit reveal that Service Provider has improperly invoiced Kellogg in an amount in excess of 5% of any Charges, then in addition to the foregoing reimbursement and interest, Service Provider will reimburse Kellogg for all out-of-pocket costs incurred in the performance of the audit. All Records produced in an audit are deemed Confidential Information of either Party as applicable.

11. Business Continuity, Force Majeure and Disaster Recovery

11.1 Upon the Effective Date for Services to be performed by Service Provider under this Agreement, Service Provider will apply Service Provider’s business continuity and disaster recovery plan(s) (as approved by Kellogg and as may be modified pursuant to this Agreement) (the “Business Continuity Plan”) to such Services. Upon the occurrence of a crisis and at Service Provider’s sole expense, Service Provider will immediately commence implementation of the Business Continuity Plan. The occurrence of a crisis (including any Force Majeure Event not leading to a catastrophic loss of the Facility) will not relieve Service Provider of its obligation to implement the Business Continuity Plan and to provide disaster recovery services. If the Services are not restored within the period specified in the Business Continuity Plan, Kellogg may terminate this Agreement for its convenience upon 30 calendar days’ written notice. The Business Continuity Plan will set forth the frequency with which Service Provider must, at its own expense, test the Business Continuity Plan, but in no event will such tests be conducted less frequently than annually. Kellogg will have the right, at any time and from time to time, to review the Business Continuity Plan as it relates to the Services and require Service Provider to modify or enhance the Business Continuity Plan as reasonably necessary to address any Kellogg concerns or policy changes.

11.2 Neither Party will be liable to the other for any delay or failure in performing its obligations under this Agreement (including any delay by Service Provider to make progress in the performance of any Services or any delay in Kellogg’s duties) and, in the case of Service Provider, for any loss and/or damage to Kellogg Goods or Equipment, to the extent that such delay, failure or loss and/or damage is caused by an event or circumstance that is beyond the reasonable control of that Party, without such Party’s fault or negligence, and which by its nature could not have been foreseen by such Party or, if it could have been foreseen, was unavoidable (“Force Majeure Event”). Force Majeure Events mean acts of God or public enemy, windstorms, floods, fire, earthquakes, explosion, epidemic, pandemic or qunarantine conditions, war, invasion, hostilities, terrorist acts, riots, or embargoes. The Parties expressly acknowledge that Force Majeure Events do not include (i) economic hardship; (ii) changes in market conditions; (iii) regulatory acts of governmental authorities; (iv) labor strikes by the workforces of the Party subject to the failure or delay, or (v) the non-performance of subcontractors or third party suppliers of the non-performing Party, unless such failure or non-performance by a subcontractor or third-party suppliers is itself caused by a Force Majeure Event. Upon the occurrence of a Force Majeure Event, the non-performing Party will promptly notify the other Party of the circumstances hindering its performance and of its plans and efforts to implement a work-around, in which case the non-performing Party will be excused from any further performance or observance of the affected obligation(s) for as long as such circumstances prevail, and such Party continues to attempt to recommence performance or observance to the greatest extent possible without delay. The non-performing Party will also notify the other promptly when the Force Majeure Event has abated. For the avoidance of doubt, Service Provider will not have the right to any additional payments from Kellogg for costs or expenses incurred by Service Provider as a result of any Force Majeure Event unless agreed upon in writing by Kellogg, and such additional costs may be considered Extraordinary Costs (defined hereafter in Schedule 2) with Kellogg’s agreement. If Service Provider fails to provide the Services in connection with any Force Majeure Event, the Charges due Service Provider under this Agreement will be equitably adjusted in a manner such that Kellogg will not be responsible for the payment of any Charges for such Services that Service Provider failed to provide.

i. Notwithstanding any other provision of this Agreement, a Force Majeure Event will (i) obligate and require Service Provider to perform its obligations under the Business Continuity Plan within the time period described therein. Service Provider will implement the redundancy requirements set forth in the Business Continuity Plan, but in any event will ensure that there is sufficient redundancy with respect to core aspects of the Services to prevent or minimize the impact of any Force Majeure Event.

ii. If Service Provider is unable to perform the Services in any material respect, Service Provider will immediately notify Kellogg in writing of such inability. Kellogg shall provide Service Provider a reasonable opportunity to recommence performance. Kellogg may obtain substitute services from one or more third parties, or provide substitute services through internal Kellogg resources.

12. Kellogg Company Data Protection and Security

12.1 Data

i. Kellogg acknowledges that, in the course of the performance of Services or in connection with its engagement, Service Provider (i) may be provided or obtain from Kellogg or otherwise, any type of personally identifiable information about individuals, including sensitive personal data, that is used, received or accessed by Service Provider and (a) relates to, or is provided by Kellogg or its subsidiaries or affiliates, and their respective employees, shareholders, directors, officers, creditors, agents, subcontractors, independent contractors, customers or other third parties, or (b) directly or indirectly relates to Kellogg’s or its subsidiaries’ or affiliates’ past, present or future employees, agents, contractors, consultants, temporary workers, contingent workers, clients, customers or dependents of the foregoing, or individuals designated by the foregoing as beneficiaries or in other capacities (e.g., under a pension plan, life insurance, as an emergency contact, and the like), or individuals who become or may be entitled to benefits as a result of operation of law or the rules of any benefit plan, or (c) is information that can be used on its own or with other information to identify, contact, or locate a single person, or to identify an individual in context (“Kellogg Personal Data”); and (ii) may need to process such Kellogg Personal Data.

ii. “Kellogg Data” means all Kellogg Personal Data, all Kellogg confidential information and any other information relating to Kellogg, or its subsidiaries or affiliates, and each of their respective shareholders, directors, officers, employees, distributors, suppliers, creditors, agents, subcontractors, clients, or customers of Kellogg (excluding Service Provider), or relating to the business of Kellogg, including third party information, operations, facilities, products, services and markets, all as to the extent provided to or obtained by Service Provider by or at the direction of Kellogg, or to which access was provided to Service Provider by or at the direction of Kellogg, or information collected on behalf of Kellogg, in the course of Service Provider’s performance under the Agreement. The term Kellogg Data further includes (i) any such information in tangible form, regardless of the form or method by which such information is created, stored, maintained or communicated; and (ii) all data maintained by Service Provider for Kellogg.

iii. Service Provider will not, and has no right to, retain or use Kellogg Data, except where required for performance of the Services. As between the parties, Kellogg Data will be and remain the property of Kellogg. Service Provider will use the Kellogg Data solely to perform Service Provider’s obligations under the Agreement or as otherwise expressly permitted in the Agreement. Except as expressly permitted in the Agreement, Service Provider will not sell, assign, lease, disseminate, or otherwise dispose of any Kellogg Data or any part thereof to any other person, nor will Service Provider commercially exploit any part of the Kellogg Data. Service Provider will not possess or assert any property interest in, or any lien or other right against or to, any Kellogg Data.

iv. Service Provider will retain all Kellogg Data for the greater of (i) as long as required by applicable laws; or (ii) as required by Kellogg’s policies and practices. Kellogg will inform Service Provider of any such policies and practices. Nothing in this Section will relieve Service Provider of other document retention requirements expressly provided in the Agreement or by Applicable Laws. Upon request of Kellogg, upon termination or expiration of the Agreement, or at the end of any specified retention period agreed by the parties, Service Provider will, unless otherwise instructed by Kellogg, destroy all Kellogg Data and delete from its environment any electronic copies of all such Kellogg Data that are in Service Provider’s possession or control and, if requested by Kellogg, provide to Kellogg a signed certificate in form set out in Appendix I stating that all Kellogg Data has been destroyed. Service Provider will remove Kellogg Data from its applications and databases and will use commercially reasonable data destruction methods to remove Kellogg Data from its back-up systems; provided, however, that in the event that any Kellogg Data cannot be removed from Service Provider’s back-up systems using such methods, Service Provider will store such Kellogg Data in a manner that ensures that such Kellogg Data is not readily accessible and is kept secure in accordance with reasonable industry standards and any applicable data protection laws and other applicable laws.

12.2 Notwithstanding any other provision in the Agreement, upon expiration or termination of the Agreement, Service Provider will, at its sole cost and expense, deliver to Kellogg all Kellogg confidential information and Kellogg Data, and all copies thereof in the possession of Service Provider (collectively, “Kellogg Materials”) in the format and medium in use by Service Provider in connection with the Services as of the date of such expiration or termination. Upon delivery of the Kellogg Materials, at Kellogg’s request, Service Provider will destroy all digital and other copies of Kellogg Materials in its possession as of the date of such expiration or termination, to the satisfaction of Kellogg and at Service Provider’s sole cost and expense. Service Provider will complete a certificate of data destruction demonstrating that Service Provider has complied with the foregoing obligation in form set out in Schedule 6.

12.3 In the event the Services provided by Service Provider pursuant to the Agreement includes the exchange of Kellogg Data, or the storage, hosting or processing of Kellogg Data by Service Provider and/or any third party providing Services on behalf of Service Provider (“Third Party”), or where Kellogg is required to use Service Provider’s services to access and/or gather such information on behalf of Kellogg, Service Provider and Third Party will comply with (i) the then-current Kellogg’s Global Privacy Principles and the Kellogg Human Resources Data Privacy Policy; and (ii) all other Kellogg policies regarding (a) the destruction, loss or alteration of data, (b) the encryption of data, (c) the security of internet transactions and Kellogg Data, and the integrity and privacy of the users’ interaction with Service Provider’s system, and (d) unauthorized electronic access to Kellogg Data. Service Provider will execute any data transfer agreements concerning the transfer of Kellogg Data when reasonably required by Kellogg, and cause its subcontractors to do so. The Kellogg’s Global Privacy Principles and the Kellogg Human Resources Data Privacy Policy are attached to in Schedule 6, and are hereby incorporated herein by reference.

12.4 Data Security and Protection

i. In the event the Services provided by Service Provider pursuant to the Agreement includes the exchange of Kellogg Data, or the storage, hosting or processing of Kellogg Data by Service Provider and/or Third Party, or where Kellogg is required to use Service Provider’s services to access and/or gather such information on behalf of Kellogg, Service Provider and Third Party will (i) establish and maintain commercially reasonable and appropriate administrative, technical and physical safeguards consistent with the highest industry standards against the destruction, loss, alteration, unauthorized access to or use of Kellogg Data, and any anticipated threats and hazards to the security and integrity of Kellogg Data (the “Data Safeguards”); (ii) permit Kellogg or its designated representatives (subject to reasonable and appropriate confidentiality undertakings), to inspect and audit Service Provider’s data storage, hosting and processing activities (and/or those of its affiliates, agents and subcontractors); and (iii) comply with all reasonable requests or directions by Kellogg to enable Kellogg to verify and/or procure that Service Provider is in full compliance with its obligations under the Agreement.

ii. Service Provider will submit to Kellogg for its review its latest auditor’s SSAE16 Type II SOC1 report (if the Services or Kellogg Data is critical to the completeness and accuracy of Kellogg financial reporting controls), SOC2 report, ISAE 3402 Type II report, and/or other similar report as required by Kellogg with regard to controls placed in operation and tests of operating effectiveness pertaining to the Services provided hereunder within 90 days after the applicable report is issued by Service Provider’s auditors. In the event Service Provider fails to submit the SSAE16 Type II SOC1, SOC2 or ISAE 3402 Type II report, as applicable, within such 90 calendar day period, then together with the SSAE16 Type II SOC1, SOC2 or ISAE 3402 Type II report, as applicable, Service Provider will submit a bridge letter covering the period from the date the attestation expires to the date of submission of the report to Kellogg. In the event Service Provider is ISO:27001 certified, Service Provider will submit its latest certificate within 90 calendar days of such certificate’s issuance.

iii. Each party represents and warrants that they will comply with their respective obligations under the Global Data Protection Regulation (“GDPR”) protecting natural persons in regard to the processing of personal data and the free circulation of such data within the European Union. As applicable, Kellogg, in its capacity as “Data Controller”, hereby appoints Service Provider as “Data Processor” of any Personal Data of Kellogg’s employees and associates as such terms are defined in the European Directive. Service Provider acknowledges and agrees that it will not subcontract any processing of Kellogg Data to a subcontractor without the prior express written consent of Kellogg in each and every instance.

12.5 The Parties acknowledge that, in accordance with the Agreement, Service Provider will not collect or store credit card data (including without limitation names, account numbers, expiration dates or billing addresses) on behalf of Kellogg.

12.6 Service Provider will ensure that any Service Provider personnel that have access to Kellogg Data are informed of the confidential nature of the Kellogg Data and comply with this Agreement. Service Provider will ensure that none of its personnel publish, disclose, or divulge any of the Kellogg Data or Kellogg Material to any third party unless directed in writing to do so by Kellogg. In the event Service Provider breaches, or reasonably anticipates a breach of, the foregoing security requirements, Service Provider will immediately give written notice thereof to the appropriate Kellogg representative. It is understood and agreed that in the event of a breach of this Section damages will not be an adequate remedy and the non-breaching Party will be entitled to injunctive relief to restrain any such breach, threatened or actual, without the requirement of posting a bond or other surety.

12.7 This Section will be in addition to, and not in lieu of, the confidentiality requirements set forth herein.

13. Miscellaneous

13.1 Unless otherwise provided herein, all notices required under this Agreement will be in writing and delivered in person, sent by registered or certified mail, courier, or transmitted by electronic mail (provided acknowledgement of such electronic mail is obtained by the sender) to the appropriate contact(s) shown below. Each notice so given will be deemed to have been received on the date on which it was delivered in person, by courier or by electronic mail; or, if sent by registered or certified mail, on the date five calendar days after its mailing. Either Party may provide notice of a change of address or contact to the other party in writing via electronic mail.

|  |  |
| --- | --- |
| KELLOGG SALES COMPANY |  |
| One Kellogg Square |  |
| Battle Creek, Michigan 49017 |  |
| ATTN: Chief Legal Officer |  |
|  | |
| With a copy to: | With a copy to: |
| Kellogg Sales Company/KNA CSL - DTS |  |
| One Kellogg Square |  |
| Battle Creek, MI 49017 |  |
| ATTN: Senior Director, KNA Distribution |  |

13.2 This Agreement will be construed and the legal relations between the Parties will be determined in accordance with the internal laws of Arizona without giving effect to any conflict of laws principles that would require the application of the laws of a different jurisdiction. Each Party irrevocably (i) submits to the exclusive jurisdiction of the courts of Arizona over any claim or matter arising under or in connection with this Agreement or the legal relationships established by this Agreement, and (ii) waives any rights it may otherwise have to a trial by jury

13.3 The Parties acknowledge that any breach or threatened breach of Section 9 and/or Section 12 could cause irreparable harm to the other Party for which there might be no adequate remedy at law and, therefore, upon any breach or threatened breach of these provisions, each Party will be entitled to seek equitable relief, in addition to any other remedies available to it at law, without the need to prove irreparable harm or to provide an undertaking, post a bond or other security.

13.4 Service Provider hereby acknowledges that Kellogg is entering into this Agreement based upon either (a) its personal relationship with Service Provider or (b) the personal judgment, skills, qualifications, and abilities of Service Provider and Service Provider personnel.

i. Service Provider may not assign, novate, sublicense or delegate this Agreement or any rights or obligations of Service Provider under this Agreement, in whole or in part, to any third party or entity.

ii. Kellogg may freely assign this Agreement, in whole or in part, to an Affiliate of Kellogg.

iii. This Agreement may not be involuntarily assigned or assigned by operation of law, without the prior written consent of Kellogg, which consent may be given or withheld by Kellogg in its sole discretion.

13.5 Each Party will provide such further documents or instruments required by the other Party as may be reasonably necessary or desirable to give effect to this Agreement and to carry out its provisions.

13.6 Notwithstanding any provisions in this Agreement to the contrary, no remedy made available to either Party hereunder is intended to be exclusive of any other remedy, and each and every remedy will be cumulative and will be in addition to, and not in lieu of, every other remedy provided hereunder or available at law, in equity, or otherwise.

13.7 If any term of this Agreement is determined to be illegal, invalid or unenforceable under any applicable law, such term will, to the extent it is severable from the remaining terms, be omitted from this Agreement and will not affect the legality, validity or enforceability of the remaining terms.

13.8 A Party does not waive any right under this Agreement by failing to insist on compliance with any of the terms of this Agreement or by failing to exercise any right under this Agreement or any remedy provided by law. Any waivers granted under this Agreement are effective only if delivered in writing and signed by the Party granting such waiver. The waiver by a Party of any breach of this Agreement, shall not prevent any subsequent enforcement of such term or obligation or be deemed a waiver of any subsequent breach.

13.9 Neither Party may use the name or any trademark, trade name, trade dress, logo or symbol of the other Party or its Affiliates or disclose matters relating to this Agreement, in any advertising, promotion, press/publicity releases, articles or communications without the prior written consent of the other Party. Neither Party will make any press announcements or publicize this Agreement or any matters relating to any of the transactions contemplated hereby without the express, prior written consent of the other Party.

13.10 This Agreement incorporates the terms of the supplemental materials identified within Appendix I and all attached Schedules. Kellogg, in its sole discretion, will provide updates to any or all Appendix I policies throughout the term of this Agreement and Service Provider is required to confirm in writing receipt of any such updates. The most current version of Kellogg standards and operating policies will be delivered to Service Provider electronically via email communication or an electronic document sharing site as solely determined by Kellogg with notice to Service Provider as updates are made and published. In the event of any conflict between the provisions of Appendix I and this Agreement, the terms of this *Warehouse Services Agreement* will govern and control.

13.11 This Agreement together with all associated Appendices, Exhibits and/or Schedules, which are incorporated by reference, constitute the complete and final agreement of the Parties pertaining to the subject matter herein and supersede all prior agreements, understandings and discussions of the Parties relating to such subject matter. No modification of this Agreement is binding unless it is in writing and signed by Kellogg and Service Provider.

13.12 This Agreement may be executed in two or more counterparts and by facsimile or electronic transmission, each of which will be deemed an original, but all of which together will constitute one instrument.

Intending to be legally bound, each of the Parties has caused its undersigned representative to execute this Agreement as of the Effective Date set forth above.

|  |  |  |  |
| --- | --- | --- | --- |
| **(on behalf of itself and its Affiliates)** | | **Kellogg Sales Company (on behalf of itself and its Affiliates)** | |
| By: |  | By: |  |
| Name: |  | Name: |  |
| Title: |  | Title: |  |

SCHEDULE 1

Kellogg Facility Profiles

SCHEDULE 2

Performance Standards and Default Criteria

I. Performance Standards

A. Service Provider will provide the Services in accordance with the Performance Standards set out in this Schedule 2 and any such other service levels as are agreed between the Parties.

B. Service Provider must demonstrate proficiency in managing cost and in utilizing cost control tools as outlined in the Agreement.

C. Service Provider will not ship damaged or quality hold Goods to customers. Service Provider must follow Kellogg guidelines for determining damage and remove all designated damage prior to shipment. Service Provider will notify Kellogg of any damaged Goods received or in its possession at the Facility so that timely claims against the carrier can be made by Kellogg, or disposition directions can be provided in a timely manner. Service Provider must follow the Kellogg claims procedures and seal policy guidelines as provided in Appendix I. Service Provider must identify and report all damage categories (warehouse, inbound, stock returns, etc.) using the designated warehouse management system within 24 hours of identification.

D. Service Provider must maintain proper levels of communication with Kellogg. This includes, but is not limited to: KNA Distribution, KNA Transportation (inclusive of Kellogg internal employees and third-party transportation operations partners), Customer Supply Chain, Customer Service, Finance, Accounting, Quality, I/S System Support, and KNA Contract Management. Service Provider must keep Kellogg fully aware of any problems or difficulties that the Facility is experiencing. Service Provider’s performance in this area will be reviewed quarterly by the designated Kellogg manager.

E. Service Provider will prepare and provide reports and data Kellogg may require, including reports and data available via the warehouse and/or order management systems.

F. Service Provider must demonstrate a strong application of human resource policies including continuity of personnel on Kellogg account, and adequate process documentation to provide training and backup for all levels supporting the Facility and all aspects of the Kellogg account, as outlined in the Agreement.

G. Upon Kellogg’s request, Service Provider will collaborate with Kellogg to explore operational improvements identified by Kellogg or its third-party advisors and to implement those improvements determined by Kellogg that are likely to result in meaningful cost savings.

II. Performance Default

A. Performance Improvement Plan

1. The Parties will measure Service Provider’s performance against the Performance Standards described herein each month. When Service Provider has failed to deliver the Services in accordance with the Performance Standards (“Service Failure”) Service Provider will:

i. Notify Kellogg immediately of a Service Failure.

ii. Promptly delivery to Kellogg a detailed service improvement plan to rectify the Service Failure (“Service Improvement Plan”). If necessary, Kellogg will provide reasonable assistance to Service Provider in implementation of such Plan.

iii. Deploy all additional resources and take all remedial action that is necessary to rectify or to prevent a recurrence of such Service Failure.

iv. Carry out the actions identified in the Service Improvement Plan by such dates specified in the Service Improvement Plan, or if dates are not specified, by such dates as Kellogg will specify in its sole discretion, determined by the severity of the Service Failure.

2. Kellogg reserves the right to elect to hold Service Provider immediately in default if a Service Failure is tied to items 4 (provided such overall inventory variance is estimated to be greater than $50,000 in total value), 6, 7 or 8 in the table provided in Section III below.

B. Performance Default

Service Provider will be considered in default of this Agreement for below standard performance and Kellogg may terminate this Agreement forthwith upon 60 calendar days’ written notice to Service Provider, provided Service Provider has been afforded the opportunity to cure the first default item occurring in the periods referenced below in accordance with the provisions of Section 4.2, if (i) any one of the following default items that occurs twice over a rolling six-month period, (ii) any two different of the following default items that occur over a rolling three-month period or (iii) any three of the following default items that occur during the same monthly period.

1. Service Provider is accountable for warehouse-related order cuts and will maintain case fill as a percent of the total amount of cases shipped, as outlined in Section III, on a monthly basis. Allowances will be made for non-Facility- related cuts provided that Service Provider obtains Kellogg order management approval prior to “short-shipping” orders.

2. Service Provider will maintain appropriate over, short and damage (“OS & D”), as a percent of cases shipped, as outlined in the Performance Table, on a monthly basis (no errors) as measured by Kellogg internal accounting records and software. Allowances will be made for non-Facility-related errors.

3. Service Provider will maintain on-time loading of customer orders, as outlined in Section III’s key performance metric (“KPI”) table, on a monthly basis as measured from the first appointment date (less non-Facility-related errors).

4. Service Provider will maintain a total Inventory Variance Adjustment [i.e. net changes in inventory variances from Kellogg internal computer records (SAP)], as a percentage of total cases handled as calculated on a monthly basis. Service Provider will control the level of losses as described in Section 3 of this Agreement to the standards outlined herein on a monthly basis and will reconcile with Kellogg quarterly.

5. Service Provider must maintain the Facility in good operating condition in accordance with the Agreement and any requirements as reasonably established by Kellogg, its other authorized representatives, or the Landlord. In addition, Service Provider must maintain an overall passing grade (yellow or green rating), as outlined in Section III, on the semi-annual or annual Kellogg Property Audit Report.

6. Service Provider must maintain passing scores on all quality and food safety audits. Service Provider will maintain food grade storage conditions for Kellogg Goods in accordance with Kellogg’s Quality, Warehousing and Distribution Sanitation guidelines, any applicable state and local government guidelines or regulations concerning sanitary operation of food grade warehousing, and any other guidelines or procedures that Kellogg may, from time to time, submit in writing to Service Provider.

i. If Kellogg changes the parameters of Goods Protection outlined in this paragraph and Service Provider determines that it will result in unanticipated costs and proves such to Kellogg, the Parties will mutually agree as to the amount of these costs to be reimbursed by Kellogg to Service Provider. Service Provider will not be reimbursed for costs determined to be a result of Service Provider’s negligence or willful misconduct under this Section.

7. Unless directed by Kellogg to do otherwise, Service Provider will ship all Kellogg Goods on an aged or first-expired, first-out (“FEFO”) basis. Service Provider will provide Kellogg with a monthly report itemizing all Goods that will exceed age requirements, and request disposition of such Goods. Service Provider will not ship damaged or quality hold Goods to customers.

i. To ensure accurate traceability of Kellogg Goods, Service Provider must maintain precise records of all case movement into, within, and out of the Facility and ensure accuracy of all components of lot codes. At the request of Kellogg, Service Provider must undertake and complete a successful mock or actual recall within 24 hours of the request.

ii. Retention of records of Facility activities, including but not limited to, inbound receiving, outbound shipping, export shipping, and inventory activity must be in accordance with the Agreement and Kellogg written guidelines.

8. Service Provider must ensure a safe environment for its employees, and any contractors, visitors or guests to the Facility consistent with OSHA requirements. Service Provider must prepare and share any safety incident reports with Kellogg as they occur. Service Provider must pass all OSHA inspections.

9. The TIR (Total Incidents Recordable) Rate will be calculated by taking Service Provider’s total incidents recordable (number of injuries) \* 200,000 hours and dividing the result by the total employee hours worked.

C. Key Performance Indicators (“Performance Metrics” or “KPIs”)

|  |  |  |
| --- | --- | --- |
| **KPI Item** | **Description** | **MIN REQ** |
| 1 | Warehouse Cuts - Casefill | 0.42% |
| 2 | Over, Short and Damage (OS & D) | 0.05% |
| 3 | On-Time Loading | 87% |
| 4 | Inventory Accuracy | 99.96% |
| 5 | Property Audit | Red |
| 6 | AIB or QFS Audits | 935 or >60% |
| 7 | Product Accountability / Inventory Control Audit | Fail |
| 8 | Safety | Red |
| 9 | TIR Rate | 2.0 |

SCHEDULE 3

Fees, Charges and Commercial Details

SCHEDULE 4

Facility Operating Budget(s)