

Dated

20[]

NHS PROPERTY SERVICES LIMITED

and

[OCCUPIER]

MEMORANDUM OF TERMS OF OCCUPATION

[Address/description of property]

- 1.10 Any obligation on a party not to do something includes an obligation not to allow that thing to be done and an obligation to use all reasonable but commercially prudent endeavours to prevent that thing being done by that party's employees, staff, visitors or other persons at the Property with that party's permission.
- 1.11 References to clauses and Schedules are to the clauses and Schedules of this MoTo and references to paragraphs are to paragraphs of the relevant Schedule.
- 1.12 Any phrase following the terms "including", "include", "in particular", "for example" or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.
- 1.13 Unless expressly provided otherwise, the obligations and liabilities of the Occupier under this MoTo are joint and several.
- 1.14 A "**working day**" is any day which is not a Saturday, a Sunday, a bank holiday or a public holiday in England and Wales.

2 MEMORANDUM OF OCCUPATION

- 2.1 Subject to clause 3 and clause 4, NHS PS permits the Occupier to occupy the Property for the Permitted Use for the Occupation Period during the Permitted Hours (subject to clause 2.5 below) together with the rights mentioned in Schedule 2.
- 2.2 This MoTo is an intra-NHS agreement made between public sector bodies, it is not intended to create legal relations between the parties and is not subject to the jurisdiction of the Courts of England and Wales (or any other jurisdiction).
- 2.3 Any dispute or claim arising out of or in connection with this MoTo or its subject matter or formation shall be determined only in accordance with clause 13.
- 2.4 This MoTo is personal to the Occupier and is not assignable and any rights given in it may only be exercised by the Occupier and its employees and visitors [save that the Occupier may share occupation of the Property with NHS or private organisations and associated health personnel who are supporting the Occupier in providing services falling within the Permitted Use, provided that no tenancy is created by that sharing of occupation].
- 2.5 [If the Occupier shares occupation of the Property in accordance with clause 2.4, the Occupier shall:
- a. give notice to NHS PS at the beginning and end of any sharing arrangement of the arrangement and the identity of the NHS organisation sharing occupation with the Occupier; and
 - b. without limiting the Occupier's obligations under clause 4, ensure that the organisation sharing occupation with the Occupier complies at all times with the provisions of clause 4 (save for the obligation in clause 4.1 which remains an obligation of the Occupier alone) of this MoTo.]
- 2.6 [The Occupier shall not occupy the Property outside of the Permitted Hours and] where the Occupier occupies the Property outside of the Core Hours, the Occupier shall pay to NHS PS (as part of the Service Charge) the whole of the costs of providing Building Services to the Property or the Common Parts, for the benefit of the Occupier, outside of Core Hours unless such costs can be shared by any other occupier who is also in occupation outside the Core Hours (in which case the Occupier shall pay a proportionate part of such costs).

3 ADDING TO OR REDUCING THE PROPERTY OR RELOCATING

- 3.1 Subject to the provisions of clause 3.7, NHS PS shall be entitled at any time (acting reasonably and in accordance with the principles of good estate management [and following consultation with the commissioner under the Service Contract]¹) on giving not less than three months' written notice to

¹ Only relevant for providers and not for ALBs.

require the Occupier to relocate to Alternative Premises and the Occupier shall, subject to clauses 3.5 and 3.6, promptly comply with such requirement.

3.2 [Subject to:

3.2.1 prior completion of the activities referred to in clause 3.3 below;

3.2.2 the Occupier first obtaining the consent of NHS PS (not to be unreasonably withheld or delayed where the Occupier is reducing the extent of the Property following the termination or expiry of a Service Contract); and

3.2.3 where the Occupier is increasing the extent of the Property or relocating to alternative property within the Building, the Occupier agreeing with NHS PS a revised Charging Schedule and ACS for their occupation of any additional or alternative property within the Building which includes an occupation charge that is appropriate for the additional or alternative property having regard to the occupation charge at which NHS PS would make that additional or replacement property available to a third party occupier on terms similar to this MoTo;

the Occupier may increase or decrease the extent of the Property within the Building or relocate to alternative property within the Building by completing an online occupancy change notice not less than three months before the required change.

The occupancy change notice can be found at:

<https://www.property.nhs.uk/property/report-a-change-to-your-occupancy/>

3.3 Prior to:

3.3.1 completion of the relocation of the Occupier at the instigation of NHS PS pursuant to clause 3.1; or

3.3.2 completion of an increase or decrease in the extent of the Property or relocation to alternative property within the Building at the instigation of the Occupier pursuant to clause 3.2

the parties shall each (acting promptly, reasonably and in good faith) agree a revised Plan, Charging Schedule and ACS and any additional documents as may be required by NHS PS (acting reasonably) to apply from the date of completion of either the relocation or increase/decrease of the Property (as the case may be)

3.4 The obligations at clause 3.3 shall be subject to the following PROVISOS:

3.4.1 the costs contained in any revised Charging Schedule and ACS shall not be greater than those payable immediately prior to the completion of the change to the Property pursuant to clause 3.1 or clause 3.2 except where:

(a) the extent of the Property is being increased;

(b) there is a relocation to alternative property within the Building instigated by the Occupier accordance with clause 3.2; or

(c) otherwise with the agreement of the Occupier [or where the commissioner of the service being provided by the Occupier pursuant to the Service Contract or any other person agrees to reimburse the Occupier for the same].

3.4.2 if the Occupier does not complete the online occupancy change notice form, giving NHS PS at least 3 months' advance notice of the planned change the extent of the Property or otherwise changes the property that it occupies at the Building without complying with the relevant provisions of this clause 3, the Occupier will be billed at the higher of the existing Occupation Charge and an occupation charge corresponding to the value of the new area of occupation until the change can be processed and approved.

3.5 Following a change to the Property pursuant to this clause 3, this MoTo shall apply to either the Alternative Premises or the increased, decreased or replacement Property referred to in clause 3.2 (as

the case may be) as if the same were defined in this document as “the Property” and the revised Charging Schedule, Plan and ACS referred to in clause 3.3 shall replace the Charging Schedule, Plan and ACS attached to this MoTo and the parties shall promptly sign a MoTo Addendum to record these changes.

- 3.6 Any dispute regarding the operation of this clause 3, including a dispute regarding whether or not any part of the Building comprises Alternative Premises within the meaning of this MoTo shall be dealt with in accordance with clause 13.
- 3.7 The Occupier will not be required to comply with any requirement to relocate pursuant to this clause 3, unless prior to such relocation taking place it receives from NHS PS or any other person a written commitment to meet its reasonable and proper costs of the relocation.

4 OCCUPIER'S OBLIGATIONS

The Occupier agrees and undertakes:

- 4.1 To pay:
- 4.1.1 the Charges in accordance with the Charging Schedule, together in all cases with such VAT as may be properly payable on the Charges;
- 4.1.2 all Outgoings attributable to the Property; and
- 4.1.3 to relevant suppliers all costs in connection with the supply of electricity, gas, water, sewage, telecommunications and data and other services and utilities to or from the Property.
- 4.2 Not to use the Property other than for the Permitted Use.
- 4.3 Not to make any alteration or addition whatsoever to the Property without the prior consent of NHS PS (such consent to be unreasonably withheld or delayed and which the Occupier acknowledges may be issued subject to a condition that the Occupier removes the relevant alterations and reinstates the Property upon vacating the Property).
- 4.4 Save where exercising the right granted by paragraph 1.2 of Schedule 2, not to display any advertisement, signboards, name plate, inscription, flag, banner, placard, poster, signs or notices at the Property or elsewhere in the Building without the prior written consent of NHS PS (such consent not to be unreasonably withheld or delayed).
- 4.5 Not to do or permit to be done on the Property anything which is illegal or which may be or become a nuisance (whether actionable or not), annoyance, inconvenience or disturbance to NHS PS or to tenants or occupiers of the Building or any owner or occupier of neighbouring property.
- 4.6 Not to cause or permit to be caused any damage to:
- 4.6.1 the Property, Building or any neighbouring property; or
- 4.6.2 any property of the owners or occupiers of the Property, Building or any neighbouring property.
- 4.7 Not to obstruct the Common Parts, make them dirty or untidy or leave any rubbish on them.
- 4.8 Not to apply for any planning permission:
- 4.8.1 in respect of any part of the Building (other than the Property) or in respect of the Property together with any other part of the Building; and
- 4.8.2 in respect of the Property only, without the consent of NHS PS (such consent not to be unreasonably withheld or delayed).
- 4.9 Not to do anything that will or might constitute a breach of any Necessary Consents affecting the Property or the Building or which will or might vitiate in whole or in part any insurance effected by NHS PS in respect of the Property and Building from time to time.

- 4.10 To comply with all laws and with any reasonable recommendations of the relevant suppliers relating to the supply of electricity, gas, water, sewage, telecommunications and data and other services and utilities to or from the Property and the Occupier's use of the Property and the Common Parts.
- 4.11 To observe any reasonable rules or regulations that NHS PS makes and notifies to the Occupier together with any operational policies and health and safety policies that apply from time to time in respect of the Property and the Common Parts.
- 4.12 Not to do anything on or in relation to the Property that would cause NHS PS to be in breach of the tenant covenants and the conditions contained in any Lease (where applicable).
- 4.13 To promptly make good any wilful or negligent damage caused by the Occupier and leave the Property in a clean and tidy condition and to remove the Occupier's furniture, equipment and goods from the Property at the end of the Occupation Period.
- 4.14 To keep the Property clean, tidy and clear of rubbish.
- 4.15 To comply with all laws relating to:
- 4.15.1 the occupation and use of the Property by the Occupier and its staff, visitors and contractors;
- 4.15.2 the use or operation of all Service Media and machinery, plant and equipment at the Building;
- 4.15.3 all materials, chemicals or substances kept at or disposed of from the Property by the Occupier.
- 4.16 To take all proportionate steps to ensure that the Property complies with all Health and Safety Laws concerning:
- 4.16.1 the state and condition of the Property;
- 4.16.2 the state and condition of all Service Media at and exclusively serving the Property and all fixed plant, machinery and equipment at or exclusively serving the Property; and
- 4.16.3 the provision in the Property of all fire prevention, detection and fighting machinery and equipment and fire alarms which are required under all relevant Health and Safety Laws.
- 4.17 To keep the Property

[in a reasonable state of repair and condition]

[in a state of repair and condition no worse than NHS Estatecode Condition B] [Full definition to be provided if this option is chosen]

[in a state of repair and condition no worse than as at the date of this MoTo]

[in such state of repair and condition as ensures that the Occupier is compliant with its obligations, from time to time, in respect of the working environment that the Occupier is required to maintain under any clinical contract that it holds and/or in order to comply with the requirements of the Care Quality Commission (or such other successor organisation)]

5 NHS PS'S OBLIGATIONS

NHS PS agrees and undertakes:

- 5.1 to take all proportionate steps to keep those parts of the structure of the Building that afford support and protection for the Property, the exterior of the Building and the Common Parts

[in a reasonable state of repair and condition]

[in a state of repair and condition no worse than NHS Estatecode Condition B] [Full definition to be provided if this option is chosen]

[in a state of repair and condition no worse than as at the date of this MoTo]

[in such state of repair and condition as ensures that the Occupier is compliant with its obligations, from time to time, in respect of the working environment that the Occupier is required to maintain under any clinical contract that it holds and/or in order to comply with the requirements of the Care Quality Commission (or such other successor organisation) provided that the Occupier has informed NHS PS in writing of such obligations and requirements, identifying what additional works or measures are required to comply with such obligations and requirements]

(except that NHS PS shall not be obliged to carry out any repair where the need for any repair has arisen by reason of the occurrence of a risk that NHS PS has insured against or as a result of a breach of clause 4.7;

5.2 to take all proportionate steps to ensure that the Building (excluding the Property) complies with all Health and Safety Laws concerning:

5.2.1 the state and condition of the Building;

5.2.2 the state and condition of all Service Media at the Building and all fixed plant, machinery and equipment at or serving the Building (excluding any installed by the Occupier); and

5.2.3 the provision of all fire prevention, detection and fighting machinery and equipment and fire alarms which are required under all relevant Health and Safety Laws

PROVIDED ALWAYS that nothing in this clause shall impose any liability on NHS PS in relation to the matters referred to in clause 4.16.

5.3 to provide electricity and water to the Property and the Common Parts and to pay all outgoings attributable to the Common Parts.

6 INSURANCE

6.1 NHS PS agrees and undertakes to keep the Building insured against the Insured Risks:

6.1.1 either via the NHS Resolution Property Expenses Scheme; or

6.1.2 via commercial buildings insurance, with a limit of indemnity of not less than the full reinstatement value of the Building as assessed by NHS PS (acting reasonably); or

6.1.3 in appropriate circumstances via both the NHS Resolution Property Expenses scheme and top-up commercial buildings insurance with a limit of indemnity of not less than the full reinstatement value of the Building as assessed by NHS PS (acting reasonably);

6.2 If the Property is damaged or destroyed by an Insured Risk so as to be unfit for occupation and use or if the Common Parts are damaged or destroyed by an Insured Risk so as to make the Property inaccessible or unusable then, unless the insurance in relation to the Property or the Common Parts has been vitiated in whole or in part in consequence of any act or omission of the Occupier or its workers, contractors or agents or any other person on the Property or the Common Parts with the actual or implied authority of the Occupier, payment of the Charges or a fair proportion of them according to the nature and extent of the damage, shall be suspended until the Property has been reinstated and made fit for occupation and use or the Common Parts have been reinstated so as to make the Property accessible or useable (as the case may be).

6.3 If, following damage to or destruction of the Building, so as to make the Property unfit for occupation and use or inaccessible or unusable and either:

6.3.1 NHS PS considers that it is impossible to reinstate the Building; or

6.3.2 NHS PS after having:

(a) consulted with the Occupier and other relevant stakeholders in the local health economy;

(b) given due regard to representations made by the Occupier and those other stakeholders; and

- (c) considered the availability and sufficiency of funding for reinstatement or re-building works

determines that it is unviable to reinstate the Building NHS PS may terminate this MoTo by giving notice to the Occupier. On giving notice this MoTo shall determine but this shall be without prejudice to any right or remedy of either party in relation to any prior breach of any obligation contained in this MoTo. Any proceeds of the insurance shall belong to NHS PS.

- 6.4 NHS PS shall, where it has not elected to terminate this MoTo in accordance with clause 6.3, subject to obtaining all necessary planning and other consents repair or (as the case may be) reinstate the Building PROVIDED ALWAYS that NHS PS shall not be obliged to provide accommodation or facilities identical in layout or design so long as accommodation reasonably equivalent to that previously at the Property and its access, services and amenities is provided.

7 TERMINATION

- 7.1 This MoTo shall end on the earliest of:

- 7.1.1 *[date on which MoTo is to end];*

- 7.1.2 the expiry of not less than three months' notice given by NHS PS to the Occupier at any time where the Occupier is in material breach of any of the Occupier's obligations contained in this MoTo and where at the expiry of the said notice the Occupier has neither:

- (a) remedied the breach to the reasonable satisfaction of NHS PS; or
 - (b) referred the matter to dispute resolution in accordance with clause 13;

- 7.1.3 the termination or expiry of any Lease; and

- 7.1.4 the termination or expiry of the Service Contract (without immediate renewal)

- 7.2 Termination of this MoTo shall not affect the rights of either party in connection with any breach of any obligation under this MoTo which existed at or before the date of termination.

8 [REVIEW OF OCCUPATION CHARGE]

FOR FREEHOLDS

- 8.1 The Occupation Charge shall be reviewed on each Review Date to equal the greater of the Open Market Rent and the Occupation Charge payable immediately before the review.

- 8.2 Notwithstanding that this agreement is an intra-Government Memorandum of Terms of Occupation and is not intended to create a lease or tenancy, the Open Market Rent shall be determined by reference to the hypothetical open market rental value of the Property at the relevant Review Date in accordance with this clause 8.

- 8.3 The Open Market Rent agreed between NHS PS and the Occupier or determined by the District Valuer shall be the annual rent (exclusive of any VAT) at which the Property could reasonably be expected to be let at the relevant Review Date:

- (a) in the open market;
 - (b) at the relevant Review Date;
 - (c) on the assumptions listed in clause 8.4; and
 - (d) disregarding the matters listed in clause 8.5.

- 8.4 The assumptions are:

- (a) the Property is available to let in the open market:

- (b) by a willing lessor to a willing lessee;
 - (c) as a whole;
 - (d) with vacant possession;
 - (e) without a fine or a premium;
 - (f) for a term of 5 years; and
 - (g) otherwise on [the terms of NHS PS's standard form NHS provider lease at the relevant Review Date]
- 8.4.2 the willing lessee has had the benefit of any rent-free or other concession or contribution which would be offered in the open market at the relevant Review Date in relation to fitting out works at the Property;
- 8.4.3 the Property may lawfully be used, and is in a physical state to enable it to be lawfully used, by the willing lessee (or any potential undertenant or assignee of the willing lessee) for any purpose permitted by this MoTo;
- 8.4.4 NHS PS and the Occupier have fully complied with their obligations in this MoTo;
- 8.4.5 if the Property or any other part of the Building or any Service Media serving the Property, has been destroyed or damaged, it has been fully restored;
- 8.4.6 no work has been carried out on the Property or any other part of the Building that has diminished the rental value of the Property other than work carried out in order to ensure that the Property complies with all relevant statutes;
- 8.4.7 any fixtures, fittings, machinery or equipment supplied to the Property by NHS PS that have been removed by or at the request of the Occupier (otherwise than to comply with any law) remain at the Property; and
- 8.4.8 the willing lessee and its potential assignees and undertenants shall not be disadvantaged by any actual or potential exercise of an option to tax under Part 1 of Schedule 10 to the VATA 1994 in relation to the Property.
- 8.5 The matters to be disregarded are²:
- 8.5.1 any effect on rent of the fact that the Occupier has been in occupation of the Property;
 - 8.5.2 any effect on rent resulting from the existence of this MoTo or any of the terms of this MoTo;
 - 8.5.3 any goodwill attached to the Property by reason of any business carried out there by the Occupier;
 - 8.5.4 any effect on rent attributable to any physical improvement to the Property carried out after the date of this MoTo, by or at the expense of the Occupier with all necessary consents, approvals and authorisations and not pursuant to an obligation to NHS PS (other than an obligation to comply with any law);
 - 8.5.5 any effect on rent of any obligation on the Occupier to reinstate the Property to the condition or design it was in before any alterations or improvements were carried out;
 - 8.5.6 any statutory restriction on rents or the right to recover them; and
 - 8.5.7 any effect on rent attributable to the asset rating in any Energy Performance Certificate in respect of the Property

- 8.6 If the Occupier wishes to dispute the Open Market Rent proposed to it by NHS PS in respect of any Review Date it must do so by submitting written representations to NHS PS from an appropriately qualified surveyor (being a member or fellow of the RICS) and such appropriately qualified surveyor must be appointed by the Occupier to carry out all negotiations regarding the Open Market Rent on the Occupier's behalf.
- 8.7 If NHS PS and the Occupier cannot agree the Open Market Rent then (provided always that NHS PS has notified the Occupier of its proposed Open Market Rent and allowed not less than two months for the Occupier to dispute the same and for negotiations to take place) the District Valuer's assessment of the Open Market Rent shall constitute the Open Market Rent for the purposes of this MoTo and (where the District Valuer has not already provided its assessment of the Open Market Rent on instructions from NHS PS³) either party may make an application for the appointment of the District Valuer in accordance with clauses 8.8 to 8.11.
- 8.8 The District Valuer shall act as an independent expert and not as an arbitrator and shall determine the Open Market Rent. The District Valuer's decision shall be given in writing and shall be final and binding in the absence of manifest error or fraud.
- 8.9 The District Valuer shall give NHS PS and the Occupier an opportunity to make written representations to the District Valuer and to make written counter-representations commenting on the representations of the other party to the District Valuer. The parties will provide (or procure that others provide) the District Valuer with such assistance and documents as the District Valuer reasonably requires for the purpose of reaching a decision.
- 8.10 The fees and expenses of the District Valuer and the cost of the District Valuer's appointment and any counsel's fees, or other fees, reasonably incurred by the District Valuer shall be payable by NHS PS and the Occupier in the proportions that the District Valuer directs (or if the District Valuer makes no direction, then equally). NHS PS and the Occupier shall otherwise each bear their own costs of the review of the Occupation Charge.
- 8.11 If the revised Occupation Charge has not been agreed by NHS PS and the Occupier or determined by the District Valuer on or before the relevant Review Date, the Occupation Charge payable from and including that Review Date shall continue at the rate payable immediately before that Review Date. No later than 30 days after the revised Occupation Charge is agreed or the District Valuer's determination is notified to NHS PS the Occupier shall pay the shortfall (if any) between the amount that it has paid for the period from and including the Review Date until the payment date following the date of agreement or notification of the revised Occupation Charge and the amount that would have been payable had the revised Occupation Charge been agreed or determined on or before that Review Date.
- 8.12 Time shall not be of the essence for the purposes of this clause.
- 8.13 As soon as practicable after the amount of the revised Occupation Charge has been agreed or determined, a memorandum recording the amount shall be signed by or on behalf of NHS PS and the Occupier and endorsed on or attached to this MoTo and its counterpart.

FOR LEASEHOLDS

- 8.1 On each Review Date the Occupation Charge shall be reviewed so as to be the Occupier's Proportion of the reviewed rent payable by NHS PS pursuant to the terms of the Lease (together with any VAT paid by NHS PS on that lease rent and which it is not able to recover⁴).
- 8.2 If the revised Occupation Charge has not been determined on or before the relevant Review Date, the Occupation Charge payable from and including that Review Date shall continue at the rate payable immediately before that Review Date. No later than 30 days after the revised Occupation Charge is determined and notified to the Occupier, the Occupier shall pay the shortfall (if any) between the amount

³ It is anticipated that in most cases NHS PS will use the DV service to assess the market rent in any event and NHS bodies will be expected to adopt the assessment provided by the DV. Where NHS PS has used in-house or commercial surveyors to assess the open market rent, the Occupier is permitted to dispute and negotiate the assessment by use of its own appropriately qualified surveyor (who may be an employee or external appointment). The independent expert will be the DV.

⁴ Where a Superior Landlord has VAT opted its interest in a building, NHS PS may have to pay VAT on the lease rent. Where it does so, the rent payable under this MoTo will either be the grossed up sum (including that irrecoverable VAT) or, where NHS PS has itself VAT opted, the rent plus VAT on the same.

that it has paid for the period from and including the Review Date until the payment date following the date of notification of the revised Occupation Charge and the amount that would have been payable had the revised Occupation Charge been agreed or determined on or before that Review Date.

8.3 Time shall not be of the essence for the purposes of this clause.

8.4 As soon as practicable after the amount of the revised Occupation Charge has been determined, a memorandum recording the amount shall be signed by or on behalf of NHS PS and the Occupier and endorsed on or attached to this MoTo and its counterpart.

9 BREACH OF OCCUPIER REPAIRING AND MAINTENANCE OBLIGATION

9.1 NHS PS may inspect the state of repair and condition of the Property or any Service Media at and exclusively serving the Property or any fixed plant, machinery and equipment at or exclusively serving the Property at any time may give the Occupier a notice of any breach of clause 4.17 of this MoTo.

9.2 If the Occupier has not begun any works needed to remedy that breach within a reasonable timeframe following that notice (or if works are required as a matter of urgency, then immediately) or if the Occupier is not carrying out the works with all due speed, then NHS PS may carry out the works needed.

9.3 The costs incurred by NHS PS in carrying out any works pursuant to this clause (and any professional fees and any VAT in respect of those costs) shall be a debt due from the Occupier to NHS PS and payable on demand.

9.4 Any action taken by NHS PS pursuant to this clause shall be without prejudice to NHS PS' other rights, including those under clause 7.

9.5 Where NHS PS has properly exercised its right at clause 9.2 on more than two occasions (following persistent breaches of the same nature and concerning matters of statutory compliance or that may pose a risk to the safety of persons using the Property or Building) then for the remaining period of this MoTo NHS PS may itself (at its election and without obligation) take all steps or actions necessary to comply with the Occupier's obligations at clause 4.17 (including carrying out all works necessary to comply with those obligations either routinely or on an ad-hoc basis) and the Occupier shall reimburse to NHS PS the costs and expenses properly incurred by NHS PS in taking such steps or actions.

10 NOTICES

10.1 Any notice or other communication given under this MoTo shall be in writing and shall be delivered by hand or sent by pre-paid first class post or other next working day delivery service or by commercial courier to the relevant party as follows:

10.1.1 to NHS PS at 99 Gresham Street, London, EC2V 7NG and marked for the attention of Head of Property Management;

10.1.2 to the Occupier at [address] and marked for the attention of [position];

or as otherwise specified by the relevant party by notice in writing to each other party.

10.2 Any notice or other communication given in accordance with clause 10.1 will be deemed to have been received:

10.2.1 if delivered by hand, on signature of a delivery receipt or at the time the notice or other communication is left at the proper address; or

10.2.2 if sent by pre-paid first class post or other next working day delivery service at 9.00am on the second working day after posting; or

10.2.3 if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed.

10.3 A notice or other communication required to be given under this MoTo shall not be validly given if sent by email.

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

11 NO WARRANTIES FOR USE OR CONDITION

11.1 NHS PS gives no warranty that the Property possesses the Necessary Consents for the Permitted Use and the Occupier shall carry out its own due diligence regarding the same.

11.2 The Occupier acknowledges that it does not rely on, and shall have no remedies in respect of, any representation or warranty (whether made innocently or negligently) that may have been made by or on behalf of NHS PS before the date of this MoTo as to the matter mentioned in clause 11.1.

12 NO EXCLUSIVE POSSESSION

12.1 The parties hereby agree and declare that this MoTo is not intended to create a tenancy nor to grant exclusive possession of the Property to the Occupier, but if it inadvertently does so (contrary to the intention of the parties) then that tenancy will not benefit from security of tenure pursuant to sections 24 to 28 of the Landlord and Tenant Act 1954 (“**LTA 1954**”) and security of tenure will be excluded from such a tenancy.

12.2 The parties confirm that:

12.2.1 NHS PS served a notice on the Occupier as required by section 38A(3)(a) of the LTA 1954 and which applies to any tenancy created by this MoTo (contrary to the intention of the parties) [not less than 14 days] before this MoTo was entered into; and

12.2.2 [], who was duly authorised by the Occupier to do so made a [statutory] declaration dated [] in accordance with the requirements of section 38A(3)(b) of the LTA 1954.

13 DISPUTE RESOLUTION

13.1 If a dispute arises between NHS PS and the Occupier in relation to any matter arising out of or in connection with this MoTo, it shall first be discussed between an NHS PS officer with responsibility for the Property and an appropriate authorised officer from the Occupier at a meeting convened for this purpose and the parties shall use their respective reasonable endeavours to resolve such dispute before relying on the additional provisions of this clause 13.

13.2 If a dispute cannot be resolved in accordance with clause 13.1 then it shall be referred to the relevant Principal Property Manager of NHS PS and an appropriate senior representative of the Occupier (which may be the same person as referred to in clause 13.1) who shall meet within ten (10) working days of such referral solely in order to resolve the matter in dispute. Such meeting shall be minuted and conducted in such manner and at such venue as to promote a consensual resolution of the dispute in question.

13.3 If a dispute cannot be resolved in accordance with clause 13.1 or 13.2 the matter shall be referred to an executive director of NHS PS and an executive director from the Occupier with authority to resolve the dispute and the provisions at clause 13.1 shall apply.

13.4 In attempting to resolve the dispute in accordance with clauses 13.1 to 13.3, the parties:

13.4.1 shall act reasonably and in good faith;

13.4.2 may (in appropriate circumstances and by agreement) submit the dispute to an independent expert (with appropriate expertise in the subject matter of the dispute) for determination of the dispute and the expert’s determination shall be binding on the parties; and

13.4.3 shall (where relevant to the subject matter of the dispute) seek assistance in resolving the dispute from the Regional Team of NHS England/NHS Improvement

13.5 If a dispute has not been resolved by the parties in accordance with clauses 13.1 to 13.4 (inclusive) within four months (or such other reasonable period agreed between the parties) of the dispute arising,

either party may refer the dispute to the DHSC for resolution and the DHSC shall consider the same in accordance with any relevant procedures and policies from time to time (and calling upon such expert advice or input as it considers necessary) and make an award which shall be given in writing and shall be final and binding on the parties (save to the extent only that any appeal process is notified to the parties by the DHSC as part of the award).

- 13.6 The DHSC may (but is not obliged to) give NHS PS and the Occupier an opportunity to make written representations regarding the dispute and make written counter-representations commenting on the representations of the other party. The parties will provide (or procure that others provide) DHSC with such assistance and documents as DHSC reasonably requires for the purpose of reaching a decision and making an award.
- 13.7 In determining any dispute referred to in accordance with this clause 13, the DHSC may make an award specifying that:
 - 13.7.1 one party shall make good to the other all losses, claims, demands, actions, proceedings, damages, costs, expenses or other liability arising in any way from breach of the first party's obligations under this MoTo; and/or
 - 13.7.2 that one party should pay to the other a contribution towards internal or external costs incurred in pursuing the dispute.
- 13.8 Where any sum payable by the Occupier to NHS PS pursuant to this MoTo is subject to a bona fide dispute (and that dispute has been the subject of a referral to dispute resolution in accordance with this clause 13), the Occupier may withhold payment of the sum in dispute until the resolution of the same but shall promptly pay to NHS PS all other sums properly due and owing under this MoTo.

14 FREEDOM OF INFORMATION

NHS PS and the Occupier each acknowledges that the other is subject to the requirements of the FOIA, the FOIA Code and the Environmental Information Regulations and each agrees to facilitate the other's compliance with its Information (as defined in section 84 of the FOIA) disclosure requirements pursuant to the same so far as reasonably practicable.

This MoTo has been entered into on the date stated at the beginning of it.

SCHEDULE 1

DEFINITIONS

ACS means the annual charging schedule, annexed to this Agreement as Schedule 4

Alternative Premises means appropriate alternative premises within the Building, which are no less commodious than the Property and are in all material respects suitable for use by the Occupier [for the purposes of providing services to NHS patients pursuant to its obligations in its Service Contract].

Building Services means all of those services listed in the ACS, together with any other services which NHS PS (acting reasonably) provides from time to time for the benefit of occupiers of the Building or in the interests of good estate management.

Charge Commencement Date means [the date of this MoTo] [*INSERT ALTERNATIVE AGREED DATE*]⁵.

Charges means the sums referred to in the Charging Schedule, subject to review from time to time in accordance with the terms of the Charging Schedule and this MoTo.

Charging Schedule means the schedule of charges set out in Schedule 3 to this MoTo.

Common Parts means such roads, paths, entrance halls, corridors, lifts, staircases, landings and other means of access in or upon the Building the use of which is necessary for obtaining access to and egress from the Property as designated from time to time by NHS PS (acting reasonably and in accordance with the principles of good estate management) together with [the Shared Areas] [such meeting rooms, toilets, kitchens, reception areas, waiting areas and other areas for common use of occupiers and visitors to the Buildings (if any) as designated from time to time by NHS PS].

Competent Authority means any statutory undertaker or any statutory, public, local or other authority or regulatory body or any court of law or government department or any of them or any of their duly authorised officers.

Core Hours means [*INSERT CORE HOURS OF OPERATION OF THE BUILDING, DURING WHICH SERVICES WILL BE PROVIDED*]

DHSC means the Department of Health and Social Care (being the department of Her Majesty's Government led by the Secretary of State for Health and Social Care).

[District Valuer means the district valuer service of the Valuation Office Agency (an executive agency of Her Majesty's Revenue and Customs) or where such service has ceased to exist, such other appropriately qualified valuer as may be appointed by the DHSC on the application of either party].

Environmental Information Regulations means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such regulations.

FOIA means the Freedom of Information Act 2000 and any subordinate legislation (as defined in Section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner (as defined in Section 18 of the FOIA) or relevant Government Department in relation to such Act, including without limitation the FOIA Code.

FOIA Code means the Secretary of State for Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the Freedom of Information Act 2000.

⁵ In the majority of cases, the relevant date will be the date of the MoTo but from time to time the parties may agree an alternative earlier date.

Health and Safety Laws means all laws applicable from time to time (whether contained in EU law, statute, secondary legislation or common law), all by-laws and regulations concerning the health and safety of any person or group of persons.

Health and Safety Service means the taking by NHS PS of all actions, steps or activities (including, for example but without limitation, testing, maintenance, inspections repair and replacement) reasonably necessary to discharge its obligation at clause 5.2.

Insurance Charge means the Occupier's Proportion of the reasonable costs incurred by NHS PS in complying with clause 6.1.

Insured Risks means the risks and events that a reasonable owner of a property of the same type as the Building would commonly insure against together with such other risks as NHS PS acting reasonably may from time to time require provided that where NHS PS has elected to join the NHS Resolution Property Expenses Scheme an "Insured Risk" will be the risks and events covered by such scheme.

Lease means the occupational lease (if any) pursuant to which NHS PS holds its interest in the Property (together with any documents that are ancillary, collateral or supplemental thereto), a copy of which has been provided to the Occupier.

Occupier's Proportion means the percentage shown in the Charging Schedule or such other fair and reasonable percentage as NHS PS may specify from time to time (acting reasonably and in accordance with the principles of good estate management).

[Open Market Rent means the rent which would reasonably be obtainable were the Property let on the open market, assessed in accordance with clause 8 of this MoTo.]

Outgoings means present and future rates, taxes and other impositions and outgoings payable in respect of the Property, its use and any works carried out there.

MoTo Addendum means an addendum in the form in Schedule 6.

Necessary Consents means all planning permissions and other consents, licences, permissions, certificates, authorisations and approvals whether of a public or private nature that shall be required by any Competent Authority for the Permitted Use.

[NIA means the Net Internal Area as ascertained in accordance with "RICS Property Measurement" published by the Royal Institution of Chartered Surveyors [and having regard to its Practice Standards GN60/2010 Valuation of Medical Centre and Surgery Premises 2nd edition] (or [in each case] any substitution from time to time).]

[Permitted Hours means 24 hours per day, seven days per week⁶ (including weekends and bank holidays) subject to: (i) any restrictions on hours of use imposed on the Building by any Necessary Consent and (ii) any restrictions on hours of use contained in any Lease.]

Permitted Use means [specify use] **OR** [within Use Class [] of the Town and Country Planning (Use Classes) Order 1987 as at the date of this MoTo.

Plan means the Plan attached to this MoTo marked "Plan".

[Review Date means [each third anniversary of the date of this MoTo (where this MoTo continues)] or [each date which is a rent review date under the Lease]].

[Revised Occupation Charge means [a charge equal to the open market rent for the Property, agreed or determined in accordance with clause 8 of this MoTo] or [a charge equal to the Occupier's Proportion of the rent payable by NHS PS pursuant to its Lease]].⁷

⁶ 24 hour use is included as standard but this may need to be amended on a case-by-case basis, for example where two services share the same space (e.g. out-of-hour services run by different providers).

⁷ The appropriate text should be chosen dependant upon whether it is an NHS PS freehold or leasehold.

[Service Contract: the contract or contracts for services dated [] made between [] and the Occupier.]⁸

Service Media means all media for the supply or removal of heat, electricity, gas, water, sewage, air-conditioning, energy, telecommunications, data and all other services and utilities and all structures, machinery and equipment ancillary to those media.

[Shared Areas means those parts of the Building shown hatched [COLOUR] on the Plan or such other areas which are provided by NHS PS from time to time for the use of the Occupier and in common with the other occupiers of the Building.]

[Shared Area Proportion means a fair proportion of the Shared Areas as adjusted at NHS PS's discretion (acting reasonably) from time to time.]

VAT means value added tax chargeable under the Value Added Tax Act 1994 and any similar replacement tax and any similar additional tax.

⁸ Only to be included where the Occupier is a provider and not where they are an ALB.

SCHEDULE 2 – RIGHTS GRANTED

- 1 The right for the Occupier to:
 - 1.1 use during the Permitted Hours:
 - 1.1.1 the service media serving the Property; and
 - 1.1.2 such parts of the Common Parts for the purpose of access to and egress from the Property as shall from time to time be designated by NHS PS for such purpose [and]
 - 1.1.3 [add any additional rights e.g. car parking and use of other facilities such as toilets, kitchens, meeting rooms].⁹
 - 1.2 display its name on existing signboards or noticeboards at the Property and (as appropriate) the Building, in a font and style that is consistent with those prevailing at the Building.

⁹ Include right to use Shared Areas, if appropriate.

SCHEDULE 3 – CHARGING SCHEDULE

The Occupier's Proportion shall be [] or such other fair and reasonable percentage as NHS PS may specify from time to time (which may vary dependant on the charge concerned and may be up to 100% in relation to any costs or services which are attributable wholly to the Property and do not benefit any Common Parts or other parts of the Building).

All Charges are subject to VAT, where properly charged.

Charge	Amount	Payable	Review Mechanism
Occupation Charge	[£] per [annum/month]	Quarterly in advance, on 1 January, 1 April, 1 July and 1 October or, if later, the date that is 30 days after receipt of an invoice in respect of the Occupation Charge payable on those dates	[Open market review in accordance with clause 8] OR [Review in accordance with the terms of NHS PS Lease]
	<i>[As to the requirement for additional rows, see footnotes¹⁰¹¹]</i>		<i>[As to review requirements for further charges, see footnotes¹²¹³]</i>
Utilities Contribution	The Occupier's Proportion of all charges relating to the supply, consumption and removal of electricity, gas, water, sewage and other utilities to and from the Building where those charges are not both separately metered and paid direct to the utility provider by the Occupier	Quarterly, as part of or together with the Service Charge	Variable dependant on actual costs.
Rates Contribution	The Occupier's Proportion of non-domestic rates payable in respect of the Building and other taxes and impositions payable in respect of the Common Parts, where not paid directly by the Occupier to the billing authority	Quarterly, as part of or together with the Service Charge	Variable dependant on actual costs.
Insurance Charge	The Occupier's Proportion of the insurance costs for the Building, as referred to in clause 6.1	Quarterly, as part of or together with the Service Charge	Variable dependant on actual costs.
Service Charge	The Occupier's Proportion of the costs properly incurred by NHS PS in providing the Building Services	In accordance with Schedule 5	Variable dependant on actual costs.

¹⁰ If the Occupier has use of Shared Areas, there should be a "**Shared Area Charge**" and the following wording should be added ["Shared Area Charge" – the sum of £ per annum/month for use of the Shared Areas. The Shared Area Charge is payable at the same times as the Occupation Charge.

¹¹ If the Occupier is due to repay the cost of capital works (by what is known as a "Supplemental Rent" in leasehold transactions) then include ["**Supplemental Works Charge**" -- the sum of £ per annum/month. The Supplemental Works Charge is payable at the same times as the Occupation Charge.

¹² Where there is a Shared Area Charge, include the following uplift wording [The Shared Area Charge shall be reviewed at the same time as Occupation Charge using the following formula (*Occupation Charge as reviewed from time to time / NIA of the Property*) x (*Shared Area Proportion x NIA of the Shared Areas*)].

¹³ Where a Supplemental Works Charge has been added, include any appropriate uplift provisions.

Lease Costs (only applicable where NHS PS holds a leasehold interest in the Property)	The Occupier's Proportion of all costs properly payable by NHS PS pursuant to the Lease (except for the annual rent first reserved by the Lease and any costs charged elsewhere in this Charging Schedule)	Quarterly, as part of or together with the Service Charge	Variable dependant on actual costs.
Management Fees	10% of the Service Charge 5% of the Rates Contribution 5% of the Insurance Charge [5% of the Occupation Charge, where the Property is held by NHS PS pursuant to a Lease) or such other management fees or charges as may be permitted by the NHS Property Services Limited Consolidated Charging Policy from time to time ¹⁴	Quarterly, as part of or together with the Service Charge	Variable dependant on actual costs.

¹⁴ This Charging Policy is produced in conjunction with the DHSC and NHS England/NHS Improvement. It is currently available at <https://www.property.nhs.uk/about-us/policies/charging-policy/>

SCHEDULE 4- ANNUAL CHARGING SCHEDULE

[Attach the Occupier's starting ACS]

SCHEDULE 5 – SERVICE CHARGE PROVISIONS

1 SERVICES AND SERVICE CHARGE

1.1 The Services are:

- 1.1.1 all activities necessary to comply with NHS PS's obligations in clause 5;
- 1.1.2 all other services or activities listed in the ACS;
- 1.1.3 all other services that NHS PS and the Occupier may from time to time agree;
- 1.1.4 the Health and Safety Service; and
- 1.1.5 any other service or amenity that NHS PS may in its reasonable discretion acting in accordance with the principles of good estate management provide for the benefit of the tenants and occupiers of the Building.

1.2 Subject to paragraph 1.3, the Service Costs are the total of the whole of the proper and reasonable costs incurred in providing the Services together with any VAT payable by NHS PS in respect of any of the items mentioned above (except to the extent that NHS PS obtains credit for such VAT under the Value Added Tax Act 1994).

1.3 The Service Costs shall always exclude any costs which relate to or arise from:

- 1.3.1 matters between NHS PS and any other occupier of the Building;
- 1.3.2 negligence of NHS PS or any person acting on its behalf;
- 1.3.3 any part of the Building that is capable of independent letting that is unlet;
- 1.3.4 the initial provision of any items that are reasonably to be considered part of the original design and construction of the fabric, plant or equipment of the Building or any accessway serving the Building together with the initial setting up that is reasonably to be considered part of the original development of the Building;
- 1.3.5 any future redevelopment of the Building;
- 1.3.6 the replacement of any item of the fabric, plant, equipment or materials necessary for the operation of the Building, except where analysis of the reasonable options and alternatives determines that:
 - (a) replacement is appropriate because the fabric, plant, equipment or materials are beyond economic repair at reasonable cost or beyond efficient or economic operation;
 - (b) the cost of replacement is relatively low when compared to the greater cost anticipated if replacement is postponed materially; or
 - (c) replacement is required by statute or the insurers of the Building.
- 1.3.7 the improvement of any item (where the cost exceeds the costs of normal maintenance, repair or replacement) except where the expenditure can be justified following the analysis of reasonable options and alternatives and having regard to a cost benefit analysis over the term of the leases in the Building.
- 1.3.8 any Services provided by reason of damage to or destruction by an Insured Risk; and
- 1.3.9 any costs incurred in relation to any dealing with NHS PS's interest in the Building

1.4 NHS PS shall take all proportionate steps:

- 1.4.1 to provide heating (and, where provided at the date of this MoTo, ventilation and air conditioning) to the internal areas of the Common Parts and the Property during such periods of the year as NHS PS (acting reasonably) considers appropriate;
 - 1.4.2 to provide electricity and water to the Property;
 - 1.4.3 to keep the internal areas of the Common Parts clean, and to clean the outside of the windows of the Building as often as NHS PS (acting reasonably) considers appropriate;
 - 1.4.4 to keep the internal areas of the Common Parts reasonably well lit;
 - 1.4.5 to supply hot and cold water, soap, paper, towels and other supplies for the lavatories and washrooms (if any) on the Common Parts; and
 - 1.4.6 to keep the lifts (if any) in reasonable working order.
- 1.5 NHS PS may, but shall not be obliged to, provide any of the other Services. NHS PS shall not be obliged to carry out any works where the need for those works has arisen by reason of any damage or destruction by a risk against which NHS PS is not obliged to insure.
- 1.6 [NHS PS shall not be liable for:
- 1.6.1 any interruption in, or disruption to, the provision of any of the Services for any reason that is outside the reasonable control of NHS PS; or
 - 1.6.2 any injury, loss or damage suffered by the Occupier as a result of any absence or insufficiency of any of the Services or of any breakdown or defect in any Service Media, except where due to the negligence or deliberate act of NHS PS]
- Provided that NHS PS shall take all reasonable steps to ensure that any interruption to the Services is kept to a minimum and the provision of Services is recommenced as quickly as reasonably practicable
- 1.7 Before or as soon as possible after the start of each Service Charge Year, NHS PS shall prepare and send the Occupier, the ACS which will contain an estimate of the Service Costs that NHS PS expects to incur for that Service Charge Year and a statement of the estimated Service Charge for that Service Charge Year.
- 1.8 The Occupier shall pay the estimated Service Charge for each Service Charge Year in four equal instalments on each of 1 January, 1 April, 1 July and 1 October or, if later, the date that is 30 days after receipt of an invoice in respect of the amount payable on those dates.
- 1.9 In relation to the Service Charge Year current at the date of this MoTo, the Occupier's obligations to pay the estimated Service Charge and the actual Service Charge shall be limited to an apportioned part of those amounts, such apportioned part to be calculated on a daily basis for the period from and including the date of this MoTo to the end of the Service Charge Year. [The estimated Service Charge for which the Occupier is liable shall be paid in equal instalments on the date of this MoTo (such days as are remaining of 1 January, 1 April, 1 July and 1 October in that Service Charge Year)].
- 1.10 As soon as reasonably practicable after the end of each Service Charge Year, NHS PS shall prepare and send to the Occupier a statement showing the Service Costs and the Service Charge for that Service Charge Year and will upon request from the Occupier provide supporting information in respect of the Service Costs incurred within a reasonable period of time from receipt of such request.
- 1.11 If any cost is omitted from the calculation of the Service Charge in any Service Charge Year, NHS PS shall be entitled to include it in the estimate and statement of the Service Charge in the following Service Charge Year. Otherwise, and except in the case of manifest error, or a dispute pursued pursuant to paragraph 1.14, the Service Charge statement shall be conclusive as to all matters of fact to which it refers.
- 1.12 If, in respect of any Service Charge Year, NHS PS's estimate of the Service Charge is less than the Service Charge, the Occupier shall pay the difference within 30 days following receipt of an invoice for the same. If, in respect of any Service Charge Year, NHS PS's estimate of the Service Charge is more than the Service Charge,

NHS PS shall credit the difference against the Occupier's next instalment of the estimated Service Charge or promptly return:

1.12.1 the difference to the Occupier where no further instalments of Service Charge are due; or

1.12.2 the difference less the next instalment to the Occupier, where the difference exceeds the next instalment.

1.13 .Any dispute concerning the Service Charge or any payment on account or any other matter arising under this Schedule may be referred by either party to the dispute resolution process in clause 13 of this MoTo.

SCHEDULE 6 – MOTO ADDENDUM

This is the agreed form of MoTo Addendum, to be used in the circumstances set out in clause 3.4.

[ADD]

Signed by [name of authorised signatory]..... _____
for and on behalf of NHS Property Services Limited Authorised Signatory

Signed by [name of director]..... _____
for and on behalf of [name of Occupier] Director