

# MUTUAL CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT

This MUTUAL CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT (the “Agreement”) is made and entered into \_\_\_\_\_ (“Effective Date”), by and between:

\_\_\_\_\_

on behalf of itself and its designated affiliates (collectively, the “Company”); and

\_\_\_\_\_

on behalf of itself and its designated affiliates (collectively, the “Vendor”)

WHEREAS, Vendor and the Company are each willing to disclose to the other and to receive certain “Confidential Information” (as hereinafter defined) from the other party for the purpose of evaluating the viability of establishing a mutually beneficial relationship and entering into a transaction, subject to the terms and conditions hereinafter set forth.

NOW THEREFORE, in consideration of the foregoing premises and mutual promises hereinafter contained, Vendor and the Company agree as follows:

1. The purpose of the disclosure hereunder shall be for the parties to discuss the Company’s potential use of Vendor’s products and/or services and Vendor’s potential use of the Company’s products and/or services. The parties agree to use the Confidential Information only for such purpose and only in accordance with the terms of this Agreement.
2. The parties hereto understand that each may now market or have under development products and/or services which are competitive with products or services now offered or which may be offered by the other.

Subject to the terms and conditions of this Agreement, discussions and/or communications between the parties hereto will not serve to impair the right of either party to develop, make, use, procure, protect, and/or market products or services now or in the future which may be competitive with those offered by the other, nor require either party to disclose any planning or other information to the other.

3. As used herein, the term “Disclosing Party” shall refer to either Vendor or the Company in connection with its disclosure of any such written or oral information to the other party, and the term “Receiving Party” shall refer to either Vendor or the Company in connection with its receipt of any such written or oral information from the other party.
4. The term “Confidential Information” shall mean and refer to all confidential or proprietary information, documents, and materials, whether printed or in machine-readable form or otherwise, including, but not limited to, processes, hardware, software, inventions, trade secrets, ideas, designs, research, know-how, business methods, production plans, marketing and branding plans, merger plans, human resource policies, programs, and procedures relating to and including but not limited to organizational structure, management, marketing and branding strategies, products and services, customer service, merger integration provisions, human resource and employee benefit policies, programs, and services, and internal communication processes and technology tools. Confidential Information shall include all information that should reasonably have been understood by the Receiving Party, because of legends or other markings, the circumstances of disclosure, or the nature of the information itself, to be proprietary and confidential to the Disclosing Party, regardless of whether such information is marked “Confidential.”
5. Subject to Sections 6 and 7 hereof:
  - (i) each party hereto agrees to use the same degree of care and scrutiny as the Receiving Party would use with respect to its own Confidential Information, but in any case using no less than a reasonable degree of care, to avoid disclosure (including, but not limited to, disclosure to the United States government or any agency or department thereof), publication, dissemination, or use of any or all of the Confidential Information obtained hereunder; and
  - (ii) Confidential Information will be kept confidential for a period of two (2) years from the date hereof and shall not, without the prior written consent of the Disclosing Party, be disclosed by the Receiving Party or its representatives in any manner whatsoever, in whole or in part.
6. The parties agree that with respect to the other party’s Confidential Information a Receiving Party will:
  - (i) not use the Confidential Information other than in connection with the possible transaction with the Disclosing Party;
  - (ii) reveal the Confidential Information only to its representatives who need to know the Confidential Information for the purpose of evaluating such possible transaction, who are informed by the Receiving Party of the confidential nature of the Confidential Information, and who shall agree to act in accordance with the terms and conditions of this Agreement; and

- (iii) at the Disclosing Party's request, return promptly to such party or destroy (and confirm such destruction in writing to the Disclosing Party) any and all portions of the Confidential Information disclosed under this Agreement (including copies forwarded to subcontractors and/or agents), together with all copies thereof, provided that the Receiving Party may retain one copy thereof in its confidential, restricted access files for archival purposes, which copy shall be maintained in accordance with the provisions of this Agreement.

The Receiving Party shall be responsible for any breach of this Agreement by its representatives under Section 6(ii) above.

7. It is understood, however, that the foregoing provisions in Sections 1, 4, 5, and 6 above shall not apply to any portion of the Confidential Information which:
  - (i) was previously known to the Receiving Party without obligation of confidentiality;
  - (ii) is obtained by the Receiving Party after the date hereof from a third party which is lawfully in possession of such information and is not in violation of any contractual or legal obligation to a Disclosing Party or other third party with respect to such information;
  - (iii) is or becomes part of the public domain through no fault of the Receiving Party or its employees, subcontractors, or agents;
  - (iv) is independently ascertained or developed by the Receiving Party or its employees, subcontractors, or agents;
  - (v) is required to be disclosed by administrative or judicial action provided that the Receiving Party immediately after notice of such action notifies Disclosing Party of such action to give Disclosing Party the opportunity to seek any other legal remedies to maintain such Confidential Information in confidence; or
  - (vi) is approved for disclosure and release by written authorization of the Disclosing Party.
8. Each party hereby represents to the other that the disclosure of the Confidential Information, as may be the case, will not violate any proprietary rights of third parties, including, without limitation, confidential relationships, patent and copyright rights, or other trade secrets, and that the disclosure between the parties will not violate any contractual obligations which the Company or Vendor may have to any third party. Each party further warrants that it has the right to disclose all Confidential Information that it discloses to the other party pursuant to this Agreement.
9. Except as otherwise provided herein, neither party makes any representation or warranty, express or implied, with respect to any Confidential Information. Confidential Information is provided "as is" with all faults, and the Disclosing Party shall not be liable for the accuracy or completeness of the Confidential Information.

Neither party shall be liable for any indirect, incidental, or consequential damages of any nature or kind resulting from or arising in connection with this Agreement.

10. All the Confidential Information disclosed to, delivered to, or acquired by a Receiving Party from a Disclosing Party hereunder shall be and remain the sole property of the Disclosing Party.
11. Disclosure of the Confidential Information disclosed by one party to the other shall not constitute any option, grant, or license to the Receiving Party of such Confidential Information under any patent, know-how, or other rights heretofore, now, or hereinafter held by the Disclosing Party. It is understood and agreed that the disclosure by either party hereto of the Confidential Information hereunder shall not result in any obligation on the part of either party to enter into any further agreement with the other with respect to the subject matter hereof or otherwise.
12. This Agreement is binding on the parties, their successors and assigns. No modification of this Agreement shall be effective unless in writing and signed by both parties hereto.
13. All notices, demands, requests or other communications given under this Agreement shall be in writing and be given by personal delivery, certified mail, return receipt requested, or nationally recognized overnight courier service to the address set forth below or as may subsequently in writing be requested.

If to Vendor:

With a copy to (optional):

If to the Company:

With a copy to (optional):

14. Either party's waiver of any breach or failure to enforce any of the terms and conditions of this Agreement at any time shall not in any way affect, limit, or waive such party's right thereafter to enforce and compel strict compliance with every term and condition hereof.

15. This Agreement shall be governed, construed, and enforced in accordance with the laws of the laws of the State of \_\_\_\_\_, without regard to principles of conflicts of law.

16. This Agreement constitutes the complete agreement between the parties hereto and supersedes and cancels any and all prior communications and agreements between the parties with respect to the disclosure of Confidential Information related to the purpose described herein and the subject matter hereof.

IN WITNESS WHEREOF, the parties hereto by their duly authorized representatives have executed this Mutual Confidentiality and Nondisclosure Agreement upon the date first set forth above.

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_