

# CONFIDENTIALITY AGREEMENT

THIS CONFIDENTIALITY AGREEMENT (“Agreement”) is made and entered into as of \_\_\_[DATE] (the “Effective Date”), by and between **\_\_\_[MEMBER COMPANY NAME]\_\_** , a California limited liability company (the “Discloser”), and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the “Recipient”). The Discloser shall also include its Affiliates, as hereinafter defined.

# RECITALS

1. The parties are considering **[insert description of proposed transactions]** (such transactions, the “Proposed Transactions”).
2. In connection with the Proposed Transactions, the Discloser may furnish, disclose, or otherwise provide the Recipient with certain Proprietary Information (as defined below) which is either generally confidential and non-public, or proprietary, relating to the Discloser’s business and/or its Affiliates, and/or any of the Discloser’s respective customers, vendors, or clients.
3. The Recipient recognizes and acknowledges that the Proprietary Information are valuable assets owned by the Discloser and undertakes to prevent the unauthorized use and disclosure of such Proprietary Information.

# AGREEMENTS

In consideration of the promises and the mutual covenants and obligations hereinafter set forth, the sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. Proprietary Information.
   1. “Proprietary Information” includes all of the information and materials relating to the Discloser, its business, or any portion thereof, whether or not marked or otherwise identified as confidential, in whatever form or format and however it may be embodied, that is furnished, made available, or otherwise disclosed to the Recipient by or on behalf of the Discloser, directly or indirectly, orally, visually, in writing, by email or facsimile, including without limitation the following: (i) all patents (including business method patents), trademarks, trade secrets, copyrights, domain names, inventions, designs, specifications, ideas, discoveries, improvements, technology, know-how, innovations, writings, works, data, arts, processes, methods, protocols, procedures, formulations, blueprints, devices, prototypes and software (including source code, object code, and derivatives thereof), business plans, business prospects, marketing information, customer or supplier lists, current or anticipated customer requirements, pricing information, cost structure, information related to strategic alliances, audited and/or unaudited financial statements or other financial information and all applications for any of the foregoing intellectual property rights and other intellectual property and proprietary rights, and (ii) all notes, analyses, reports, spreadsheets, compilations, studies or other documents or materials which contain or reflect all or any portion of such information, whether prepared by the Discloser or others, or which are derived in whole or in part from any such information by the Recipient, its Affiliates or their respective Representatives, as defined below.
   2. Notwithstanding subsection a. above, Proprietary Information does not include the particular portion thereof that the Recipient can prove: (i) was or becomes generally available to the public other than as a result of an unauthorized disclosure by the Recipient or the Recipient’s officers, directors, managers, employees, accountants, attorneys, agents, representatives or advisors (collectively, “Representatives”); (ii) was known by the Recipient prior to the date hereof without any obligation of confidentiality, as evidenced by written records; (iii) becomes lawfully available to the Recipient on a non-confidential basis from an independent source without breach of this Agreement or any other confidentiality obligations; or (iv) is independently developed by the Recipient without any reliance on or use of any Proprietary Information and without breach of this Agreement or any other confidentiality obligations.
   3. Nothing herein is intended to limit or abridge the protection of trade secrets under applicable trade secrets law, and any trade secrets disclosed pursuant to this Agreement shall be maintained as such until they are no longer protectable as such.
2. Nature of Proprietary Information. The Recipient acknowledges that the Proprietary Information are the sole property of the Discloser and that the Recipient has not received and will not receive any right or claim with respect to any Proprietary Information other than the limited right of use set forth in this Agreement for the sole purpose of evaluating and participating in the Proposed Transactions.
3. Nondisclosure of Proprietary Information.
   1. During the Term of this Agreement, as defined below, and for a period of three (3) years from its expiration or termination, all Proprietary Information shall: (i) be kept confidential by the Recipient, its Affiliates and their respective Representatives and not disclosed to any third party except as provided in this Section 3, and (ii) not be used by the Recipient or its Affiliates or their respective Representatives for any commercial or competitive purpose whatsoever and may only be used in connection with the Proposed Transactions. The Recipient agrees that it shall not reverse engineer, disassemble or decompile any prototypes, software, data or other objects which embody any Proprietary Information that is provided to the Recipient pursuant to this Agreement.
   2. The Recipient may disclose the Proprietary Information to its Affiliates and their respective Representatives, but only to the extent such Affiliates and Representatives reasonably need to know the Proprietary Information for the purpose of evaluating and participating in the Proposed Transactions. The Recipient will: (i) inform each of its Affiliates and such Affiliates’ Representatives receiving Proprietary Information of the confidential nature of the Proprietary Information and of the existence and the terms of this Agreement and (ii) direct its Affiliates and such Affiliates’ Representatives that by receiving Proprietary Information they agree to be bound by the terms of this Agreement and will treat the Proprietary Information confidentially and not use it other than in connection with evaluating and participating in the Proposed Transactions. The Recipient shall be responsible for any breach of this Agreement by its Affiliates and its and such Affiliates’ Representatives. The Recipient further covenants and agrees to protect the Proprietary Information by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized use, dissemination or publication of the Proprietary Information as the Recipient uses to protect its own confidential and proprietary information and materials.
   3. If the Recipient, its Affiliates or its or such Affiliates’ Representatives are requested or required (by oral question, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process) to disclose any of the Proprietary Information it will, to the extent legally permissible, provide the Discloser with prompt notice of such request, and the documents and/or information requested thereby, so that the Discloser may seek an appropriate protective order and/or waive compliance with the provisions of this Agreement. If, in the absence of a protective order or the receipt of a waiver hereunder, the Recipient, its Affiliates or its or such Affiliates’ Representatives are nonetheless, in the opinion of its legal counsel, compelled by law to disclose Proprietary Information, the Recipient, its Affiliates or its or such Affiliates’ Representatives may disclose without liability hereunder, that portion of the Proprietary Information which the Recipient’s legal counsel advises that the Recipient, its Affiliates or its or such Affiliates’ Representatives are compelled to disclose. “Affiliate” means any entity controlled by, under common control with or controlling, directly or indirectly, the referenced party.
4. Return of Proprietary Information. Upon the request of the Discloser, the Recipient will promptly, but in no event more than five (5) days after such request of the Discloser, return (or, in the case of Proprietary Information stored in electronic, magnetic or digital media, will, at the election of the Discloser, promptly erase or render unreadable) all materials and all copies thereof which contain Proprietary Information of the Discloser, and agrees that the Recipient will deliver a letter signed by an appropriate executive officer stating that all such Proprietary Information within the Recipient’s possession or control or the possession or control of its Affiliates or its or such Affiliates’ Representatives has been returned or erased, as appropriate, and that no such Proprietary Information or copies thereof has been retained. No termination of this Agreement or return or destruction of the Proprietary Information will affect the confidentiality obligations hereunder, which shall remain in effect as provided in this Agreement. Notwithstanding the foregoing, the Recipient may retain Proprietary Information to the extent required to comply with its corporate record-keeping policies or to the extent any electronic copies are automatically saved or backed up on the Recipient’s computer system, on the condition that any such retained Proprietary Information remain subject to the confidentiality and limited use obligations hereunder.
5. Notice of Disclosure. In the event any Proprietary Information is inadvertently, accidentally or otherwise disclosed in breach of this Agreement, the Recipient will immediately notify the Discloser upon discovery of such disclosure, and shall take all necessary precautions to avoid further dissemination of the Proprietary Information disclosed, as well as all actions to secure the return of such Proprietary Information.
6. Compliance with Export Laws. The Recipient agrees that it shall not export, re- export, transfer or release, directly or indirectly, any technology, software, or software source code received as part of the Proprietary Information, or any direct product thereof, except in full compliance with the U.S. Export Administration Regulations and any other applicable U.S. or other laws and regulations, and in particular not to any prohibited party, to any prohibited country or for any prohibited end use. The Recipient agrees that it shall obtain the written consent of the Discloser prior to submitting any request to any U.S. government agency for authority to export, re-export, transfer or release any technology, software or source code received as part of the Proprietary Information, or any direct product thereof.
7. Limitation as to Liability. This Agreement does not create any obligation with respect to the Proposed Transactions, except for the matters specifically agreed to herein. The Recipient understands and acknowledges that by signing this Agreement the Discloser does not make any representation or warranty, express or implied, as to the accuracy or completeness of any Proprietary Information.
8. Equitable Remedies; Attorneys’ Fees. The Recipient agrees that money damages would not be a sufficient remedy for any breach of this Agreement, and that the Discloser shall be entitled to seek specific performance and injunctive or other equitable relief as a remedy for any such breach by the Recipient and any of its Affiliates, without the necessity of posting bond. Such remedies shall not be deemed to be the exclusive remedy for a breach of this Agreement, but shall be in addition to all other remedies that may be available at law or equity. In any action for breach of this Agreement, the prevailing party shall be entitled to an award of all court costs and reasonable attorneys’ fees and expenses incurred by such prevailing party in connection with such action.
9. Severability. The invalidity or unenforceability of any provision hereof in any jurisdiction shall not affect the validity, legality or enforceability of the remainder hereof in such jurisdiction or the validity, legality or enforceability hereof, including any such provision, in any other jurisdiction, it being intended that all rights and obligations of the parties hereunder shall be enforceable to the fullest extent permitted by law.
10. Non-Solicitation. During the continuance of the evaluation of and participation in the Proposed Transactions and for a period of one (1) year thereafter, neither party shall solicit or attempt to solicit for employment or retention as an independent contractor any employee of the other party or any individual who was an employee of the other party at any time during the one (1) year period immediately prior to the solicitation, without the prior written consent of the other party. A general advertisement for a position not directed at the employee shall not be deemed a solicitation.
11. Governing Law; Venue. This Agreement shall be construed under and governed by the laws of the State of California, USA, applicable to contracts made and performed in such State, without giving effect to the choice of laws principles of such State that would require or permit application of the laws of another jurisdiction. Any action to enforce or interpret this Agreement shall be brought and maintained exclusively in either the Superior Court of the State of California in and for Orange County, located in Santa Ana, California, USA, or in the Federal District Court for the Central District of California, located in Santa Ana, California, USA. Each of the parties hereby consents to the jurisdiction of said Courts and waives all objections to such jurisdiction, including the objection of inconvenient forum.
12. Binding Effect; Assignment. This Agreement is binding upon and inures to the benefit of the parties and their successors and permitted assigns. This Agreement may not be assigned by the Recipient without the prior written consent of the Discloser.
13. Entire Agreement; Waiver. Except for obligations of confidentiality of the Recipient under any existing contract or otherwise, this Agreement, incorporating by reference the Recitals hereto, contains the entire understanding between the parties hereunder relating to the subject matter hereof and supersedes all oral statements and prior writings with respect thereto. No modification or waiver of this Agreement or any provision hereof, nor consent to any departure therefrom shall in any event be effective, irrespective of any course of dealing between the parties, unless the same shall be in a writing executed by a duly authorized officer of the party whose rights are being waived, and then such waiver or consent shall be effective only in the specific instance and for the purpose for which it is given.
14. Counterparts; Signatures. This Agreement may be executed and delivered in two or more counterparts, each of which, when so executed and delivered, shall be an original, and such counterparts together shall constitute but one and the same Agreement and shall not be binding on any party until all parties have executed it. This Agreement may be executed by facsimile or electronic signatures which shall be deemed an original and bind such party.
15. Amendments. This Agreement may be amended or modified only by a duly authorized and executed writing signed and delivered by both parties to this Agreement.
16. Relationship of the Parties. Nothing herein shall be construed to create a partnership, joint venture or teaming relationship between the parties.
17. Notices. Any notices provided pursuant to this Agreement shall be in writing and sent by personal delivery, by registered mail, return receipt requested, or by reputable overnight delivery service to the addresses set forth below the signature blocks below.
18. Term. This Agreement shall be effective with respect to Proprietary Information provided by the Discloser on or after \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **[date may be prior to execution of this Agreement]** and shall continue in full force and effect for a period of three (3) years (the “Term”). Either party may terminate this Agreement for any reason by giving thirty (30) days’ written notice to the other party, but each party’s obligations regarding any Proprietary Information received pursuant to this Agreement will survive any such termination as provided for herein.

IN WITNESS WHEREOF, the parties have duly executed this Agreement as of the date first set forth above.

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| **[MEMBER COMPANY NAME]**, a  California limited liability company  By:  Title:  Address: | ­­\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  By:  Title:  Address: |