

## NDA & Non-Circumvent Agreement

This Mutual Non-Disclosure and Non-Circumvention Agreement ("Agreement") is made and effective on \_\_\_\_\_, 20\_\_\_\_ by any entity or person acting under direction or control between \_\_\_\_\_ ("1st Party") with principal address of \_\_\_\_\_ and \_\_\_\_\_ ("2nd Party") with principal address of \_\_\_\_\_ (jointly "the Parties") for the purposes of exploring the business opportunities, ventures and other relationships the Parties could pursue together to their mutual benefit.

The Parties have requested the mutual disclosure of certain Confidential Information (both in developmental and final formats) as well as related information (collectively "Confidential Information" and defined further below) for the purposes of enabling the Parties to mutually evaluate whether each desires to invest, participate and otherwise explore potential business relationships between the Parties and for the purposes of exploiting the Confidential Information of the Parties.

The Parties each desire to disclose Confidential Information solely for the purposes and under the terms and conditions set forth as follows:

**IN CONSIDERATION** for the mutual disclosure of Confidential Information by the Parties and the opportunity to evaluate the Confidential Information and explore potential future business relationships, respectively, the Parties agree:

1. Definitions:

A. **Discloser and Disclosee.** Discloser shall mean the party disclosing Confidential Information, defined below. Disclosee shall mean the Party receiving disclosed Confidential Information. It is contemplated between the Parties that each will be a Discloser and Disclosee of Confidential Information under this agreement to effectuate the purposes recited herein.

B. **Confidential Information.** Confidential Information shall mean all information, material, plans, charts, documentation, models, intellectual property, ideas, Business Plans (whether in developmental, draft, final or any other stage of completeness) and all related material disclosed or made available between the Parties pursuant to this Agreement, irrespective of whether in tangible or intangible form related to the business opportunity, venture or relationship contemplated and disclosed between the Parties.

The term Confidential Information under this agreement expressly includes all such information disclosed between the Parties, regardless of whether such Confidential Information was disclosed prior to execution of this Agreement. The Parties expressly agree that Confidential Information has been disclosed prior to the execution of this Agreement and agree that same shall be included under the terms of this Agreement. The Discloser of Confidential Information under this Agreement shall remain the legal owner of such Confidential Information and does not, in any way, waive, alter, restrict, give away, donate, or otherwise affect its rights and ownership of such Confidential Information upon disclosure to the other Party to this agreement.

**Except that Confidential Information shall not include information which:**

- i. was acquired by Disclosee prior to the time of its disclosure by Discloser, as shown by files of Disclosee in existence at the time of disclosure, and at a time when the Disclosee was under no obligation to the Discloser to keep such information confidential;
- ii. is or becomes available in the public domain through no act of the Disclosee that violates this Agreement;
- iii. is received by the Disclosee from a third person or entity that is not known by the Disclosee to be sharing such information in violation of rights of the Discloser;

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iv. is developed by or on behalf of the Disclosee without any use of Confidential Information of the Discloser; or

v. is at any time furnished to any person, entity or other party not bound by this agreement or other companion agreements, as described below, ("3rd Parties") by the Discloser without restrictions on the third party's rights to disclose.

The Party claiming that any of the foregoing exceptions applies shall have the burden of proving such applicability.

C. **Trade Secret.** The Parties acknowledge and agree that all Confidential Information disclosed between the Parties is a Trade Secret of the Discloser and that the Discloser has expended considerable effort to develop such Confidential Information and that any disclosure of such Confidential Information to 3rd Parties will cause irreparable harm to the Discloser as owner of such Confidential Information. Furthermore, Disclosee of Confidential Information under this agreement agrees not to challenge or contest the nature and status of disclosed information under this agreement as being a Trade Secret of the Discloser.

### 2. Treatment by Disclosee of Confidential Information:

Disclosee of Confidential Information obtained under this Agreement represents, warrants and agrees that it will keep the Confidential Information confidential and maintain the Confidential Information under the terms of this agreement with all due diligence and will:

A. Use the Confidential Information for the sole and exclusive purposes of exploring the business opportunities, ventures and other relationships the Parties could pursue together to their mutual benefit and otherwise for the purposes recited in this Agreement, including to evaluate whether Disclosee desires to invest, participate and otherwise explore potential business relationships between the Parties and for the purposes of exploiting the Confidential Information of the Parties.

B. Not, under any circumstances, disclose Confidential Information or any portion or aspect thereof, to any 3rd Parties, except that Disclosee may disclose same to Disclosee's Employees only as needed and whom Disclosee determines need to know Confidential Information in Disclosee's use of such Confidential Information in which case Disclosee represents and warrants that it has companion agreements with such employees substantially similar to the Agreement and which provides and affords substantially similar terms and conditions as contained herein. In the event that Disclosee does not have such companion agreements, then the following procedures shall be followed: Disclosee's employee shall execute copies of the executed version of this Agreement in duplicate as indicated in the Employee Section at the end of this Agreement and then Disclosee shall deliver one original executed companion agreement to Discloser prior to Disclosee's dissemination of Confidential Information to such employee and retain the second original executed copy of the companion agreement for Disclosee's records.

C. Not copy, or otherwise duplicate or replicate the Confidential Information and destroy same as may be reasonably located, including any notes or other physical evidence relating thereto, whether provided by Discloser to Disclosee or created by Disclosee as a result of Disclosee's use of the Confidential Information, upon determination by Disclosee that Disclosee has no interest in pursuing business opportunities, ventures or other future relationships with Discloser, or upon a determination by Discloser that Discloser has no interest in pursuing business opportunities, ventures or other future relationships with Disclosee, within thirty (30) days (including holidays and weekends) of written notice to the other Party of such determination and demand for the return of such Confidential

Information and other materials as set forth herein.

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D. Not circumvent Discloser either directly or indirectly, with regard to any business venture or other relationships, either established or contemplated; the term circumvent as used herein refers to any action or deed, whether by Disclosee, their agents or anyone acting on their behalf, that would either individually or collectively frustrate, hamper or in any way prevent or impede from happening or occurring, any effort or action of Discloser in establishing business ventures or other relationships based on and contemplated by Confidential Information which has been disclosed pursuant to this Agreement.

**3. No Option Created or Offered Implied:**

Neither the execution of this Agreement nor the disclosure of Confidential Information pursuant to this Agreement shall be construed to create an option, offer or otherwise obligate the Parties in any manner to venture or participate together in any venture or other relationship. Any option or offer from one Party to the other must be by separate agreement between the Parties.

**4. Duration of Agreement and Survival of Terms:**

The terms of this Agreement shall bind the Parties so long as the Parties are engaged in the purposes set forth herein. In the event that, pursuant to Section 2(C), above, either Party determines it has no interest in pursuing business opportunities, ventures or other future relationships with the other Party and demands the return of all Confidential Information and other material as set forth in that Section, the terms of this agreement shall survive for a period of three (3) years from the date of the written notice of such determination and demand for the return of such Confidential Information and other materials as set forth herein, and shall apply to and be binding upon both Parties, their employees, agents, successors, affiliates, subsidiaries, assigns and any other person or entity acting on behalf of either Party.

**5. Choice of Law, Jurisdiction and Costs of Litigation:**

The parties agree that this Agreement shall be governed by the laws of the State of Texas and submit to personal jurisdiction in either the federal or provincial courts of the State of Texas. The Parties further agree that, in any legal action brought as a result of a breach of this Agreement, the prevailing Party shall recover from the non-prevailing Party all reasonable attorney's fees and costs associated with the litigation, specifically including, but not limited to, the costs of expert witnesses and the costs of collection of any judgment which may be awarded to the prevailing Party.

[Signature Page Follows]



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Date: \_\_\_\_\_

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

\_\_\_\_\_ (insert com-any #1)      \_\_\_\_\_ *[Insert Company #2]:*

\_\_\_\_\_

\_\_\_\_\_

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

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

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

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