

Confidentiality Agreement

Dated 20[]

[Party name 1]

[Party name 2]

- 1 This template NDA – which is in the form of an agreement rather than a letter - has been prepared for discussion purposes (including whether it can be simplified in any respect).**
- 2 It is a mutual NDA between two parties which means that it envisages an exchange of confidential information both ways.**
- 3 It does not contain an indemnity in the event that one party breaches its terms and causes loss to the other – we can discuss if this should be included.**
- 4 It also does not contain any non-solicitation of employees provision which you sometimes see in the context of, for example a M&A deal.**
- 5 The NDA does contain, however, some limited undertakings (but does not require a recipient of confidential information to procure that any person to whom it is permitted to pass information sign a confidentiality undertaking before doing so).**
- 6 Occasionally, in the context of a corporate transaction, a NDA will contain some exclusivity provisions – again, these have not been included so as to keep the NDA as simple as possible.**
- 7 Sometimes, NDAs provide that each party may only deal with a designated person at the other party – the template does not include this level of prescription.**
- 8 This NDA is expressed to last for 3/5 years following its termination – occasionally NDAs are expressed to last for a longer term or even indefinitely.**

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Agreement dated [●]

Between

(1) [], [registered in England with number [] whose registered office is at []][a corporation organised and existing under the laws of [] whose principal place of business is at [] (" "); and

(2) [], [registered in England with number [] whose registered office is at []][a corporation organised and existing under the laws of [] whose principal place of business is at [] (" "),

(together the **Parties** and each a **Party**).

Recitals

A The Parties intend to enter into discussions relating to the Project which will involve the exchange of Confidential Information between them.

B The Parties have agreed to comply with this Agreement in connection with the disclosure and use of Confidential Information.

It is agreed:

1 Interpretation

1.1 The following terms have the following meanings unless the context requires otherwise:

Business Day means a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business.

Confidential Information has the meaning given in clause 2.

Discloser means a party to this Agreement when it or a person on its behalf discloses Confidential Information, directly or indirectly, to the other Party.

Group means in relation to a company, where relevant, that company, any subsidiary or subsidiary undertaking or any holding company or parent undertaking from time to time of that company, and any subsidiary or subsidiary undertaking from time to time of a holding company or parent undertaking of that company, and each company in a Group is a member of the Group or a **Group Company**.

Project means [].

Recipient means a Party to this Agreement when it or a person on its behalf receives Confidential Information, directly or indirectly, from the other Party.

Representative(s) means in relation to each Party and, where relevant, any member of its Group:

- (a) its officers and employees who need to know the Confidential Information for the Project;
 - (b) its professional advisers or consultants who are engaged to advise that Party and/or, where relevant, any member of its Group in connection with the Project;
 - (c) its contractors and sub-contractors engaged by that Party and/or any, where relevant, any member of its Group in connection with the Project; and
 - (d) any other person to whom the other Party agrees in writing that Confidential Information may be disclosed in connection with the Project.
- 1.2 A reference to a statute or statutory provision is a reference to it as amended or re-enacted. A reference to a statute or statutory provision includes any subordinate legislation made under that statute or statutory provision, as amended or re-enacted.
- 1.3 Any words 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.
- 1.4 A reference to **writing** or **written** includes email.
- 1.5 A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.
- 1.6 A reference to a **holding company** or **parent undertaking** or a **subsidiary** or **subsidiary undertaking** has the relevant meaning as set out in sections 1159 and 1162 of the Companies Act 2006, and a company shall be treated, for the purposes only of the membership requirement contained in section 1159(1)(b) and (c), as a member of another company even if its shares in that other company are registered in the name of:
- (a) another person (or its nominee) by way of security or in connection with the taking of security; or
 - (b) its nominee.
- 1.7 A reference to a **person** or **party** includes a natural person, corporate or unincorporated body (whether or not having a separate legal personality).
- 1.8 Any obligation on a Party not to do something includes an obligation not to allow that thing to be done.

2 Confidential Information

- 2.1 Confidential Information means all confidential information in oral, visual, written, electronic or other tangible or intangible form relating to the Project which the Discloser or its Representatives or any of its Group Companies, or their Representatives, directly or indirectly, discloses, or makes available, to the Recipient or its Representatives or any of its

Group Companies, or their Representatives, [before], on or after the date of this Agreement. This includes:

- (a) the fact that discussions and negotiations may take place, are taking place or have taken place concerning the Project, the status of those discussions and negotiations, or that the Project is in contemplation;
- (b) the existence and terms of this Agreement;
- (c) all confidential or proprietary information relating to:
 - (i) the business, affairs, customers, clients, suppliers, plans, intentions, or market opportunities of the Discloser or of any of the Discloser's Group Companies; and
 - (ii) the operations, processes, product information, know-how, technical information, reports, analyses, memoranda, compilations, studies or other documents, designs, trade secrets or software of the Discloser, or of any of the Discloser's Group Companies; ***[Note: this could be tailored if appropriate]***
- (d) any information, findings, data or analysis to the extent they are derived from or contain or reflect or are generated from Confidential Information; and
- (e) any other information that is identified as being of a confidential or proprietary nature,

but excludes any information referred to in clause 2.2.

2.2 Information is not Confidential Information if:

- (a) it is, or becomes, generally available to the public other than as a direct or indirect result of the information being disclosed by the Recipient or its Representatives or by any of the Recipient's Group Companies or their Representatives in breach of this Agreement;
- (b) it was, is, or becomes available to the Recipient on a non-confidential basis from a third party who is not under any confidentiality obligation in respect of that information;
- (c) it was lawfully in the possession of the Recipient before the information was disclosed by the Discloser or on the Discloser's behalf;
- (d) it is developed by or for the Recipient independently of the information disclosed by the Discloser; or
- (e) the Parties agree in writing that the information is not confidential.

3 Confidentiality obligations

- 3.1 In consideration for the Discloser making Confidential Information available to the Recipient, the Recipient undertakes to the Discloser that it shall:
- (a) keep the Confidential Information secret and confidential;
 - (b) not use or exploit the Confidential Information in any way except for the evaluation or negotiation of the Project;
 - (c) not directly or indirectly disclose or make available any Confidential Information in whole or in part to any person, except as expressly permitted by, and in accordance with, this Agreement and which person needs to know the Confidential Information for the purpose of evaluation or negotiating the Project; and
 - (d) not copy, reduce to writing or otherwise record the Confidential Information except as strictly necessary for the Project (but any such copies, reductions to writing and records shall be the property of the Discloser).
- 3.2 The Recipient shall establish and maintain adequate and reasonable security measures to safeguard the Confidential Information from unauthorised access or use, such measures being no less than the measures taken to safeguard its own proprietary or Confidential Information.
- 3.3 The Recipient shall immediately notify the Discloser of any actual or threatened security breach which may result in unauthorised access to, or disclosure of, Confidential Information. The Recipient shall provide all reasonable co-operation to the Discloser in relation to the Discloser's investigation of any security breach or unauthorised access.

4 Permitted disclosure

- 4.1 The Recipient may disclose the Confidential Information to its Representatives, any of its Group Companies or their Representatives on the basis that it:
- (a) informs those Representatives, Group Companies or their Representatives of the confidential nature of the Confidential Information before it is disclosed; and
 - (b) procures that those Representatives, Group Companies or their Representatives comply with the confidentiality obligations in clause 3 as if they were the Recipient.
- 4.2 The Recipient shall be liable for the actions or omissions of the Representatives, any of its Group Companies or their Representatives in relation to the Confidential Information as if they were the actions or omissions of the Recipient.
- 4.3 [The Recipient may, provided that it has reasonable grounds to believe that the Discloser is involved in activity that may constitute a criminal offence under the Bribery Act 2010, disclose the Discloser's Confidential Information to the Serious Fraud Office without first notifying the Discloser of such disclosure.]

5 Mandatory disclosure

5.1 Subject to the provisions of this clause 5, a Party may disclose Confidential Information to the minimum extent required by:

- (a) an order of any court of competent jurisdiction or any regulatory, judicial, governmental or similar body or any taxation authority of competent jurisdiction;
- (b) the rules of any listing authority or stock exchange on which its shares or those of any of its Group Companies are listed or traded; or
- (c) the laws or regulations of any country to which its affairs or those of any of its Group Companies are subject.

5.2 Before a party discloses any Confidential Information pursuant to clause 5.1 it shall, to the extent permitted by law and/or practicable having regard to the timing of any disclosure obligation, use reasonable endeavours to give the other Party as much notice of this disclosure as possible. Where notice of such disclosure is not prohibited and is given in accordance with clause 5.2, that Party shall take into account to the extent permitted the reasonable requests of the other Party in relation to the content of this disclosure.

5.3 If a party is unable to inform the other party before Confidential Information is disclosed pursuant to clause 5.1 it shall, to the extent permitted by law, inform the other Party of the circumstances of the disclosure and the information that has been disclosed as soon as reasonably practicable after such disclosure has been made.

6 Return or destruction of Confidential Information

6.1 If so requested by the Discloser at any time by notice in writing to the Recipient, the Recipient shall:

- (a) destroy or return to the Discloser all documents and materials (and any copies) containing, reflecting, incorporating or based on the Discloser's Confidential Information;
- (b) to the extent that it is practicable to do so, erase all the Discloser's Confidential Information from its computer and communications systems and devices used by it, or which is stored in electronic form (including on systems and data storage services provided by third parties)[; and
- (c) certify in writing to the Discloser that it has complied with the requirements of this clause 6.1.]

6.2 Nothing in clause 6.1 shall require the Recipient to return or destroy any documents and materials containing or based on the Discloser's Confidential Information that the Recipient is required to retain by applicable law, or to satisfy the requirements of a regulatory authority or body of competent jurisdiction or the rules of any listing authority or stock exchange to which it is subject [or any widely and consistently applied internal document

retention policy]. Notwithstanding clause 10.2, the provisions of this Agreement shall continue to apply to any documents and materials retained by the Recipient pursuant to this clause 6.2.

7 Reservation of rights and acknowledgement

- 7.1 Each Party reserves all rights in its Confidential Information. The disclosure of Confidential Information by one Party does not give the other Party or any other person any licence, assignment or transfer of any right, title or interest in respect of any such Confidential Information beyond the rights expressly set out in this Agreement.
- 7.2 Except as expressly stated in this Agreement, neither Party (for and on behalf of itself and any Group Company or any of their Representatives) makes any express or implied warranty or representation concerning its Confidential Information, including but not limited to the adequacy, accuracy, reliability or completeness of the Confidential Information [or the achievement or reasonableness of any projected financial information, estimates or other financial statement] or accepts responsibility or liability howsoever or whensoever incurred or suffered by any person in connection with any such Confidential Information.
- 7.3 The disclosure of Confidential Information by a Party shall not form any offer by, or representation or warranty on the part of, that Party to enter into any further agreement with the other Party in relation to the Project.
- 7.4 Each Party shall make (and shall be deemed to make) its own independent investigation and assessment of the Project.

8 Inadequacy of damages

Without prejudice to any other rights or remedies that each Party may have, each Party acknowledges and agrees that damages alone may not be an adequate remedy for any breach of the terms of this Agreement by the other Party. Accordingly, each Party shall be entitled to seek the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of this Agreement.

9 No obligation to continue discussions

Nothing in this Agreement shall impose [an obligation on either Party to continue discussions or negotiations in connection with the Project or otherwise pursue the Project, or] an obligation on each Party, or] any of its Group Companies, to disclose any information (whether Confidential Information or otherwise) to the other Party or to provide any additional information or to update any information supplied or to correct any inaccuracies in any information supplied.

10 Ending discussions and duration of confidentiality obligations

- 10.1 If either Party decides not to continue to be involved in the Project with the other Party, it shall notify that other Party in writing immediately.

10.2 Notwithstanding the end of discussions between the Parties pursuant to clause 10.1, each Party's obligations under this Agreement shall continue in full force and effect for a period of [three] [five] years from the date of this Agreement.

10.3 The end of discussions relating to the Project shall not affect any accrued rights or remedies to which either Party is entitled.

11 Data Protection

11.1 Where applicable, each Party warrants that it is registered under the [Data Protection Act 1998] (the "Act") to process personal data in relation to the Project.

11.2 Each Party shall comply with the Act when Processing Personal Data and Sensitive Personal Data in the course of this Agreement, including Personal Data relating to any employees of the other Party.

11.3 Unless defined in this Agreement, capitalised terms in this clause 11 shall have the same meaning as in the Act and any such terms shall be construed using any of the interpretative provisions contained in the Act as may be necessary. *[Note: to be updated to reflect GDPR]*

12 General

12.1 Assignment and other dealings

Neither Party shall assign, transfer, mortgage, charge, subcontract, declare a trust over or deal in any other manner with any of its rights and obligations under this Agreement save as expressly permitted.

12.2 Entire agreement

12.2.1 This Agreement constitutes the entire agreement between the Parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

12.2.2 Each Party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Agreement. Each Party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this Agreement.

12.3 Variation

No variation of this Agreement shall be effective unless it is in writing and signed by the Parties (or their authorised representatives).

12.4 Waiver

No failure or delay by a Party to exercise any right or remedy provided under this Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise

of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

12.5 Severance

If any provision or part-provision of this Agreement is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this clause shall not affect the validity and enforceability of the rest of this Agreement.

12.6 Notices

12.6.1 Any notice or other communication given to a Party under or in connection with this Agreement shall be in writing, addressed to that Party at its registered office or such other address as that Party may have specified to the other Party in writing in accordance with this clause 12.6, and shall be delivered personally, or sent by pre-paid first class post or recorded delivery or airmail letter, or e-mail.

12.6.2 A notice or other communication shall be deemed to have been received: if delivered personally, when left at the address referred to in clause 12.6.1; if sent in the United Kingdom by pre-paid first class post to an address in the United Kingdom, at 9.00 am on the second Business Day after posting; if delivered by recorded delivery, on the date and at the time that the courier's delivery receipt is signed; if sent by airmail letter then on the fifth Business Day after posting; or, if sent by e-mail, on receipt of a successful transmission report.

12.6.3 The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.

12.7 Third party rights

This Agreement does not give rise to any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

12.8 No partnership or agency

12.8.1 Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between the Parties, constitute any Party the agent of the other Party, or authorise any Party to make or enter into any commitments for or on behalf of the other Party.

12.8.2 Each Party confirms it is acting on its own behalf and not for the benefit of any other person.

12.9 Counterparts

The Agreement may be executed in counterpart, each of which when executed and delivered shall be an original, but all of which shall constitute one and the same document.

12.10 Governing law

This Agreement and any dispute or claim (including any non-contractual dispute or claim) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales.

12.11 Jurisdiction

Each Party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including any non-contractual dispute or claim) arising out of or in connection with this Agreement or its subject matter or formation, and each Party agrees to waive any objection to the courts of England and Wales, whether on the grounds of venue or that the forum is not appropriate.

[Note: if a Party is not based in England or Wales, an address for service provision will need to be included allowing for service on a third party in England or Wales]

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

Signed by)
duly authorised for and)
on behalf of)
) _____

Signed by)
duly authorised for and)
on behalf of)
) _____