



# NDA (mutual)



[COMPANY NAME]

MUTUAL NON-DISCLOSURE AGREEMENT

Effective as of the Effective Date (defined on the signature page below), [Company Name], a [Delaware [public benefit] corporation] (“Company”), and the individual or entity identified on the signature page below (“Counterparty”) enter into this Mutual Non-Disclosure Agreement (the “Agreement”) and agree as follows:

1. **Purpose.** The Company and Counterparty wish to explore a possible business opportunity of mutual interest (the “Relationship”), in connection with which each party may have disclosed and may further disclose its Confidential Information (as defined below) to the other. This Agreement is intended to allow the parties to discuss or continue to discuss and evaluate the Relationship while protecting each party’s Confidential Information (including Confidential Information that may have been previously disclosed to the other party) against unauthorized use or disclosure.

2. **Definition of Confidential Information.** “Confidential Information” means any and all information and data exchanged between the parties, which includes, without limitation, information (tangible or intangible, written or oral) regarding a party’s technology, patents, patent applications, developments, inventions, designs, drawings, techniques, research, know-how, specifications, products, product plans, services, pricing, customer information, marketing information, regulatory information, reports, user data, other data and analysis, software (including source and object code), computer systems configurations, biological materials, chemicals and formulas, agreements with third parties, current or future strategic information, current or future business plans, processes, policies or practices, employee information, and other business and technical information, which (i) is marked “confidential” or “proprietary” at the time of disclosure by the disclosing party, or (ii) by its nature or content is reasonably distinguishable as confidential or proprietary to the party receiving the Confidential Information. Confidential Information may also include information of a third party that is in a party’s possession under an obligation of confidentiality and is disclosed to the other party under this Agreement.

3. **Non-Use and Non-Disclosure of Confidential Information.**

(a) The Company and Counterparty each agree not to use any Confidential Information disclosed to it by the other party for its own use or for any purpose other than to carry out discussions concerning, and the undertaking of, the Relationship. Neither party shall disclose or permit disclosure of any Confidential Information of the other party to third parties or to employees of the party receiving Confidential Information, other than directors, officers, employees, consultants and agents who are required to have the information in order to carry out the discussions regarding the Relationship. Each party agrees that it shall take all reasonable measures to protect the secrecy of and avoid disclosure or use of Confidential Information of the other party in order to prevent it from falling into the public domain or the possession of persons other than those persons authorized under this Agreement to have any such information. Such measures shall include, without limitation, taking the highest degree of care that the receiving party utilizes to protect its own Confidential Information of a similar nature, which shall be no less than reasonable care. Each party agrees to notify the other in writing of any actual or suspected misuse, misappropriation or unauthorized disclosure of Confidential Information of the disclosing party which may come to the receiving party’s attention.

(b) **Exceptions.** Notwithstanding the above, neither party shall have liability to the other with regard to any Confidential Information of the other which the receiving party can prove:

(i) was publicly known at the time it was disclosed or has been made generally available through no fault of the receiving party;

(ii) was known to the receiving party, without restriction, at the time of disclosure, as demonstrated by written files and records in existence and kept in the ordinary course of business at the time of disclosure;

(iii) is disclosed with the prior written approval of the disclosing party;

(iv) was independently developed by the receiving party without any use of the Confidential Information of the disclosing party and by employees of the receiving party who have not had access to the Confidential Information, as demonstrated by written files and records created and kept in the ordinary course of business at the time of such independent development;

(v) becomes known to the receiving party, without restriction, from a source other than the disclosing party without breach of this Agreement by the receiving party and otherwise not in violation of the disclosing party's rights;

(vi) is disclosed generally to third parties by the disclosing party without restrictions similar to those contained in this Agreement; or

(vii) is disclosed pursuant to the order or requirement of a court, administrative agency, or other governmental body; *provided, however*, that the receiving party shall provide prompt notice of such court order or requirement to the disclosing party to enable the disclosing party to seek a protective order or otherwise prevent or restrict such disclosure unless prohibited by such order or requirement or otherwise by applicable law; and *provided, further*, that if the disclosing party fails to obtain a protective order or other appropriate remedy, the receiving party will furnish only that portion of the Confidential Information that is legally required to be disclosed and any Confidential Information so disclosed shall maintain its confidentiality protection for all purposes other than such legally compelled disclosure.

4. **Return of Materials.** Any materials or documents that have been furnished by one party to the other in connection with the Relationship, along with all copies of the same, shall be promptly returned, deleted or destroyed (with certification of such deletion or destruction) by the receiving party within 10 days after the earlier of (a) the Relationship has been rejected or concluded, or (b) the written request of the disclosing party.

5. **No Rights Granted.** Nothing in this Agreement shall be construed as granting any rights under any patent, copyright or other intellectual property right of either party, nor shall this Agreement grant either party any rights in or to the other party's Confidential Information other than the limited right to review such Confidential Information solely for the purpose of determining whether to enter into the Relationship.

6. **No Warranty.** ALL CONFIDENTIAL INFORMATION IS PROVIDED "AS IS." NEITHER PARTY MAKES ANY WARRANTIES, EXPRESS, IMPLIED OR OTHERWISE, REGARDING THE ACCURACY, COMPLETENESS OR PERFORMANCE OF ANY CONFIDENTIAL INFORMATION, OR WITH RESPECT TO NON-INFRINGEMENT OR OTHER VIOLATION OF ANY INTELLECTUAL PROPERTY RIGHTS OF A THIRD PARTY OR OF THE RECEIVING PARTY.

7. **Term.** The rights and obligations of the parties under this Agreement shall survive any termination of the Relationship between the parties and shall continue for a period terminating on the later to occur of the date (a) five (5) years following the date of this Agreement, or (b) three (3) years from the date on which Confidential Information is last disclosed under this Agreement. Notwithstanding the foregoing, the obligations of the parties regarding the use, protection and confidentiality of Confidential Information that constitute trade secrets of the disclosing party pursuant to and in accordance with this

Agreement shall survive the termination of this Agreement for so long as such Confidential Information remains a trade secret of the disclosing party.

8. **Successors and Assigns.** The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties, *provided* that Confidential Information of the disclosing party may not be assigned without the prior written consent of the disclosing party. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement.

9. **Severability.** If one or more provisions of this Agreement are held to be unenforceable under applicable law, the parties agree to renegotiate such provision in good faith. In the event that the parties cannot reach a mutually agreeable and enforceable replacement for such provision, then (a) such provision shall be excluded from this Agreement, (b) the balance of the Agreement shall be interpreted as if such provision were so excluded, and (c) the balance of the Agreement shall be enforceable in accordance with its terms.

10. **Governing Law.** This Agreement and all acts and transactions pursuant hereto and the rights and obligations of the parties hereto shall be governed, construed and interpreted in accordance with the laws of the State of [California], without giving effect to any conflict of laws principles that require the application of the law of a different jurisdiction.

11. **Remedies.** The Company and Counterparty agree that any violation or threatened violation of this Agreement will cause irreparable injury to the disclosing party, entitling the disclosing party to obtain injunctive relief in addition to all legal remedies without showing or proving any actual damage and without any bond being required to be posted.

12. **No Publicity.** Neither the Company nor Counterparty shall, without the prior consent of the other party, disclose to any other person the fact that Confidential Information of the other party has been and/or may be disclosed under this Agreement, that discussions or negotiations are taking place between the Company and Counterparty, or any of the terms, conditions, status or other facts with respect thereto, except as required by law and then only with prior notice as soon as possible to the other party.

13. **No Modification.** The Company and Counterparty each agree that it shall not modify, reverse engineer, decompile, create other works from or disassemble any software programs contained in the Confidential Information of the other party unless permitted in writing by the disclosing party.

14. **Compliance with Laws.** The Company and Counterparty each agree to comply with all laws, statutes, regulations, rulings, or enactments of any governmental authority including, without limitation, export compliance regulations, applicable to its performance hereunder.

15. **Entire Agreement.** This Agreement is the product of both of the parties hereto and constitutes the entire agreement between such parties pertaining to the subject matter hereof and merges all prior negotiations and drafts of the parties with regard to the transactions contemplated herein. Any and all other written or oral agreements existing between the parties hereto regarding such transactions are expressly canceled. Any term of this Agreement may be amended with the written consent of the Company and Counterparty. Failure to enforce any provision of this Agreement by a party shall not constitute a waiver of any term hereof by such party.

16. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via email or other transmission method (including pdf or any electronic signature complying with applicable law) and any counterpart so delivered shall be deemed valid and effective for all purposes.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date of the last signature set forth below (the “**Effective Date**”).

**COMPANY:**

**COUNTERPARTY:**

[COMPANY NAME]

\_\_\_\_\_

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

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

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

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

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

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

Email: \_\_\_\_\_

Email: \_\_\_\_\_

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

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