Appendix 8A

MUTUAL NONDISCLOSURE AGREEMENT

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This Mutual Nondisclosure Agreement (this “Agreement”) is made by and between [insert company A name, state, and entity type] with an address at [insert company A address] (“[company A]”) and [insert company B name, state, and entity type] with an address at [insert company B address] (“[company B]”). [company A] and [company B] are each referred to as a “Party.”

1. BACKGROUND. To promote the business dealings between the Parties, either Party may disclose Confidential Information (as defined below) to the other Party. The “Discloser” of specific Confidential Information is the Party who discloses that Confidential Information, and the “Recipient” of specific Confidential Information is the Party to whom that Confidential Information is disclosed. “Representatives” means a Party’s directors, officers, employees, advisors (including financial advisors, counsel, and accountants), agents, or controlling persons. The Parties acknowledge that Confidential Information is a valuable business asset of the Discloser and the protection of that Confidential Information by the Recipient is, therefore, essential.

2. CONFIDENTIAL INFORMATION.

a. Definition. For the purposes of this Agreement, “Confidential Information” means any non-public information disclosed by the Discloser or its Representatives to the Recipient or its Representatives, including but not limited to any information that is a trade secret of the Discloser. A Party’s granting of access to information (including by the granting of access to its premises) constitutes disclosing that information for purposes of this section. Confidential Information includes, but is not limited to, the following types of information and other information of a similar nature: [marketing and development plans, business plans, financial information, customer lists, supplier lists, designs, drawings, models, prototypes, pilots, inventions, patents and patent applications, software (including source code, object code, and executable code), documentation, diagrams, flow charts, technical concepts and specifications, production methods, know-how, processes and procedures, correspondence, written or verbal representations, memoranda, reports and records, as well as information or notes derived by the Recipient from this information]. [Review definition of “Confidential Information” in light of the specific business.]

b. Nondisclosure; Use Limited to the Purpose. The Recipient shall use the Confidential Information only for the purpose of evaluating a possible license agreement, business relationship, or other transaction with the Discloser, or for one Party to provide products or services to the other Party, and not in any manner detrimental to the Discloser (the “Purpose”). Nothing in this Agreement requires the disclosure of any Confidential Information. The Recipient shall not disclose the Confidential Information to any other person or entity.[[1]](#footnote-1) The Recipient shall take all reasonable precautions to protect the confidentiality of the Confidential Information and shall use no less than the degree of care it uses in protecting its own Confidential Information of a similar nature.

c. Exceptions. Except for personal information governed by applicable privacy law, the Recipient has no obligations under Section 2.b with respect to any Confidential Information if it: (i) is generally known, or readily ascertainable by proper means, by the public other than through a breach of this Agreement by the Recipient or its Representatives; (ii) is known by the Recipient before it is disclosed to the Recipient by the Discloser as evidenced by Recipient’s written records; (iii) is developed independently by the Recipient in a manner that does not rely on Confidential Information of the Discloser; or (iv) is disclosed to the Recipient or its Representatives by a third party not subject to any nondisclosure obligations with respect to the Confidential Information.

d. Representatives. The Recipient shall restrict circulation of Confidential Information to its Representatives who need Confidential Information in order to carry out the Purpose and who are bound to hold in confidence all Confidential Information made available to them and to use the Confidential Information only for authorized purposes. The acts and omissions of a Party’s Representatives are deemed the acts and omissions of that Party under this Agreement.

e. Compelled Disclosure. If the Recipient receives a request to disclose all or any part of the Confidential Information under the terms of a subpoena or order issued by a court or other governmental agency, the Recipient shall: (i) immediately notify the Discloser of the existence, terms, and circumstances surrounding the request; (ii) consult with the Discloser on the advisability of taking legally available steps to resist or narrow the request; and (iii) if disclosure is required, cooperate with the Discloser at the Discloser’s expense in obtaining an order or other reliable assurance that confidential treatment will be accorded to the portion of the information as the Discloser may designate.

f. Additional Restrictions. The Recipient shall not cause or permit the reverse-engineering, decompilation, disassembly, or other translation of the Confidential Information. The Recipient shall not alter or remove from the Confidential Information any identification, including copyright and trademark notices, and shall place these markings on any copies.

3. OWNERSHIP. All Confidential Information will remain the property of the Discloser or its licensors.

4. NO LICENSE. Nothing in this Agreement will be construed as a grant by the Discloser of any license or assignment, directly or by implication, estoppel, or otherwise, in any Confidential Information or other intellectual property.

[5. NO WARRANTIES. The Recipient understands and acknowledges that, except as may be set forth in a separate agreement signed by the Discloser, (a) the Discloser makes no representation or warranty, express or implied, as to the accuracy or completeness of the Confidential Information or its freedom from defect of any kind, including freedom from any patent, copyright, or trademark infringement that may result from the use of the Confidential Information, and (b) neither the Discloser nor any of its Representatives will have any liability to the Recipient or any other person resulting from the Recipient’s use of the Confidential Information.]

6. RETURN OF INFORMATION; BACKUP COPIES. At the Discloser’s request, the Recipient shall return to the Discloser all documents and other materials containing Confidential Information, including all copies made by the Recipient or its Representatives (except that the Recipient may destroy notes or other documents generated by the Recipient that contain non-public information other than Confidential Information). At the Discloser’s option, the Recipient shall instead destroy all documents and other materials containing Confidential Information and all copies (including written information or notes derived from the Confidential Information), and the Recipient shall certify the destruction in writing within five (5) days after the Discloser’s request. The Recipient may retain a limited number of electronic backup copies of Confidential Information that are automatically created and retained by the Recipient’s standard backup processes and systems. The Recipient shall comply with its nondisclosure obligations under this Agreement with regard to these copies and shall destroy them in accordance with Recipient’s normal destruction processes.

7. NO ASSIGNMENT. This Agreement may not be assigned or transferred by either Party without the prior written consent of the other Party. Any assignment or transfer in violation of this Section is void.

8. SEVERABILITY. If a provision of this Agreement is held invalid or unenforceable by a court, the Parties hereby agree and request the court to modify the provision to the minimum extent necessary to make it valid and enforceable, and if this modification may not be made, then the remaining provisions will be construed as if the invalid or unenforceable provision was not included in this Agreement.

9. GOVERNING LAW. This Agreement will be construed according to and governed by the internal laws of the State of [STATE], without regard to any conflict of law provisions.

10. INJUNCTIVE RELIEF AND SPECIFIC PERFORMANCE. The Parties acknowledge that a breach of this Agreement would cause irreparable injury, and that the damages resulting from a breach would be difficult to calculate. Therefore, in addition to any other remedy to which it may be entitled in law or in equity, the injured Party will be entitled to injunctive relief preventing or ending the breach, and to an order of specific performance of the covenants contained in this Agreement.

11. LEGAL EXPENSES. If legal action is taken by either Party to enforce its rights under this Agreement, all costs and expenses incurred by the prevailing Party, including reasonable attorney fees and court costs, will be paid by the other Party.

12. NO WAIVER. No failure on the part of either Party to exercise, and no delay in exercising, any right, power, or privilege will operate as a waiver. The waiver by either Party of any default or breach of this Agreement will not constitute a waiver of any other or subsequent default or breach.

13 REMEDIES CUMULATIVE. Each remedy of a Party is cumulative with each other remedy contained in this Agreement and with all other remedies available to that Party at law, in equity, and otherwise, and no pursuit of any particular remedy will constitute an exclusive election of any particular remedy.

14. FINAL AGREEMENT; MODIFICATION. This Agreement terminates and supersedes all prior understandings or agreements on the subject matter of this Agreement. This Agreement may not be modified or amended except in a writing signed by a duly authorized representative of each Party that expressly states the sections of this Agreement to be modified; no other act, usage, or custom will be deemed to amend or modify this Agreement. Each Party hereby waives any right it may have to claim that this Agreement was subsequently modified other than in accordance with this Section 13.

15. NO THIRD-PARTY BENEFICIARIES. This Agreement is an agreement between the Parties and confers no rights upon any of the Parties’ employees, agents, contractors, or customers, or upon any other person or entity.

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

|  |  |
| --- | --- |
| [INSERT COMPANY A NAME] | [INSERT COMPANY B NAME] |
| By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

1. [for a period of five (5) years, provided, however, that the Recipient shall not disclose any Confidential Information that constitutes a trade secret of the Discloser for as long as that information remains a trade secret under applicable law]. [Consider whether a term is appropriate and, if so, what the term should be in light of the specific circumstances.] [↑](#footnote-ref-1)