

The Shareholders Agreement - A Sample Agreement

(Note - this is just a sample agreement set in the legal context of the United States to serve as food for thought. This template will alert you to typical issues that you need to think about in the context of the governance of your start-up - get legal help to convert your thinking on these issues to typical legal clauses relevant for your geography. Notes and comments are italicized and highlighted. (Adapted by Prof Bala Vissa from a sample agreement developed by Michael C. Volker)

SHAREHOLDERS AGREEMENT

for

Carpe Diem Technology Corp

This agreement is made as of _____

BETWEEN

Pat Tater ("Pat") of the Municipality of Whistler, B.C.

of the **FIRST PART**

and

Chris Topher ("Chris") of the Municipality of Whistler, B.C.

of the **SECOND PART**

and

Jean Nee ("Jean") of the Municipality of Whistler, B.C.

of the **THIRD PART**

and

Carpe Diem Technology Corp (the "Company")

of the **FOURTH PART**

(The following section simply "sets the stage". It is important to clearly announce who owns what at the outset so there are no misunderstandings on this very important aspect)

WHEREAS the Company is a company incorporated in British Columbia of which Pat, Chris, and Jean are all of its shareholders and the authorized capital of the Company consists of an unlimited number of common voting shares without par value, of which the following are issued and outstanding as fully paid and non-assessable:

Shareholder: No.of Common Shares:

Pat Tater 400,000

Chris Topher 350,000

Jean Nee 250,000

TOTAL COMMON SHARES ISSUED: 1,000,000

AND WHEREAS the Company is doing business as a developer of esoteric software products located at #99 Forest Lawn, Burnaby (the "head office"),

NOW THIS AGREEMENT WITNESSES that in consideration of the premises and mutual covenants and agreements, the parties in this Agreement agree as follows:

1. DEFINITIONS

1.1 "Company" or "Corporation" means Carpe Diem Technology Corp.

1.2 "Common Shares" shall mean the common shares in the capital stock of the company.

1.3 "Issued Shares" shall have the meaning given in para. 5.1.

1.4 "Meeting" shall have the meaning given in para. 5.2.

1.5 "Offered Shares" shall have the meaning given in para.3.0.

1.6 "Offeree" or "Offerees" shall have the meaning given in para.3.0.

1.7 "Parties" shall mean any two or more of Pat, Chris, and Jean.

1.8 "Seller" shall have the meaning given in para.3.0.

1.9 "Selling Notice" shall have the meaning given in para. 3.1.

1.10 "Shareholder" means any one of Pat, Chris and Jean.

1.11 "Shareholders" means any two or more of Pat, Chris and Jean.

1.12 "Shares" means all the issued and outstanding common shares in the capital stock of the company beneficially owned by a Shareholder at any time.

1.13 "Special Directors' Resolution" shall mean a resolution passed at a properly constituted meeting of the board of directors of the Company, at which meeting a majority of directors in attendance are in favor of such resolution, or, in lieu of such confirmation, a resolution which is consented to by the signatures of all the directors of the Company.

1.14 "Unanimous Directors' Resolution" shall mean a resolution passed at a properly constituted meeting of the board of directors of the Company, at which meeting all of the directors in attendance are in favor of such resolution, or, in lieu of such confirmation, a resolution which is consented to by the signatures of all the directors of the Company.

(The above two types of resolutions permit decision making where either a unanimous approval is deemed appropriate or a simple majority approval is acceptable.)

1.15 "Board" shall mean the Board of Directors of the Company.

1.16 "Act" means the Company Act of the Province of British Columbia, RSBC 1979,c.59 as may be amended.

1.17 "Articles" means the articles of the Company filed at the office of the Registrar of Companies for the Province of British Columbia as may be amended from time to time.

1.18 "this Agreement", "hereto", "herein", "hereby", "hereunder", "hereof", and similar expressions refer to this Agreement and not to any particular section, subsection, paragraph, or other portion of this agreement.

(this next section spells out, in broad terms, how the Company will be organised and managed)

2. ORGANISATION OF THE COMPANY

2.0 The affairs of the Company will be managed by a board of three (3) directors unless changed by a Unanimous Directors' Resolution. The present directors of the Company are Pat, Chris and Jean. It is agreed that Pat, Chris and Jean shall each be entitled to elect one director to the board of directors of the Company so long as each is a Shareholder. Two (2) directors shall constitute a quorum for the transaction of any business at any meeting of the board of directors. At all meetings of the board of directors, every motion to be carried must receive a majority of the votes cast, subject to the provisions of subparagraphs 2.4 and 2.5. Unless otherwise agreed, board meetings will be held at the head office of the Company.

(As your venture grows, it might be a good idea to include one or two "outside" directors on the Board as well – that would ensure you and your team has access to some outside information and advice on your strategy and operations)

2.1 In the event that a nominee to the Board of one of the Shareholders shall fail to vote and act as a director to carry out the provisions of this agreement, then the shareholders agree to exercise their right as shareholders of the Company and in accordance with the Articles of the Company to remove such nominee from the Board and to elect in the place or stead thereof such individual who will use his/her best efforts to carry out the provisions of this agreement but only in the event that the Shareholder whose nominee has been removed fails to appoint a successor within a period of fourteen days from the date such nominee has been removed.

(The above gives the shareholders some clout in the event that a useless nominee is appointed. In the initial stages of your venture this is unlikely to be an issue since all shareholders likely are directors of the company.)

2.2 The election, appointment and determination of officers and the auditors and advisors of the Company, the defining of their duties and functions and the salaries and remuneration to be paid to them will be a function of the board of directors. Until changed by the board of directors, the Officers of the Company and their annual salaries shall be:

Office Held: Name Annual Salary:

President: Pat Tater \$60,000

Secretary: Chris Topher \$50,000 (also V.P. Marketing)

Treasurer: Jean Nee \$45,000 (also V.P. Finance)

All direct out-of-pocket expenses will be re-imbursed provided these fall within guidelines set out by the Board of Directors from time to time. Until otherwise agreed, each officer of the Company will commit to spending his/her full time on the affairs of the Company.

Until changed by the board of directors, the auditors and advisors of the Company shall be:

Auditor: Pricey, Taxing, et al

Legal Advisors: Scarem and Billem Law Corporation

2.3 There shall be kept, in such bank or banks (including trust companies) as may be determined by the board of directors, bank accounts of the Company in which shall be deposited all monies received by the Company in the course of carrying on business from

time to time. All payments on account of the Company shall be made by cheques drawn on the bank account and all cheques, drafts or other instruments drawn and made for the purposes of the business of the Company shall be executed by such directors, officers or employees as may from time to time be authorized so to do by the board of directors.

2.4 All parties who are employees of or consultants to the Company, shall use their best efforts to promote and maintain the interests of the Company.

2.5 Subject to paragraph 2.6, all decisions relating to the management and control of the business of the Company shall be determined by the board of directors of the Company, provided always that the following matters shall be determined by a Special Directors' Resolution:

- (a) any capital expenditures greater than \$1,000;
- (b) any lease commitments greater than \$1,000;
- (c) the acquisition of any business interests by the Company;
- (d) the elections of officers of the Company;
- (e) the payment of any cash dividends or stock dividends to Shareholders of the Company;
- (f) the issuance of any debt obligations of the Company;
- (g) the disposal of the whole or any part of the business, undertaking, or assets of the Company outside the normal course of business of the Company;
- (h) the transfer of any shares of the Company;
- (i) changes or variations in the objects or powers of the Company;
- (j) the liquidation or winding up of the Company;
- (k) the approval of any contracts or transactions outside the normal course of business;
- (l) the execution of any contract involving a consideration greater than \$5,000 within the normal course of business;
- (m) the lending of money by the Company;
- (n) the guarantee by the Company of the debts or obligations of any other person, firm or body corporate;
- (o) any non-budgeted expenditures greater than \$500;

(p) business plan and/or budgets.

2.6 The following decisions shall be determined by a Unanimous Directors' Resolution:

(a) alterations, variations or changes to the authorized or issued capital of the Company;

(b) the salaries and bonuses of officers and directors of the Company;

(c) the issue, redemption or purchase of any Shares; and

(d) changes in the number of directors of the Company

2.7 The Shareholders may pledge any of their Shares as security for any borrowings by them provided the pledgee executes an agreement, in writing, providing that the pledgee shall be subject to all of the terms of this Agreement.

2.8 The board of directors shall meet at least four times during each fiscal year of the Company. Any director can call a meeting provided 10 days notice is given. Notice may be waived. During the first year from the date of this agreement, the board of directors shall meet on a monthly basis. Directors may elect to attend a board meeting by telephone conference call.

2.9 Each Shareholder shall, for so long as s/he is the owner of shares of the Company devote such of his/her business, time and energy as may be reasonably required to carry on the business of the Company and the Shareholder shall use his/her best efforts, skill and abilities to promote the interests of the Company. Each Shareholder agrees that he/she will not engage, without the consent of the other Shareholders, in a business which is directly competitive to that of the Company.

2.10 The Company agrees to provide to the Shareholders monthly income statements within a reasonable time, but no greater than 30 days, after the end of each month commencing from the date hereof.

2.10 The Parties agree that a Company Business Plan will be prepared and maintained on an on-going basis with at least annual reviews and updates. This Business Plan will define the operational details of the Company and will include, but not be limited to, items such as: budgets, forecasts, capital expenditures, salaries and wages, hours of operation, market information (products, services, pricing, discounts, etc). The Plan will serve the purpose of giving management direction as to the day-to-day operation of the Company.

(This is (probably) relevant in the US context and perhaps in high technology settings. Might not be relevant for INSEAD alum ventures.)

3. RIGHT OF FIRST REFUSAL

(This entire section simply allows a shareholder to sell his/her shares to the other shareholders, failing which, s/he can sell them to other parties - with conditions! While this agreement states that sale price is to be negotiated at the point of sale, in many start-ups, when a founder-shareholder wants to exit, often the other founders buy back the shares at cost – i.e. exiting shareholder sells back at exactly the same price that he bought the shares for – which is usually a pittance!)

3.0 If any of the Shareholders wishes to sell, transfer or otherwise dispose of any or all of his/her Shares (such party being called the "Seller"), the other Shareholders (the "Offerees") shall have a prior right to buy such Shares (the "Offered Shares") and the following shall apply (note that in the event that a Shareholder wishes to buy shares from other Shareholders, that Shareholder may solicit offers from potential Sellers in accordance herewith):

3.1 The Seller shall give to the Offerees notice in writing of his/her desire or intention to sell all or any of his/her Shares to them. Such notice shall be given either by facsimile transmission or registered letter addressed to the Offerees at the addresses set opposite their names in Schedule 3.1 hereto annexed (or at such other address or addresses as may be notified from time to time in writing by each Shareholder to the others) or by serving such notice upon the Offerees personally, and, if mailed as aforesaid, such notice shall be deemed to have been given to the Offerees on the second business day following the mailing thereof. This notice (the "Selling Notice") shall set out:

- (i) the number of Shares beneficially owned by the Seller;
- (ii) the number and class of Shares which make up the Offered Shares, the price and the terms and conditions of the sale of the Offered Shares.

3.2 Each Offeree may, within a period of sixty days next following the date when the Selling Notice shall be deemed to have been given, give written notice either by facsimile transmission or by registered letter, addressed to the Seller at the address set opposite his/her name on Schedule 3.1 hereto annexed (or such other address as may be prescribed in the Selling Notice) or by serving the notice personally on the Seller. This notice (the "Buying Notice") shall state either that such Offeree is willing to purchase the Offered Shares, or that s/he is not willing to purchase the Offered Shares. If an Offeree fails to give the Buying Notice s/he will be deemed to have refused to purchase the Offered Shares.

3.3 After receipt by the Seller of each Buying Notice, or after the expiry of sixty days from the date of the Selling Notice, whichever is earlier, the Seller shall be bound to sell all the Offered Shares to the Offerees who have indicated in the Buying Notice that they wish to purchase the Offered Shares (the "Buyers") at such price and on such terms as contained in the Selling Notice.

3.4 If more than one Offeree has given a Buying Notice to the Seller indicating his/her willingness to purchase the Offered Shares, then, the Buyers shall purchase all the Shares comprising the Offered Shares in such proportions as they may agree upon, or, in the absence of agreement, in the Common Share Ratios of each Buyer, computed without reference to the Seller's Shares.

3.5 If the Offerees by reason of the provisions hereinbefore contained, do not purchase the Offered Shares then the Seller shall be at liberty to sell the Offered Shares to an Outsider but only at a price equal to or in excess of the price contained in the Selling Notice and on the same terms as disclosed in the Selling Notice. If, within the earlier of one hundred and twenty days of the date of the Selling Notice or sixty days of the date or receipt of the last Buying Notice by the Seller indicating the refusal of the Offerees to purchase the Offered Shares, the Seller has not received an unconditional offer to purchase the Shares from an Outsider and has not completed the sale of the Offered Shares to the Outsider within sixty days of the date of receipt of the unconditional offer, then the rights of the Offerees shall revive in respect of the

Offered Shares and if the Seller shall thereafter desire to sell any of his/her Shares s/he shall again give notice pursuant to paragraph 3.1 and so on from time to time. The Seller shall serve a copy of the Outside Offer upon the Offerees pursuant to Paragraph 3.1 prior to selling the Offered Shares to the Outsider.

3.6 Any offer to purchase Shares from an Outsider must include the condition that the Outsider agrees to become a party to this agreement pursuant to the purchase of the Shares.

4. TAG ALONG PROVISIONS

(This section simply gives a smaller shareholder the right to "tag along" in case a group of shareholders, holding a majority of shares, wishes to sell its shares)

4.0 In the event that each member of a group of Shareholders, which group holds a majority of the common shares, serves a Selling Notice in connection with the same Outside Offer and if after the Outside Offer is served upon the Offerees in accordance with paragraph 3.5, one or more of the Offerees decide that s/he or they wish to sell their Shares to the Outsider on the same terms and conditions as contained in the Outside Offer, then the group shall not be entitled to sell, transfer or otherwise dispose of the Offered Shares unless the Outsider purchases at the same time and on the same terms and conditions all of the Shares of the Offerees who so desire to sell their Shares.

4.1 In the event that any Shareholder serves a Selling Notice in accordance with paragraph 3.5 in connection with an Outside Offer which provides for a sale, the completion of which would result in the ownership by the Outsider of a majority of the common shares, and should one or more of the Offerees decide that s/he or they wish to sell their Shares to the Outsider on the same terms and conditions as contained in the Outside Offer, then the Shareholder serving the Selling Notice shall not be entitled to sell,

transfer or otherwise dispose of the Offered Shares unless the Outsider purchases at the same time and on the same terms and conditions all of the Shares of the Offerees who so desire to sell their Shares.

4.2 In the event that some of the Shareholders accept an offer from an Outsider to purchase a minimum of 75% of the common shares, then all of the Shareholders (including any Shareholder who did not accept the Outsider's offer to purchase) shall be required to sell all of their common shares to the Outsider on the same terms and conditions, if the Outsider desires to purchase such Shares, and only if the purchase price is at least equal to the Valuation Schedule attached as Schedule A to this agreement.

4.3 For the purpose of Article 4, separate offers addressed to each member of a group of Shareholders or any combination of them by the same Outsider or by separate Outsiders or any combination of Outsiders acting in concert shall be considered a single Outside Offer.

5. PRE-EMPTIVE RIGHTS

(This section simply ensures that shareholders cannot be diluted by having the Company issue more shares. It gives shareholders the right to participate, on a pro-rata basis, in new share sales from the treasury.)

5.0 Notwithstanding the articles of incorporation of the Company, the following shall apply to the allotment and issuance by the Company of any Shares:

5.1 If the Company proposes to issue further shares (the "Issued Shares"), the Issued Shares shall be offered to the Shareholders at a price and upon terms determined by the board of directors. The Company shall give written notice (the "Issuing Notice") to each of the Shareholders, setting forth the price at which, and terms on which the Issued Shares are being offered.

5.2 The Issuing Notice shall state the time at which a meeting (the "Meeting") of the Shareholders shall be held for the purposes of this Article 5 at the head office of the Company on a day which shall be not earlier than the 15th day following the date the Issuing Notice is given, provided that if the 15th day is a Saturday, Sunday or statutory holiday, the date for the Meeting shall be the next following business day.

5.3 Each Shareholder wishing to purchase part or all of the Issued shares may attend the Meeting either personally or by his/her representative duly appointed for such purpose. A Shareholder proposing to be represented at the Meeting shall deposit with the Secretary of the Company at or prior to the Meeting an instrument in writing, designating the representative and, if desired, an alternate representative or, alternate representatives, authorized to act on behalf of such Shareholder at the Meeting.

5.4 The Secretary of the Corporation shall act as Chairman of the Meeting and may prescribe such procedures for the conduct of the Meeting not inconsistent with the

provisions of this Article 5 as s/he may consider appropriate for the purposes of carrying out the intent of this Article 5.

5.5 If the Shareholders represented at the Meeting accept the offer stated in the Issuing Notice, the Shareholders shall subscribe for the Issued Shares in accordance with the Issuing Notice and shall execute a written subscription in accordance therewith which shall be accepted forthwith by the Company. The Shareholders shall be entitled to subscribe for and purchase the Issued Shares in such proportions as they may agree upon or, in default of such agreement, in their Common Share Ratios.

5.6 Any Issued Shares which are not subscribed for by the Shareholders in accordance with this Article 5 may be offered by the Company to a third party at the price and on the terms in the Issuing Notice, provided that no subscription shall be accepted by the Company for the sale of any such shares to a third party except with the written consent of the holders of not less than two-thirds of the common shares in the capital stock of the Company at such time outstanding.

6. OPTION TO PURCHASE ON DEATH OR OTHER DISABILITY

(It is a good idea to think about what will happen if a shareholder dies. Will the surviving shareholders get stuck with an obstreperous spouse? There must be a fair mechanism for dealing with this eventuality. And, it will happen - some day!)

6.0 In the event that a Shareholder becomes deceased or suffers from a permanent mental disability, the other Shareholders will have the right to purchase, on a pro-rata basis, the shares of the deceased/disabled Shareholder from the estate of said shareholder as follows:

6.1 Surviving shareholders have the option to purchase shares from the estate of the deceased/disabled shareholder pro-rata to their respective holdings at the price set forth in the Valuation Schedule attached as Schedule A to this agreement.

6.2 The Shareholders agree to maintain Schedule A and update same on a semi-annual basis commencing on the date of this agreement. Schedule A will state the value of the Company (i.e. the value of 100% of the Shares of the Company) as determined by unanimous agreement of all Shareholders. In the event that the Shareholders fail to reach unanimous agreement as to valuation, the Company's auditors will make the determination and it shall be binding on all Shareholders.

(This schedule ensures that the price is "fair" since it is agreed to and acceptable to all parties)

6.3 The Company will maintain insurance policies on each shareholder, sufficient to provide for that Shareholder's share of the valuation as per Schedule A, and shall name as beneficiaries the other Shareholders, in accordance with the ratio of their shareholdings in the Company.

7. RESTRICTIONS OF TRANSFER, ETC.

7.0 Subject to the provisions of paragraph 2.6, no Shareholder, without the prior written consent of the remaining Shareholders, shall sell, assign, transfer, dispose of, donate, mortgage, pledge, hypothecate, charge or otherwise encumber or deal with any of his/her Shares unless in accordance with this Agreement.

7.1 The parties hereby agree that notice of this Agreement shall be endorsed in red ink on all certificates representing Shares from time to time held or beneficially owned by them; and that a copy of this Agreement shall be delivered to the Secretary of the Company accompanied by a notice or direction signed by each of the parties giving notice of the provisions of this Agreement and requesting the Company not to permit the transfer of any of the shares which are subject to the terms of this Agreement, except after being satisfied that the provisions hereof have been complied with; and the parties covenant and agree that the said notice or direction shall not be rescinded so long as this Agreement shall remain in effect.

7.2 In the event that pursuant to any provisions of this agreement, any one or more of the Shareholders shall sell, assign, transfer or convey any of his/her Shares to any person, firm or corporation other than one of the present parties hereto, no such transfer shall be made or shall be effective and no application shall be made to the Company to register any such transfer until the proposed transferee enters into an agreement with the other parties hereto to the same effect as this Agreement, and any further agreement with respect to the Company to which the transferor is a party.

7.3 The Shareholders hereby covenant that in the event of a sale to an Outsider or third party pursuant to the provisions of Article 3 such Outsider or third party shall provide a written declaration to the effect that he or it is not a "non-eligible person" as defined in the Foreign Investment Review Act (Canada).

8. MANAGEMENT CONTRACTS AND DIRECTORS' OBLIGATIONS

8.0 The parties to this Agreement who are salaried full-time employees of the Company shall be required to execute a management contract.

8.1 Every director and officer of the Company shall exercise the powers and discharge the duties of his/her office honestly, in good faith and in the best interests of the Company, and in connection therewith shall exercise the degree of care and diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

8.2 It is the responsibility of each director to familiarize him/herself with the legal and regulatory obligations associated with being a director of a company incorporated in British Columbia, being especially mindful of potential personal liabilities associated with, among other things, employment matters and taxes.

9. FINANCING - SHAREHOLDER CONTRIBUTIONS AND PROFIT DISTRIBUTION

(This section causes the shareholders to give some thought as to how they will contribute additional capital if needed and how they might distribute profits. Write it as best as you can to suit your circumstances!)

9.0 The parties agree that, in order to finance the Company, interest-free Shareholder loans will, from time to time, be provided to the Company by each Shareholder, pro-rata to each Shareholder's ownership in the Company. In the event that a Shareholder is unable or unwilling to comply with this provision, it may be waived by unanimous agreement of the other Shareholders. In the event that only some Shareholders are willing to provide such loans, these Shareholders will be paid a negotiated rate of interest and may be provided with additional security.

9.1 Funds required from time to time by the Company will be obtained, to the greatest extent possible, by borrowing from a bank or other insitutional lender.

9.2 In the event that the Board decides to accept additional investment in the form of equity, the provisions of paragraph 5 shall apply.

9.3 In the event that new investors are approached by the Board for additional equity financing, the provisions of paragraph 2.5 shall apply and the new investors will be made parties to this agreement or such other agreement as all of the parties may agree to.

9.4 Except when precluded or otherwise prohibited by the terms of any debt financing and to the extent permitted by law, the net profit of the Company available for distribution, after making such provisions and transfers to reserves as shall be required in the opinion (expressed by Special Resolution) of the Board to meet expenses or anticipated expenses, shall be distributed annually (unless otherwise unanimously agreed), firstly by way of repayment of Loans on a pro-rata basis, and secondly by way of dividend.

10. TERMINATION OF AGREEMENT

10.0 This Agreement shall terminate on the occurrence of any of the following events:

(a) the Company is dissolved, wound-up, surrenders its charter, makes an assignment in bankruptcy, makes a proposal to its creditors, or has a receiving order made against it;

(b) unanimous agreement of the Shareholders; or

(c) sale of the Company to another party.

11. GENERAL COVENANTS

11.0 This Agreement shall enure to the benefit of and be binding upon the parties and their respective heirs, executors, administrators and assigns.

11.1 The parties agree to hold and cause to be held all such meetings of directors and Shareholders of the Company and to deliver and execute all such documents as may be necessary to give full effect to this Agreement.

11.2 This Agreement shall be construed in accordance with the laws of the Province of British Columbia.

11.3 Words in the singular shall include the plural and vice-versa, and words importing the masculine shall include the feminine and the neuter and vice-versa, and words importing persons shall include corporations and vice-versa.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals this ____ day of _____, 19__.

SIGNED, SEALED, AND DELIVERED

In the presence of:) _____

) Pat Tater

) _____

) Chris Topher

) _____

) Jean Nee

) _____

) Carpe Diem Technology Corp

) Per: _____