

Confidentiality agreement

[Party 1]

Recipient

[Party 2]

Provider

Confidentiality agreement

Dated: 2015

Parties

[Party 1] (Recipient)

[Party 2] (Provider)

Background

- A. The Provider and the Recipient are considering [details of proposed transaction] (Proposed Transaction).
- B. The Provider has agreed to provide the Recipient with information relating to the Provider's business to enable the Recipient to evaluate the Proposed Transaction.
- C. In consideration of the Provider agreeing to provide information to the Recipient, the Recipient has agreed to be bound by the confidentiality obligations set out in this Agreement.

Operative part

1. Definitions and interpretation

1.1. **Definitions:** In this Agreement, unless the context otherwise requires:

1.1.1. **Affiliate** means, in relation to the Provider, any director, officer, employee, Related Company, shareholder, owner, agent, consultant or professional adviser of or to the Provider.

1.1.2. **Agreement** means this agreement and includes the Background and Schedule.

1.1.3. **Confidential Information** means:

1.1.3.1. any information whether provided in writing, orally, electronically or otherwise (including, without limitation, forecasts, financial projections, estimates, assumptions, opinions and statements) concerning or relating to the affairs or prospects of the Provider which is made available to any Recipient by the Provider or any of its Affiliates or which is obtained by the Recipient from some other source but which emanated at any time from the Provider or any of its Affiliates;

1.1.3.2. the fact of the Proposed Transaction itself, or the fact that the Provider is considering the Proposed Transaction;

- 1.1.3.3. the existence of, or the fact that the Recipient is party to, this Agreement, is interested in the Proposed Transaction, is undertaking due diligence, or is engaged in discussions with the Provider or its Affiliates (as applicable);
- 1.1.3.4. the subject matter and terms of this Agreement;
- 1.1.3.5. any copies, modifications or developments made by either party to the information described in paragraph 1.1.3.1 of this definition; and
- 1.1.3.6. any information which the Recipient generates, or is generated at the request of the Recipient (whether (in each case) before, on or after the date of this Agreement), using information described in the first paragraph of this definition if that information could be identified or extracted by a third party from the information generated,

but excludes information that:

- 1.1.3.7. when disclosed to or by the Recipient, is generally available to and generally known by the public, but not through breach of any obligation of confidentiality;
- 1.1.3.8. after disclosure to the Recipient becomes generally available to and generally known by the public but not through breach of any obligation of confidentiality;
- 1.1.3.9. is already known to or in the possession of the Recipient at the time of its disclosure by or on behalf of the Provider or any Affiliate to the extent this is demonstrably evidenced by written records and is not the result of any breach of any obligation of confidentiality;
- 1.1.3.10. was acquired lawfully and in good faith by the Recipient from a third party which does not owe any obligation of confidentiality to the Provider or its Affiliates in relation to that information;
- 1.1.3.11. is agreed by the Provider in writing to be information to which this Agreement does not apply.

1.1.4. **Person** includes any individual natural person, company, corporation, partnership, firm, joint venture, association (whether corporate or unincorporated), trust organisation, Government department, Minister of the Crown, state or agency of a state (in each case, whether or not having separate legal personality), and includes, in each case, a person's executors, administrators, successors and permitted assigns.

1.1.5. **Related Company** has the same meaning set out in section 2(3) of the Companies Act 1993 with references to 'company' including any body corporate whether incorporated in New Zealand or elsewhere.

- 1.1.6. **Representative** means, in relation to the Recipient, any director, officer, employee, Related Company, shareholder, agent, consultant, representative or professional adviser of or to the Recipient.
- 1.1.7. **Working Day** means a day (other than a Saturday, Sunday, or public holiday) on which registered banks are open for general banking business in Christchurch, New Zealand but excludes any period from 24 December in any year to 5 January in the following year (both inclusive).
- 1.2. **Interpretation:** In interpreting this Agreement, the following rules must be applied unless the context otherwise requires:
 - 1.2.1. Headings to clauses are for reference only and are not an aid in interpretation.
 - 1.2.2. References to statutory provisions will be construed as references to those provisions as they may be amended or re-enacted or as their application is modified by other provisions from time to time.
 - 1.2.3. References to clauses or schedules are to clauses of or schedules to this Agreement, and any schedules referred to form part of this Agreement.
 - 1.2.4. References to a party are to a party to this Agreement and include that party's successors in title and permitted substitutes and assigns (and, where applicable, the party's legal personal representatives).
 - 1.2.5. All periods of time include the day on which the period commences and also the day on which the period ends.
 - 1.2.6. Words importing the plural include the singular and vice versa and words importing gender import all genders.
 - 1.2.7. Any obligation not to do something will be deemed to include an obligation not to suffer, permit or cause that thing to be done.
 - 1.2.8. All warranties, representations, indemnities, covenants, agreements and obligations given or entered into by, or rights of, more than one person will be deemed to have been given or entered into, or conferred on them, jointly and severally.
 - 1.2.9. Any statement in this Agreement stated to be to the best of a party's knowledge or to be so far as a party is aware (or any similar expression) will be deemed to include an additional statement that it has been made after due and careful enquiry.
 - 1.2.10. If a word or phrase is defined, its other grammatical forms have a corresponding meaning.
 - 1.2.11. A reference to writing includes any method of representing or reproducing words, figures, drawings, or symbols in a visible or tangible form.

2. Ownership and Confidentiality

- 2.1. **Ownership:** The Recipient acknowledges and agrees that all Confidential Information (including all intellectual property rights, title and interest therein) is and remains the sole and exclusive property of the Provider or (as appropriate) its Affiliates, as the case may be. The Recipient agrees that it will not at any time dispute or contest the ownership of the Confidential Information by the Provider or (as appropriate) its Affiliates, as the case may be.
- 2.2. **Confidentiality:** The Recipient acknowledges that:
- 2.2.1. any Confidential Information which has been or is communicated to it was or will be communicated on terms of strict confidentiality; and
 - 2.2.2. the Provider and/or its Affiliates may be prejudiced in future dealings and/or suffer damage, loss or liability as a result of any disclosure of the fact that Confidential Information has been provided to the Recipient or any Representative, or of disclosure of any part of that Confidential Information to any unauthorised person.
- 2.3. The Recipient acknowledges that the Confidential Information is confidential, and agrees that it will preserve the secrecy and confidentiality of that Confidential Information and, in particular, but without in any way limiting the generality of the foregoing, will take all action to prevent any unauthorised person obtaining access to, and/or knowledge of, that Confidential Information or knowledge that the Confidential Information has been provided to the Recipient or any Representative.

3. Use and disclosure of confidential information

- 3.1. **Use and disclosure of confidential information:** With respect to any Confidential Information, the Recipient will:
- 3.1.1. hold the Confidential Information in confidence and, subject to clause 3.2, will not directly or indirectly disclose the Confidential Information, or permit the Confidential Information to be disclosed, to any Person at any time, whether before, during or after the term of this Agreement and notwithstanding any termination of this Agreement;
 - 3.1.2. not use the Confidential Information, or permit the Confidential Information to be used, for any purpose other than in the evaluation and negotiation of the Proposed Transaction;
 - 3.1.3. restrict the disclosure of the Confidential Information to those of its Representatives who genuinely require the Confidential Information for the evaluation and negotiation of the Proposed Transaction, and then only on the basis set out in clause 3.2; and
 - 3.1.4. without limiting its obligations under clause 3.2, direct its Representatives to keep the Confidential Information strictly confidential and will procure that its Representatives comply with this Agreement in all respects.

3.2. **Permitted disclosure:** The Recipient may disclose the Confidential Information to such of its Representatives as it reasonably considers necessary to assist it in evaluating the Proposed Transaction and upon the basis that:

- 3.2.1. notwithstanding such disclosure, the Recipient shall remain fully liable for any breach of this Agreement resulting from any act or omission of any such Representative as though that Representative were bound by clause 3.1 (and regardless of whether or not such Representative was acting within the scope of his or her authority);
- 3.2.2. the Recipient shall, at its own cost and expense, take all such action as is reasonably required by the Provider to prevent any breach by any such Representative, including, without limitation, the commencement and diligent prosecution of appropriate legal proceedings; and
- 3.2.3. in the case of a Representative that is an advisory firm (other than a professional firm, which has a duty to the Recipient to keep the Confidential Information strictly confidential) or third party, a duly authorised signatory for that firm or party has signed an undertaking in the form attached as the Schedule to this Agreement and such undertaking is delivered to the Provider prior to any Confidential Information being made available to that person.

4. Disclosure pursuant to a lawful requirement

- 4.1. If the Recipient or any of its Representatives becomes legally compelled to disclose any of the Confidential Information, then the Recipient will only make such disclosure if:
 - 4.1.1. where the requirement to disclose arises by law, a decision, recommendation or opinion from independent counsel has been received by the Recipient to the effect that such disclosure is legally required to be made and the Provider has received a copy of that recommendation or opinion; and
 - 4.1.2. the Recipient has consulted with the Provider and given the Provider reasonable opportunity to seek orders or make representations in order to avoid or minimise the extent of such disclosure.

5. Return of confidential information

- 5.1. Without prejudice to the other terms of this Agreement, if the Provider so requests, the Recipient will immediately:
 - 5.1.1. return, or procure the return of, all copies of the Confidential Information in the Recipient's possession or control, or in the possession or control of a Representative;
 - 5.1.2. destroy or erase, or procure the destruction or erasure of, all copies (whether on paper or in an electronic information storage and retrieval system or in any other storage medium) of any analyses, compilations, studies, notes, memoranda or other documents prepared by or for the

Recipient which contain or reflect any information in the Confidential Information, provided however, that any Confidential Information held in electronic form shall only be destroyed to the extent that it is reasonably practicable to do so,

and certify in writing (signed by a director of the Recipient) to the Provider the completeness of such return, destruction or erasure.

6. No representations or warranties

6.1. The Recipient irrevocably acknowledges and agrees that:

- 6.1.1. the Provider does not give or make, and will not be taken to have given or made, any representation, warranty or undertaking, whether express or implied, as to the accuracy or completeness of any information (written or oral) disclosed or made available by the Provider, or any of its Affiliates to the Recipient or any of its Representatives;
- 6.1.2. the provision of any information to the Recipient or any of its Representatives by the Provider or any of its Affiliates will not constitute any representation, warranty or undertaking that the information so provided is correct, all-inclusive or all of the information that the Recipient or its Representatives may desire or require, or that there has been no change in the affairs of the Provider either before or after the date on which the information was provided to the Recipient or its Representatives;
- 6.1.3. neither the Provider nor any of its Affiliates will have any responsibility or liability to the Recipient or any of its Representatives in relation to any information disclosed or made available to the Recipient or any of its Representatives in connection with the Proposed Transaction or otherwise resulting from the Recipient's or any Representative's use of such information, or for any errors in, or omission from, any such information; and
- 6.1.4. the Provider and its Affiliates shall not be under any obligation to contact, or provide any information to, the Recipient or any of its Representatives in relation to the Proposed Transaction.

6.2. The Recipient hereby further acknowledges and agrees that:

- 6.2.1. the Provider, at its sole discretion and without being required to provide any reason or explanation therefor:
 - 6.2.1.1. may determine at any time, in circumstances where it has permitted the Recipient to carry out due diligence on the Proposed Transaction, that it will no longer permit the Recipient to carry out due diligence on the Proposed Transaction;
 - 6.2.1.2. may at any time decline to negotiate or otherwise deal with the Recipient in relation to the Proposed Transaction.

- 6.2.2. The Provider and/or any of its Affiliates may make the Confidential Information (or any other information) available to parties other than the Recipient, on whatever terms it may select.
- 6.2.3. Neither the Provider nor any of its Affiliates shall be liable to compensate or indemnify the Recipient or any of their Representatives or other party for any loss, cost, expense or damage (howsoever incurred or arising) in connection with receiving, investigating or analysing any Confidential Information (or other information) provided by the Provider or any of its Affiliates, which is incurred or arises in relation to carrying out due diligence, making any offer in relation to the Proposed Transaction, in connection with any sales process or otherwise.

7. Indemnity

- 7.1. The Recipient shall defend, indemnify and hold harmless the Provider and its Affiliates from and against any and all damage, loss (including loss of profits), cost, liability, and expense whatsoever (including legal fees, all and any actual court costs, witness fees and expenses and all disbursements) directly incurred by reason of:
 - 7.1.1. any failure by the Recipient or its Representatives to perform any covenant or observe any obligation of the Recipient set forth herein; or
 - 7.1.2. any breach by the Recipient or its Representatives of any representation, warranty, or covenant on the part of the Recipient contained herein; or
 - 7.1.3. the negligence or wrongful act or omission of the Recipient or its Representatives.

8. Notices

- 8.1. **Service of Notices:** Any notice given pursuant to this Agreement will be deemed to be validly given if personally delivered, posted, or forwarded by facsimile transmission or email to the address of the party to be notified set forth below or to such other address as the party to be notified may designate by written notice given to all other parties.

If to the Provider:

Address:
 Attention:
 Fax:
 Email:

If to the Recipient:

Address:
 Attention:
 Fax:
 Email:

8.2. **Time of Service:** Any notice given pursuant to this Agreement will be deemed to be validly given:

8.2.1. in the case of delivery, when received;

8.2.2. in the case of facsimile transmission or email, when sent;

8.2.3. in the case of posting, on the second day following the date of posting,

provided that any notice personally delivered or sent by facsimile or email either after 5 pm on a Working Day or on any day that is not a Working Day will be deemed to have been received at 9 am on the next Working Day.

9. General

9.1. **Further Assurances:** Each party must do anything (including executing agreements and documents) necessary to give full effect to this Agreement and the transactions contemplated by it.

9.2. **Amendments:** No amendment to this Agreement will be effective unless it is in writing and signed by all the parties.

9.3. **Remedies:** Each party acknowledges that the remedies available at law for a breach or threatened breach of this Agreement will be inadequate, and that, accordingly, the Provider, in addition to all other available remedies (including, without limitation, seeking such damages as it can show it has sustained by reason of such breach), is entitled to seek equitable relief, including an injunction and an order for specific performance, without having to prove the inadequacy of the available remedies at law.

9.4. **Waiver:** No exercise or failure to exercise or delay in exercising any right or remedy will constitute a waiver by that party of that or any other right or remedy available to it.

9.5. **Non-Merger:** The agreements, obligations and warranties contained in this Agreement will not merge on completion of the transactions contemplated by it but will remain in full force until satisfied.

9.6. **No Partnership:** Nothing contained in this Agreement will be deemed or construed to constitute any party to be a partner, agent or representative of any other party, or to create any trust or commercial partnership.

9.7. **Partial Invalidity:** If any provision of this Agreement or its application to any party or circumstance is or becomes invalid or unenforceable to any extent, the remainder of this Agreement and its application will not be affected and will remain enforceable to the greatest extent permitted by law.

9.8. **Third Parties:** Except as specifically provided, nothing in this Agreement is intended to confer a benefit upon any third party under the Contracts (Privity) Act 1982.

- 9.9. **Contracts (Privity) Act:** For the purposes of the Contracts (Privity) Act 1982 the Recipient's agreements, obligations, warranties and undertakings under this Agreement are for the benefit of the Provider and each of its Affiliates, and are enforceable at the suit of any of them, but otherwise no other Person shall derive any rights or benefits under this Agreement.
- 9.10. **Counterparts:** This Agreement may be executed in two or more counterpart copies each of which will be deemed an original, and all of which together will constitute one and the same instrument. A party may enter into this Agreement by signing a counterpart copy and sending it to the other parties (including by facsimile or email). Each of the parties shall promptly sign the original copies of this Agreement (such copies to be signed by all the parties) after the execution of counterparts.
- 9.11. **Time of Essence:** Time will be of essence in the performance by any party of its obligations under this Agreement.
- 9.12. **Rights Cumulative:** The rights of the parties under this Agreement are cumulative and are not exclusive of any other rights and remedies available to any party.
- 9.13. **Governing Law and Jurisdiction:** This Agreement will be construed and take effect as a contract made in New Zealand and will be governed by New Zealand law, and the parties submit to the non-exclusive jurisdiction of the New Zealand courts.
- 9.14. **Costs:** Each party shall bear its own costs in relation to the negotiation, preparation and execution of this Agreement.

Signed

Signed for and on behalf of
[Party 1] as Recipient by two of its
directors

Director

Director

Signed for and on behalf of
[Party 2] as Provider by two of its
directors

Director

Director

Schedule

To:

From:

Undertaking

In consideration of disclosure of the Confidential Information to us, and as required by a Confidentiality Agreement dated _____ (the **Agreement**):

1. We confirm that we have been given a copy of the Agreement, that we have read it and understood it, and that we are aware of the sensitivity and the confidential nature of the Agreement and the Confidential Information and the obligations contained in the Agreement; and
2. We irrevocably agree to be bound by the terms of the Agreement as if we had executed it, but on the basis that we are liable only for a breach of the Agreement by ourselves (including, for clarity, a breach by any of our employees, directors, agents or officers) and not by any other party.

DATED this _____ day of _____ 2015

SIGNED by _____)

[Name] _____)

in the presence of:- _____)

Witness Signature: _____

Witness Name: _____

Witness Occupation: _____

Witness Address: _____