Draft 1

5 December 2016

**SUBSCRIPTION AND SHAREHOLDERS' AGREEMENT**

[***NAME(S) OF INVESTOR(S)***] **and** [***NZVIF INVESTMENTS LIMITED***]

[***NAME OF INVESTEE COMPANY***]

[***NAMES OF EXISTING SHAREHOLDERS***]

[***NAMES OF INDIVIDUAL WARRANTORS***]

[***NAMES OF KEY PEOPLE***]

****

Barristers & Solicitors

Auckland, Wellington & Christchurch, New Zealand

www.simpsongrierson.com

**CONTENTS**

**CLAUSE PAGE**

1. INTERPRETATION 1

2. CONDITIONS 6

3. TERM OF AGREEMENT 7

4. AGREEMENT TO ISSUE AND SUBSCRIBE FOR SHARES 7

5. COMPLETION AND SUBSEQUENT SUBSCRIPTIONS 7

6. value protection 9

7. WARRANTIES 10

8. THE COMPANY'S OBJECTS AND BUSINESS 11

9. BOARD AND PROTECTIVE PROVISIONS 11

10. MANAGEMENT OF THE COMPANY 14

11. ANNUAL BUDGETS AND REPORTING 14

12. FURTHER CAPITAL RAISING 16

13. TRANSACTION FEES AND COSTS 16

14. AGREEMENT TO TAKE PRIORITY 17

15. OBLIGATIONS TO SURVIVE 17

16. CONFIDENTIALITY 17

17. ASSIGNMENT AND [RESTRICTED TRANSFER SHARES][vesting] 18

18. EXISTING SHAREHOLDERS' ACKNOWLEDGMENT 20

19. NOTICES 21

20. NO RELIANCE 21

21. INVESTOR DISCLAIMERS 21

22. GENERAL 21

23. [TRUSTEE LIABILITY 23

**SCHEDULES**

SCHEDULE 1 COMPANY AND PARTY DETAILS

SCHEDULE 2 CAPITALISATION TABLE

SCHEDULE 3 WARRANTIES

SCHEDULE 4 EXCEPTIONS TO WARRANTIES

SCHEDULE 5 CONSTITUTION

SCHEDULE 6 BUSINESS PLAN

[*SCHEDULE 7 MILESTONES*]

SCHEDULE 8 FORM OF CONDITIONS PRECEDENT LETTER

SCHEDULE 9 COMPLETION DOCUMENTS

SCHEDULE 10 FORM OF QUARTERLY REPORT [***Drafting note: delete if NZVIF is not an Investor***]

[*SCHEDULE 11 FORM OF MILESTONE CERTIFICATE*]

SCHEDULE 12 FORM OF DEED OF ACCESSION

SCHEDULE 13 NZVIF SPECIFIC CLAUSES [***Drafting note: delete if NZVIF is not an Investor***]

**DATED** [***insert year***]

**PARTIES**

**1.** [***Name(s) of Investors***]and [***NZVIF INVESTMENTS LIMITED***] (included in the term **Investors**)

**2.** [***Name of investee company***](**Company**)

**3.** [***Names of all existing shareholders***](**Existing Shareholders**)

**4.** [***Names of individual warrantors***](**Individual Warrantors**)

**5.** [***Names of Key People***] (**Key People**)

**BACKGROUND**

**A.** The Company is a company which [***insert description of the business carried on, or proposed to be carried on, by the Company***].

**B.** The Investors have agreed to invest up to $[***insert amount***] in the Company by subscribing for [***Ordinary Shares***][***Preferred Shares***].[***drafting note: delete as applicable***]

**C.** The parties wish to enter into this agreement to record the terms of the investment described in paragraph B above and their agreements relating to the future operations of the Company.

**THE PARTIES AGREE THAT:**

# INTERPRETATION

In this agreement unless the context indicates otherwise:

## **Definitions:**

**Accounts** means in respect of the Company the [***unaudited***] accounts [***audited by the Auditor***] for the year ended [***insert date***] and the management accounts (including statements of financial performance and position) for the period ended [***insert date***];

**Act** means the Companies Act 1993;

[***Additional Director means a Director appointed pursuant to clause 9.5*;**] [***Drafting note: Adapt based on how the Additional Director is to be appointed.***]

**Approved IPO** means an initial public offering of Shares on a recognised stock exchange which has been approved by the Investors pursuant to clause 9.13;

**Associated Person** has the meaning ascribed to the term in Rule 1.8 of the New Zealand Stock Exchange Listing Rules and **Associate** and **Associated** have corresponding meanings;

**Auditor** means [***insert***];

[***Bad Leaver*** *means a person who ceases to be employed or engaged by the Company, as a result of his or her:*

### ***Resignation:*** *resignation within [****insert****] years of the date of this agreement;*

### ***Termination:*** *termination by the Company with cause, including because he or she has committed:*

#### ***Fraud:*** *fraud;*

#### ***Offence:*** *an indictable criminal offence;*

#### ***Breach:*** *a material breach of his or her employment or consulting agreement;*] [***Drafting note: delete if Vesting Provisions are not used (clauses 17.4 to 17.9);]***

**Balance Date** means [***31 March***] in each year;

[***Beneficial Investors*** *means the persons who are the beneficial owners of the Shares which will be held by* [***insert nominee company name***] *as trustee*;] [***Drafting note: required where one of the Investors is a nominee company holding Shares on trust for individual investors. Adapt if there are multiple nominee companies involved.***]

**Board** means the Directors acting as a board of directors;

**Business** means the Company's [***proposed***] business as defined in paragraph A of the background;

**Business Day**means any day (excluding Saturdays Sundays and statutory holidays in [***insert city in which Company is located***]);

**Business Plan**means the business plan and annual budget for the Company at a relevant time where the initial Business Plan will be [***as attached as schedule 6***][***or***][***the business plan agreed pursuant to clause 2.1***] and subsequent Business Plans will be adopted in accordance with this agreement;

**Capitalisation Table** means the table attached as schedule 2;

**Chairperson** means the chairperson of the Board;

**Completion** means the [***initial***] issue of [***Ordinary Shares***][***Preferred Shares***]

to the Investors in accordance with clause 5; [***Drafting note: "initial" not required where investment is not tranched***]

**Completion Date** means [***insert date***] [***or***][***the***[***fifth***]***Business Day after the date by which all of the Conditions have been satisfied or waived***] [***or such other day agreed between the Investors and the Company***];

**Completion Documents** means the documents, copies of which are to be delivered to the Investors on or before Completion, as described in schedule 9;

**Condition Date** means [***insert date***];

**Conditions** means the conditions set out in clause 2.1;

**Confidential Information** means all trade secrets and financial, marketing and technical information, ideas, concepts, know-how, technology, processes, research and knowledge which is confidential or of a sensitive nature, but excludes:

### **Information Known:** the information known to the recipient on the date of its receipt; or

### **Information in Public Domain:** the information in the public domain on the date of its receipt or which entered the public domain after the date of its receipt other than by an unauthorised disclosure by a party or any Associate of that party;

**Constitution** means the new constitution of the Company to be adopted substantially in the form attached as schedule 5 and which may be amended after Completion in accordance with its terms (so that for the purpose of applying relevant provisions in this agreement after Completion, the term “Constitution” will refer to the Constitution in force at the applicable time);

**Director** means a director of the Company;

[***Fair Market Value*** *means the fair market value of the Default Shares determined by the Board in accordance with clause 17.9*]; [***Drafting note: delete if Vesting Provisions are not used (clauses 17.4 to 17.9)***]

**GAAP** means generally accepted accounting practice within the meaning of section 8 of the Financial Reporting Act 2013;

**Intellectual Property** means all trade marks, domain names, copyright, patents, registered designs, circuit layouts, rights in computer software, databases and lists, rights in inventions, know-how, and trade secrets and all other intellectual property, in each case whether registered or unregistered (including applications for the grant of any of the foregoing) and all rights or forms of protection having equivalent or similar effect to any of the foregoing which may subsist anywhere in the world, and all rights of action, powers and benefits of the same;

**Investment Amount** means an amount of up to $[***insert amount***] [***or such higher amount not exceeding $***[***insert amount***] ***specified by the Investors at any time prior to*** [***Completion***] [***or insert date or period*** ***after Completion***]];

**Investor Investment Amount** means in respect of an Investor, that amount specified in the Capitalisation Table for that Investor;

**Investor Director** means a Director appointed by the Investors pursuant to clause 9.2;

**Investors** means [***insert name(s) of Investors***], [***NZVIF***] and any new Shareholder who accedes to this agreement in accordance with clause 12.2 as an “Investor”;

**Investors' Proportions** means, in respect of each of the Investors, that proportion of the Investment Amount which they have agreed to invest up to, as specified in the Capitalisation Table;

**Issue Price** means the issue price of NZ$[***1.00***] per [***Ordinary Share***][***Preferred Share***] for the [***Ordinary Shares***][***Preferred Shares***] being subscribed for by the Investors under this agreement;

**Major Transaction** has the same meaning as in the Act;

[***Milestone Certificate means a certificate confirming that a Milestone has been satisfied, substantially in the form attached as schedule 11;***]

[***Milestones means the milestones*** [***set out in schedule 7***][***or***][***determined when satisfying the Conditions***]***;***]

**NZIFRS** means the New Zealand equivalents to the International Financial Reporting Standards;

[***NZVIF means NZVIF Investments Limited;***] [***Drafting note: delete if NZVIF is not an investor***]

**Ordinary Shares**means the ordinary sharesin the Company***,*** with the rights attaching to them as set out in the Constitution;

**Other Shareholders** means the Existing Shareholders and any other shareholders of the Company excluding the Investors;

**Other Shareholders' Director** means a Director appointed by Other Shareholders pursuant to clause 9.4;

[***Preferred Shares*** *means the preferred shares in the Company, with the rights attaching to them as set out in the Constitution;*][***drafting note: delete this definition if Investors are being issued Ordinary Shares***]

**Quarter** means each three month period ending on the last day of March, June, September and December;

**Restricted Transfer Shares** means any Shares held by any of the [***Key People***] [***or***][***insert names***];[***Drafting note: delete if clause 17.3 (Restricted Transfer Shares) is not used***]

**Securities** means Shares or any security which can be converted (at the option of the Company and/or the holder) to Shares;

**Shareholders** means the Investors and the Other Shareholders and **Shareholder** means any of them;

**Shares** means all of the shares issued by the Company, including the [***Preferred Shares and***] Ordinary Shares;

[**Share Scheme** means the share scheme (or schemes) to be established by the Board in accordance with clause 10.3(b) on those terms and conditions agreed by the Board;]

**Special Resolution** means a resolution approved by Shareholders who together hold not less than 75% of the Shares and not less than 50% of the Shares held by the Investors and which also meets any other requirements for a "Special Resolution" which might be specified in the Constitution at the time that resolution is passed;

[***Subscription Date******means the Completion Date and each date which applies pursuant to clause 5.5(b);***][***Drafting*** ***note: required where Milestones apply***]

**Taxation** includes any and all forms of tax (both domestic and foreign) imposed by any level of government or any public body and includes (without limitation) dividend withholding payments, excess retention tax, duties, levies, tariffs, rates and all charges, interest, penalties, fines, additional tax, costs and expenses incidental and relating to or arising in connection with the re-assessment of any tax or the negotiation and restoration of any dispute as to liability for any tax or any actual or threatened taxation claim;

[***Unvested Shares*** *means any shares that have not vested pursuant to clause 17.4*]; [***Drafting*** ***note: delete if clause 18.4 is not used***]

**Warranties** means the representations and warranties set out in schedule 3;

**Warrantors** means the Company and each of the Individual Warrantors; and

**Warranty Claim** means a claim by the Investors against the Warrantors pursuant to clause 7.

## **Interpretation:** In this agreement, unless the context indicates otherwise:

### **Defined Expressions:** expressions defined in the main body of this agreement have the defined meaning throughout this agreement, including the background;

### **Headings:** clause and other headings are for ease of reference only and will not affect this agreement's interpretation;

### **Parties:** references to any **party** include that party's executors, administrators, successors and permitted assigns;

### **Persons:** references to a **person** include an individual, company, corporation, partnership, firm, joint venture, association, trust, unincorporated body of persons, governmental or other regulatory body, authority or entity, in each case whether or not having a separate legal identity;

### **Plural and Singular:** references to the singular include the plural and vice versa;

### **Clauses/Schedules:** references to clauses and schedules are to clauses in, and the schedules to, this agreement. Each such schedule forms part of this agreement;

### **Statutory Provisions:** references to any statutory provision are to statutory provisions in force in New Zealand and include any statutory provision which amends or replaces it, and any by‑law, regulation, order, statutory instrument, determination or subordinate legislation made under it;

### **Negative Obligations:** any obligation not to do anything includes an obligation not to suffer, permit or cause that thing to be done;

### **Inclusive Expressions:** the term **includes** or **including** (or any similar expression) is deemed to be followed by the words **without limitation**; and

### **Documents:** references to any document (however described) are references to that document as modified, novated, supplemented, varied or replaced from time to time and in any form, whether on paper or in an electronic form.

# CONDITIONS

## **Conditions:** This agreement is subject to the following conditions entered for the benefit of the Investors:

### final approval by each Investor's board (where the Investor is a company);

### [***the Investors in their sole discretion and judgement being satisfied with all aspects of the Investors' due diligence review of the Company;***

### ***finalisation of the Business Plan for the Company's activities post-Completion*;**

### ***agreement on Milestones which must be achieved for disbursement of post-Completion Date tranches of the Investment Amount;***

### ***capitalisation of all outstanding loans*** [***other than the loan(s) of $***[***insert******amount***]***from***[***insert lender***]]***and that capitalisation resulting in the pre-investment capitalisation shown in the Capitalisation Table;***

### ***completion of employment or contractor agreements(s) with the*** [***Key People***] [***or*** ***insert names***]***on terms acceptable to the Investors (and which include suitable non-competition covenants);***

### ***all relevant officers, employees, consultants and contractors (including all Key People) assigning (in a form acceptable to the Investors) all Intellectual Property linked to the Business or proposed future business;***

### ***agreement on the parameters of an employee Share Scheme for the key officers, employees and contractors of the Company (including the Key People) to purchase up to*** [***insert percentage***]***% of the Company's post money capital); and***

### ***evidence that any third party consents or other authorisations required to issue the*** [***Ordinary Shares***][***Preferred Shares***] ***to the Investors under this agreement have been obtained***].

[***Drafting note: insert additional conditions or delete the above conditions as appropriate***]

## **Best Endeavours:** The parties will use their best endeavours to fulfil the Conditions by no later than the Condition Date.

## **Access for Due Diligence:** The Existing Shareholders and the Company will allow the Investors and any persons authorised by the Investors reasonable access during normal business hours to the records of the Company and to the Company's senior employees and such other personnel and advisers as may be reasonably required by the Investors for the purpose of carrying out the Investors' due diligence review and inspection of the Business.

## **Confirmation of Conditions:** The Investors have appointed [***insert name***] to confirm satisfaction or waiver of each Condition on behalf of the Investors in accordance with clause 2.5 by providing written confirmation to the Company and each other party substantially in the form attached as schedule 8.

## **Benefit and Satisfaction:** The Conditions are for the benefit of the Investors and will be satisfied when it is confirmed by or on behalf of all of the Investors that they have been met to the Investors' satisfaction or waived.

## **Non-fulfilment:** If the Conditions are not fulfilled or waived by or on behalf of the Investors by the Condition Date then this agreement will be voidable by the Investors jointly, or the Company, giving notice in writing to the other of them, and on giving noticeexcept forclauses 13, 15and 16 of this agreement (which will remain in effect), this agreement will have no further force or effect.

# TERM OF AGREEMENT

Subject to satisfaction of the Conditions, this agreement will continue until:

## **Agreement:** the parties agree in writing that it will be terminated as at a specific date, in which case this agreement will terminate on that date;

## **Liquidation:** an order is made, or a resolution is passed, to appoint a liquidator to the Company; or

## **Listing:** the Shares are listed pursuant to an Approved IPO;

## except for provisions which are intended to survive termination.

# AGREEMENT TO ISSUE AND SUBSCRIBE FOR SHARES

## Subject to satisfaction of the Conditions the Company agrees to issue to the Investors, and the Investors agree to subscribe for, the [***Ordinary Shares***][***Preferred Shares***]on the terms and conditions set out in this agreement.

# COMPLETION AND SUBSEQUENT SUBSCRIPTIONS

## **Completion:** Completion will take place on the Completion Date.

## **Company Obligations at Completion:** On or prior to Completion the Company will:

### **Documents:** deliver to the Investors copies of all the Completion Documents in a form reasonably acceptable to the Investors; and

### **Constitution:** adopt the Constitution.

## **File Documents:** Immediately after Completion, the Company will give the requisite notices to the Registrar of Companies and update the minute book and registers of the Company.

## **Consent to Issue and Waiver of Pre-emptive Rights:** The Existing Shareholders and the Investors (as applicable) consent to:

### **Shares:** the issue of the [***Ordinary Shares***][***Preferred Shares***] to the Investors pursuant to this agreement;

### **Share Scheme Shares:** the issue and conversion of Shares pursuant to the Share Scheme [***when established***];

### **Unvested Shares:** the repurchase of any Unvested Shares in accordance with clause 17.5;

### **Bad Leaver's Shares:** the repurchase or transfer (as applicable) of a Bad Leaver's Shares in accordance with clause 17.6; and

### **Additional Shares:** any other issue of Shares contemplated in this agreement,

#### and waive any pre-emptive rights conferred on them (as at the date of this agreement or in the future) by the Constitution, section 45 of the Act, or otherwise in respect of such issues of Shares. This agreement will constitute an agreement of all "entitled persons" pursuant to section 107(2) of the Act.

## **Manner of Subscription:**Subject to clause[***s***] [***1 of schedule 13 and***] 5.7 and the Company meeting its obligations under clause 5.6, each Investor will subscribe their Investor Investment Amount [***in full on the Completion Date***][***or by subscribing their Investor's Proportion***]:

### **Completion Date:** of$[***insert amount***] on the Completion Date; and

### **Milestones:** of $[***insert amount***] on receipt of a Milestone Certificate signed on behalf of the Board in substantially the form attached as schedule 11 [***Drafting note: will need to be adapted where there are multiple Milestones***]

[***provided that if the Investor's Proportion applicable to an Investor reduces after the Completion Date (due to the Investment Amount increasing due to other Investor(s) increasing their Investor Investment Amount(s), the Investor's proportion of subsequent portions of the Investment Amount to be subscribed by that Investor will be reduced so that after that subscription, that Investor will have subscribed the Investor's Proportion of the total Investment Amount subscribed at that time.***] [***Drafting note: delete where the investment is not to be tranched***]

## **Issue of Shares:** On [***the Completion Date***] [***each Subscription Date***] the Company will, on receipt of the relevant subscription payment, issue to each of the Investors the relevant number of [***Ordinary Shares***][***Preferred Shares***] based on the Investors' Proportions.

## **No Investment:** The obligations of the Investors to make any subscriptions under clause 5.5 will, at the Investors' absolute discretion, cease if any of the following events occur:

### **Warranty Breach:** the Investors consider based on advice from an independent firm of solicitors that they have reasonable grounds upon which to base a claim for a material breach of the Warranties;

### **Breach of Agreement:** the Company or the Existing Shareholders are in material breach of their obligations under this agreement;

### **Milestones:** if any of the Milestones which are required to have been achieved by the relevant date have not been achieved to the Investors' satisfaction [***such that the Investors reasonably form an opinion that there has been a material adverse change in the Business.***]

## **Use of Funds by Company:** The Company undertakes to use the sums invested by the Investors solely in accordance with the Business Plan or as otherwise approved by the Investors.

# value protection

## [***Drafting note: Use the appropriate anti-dilution clause in clause 6.1 (delete the other)***]

## [***Narrow-based*** ***Weighted-Average anti-dilution***]

## **Anti-dilution**: If the Company issues any Securities (**New Securities**) at a price (**Dilutive Price**) less than the Issue Price (as adjusted for any Share splits or Share dividends) for the [***Ordinary Shares***][***Preferred Shares***] issued to the Investors pursuant to this agreement (other than pursuant to an approved Share Scheme) (**Relevant Shares**), then in each case the Company will issue “X” further Relevant Shares to the Investor (on a pro-rata basis for an aggregate issue price of $10.00), on the following basis:

## X = D – A

## WHERE:

## D = IA / IP

## A = the number of Relevant Shares then on issue to the Investor immediately prior to the issue of the New Securities.

## IA = the actual dollar amount invested by the Investor for the Relevant Shares on issue to the Investor and immediately prior to the issue of New Securities.

## IP = OIP \* (A+B)/ (A+C)

## WHERE:

## OIP = the Issue Price in respect of the Relevant Shares.

## A = the number of Shares on issue (on an as converted basis) [***including all Shares which are fully vested under any Share Scheme***] immediately prior to the issue of the New Securities.

## B = the number of New Securities as if they are purchased at the Issue Price (i.e. calculated as the dollar amount of new capital to be invested / Issue Price).

## C = number of New Securities to be issued in the subject transaction (i.e. calculated as the dollar amount of new capital to be invested / Dilutive Price).

[***Full-ratchet anti-dilution***]

## **Anti-dilution**: If the Company issues any Securities (**New Securities**) at a price (**Dilutive Price**) less than the Issue Price (as adjusted for any Share splits or Share dividends) for the [***Ordinary Shares***][***Preferred Shares***] issued to the Investors pursuant to this agreement (other than pursuant to an approved Share Scheme) (**Relevant Shares**), then in each case the Company will issue “X” further Relevant Shares to the Investor (on a pro-rata basis for an aggregate issue price of $10.00), on the following basis:

## X = D – A

## WHERE:

## D = IA/DP

## IA = the actual dollar amount invested by the Investor for the Relevant Shares

## under this agreement and immediately before the time the anti-dilute is calculated.

## IP = Dilutive Price per Share.

## A = the number of Relevant Shares then on issue to the Investor for its subscription pursuant to this agreement.

## **Necessary Acts:** The parties will promptly do all things reasonably necessary of them to give full effect to this clause 6. They must do so at their own expense.

## **Rounding:** All calculations for clause 6.1 will be taken to 5 decimal points, except in the case of Shares to be issued, in which case the Shares to be issued shall be rounded down to the nearest full Share.

## [***Sunset:*** *The provisions of clause 6.1 will only apply for a period of two years from the [****Completion Date****][****relevant Subscription Date****].*]

# WARRANTIES

## **Warranties:** In consideration of the Investors entering into this agreement:

### **Company:** the Company warrants and represents to the Investors for the benefit of the Investors that each of the Warranties is true and accurate and not intentionally misleading; and

### **Individual Warrantors:** the Individual Warrantor*s* warrant that, to the best of their knowledge after due and careful enquiry, the Company is not in breach of any of the Warranties.

## **Time Warranties Given:** The Warranties referred to in clause 7.1 will be deemed to be given on the Completion Date [***and each subsequent Subscription Date***.]

## **Exclusions from Warranty Claims:** No facts or circumstances will give rise to a Warranty Claim to the extent that those facts or circumstances:

### **Disclosed in Exceptions Schedule:** are fully and fairly disclosed with sufficient particularity in schedule 4; or

### **Actions with Consent:** arise because of an action taken by the Company with the Investors' or the Investor Directors' prior express written consent.

## **Indemnity:** The Company (or where the Individual Warrantors are also in breach of clause 7.1(b) the Warrantors jointly and severally) indemnify the Investors against any loss or expenses suffered or incurred by the Investors resulting from a breach of clause 7.1.

## **General Authority Warranty:** Each party warrants and represents to each of the other parties that:

### **Authority:** it has the legal right, authority and full power to enter into this agreement and to perform its obligations under it and has taken all necessary corporate and other action to authorise its execution, delivery and performance; and

### **Binding Obligation:** this agreement constitutes valid and binding obligations of that party enforceable against that party in accordance with its terms.

## [***Warranty Cap:*** *An Individual Warrantor's liability to the Investors under or in connection with a Warranty Claim or under clause 7.4 will not exceed, in aggregate, $[****insert amount****][****the Investment Amount****]*].

# THE COMPANY'S OBJECTS AND BUSINESS

## **Primary Objects:** The Company's primary objects are to:

### **Business:** where consistent with clause 8.1(b) develop and grow the Business in a manner consistent with the Business Plan; and

### **Maximise:** maximise the value of the Company.

## **No Other Business:** The Company will not carry on any business other than the Business without the prior written consent of the Investors.

# BOARD AND PROTECTIVE PROVISIONS

## **Board Composition:** The Company will have a maximum of [***insert number***] Directors.

## **Investor Directors:** The Investors will jointly be entitled to appoint [***insert number***] Director[***s***] by giving written notice to the Company signed by each investor and may remove or replace any person so appointed by giving written notice in the same manner.

## **Observation Right:** Each Investor may nominate a person from time to time who will have the right to attend all meetings and proceedings of the Board as an observer and to receive all papers provided to the Board (including those described in clause 11.4), provided such person signs a confidentiality agreement in a form reasonably acceptable to the Board if requested by the Board.

## **Other Shareholders' Directors:** The Other Shareholders will be entitled to appoint [***insert number***] Director[***s***] by giving written notice to the Company signed by each Other Shareholder and may remove or replace any person so appointed by giving written notice in the same manner.

## [**Additional Directors:** In addition to the Investor Director[***s***] and the Other Shareholders' Director[***s***], the Investors and the Other Shareholders may appoint up to [***insert number***] Additional Directors by giving written notice to the Company signed by each Shareholder and may remove or replace any person so appointed by giving written notice in the same manner.]

## **Alternate Directors:** Each Director will be entitled to appoint an alternate to act on his or her behalf as a Director and the Company's obligations to the Director will be taken to extend to such alternate.

## **Initial Directors:** The initial Directors of the Company will comprise:

### **Investor Director**[***s***]**:** [***insert names***]as the Investor Director[***s***]; [***and***]

### **Other Shareholders' Director**[***s***]**:** [***insert names***] as the Other Shareholders' Director[***s***]; [***and***]

### [***Additional Director***[***s***]**:**[***insert names***] *as the Additional Director*[***s***].]

## **Chairperson:** The Chairperson will be a Director appointed by a majority vote of the Board (acceptable to the Investors). The Chairperson will [***not***] have an additional casting vote.

## **Quorum:** A quorum for a meeting of the Board will be a majority of Directors, including at least one Investor Director and at least one Other Shareholders' Director (or their respective alternates in each case) present in person or by telephone or equivalent electronic means, provided that where a quorum is not present the meeting will be adjourned to the next Business Day and at such adjourned meeting, if at least one Investor Director is present, the Directors present will constitute a quorum.

## **Meetings:** The Board will meet [***bi*-**][***monthly***][***six weekly***]. The parties will ensure that, at least 5 Business Days before each meeting, the Directors receive a meeting agenda and all relevant board papers for that meeting including:

### **Report:** a report from the [***Managing Director***][***Chief Executive Officer***] setting out the key issues relating to the Business;

### **Cashflow:** a cashflow forecast showing forecast cashflows for each of the [***insert number***]months from and including the current month; [***and***]

### [***Statements: the most* *up‑to‑date financial statements as described in clause 11.3; and***]

### **Other:** any other information or reports as requested by the Directors.

Draft minutes of each board meeting will be provided to every Director within [***5***] Business Days after the meeting.

## **Directors' Fees and Expenses:**

### **Fees:** [***The Chairperson will be paid $***[***insert amount***]***per*** [***annum***][***meeting***]*,* [***any Independent Directors will be paid $***[***insert amount***] ***per*** [***annum***][***meeting***] ***and***] [***the***[***Investor***] [***other***] ***Directors will be paid* $**[***insert amount***] ***per*** [***annum***][***meeting***] [***but* *otherwise***]***attendance at Board meetings will not be remunerated*.**][***or***][***No Directors' fees will be paid*** [***until at least***[***insert number***]***years after the Completion Date***]***unless authorised by Special Resolution;***]and

### **Expenses:** The Directors will be entitled to be reimbursed by the Company for out-of-pocket expenses reasonably and properly incurred in attending meetings of the Board (or committees thereof) and performing duties authorised by the Board on behalf of the Company, to the extent approved by the Board.

## **Insurance:** The Company will take out and maintain at all times directors' and officers' liability insurance cover in respect of those risks (which can be lawfully covered) and to an appropriate level approved by the Board.

## **Matters Requiring Support of Investor Director:** In addition to any other approvals required under the Act or otherwise, the following actions by the Company will require the approval of [***a majority resolution of the Board supported by at least one Investor Director***][***or***][***the Investor Director***[***s***]]:

### [***Approval of Business Plan:*** *approving each Business Plan and all material amendments to or departures from the current Business Plan****;***

### ***Significant Unbudgeted Transactions:*** *entering into any transaction or arrangement likely to have the effect of the Company acquiring or disposing of assets, rights or interests, or incurring obligations or liabilities, not specifically identified in the Business Plan, the value of which is greater than $[insert amount];*

### ***Issue of Securities:*** [***for a period of two years following the Completion Date***], *any issue of any Shares (including any IPO), options or any other instruments convertible to equity (other than those already contemplated by this agreement and any pro-rata rights issues)****;***

### ***Employment of Senior Management:*** *hiring or dismissing, or materially reviewing the compensation of, the Chief Executive Officer, Chief Financial Officer [or Chief Technical Officer] of the Company, [any other [senior management] employee] [or any other Key Person]****;***

### ***Borrowings:*** *borrowing any money or otherwise providing any guarantee, indemnity or other contingent commitment or granting any security over assets of the Company****;***

### ***Purchase of Securities:*** *any purchase by the Company of any securities of any other company****;***

### ***Accounting Policies/Auditor:*** *any change to the accounting policies of the Company (including any change to the Balance Date) or appointing or revoking the appointment of the Auditor****;***

### ***Appointment:*** *any change to the Director appointment rights (otherwise than pursuant to clauses 9.2 or 9.4);*

### ***Fair Market Value:*** *determining Fair Market Value of any Default Shares under clause 17.9; and [****Drafting note: delete if Vesting Provisions are not used (clauses 17.4 to 17.9****]*

### [***insert any other matters***]]

## **Matters Requiring Special Shareholder Approval:** In addition to the requirements of clause 9.13 the parties will ensure that the following only occur where approved by a Special Resolution:

### **Material Transaction:** any Major Transaction or transaction involving the disposal of a significant proportion of the Company's assets which are integral to the operation of the Business;

### **Business:** any significant change in the nature of the Company's business (whether by acquisition or otherwise); and

### **Related Party Transactions:** any transaction between the Company and any holder of Securities, Director, officer or employee of the Company or any Associate of any of them, unless that transaction has been approved by a unanimous resolution of all of the Directors (including at least one Director who is not interested in the transaction)*.*

# MANAGEMENT OF THE COMPANY

## **General Management:** The management structure of the Company will be determined by the Board from time to time.

## [***Managing Director***][***CEO***]**:** The [***Managing Director***][***Chief Executive Officer***] will have responsibility for the day to day management of the Company in accordance with, and subject to directions and requirements specified by, the Board from time to time.

## [***Remuneration Committee***][***Executive Compensation and Share Scheme***]***:*** [***The Board will appoint a remuneration committee whose members will***[***be***][***include***]***one Investor Director and one Other Shareholders' Director. Any decision of the remuneration committee must be supported by the Investor Director member. The remuneration committee will be responsible for***][***The Board will be responsible for***]:

### ***Executive Compensation: reviewing and*** [***making recommendations to the Board regarding***][***determining***]***any executive compensation (whether by salary or wages)*** [***over $***[***insert amount***] ***per annum***]*;* ***and***

### [***Share Scheme: establishing a Share Scheme (or Schemes) for up to*** [***insert percentage***]**%, *being up to [insert number] of Shares* *of the existing capital of the Company (subject to any Reorganisations (as defined in the Constitution))*** ] ***or*** ***such other terms and conditions as approved by the*** [***remuneration committee***][***Board***] ***and the Investors. For the avoidance of doubt the Company may not issue any Securities to Directors, employees or consultants of the Company other than pursuant to the Share Scheme or as otherwise specified in this agreement.***]

## **Key Person Insurance:** The Company will procure and maintain and at least once annually review, such key man life insurance policies for Key People (for the Company’s benefit and for such amounts and on such other terms) as the Board determines is prudent, based on advice from a suitably qualified risk adviser obtained by the Board before making those determinations.

# ANNUAL BUDGETS AND REPORTING

## **Financial Year:** Each financial year of the Company will end on the Balance Date or on such other date as the Board determines.

## **Accounts and Records:** The parties will ensure the Company maintains accurate and complete books, records, accounts, statements and documents relating to the Company and its Business, all of which will be available to the Directors and comply with GAAP, NZIFRS and all other legal requirements (as applicable).

## **Business Plan and Financial Reporting:** The parties will ensure the Company causes to be prepared and submitted to the Directors for approval:

### **Business Plan:** on or before [***one***] month prior to the Balance Date in each year a detailed draft business plan for the Company for the next financial year which includes an annual budget and contains similar detail as the first Business Plan;

### **Annual Statements:** no later than [***75***] Business Days after the end of each financial year of the Company, [***unaudited***] financial statements [***audited by the Auditor***];

### **Quarterly Statements:**within [***20***] Business Days after the end of each Quarter, unaudited financial statements;

### [***Monthly Cashflow Statements: within***[***5***]***Business Days after the end of each calendar month, a cashflow statement for that month, and for the financial year to date and a cashflow forecast for the next***[***3***]***months; and***]

### **Additional Information:** such further information as the Investors may reasonably require from time to time relating to the Company's Business and/or financial condition.

## **Reports:** Each of the statements described in clauses 11.3(b), 11.3(c) and 11.3(d) will be accompanied by management reports covering all material aspects of the Company's progress against the Business Plan.

## **Annual Budget:** Subject to clause 9.13, the Board may amend the current annual budget from time to time as required to reflect any material new arrangement entered into by the Company (being an arrangement consistent with the overall Business Plan and approved by the Board including [***the***][***an***] Investor Director) which was not contemplated when that annual budget was prepared.

## **Compliance:** The Board will:

### **Policies:** maintain for the Company and its Directors and employees internal audit and compliance policies and procedures which are consistent with applicable regulatory requirements, GAAP and, to the extent practical, best practice for similar companies; and

### **Compliance Breaches:** adopt appropriate procedures to ensure that any material breach of the compliance procedures is reported to it without delay.

## **Investors' Access:** The parties will procure:

### **Company Records:** the Company to make available to the Investors or any observer appointed by an Investor pursuant to clause 9.3 and any auditor, accountant, or other consultant duly appointed by an Investor, complete access to the Company's books of account, registers and other records (including all other information in whatever form) at all reasonable times for inspection and/or audit; and

### **Senior Management Availability:** senior management of the Company to be available to meet the Investors or their representatives as reasonably required by the Investors to discuss the progress of the Company.

### **Copies of Board Information:** copies of all information and reports provided to the Board to be provided to the Investors, and for the Investors to be immediately notified of:

#### any development relating to the Company which might prejudice the reputation of any Investor; and

#### any material legal proceedings (not being of a vexatious nature) initiated or threatened by or against the Company (such notification to include copies of all relevant documents and a full report of information known to the Company concerning those proceedings).

# FURTHER CAPITAL RAISING

## No third party will be issued Securities unless:

## **Pre-emptive Rights:** that opportunity has first been offered to the Investors, provided that a pre-emptive offer made to all Shareholders in accordance with the Constitution will satisfy the Company’s obligations under this clause. If at any time the Constitution does not require new Securities to be offered pro rata to all Shareholders first, then such Securities must first be offered to the Investors (on a pro rata basis) and the Investors will be given not less than 30 days to consider the proposed investment. If one or more of the Investors does not take up all of their entitlement within that 30 day period the Securities not taken up by such Investor(s) will be offered (on the same terms and on a pro rata basis in each case):

### **Other Investors:** to the other Investor(s); and

### **Other Shareholders:** if all of the available Securities are not taken up by the Investors under clause 12.1(a) within 5 Business Days, to the Other Shareholders.

## Any Securities not taken up pursuant to clause 12.1(a) or 12.1(b) within 15 Business Days of the offer under clause 12.1(a) may be offered to third parties on terms which are not more favourable than were offered to the Investors and

## **Accession:** that third party has signed a deed of accession, in [***the form attached as schedule 12 or any other***] [***an***] approved form reasonably acceptable to the Company, agreeing to be bound by this agreement. Such deed of accession will specify whether the new Shareholder is acceding as an Investor or as one of the Other Shareholders, where that designation must be approved by the Board including [***the***][***an***] Investor Director.

# TRANSACTION FEES AND COSTS

## **Agreement to Pay:** Immediately following [***Completion***][***each Subscription Date***], the Company will pay a sum equivalent to [***insert percentage***] of the [***proportion of the Investment Amount subscribed for on that Subscription Date***][***Investment Amount***] (plus GST) to [***insert entity***].

## **Reasonable Costs:** The Company will bear all reasonable out of pocket costs incurred by the Investors associated with the investment contemplated by this agreement, including all legal costs associated with the preparation of this agreement and all related documents, and all reasonable third party out of pocket expenses incurred by the Investors associated with due diligence [***up to a maximum of $[insert]***]. The Company will bear its own legal and professional costs associated with the investment contemplated by this agreement, which in any event will not exceed $[***insert***].

## [***Budget: The Investors undertake to use their best endeavours to contain the expenses described in clause* 13.2 *within the budget of $***[***insert amount***] ***and to seek approval from the Company before committing to any expenses that would exceed this budget (such approval not to be unreasonably withheld)****.*]

## **Benefit:** The undertakings in this clause 13 confer, and are intended to confer, benefits on [***insert names of relevant entities***] for the purposes of the Contracts (Privity) Act 1982.

# AGREEMENT TO TAKE PRIORITY

## In the case of any conflict or inconsistency between:

## **Other Documents:** any of the Constitution, the Business Plan or any other agreement or contract or document between the parties relating to, or affecting, the Business or affairs of the Company; and

## **This Agreement:** the terms and provisions of this agreement;

### the terms and provisions of this agreement as may be applicable will prevail and if required the parties will procure the Constitution to be amended promptly to be consistent with the terms and provisions of this agreement.

# OBLIGATIONS TO SURVIVE

Termination of this agreement will not affect the parties' rights and obligations intended to survive termination, and termination will be without prejudice to, and will not be a waiver, of any claims which any party may have against any other party concerning any breach or other failure to comply with any term or condition of this agreement before the date of termination.

# CONFIDENTIALITY

## **Confidentiality:** All Confidential Information concerning the Company and each of the parties, disclosed by one party to the other parties or the Company (whether oral, written or embodied in any other form) together with this agreement's existence and its terms, are confidential and will only be disclosed by a party:

### **With Consent:** after obtaining the written consent of the other parties to this agreement, such consent not to be unreasonably withheld;

### **Officers, etc:** on a confidential basis, in the case of each Shareholder, to an officer, employee or professional adviser of that Shareholder;

### **Required By Law:** as required by applicable law or by a stock exchange, or any court or government agency, after consulting with the other parties to the extent reasonably possible about the form and content of the disclosure; or

### **Agreement:** as required in connection with the implementation or enforcement of this agreement,

and each party must use its reasonable endeavours to ensure any permitted disclosure is are kept confidential by the party to whom the disclosure is made.

## **Release of Company Information:** The parties will consult in good faith in respect of any information they intend to release to third parties in respect of the Company.

## **Return of Information:** Where a party is no longer a party to this agreement or a Shareholder in the Company, that party will immediately return all Confidential Information in its possession or control to the other parties or the Company, from whom it received the Confidential Information.

## **Survive Termination:** The confidentiality obligations under this clause 16 will continue beyond this agreement's termination or a Shareholder ceasing to be a Shareholder, unless and until the Confidential Information enters the public domain.

# ASSIGNMENT AND [RESTRICTED TRANSFER SHARES][vesting]

## **No Assignment Independent of Sale of Shares:** A party may only transfer its Shares in compliance with all applicable requirements under this agreement and the Constitution and must also assign all of its rights or obligations under this agreement to the transferee of the Shares. Any such transfer or assignment will not be effective until the transferee or assignee has signed a deed of accession, in [***the form attached by schedule 12 or any other***][***an***] approved form reasonably acceptable to the Company, agreeing to be bound by this agreement.

## **Assignor's Release from Obligations Arising after Assignment:** A party which assigns or transfers its interest under this agreement in accordance with clause 17.1 other than to a Permitted Transferee (as defined in the Constitution) will, from the effective date of the assignment or transfer, be released from all obligations in connection with this agreement arising after that date (but to avoid doubt this will not release that party from any liabilities to any other party which have arisen in, or relate to, any period prior to the effective date of the assignment or transfer).

## **[*Restricted Transfer Shares:*** *The holders of the Restricted Transfer Shares each agree and acknowledge that they may not sell, transfer or otherwise dispose of any of their Shares without the prior written approval of the Investor Director[****s****] for a period of [****3****] years from the Completion Date, unless:*

### ***Tag Along:*** *the sale is pursuant to the exercise of the "tag along" or "drag along" rights in the Constitution, if any;*

### ***IPO:*** *the sale is an Approved IPO or other transaction approved by the Investors where the Investors have the opportunity to sell on identical terms; or*

### ***Controlled Entities/Immediate Family:*** *the transfer is to wholly owned and controlled entities or immediate family members of the holders of the Restricted Transfer Shares who enter into a deed in a form acceptable to the Investor Director[****s****] agreeing to be bound by this transfer restriction.*]

### [***Drafting note: delete clause 17.3 if Restricted Transfer Shares provision is not included in the Term Sheet***]

## [***Vesting:*** *[****50****]% of the Shares held by [****each****][****the****] Key Person as at the Completion Date will vest as follows (****Vesting Shares****):*

### ***Initial Vesting:*** *[****25%****] will vest on the date that is [****12****] months after the Completion Date; and*

### ***Subsequent Vesting:*** *at a rate of [****1/36th****] of the balance at the end of each month thereafter, provided that [****the****][****the relevant****] Key Person remains engaged by the Company to provide services, whether as a contractor or employee at the date of vesting.*

## **Buy Back:** If a Key Person:

### ***No Longer Engaged:*** *ceases to be employed or engaged by the Company to provide services;*

### ***Non-permitted Transfer:*** *attempts to transfer any of its Unvested Shares (other than as permitted by this agreement); or*

### ***Material Breach:*** *materially breaches this agreement,*

*the Company may, by written notice to the relevant Key Person, buy back any Unvested Shares from that Key Person for a price equal to $1.00 in total for all Unvested Shares, and that Key Person must do everything necessary to facilitate the sale of those Unvested Shares to the Company within 5 Business Days of the Company's notice.*

## ***Bad Leaver:****Without limiting clause 17.5, if:*

### ***Default Shares:*** *a Key Person ceases to be employed or engaged by the Company in circumstances where he or she is a Bad Leaver, the Company may* *by written notice, buy back all (but not some only) of the Shares held by, and from, that Key Person (****Default******Shares****) or direct that Key Person to transfer to a person nominated by the Board all of the Default Shares at the price set out in clause 17.7.*

### ***Notification:*** *If the Company notifies a Key Person that it wishes to buy back or require a compulsory transfer of the Default Shares under clause 17.6(a), the Key Person and the other Shareholders must do everything necessary to facilitate the sale of the Default Shares to the Company or the Company’s nominee within 10 Business Days of the Company's notice.*

### ***Qualification:*** *Despite clauses 17.6(a) and 17.6(b), the Company may only buy back the Default Shares itself if that is permitted under the Company's constitution, the Act and if the buyback will not materially prejudice the Company's ability to pay its creditors.*

## 

## ***Price for Default Shares:****The price for the Default Shares (****Default Price****) is [****50****]% of Fair Market Value as at the date on which the Company gives notice under clause 17.6.*

## ***Suspension:*** *To the extent permitted by law, from the time the Company gives notice under clause 17.6(b):*

### ***Deemed Resignation:*** *any person appointed as a Director by that Key Person (if applicable) is deemed to have provided a resignation notice to the Company at the same time as the Key Person is notified pursuant to clause 17.6(b) and is automatically removed from the Board at that time, and has no further right to participate in the Business or management of the Company; and*

### ***Rights Suspended:*** *the rights attaching to the Key Person's Shares (including dividend and distribution rights in relation to the Shares, and the rights to attend and vote at general meetings of Shareholders and to receive information and documents) are suspended until those Shares have been acquired by the Company or as directed by the Company.*

## ***Fair Market Value:*** *The Board* *will determine the Fair Market Value of the Default Shares and will notify the Key Person within 5 Business Days of such determination, provided that any Director who is appointed by the Key Person who has been issued with a notice under clause 17.6 will not be entitled to vote on the determination of Fair Market Value under this clause.*

### [***Drafting note: delete clauses 17.4 to 17.9 if Vesting Provisions are not included in the Term Sheet***]

## [***Insert nominee company name***] ***Holds Shares: The parties acknowledge that the*** [***insert nominee company name***] ***holds Shares as nominee of and as bare trustee for the Beneficial Investors and that clause 3 of this agreement and clause 6 of the Constitution will not apply to a transfer of Shares to one or more Beneficial Investors who already beneficially own those Shares.*** [***insert nominee company name***]***:***

### ***Deal Separately: may deal with Shares held on behalf of one Beneficial Investor independently of the other Shares it holds (provided it complies with the requirements of this agreement and the Constitution in respect of that dealing); and***

### ***Transfer Notice: must, if it receives notice of a transfer of beneficial ownership of any of the Shares*** [***but subject to clause 17.11***]***, deliver a Transfer Notice to the Company pursuant to clause 6.2 of the Constitution.***]

## [***Transfers between Beneficial Investors:*** *[For the avoidance of doubt, [****clause 3.1 of schedule 13 and****] the pre-emptive rights contained in the Constitution will not apply to a transfer of beneficial ownership of the Shares by a Beneficial Investor to another member of the [insert name of investment syndicate] investment syndicate where [insert nominee company name] continues to hold legal title to the Shares.][or][****Clause 3.1 of schedule 13*** *and] [****T****]****[t****]he pre-emptive rights contained in the Constitution will apply to a transfer of beneficial ownership of the Shares by a Beneficial Investor (irrespective of whether there is any transfer of legal ownership of Shares by [insert nominee company name]) to the intent that [insert nominee company name] will not acknowledge a change of beneficial ownership unless the other Investors have been offered the co-sale opportunity described in clause 3.1 of schedule 13*].

# EXISTING SHAREHOLDERS' ACKNOWLEDGMENT

## **Termination of Existing Agreements:** In consideration for the entry into this agreement by the Investors, the Existing Shareholders acknowledge and agree that with effect from Completion all existing shareholder agreements between them relating to the Company are terminated and of no further effect.

## **No Outstanding Obligations:** Each of the Existing Shareholders further acknowledge and covenant in favour of the Company and the Investors that they have no actual or contingent entitlement to the issue of further Securities (whether pursuant to any option, ratchet or similar agreement with the Company) and that the Company does not owe them any money.

# NOTICES

## **Method of Delivery:** Any written notice required under this agreement must be signed by a duly authorised senior representative of the party giving that notice and will be deemed validly given only if:

### delivered by hand to the intended recipient's address as set out in schedule 1;

### sent by facsimile to the intended recipient's facsimile number as set out in schedule 1 and if the sender's facsimile machine confirms transmission to the intended recipient; or

### sent by email to the intended recipient's email address as set out in schedule 1 one hour after the email is sent unless a return email is received by the sender within that one hour period stating that the email address is wrong or that the message cannot be delivered;

## **Time of Delivery:** Any notice transmitted by facsimile or email delivered after 5 pm on a Business Day, or at any time on a non Business Day, will be deemed received at 9 am on the next Business Day (being, in each case, the time of day at the intended place of receipt of that notice).

# NO RELIANCE

Each party confirms to each other party that it:

## **Independent Advice:** has had the opportunity to instruct and receive separate legal advice on the terms and effect of this agreement; and

## **No Reliance:** has not entered into this agreement in reliance on any warranties, representations or other statements made by any of the other parties, except as expressly set out in this agreement.

# INVESTOR DISCLAIMERS

## **Disclaimers:**The Investors each acknowledge that they have not received or relied on any representations, warranties or other assurances from [***insert name of relevant entity***], [***NZVIF***] or any of their respective affiliates, employees or officers (**Relevant Parties**) in relation to any aspect of the investment in the Company or the financial or operational position or prospects of the Company and its Business. They further acknowledge that they have no rights of recourse to any of the Relevant Parties in respect of such representations, warranties or other assurances and unconditionally waive any claim (whether arising in tort, contract, by operation of law or otherwise) they might have had against any of the Relevant Parties in respect of such representations, warranties or other assurances.

## **Contracts Privity:** The acknowledgment and waivers contained in clause 21.1 are promises which confer, and are intended to confer, a benefit upon each of the Relevant Parties, and accordingly the provisions of the Contracts (Privity) Act 1982 apply to, and for the benefit of, each of them.

# GENERAL

## **Further Assurances:** The parties will each execute and deliver such other documents, pass such resolutions and do such further and other things as may be necessary to implement and carry out this agreement's intent including without limitation, exercising their respective best efforts to ensure the Directors appointed by them act in accordance with this agreement's intent.

## **Modification:** This agreement may be amended by a written instrument signed by the Company and Shareholders holding at least 75% of the Shares in the Company, but provided that any amendment which:

### **Affects Specific Right:** affects any special right given to an individual Shareholder; or

### **Increases Obligations:** materially increases the obligations imposed on a Shareholder;

## must also be approved in writing by the affected Shareholder.

## **Waiver of breach:** No party will be treated as having waived any right under this agreement unless the waiver is in writing and signed by such party. Any such waiver by a party of a breach of any provision of this agreement will not constitute a waiver of any subsequent or continuing breach of such provision or of the breach of any other provision of this agreement by that party.

## **Governing Law and Jurisdiction:** This agreement will be governed by and construed in accordance with New Zealand law. The parties submit to the exclusive jurisdiction of the New Zealand Courts in respect of all matters relating to this agreement.

## **Severability:** If anything in this agreement is unenforceable, illegal or void, it may be severed and the rest of this agreement will remain in force.

## **Implied Relationships:** Except to the extent of the authorities contained in clause 2.4, nothing expressed or implied in this agreement constitutes any party as the partner, agent, employee or officer of, or as a joint venturer with, any other party. No party will make any contrary representation to any other person.

## **Execution and Counterparts:** The parties may execute a counterpart copy of this agreement by photocopying a facsimile, or printing out an email version, of this agreement and executing that photocopy or email version. Where a party executes such a counterpart copy and transmits the signed execution page of that counterpart copy by facsimile or email to the other parties, then, for the purposes of this agreement:

### **Proof:** the transmission will be deemed proof of signature of the original; and

### **Counterpart:** the signed counterpart copy will be deemed an original for the purposes of this agreement.

## Entire Agreement: This agreement and the documents referred to in this agreement constitute the entire understanding and agreement between the parties relating to the matters dealt with in this agreement and supersede all prior understandings, agreements, representations and correspondence between the parties.

## **Remedies:** The rights, powers and remedies provided in this agreement are cumulative and are in addition to any rights, powers or remedies provided by law.

## **Non Merger:** The warranties, undertakings, obligations and indemnities given under this agreement will not merge or be treated as discharged on Completion [***or any subsequent Subscription Date***] but will remain enforceable to the fullest extent, despite any rule of law to the contrary.

# [*TRUSTEE LIABILITY*

## ***Independent Trustee: This clause 23 applies if any of the signatories for a party are trustees of a trust and who have no right to, or interest in, any of the assets of the trust except in his, her, or its capacity as trustee of that trust (each such person being an Independent Trustee).***

## ***Liability: The liability of each Independent Trustee under or in connection with this agreement (including liability for breach of a duty, including any duty of care) will not be an unlimited personal liability and is limited to the assets for the time being of the relevant trust (including proceeds of realisation or reinvestment of any of those assets) which are in that Independent Trustee’s hands as trustee in the proper course of the administration of that trust. Those assets will not include any capital or income of the relevant trust which has been transferred or paid to or appropriated or applied to the benefit of any person in accordance with the deed establishing the trust.***

## ***Breach of Trust: If due to a breach of trust as a direct consequence of dishonesty by the Independent Trustee, any party claiming under or in connection with this agreement is unable to recover from the assets for the time being of that trust all or any moneys properly payable to that party, then that party may seek to recover those moneys from the personal assets of that Independent Trustee provided that in doing so, that party may only recover the amount (if any) by which the value of the relevant trust assets has been diminished due to the breach of trust.***]

**SIGNATURES**

**SIGNED** on behalf of [***insert name of Investor***]:

|  |  |
| --- | --- |
| Full name of director/authorised signatory | Signature of director/authorised signatory |
| Full name of director/authorised signatory | Signature of director/authorised signatory |

**SIGNED** for and on behalf of **NZVIF INVESTMENTS LIMITED** by:

|  |  |
| --- | --- |
| Full name of director/authorised signatory | Signature of director/authorised signatory |
| Full name of director/authorised signatory | Signature of director/authorised signatory |

**SIGNED** by [***Company***]by:

|  |  |
| --- | --- |
| Full name of director/authorised signatory | Signature of director/authorised signatory |
| Full name of director/authorised signatory | Signature of director/authorised signatory |

|  |  |
| --- | --- |
| **SIGNED** by [***insert Existing Shareholder's name***]: | [***insert name***] |

|  |  |
| --- | --- |
| **SIGNED** by [***insert name of Individual Warrantor***]: | [***insert name***] |

|  |  |
| --- | --- |
| **SIGNED** by [***insert name of Individual Warrantor***]: | [***insert name***] |

|  |  |
| --- | --- |
| **SIGNED** by [***insert name of Individual Warrantor***]: | [***insert name***] |

|  |  |
| --- | --- |
| **SIGNED** by [***insert name of Key Person***]: | [***insert name***] |

|  |  |
| --- | --- |
| **SIGNED** by [***insert name of Key Person***]: | [***insert name***] |

1. SCHEDULE 1

COMPANY AND PARTY DETAILS

**Name:**

**Issued shares and shareholders**

|  |  |
| --- | --- |
| **Name of Shareholder** | **Number of Shares** |
|  |  |
|  |  |
|  |  |

**Share options and any other equity conversion rights:**

**Directors:**

**Encumbrances:**

**Subsidiaries:**

**Parties and Notice Details:**

|  |  |
| --- | --- |
| **Name** | **Address for Notices, Facsimile Number and Email Address** |
|  |  |
|  |  |
|  |  |
|  |  |
|  |  |
|  |  |
|  |  |
|  |  |
|  |  |

**SCHEDULE 2**

**CAPITALISATION TABLE**

**SCHEDULE 3**

**WARRANTIES**

1. iNFORMATION DISCLOSED
   1. **Schedules:** The details set out in schedule 1 are true and accurate.
   2. **Information:** All factual information was at the time and in the context it was given to the Investors true and accurate in all material respects (and not misleading in its context, whether by omission or otherwise). All documents given to the Investors are true and complete copies of the originals.
   3. **Full Disclosure:** All information relating to the Company which is material for the evaluation of its financial condition and trading prospects has been fully and accurately disclosed to the Investors in a manner that would not mislead a reasonable investor as to the state of the Company.
   4. **Business Plan:** The Warrantors do not disagree with any statement of opinion contained in the Business Plan and, as far as the Warrantors are aware, the factual information in the Business Plan is true and accurate in all material respects and all material assumptions on which the Business Plan are based are set out in the Business Plan.
2. SHARES AND OPTIONS
   1. **Shares and Options:** The shares and options described in schedule 1 constitute all of the issued Securities and all rights to be issued Securities of the Company immediately prior to Completion.
   2. **No Shareholdings:** The Company has no shares or other securities in any other company and no partnership interest in any other business and has not agreed to acquire any such shares, securities or partnership interest.
3. TRANSACTIONS WITH THE EXISTING SHAREHOLDERS
   1. **Arrangements with Existing Shareholders:** There are no:
      1. loans made by the Company to the Existing Shareholders, or any Associate of any Existing Shareholder;
      2. save in relation to unpaid salaries or expenses, debts owing by the Company to the Existing Shareholders or any Associate of any Existing Shareholder; or
      3. guarantees entered into by the Company in respect of any loans, debts or other obligations of the Existing Shareholders and/or of any Associate of any Existing Shareholder.
   2. **Related Contracts:** Except for services provided to the Company by the Existing Shareholders and/or any Associate of them:
      1. there are no existing and continuing contracts or arrangements between the Company and Existing Shareholders and/or any Associate of any Existing Shareholder; and
      2. the Company does not depend in any material respect upon the use of any property, right or asset owned by, or facilities or services provided by any Existing Shareholder or any Associate of them.
   3. **Competition by Existing Shareholders:** None of the Existing Shareholders nor any Associates of the Existing Shareholders is directly or indirectly engaged or concerned or interested in any way whatsoever in any other business competitive with the Business.
4. VALID AUTHORISATIONS

All requirements of the Act and the Company's constitution (if any) have been, or will be, complied with on a timely basis in relation to the issue of the [***Ordinary Shares***][***Preferred Shares***] to the Investors and the execution of this agreement and the allotment and issue of the [***Ordinary Shares***][***Preferred Shares***] to the Investors have been authorised by all necessary corporate and other acts and do not violate any trust deed, instrument, agreement or other arrangement to which the Company is party.

1. ASSETS UNENCUMBERED

As at the date of execution of this agreement, any material assets of the Company or any subsidiary of the Company (as the case may be) are free of all encumbrances, mortgages, liens, charges, or any other claim by a third party.

1. INTELLECTUAL PROPERTY
   1. **Ownership:** The Company owns or is legally entitled to use all Intellectual Property used in, or in connection with, the Business (at present and intended to be developed).
   2. **Rights:** All Intellectual Property used by the Company in, or in connection with, the Business:

### is done so under valid, binding and enforceable agreements (**Licensed Intellectual Property**) that permit the Company to use the Licensed Intellectual Property as required by the Company for the Business (at present and intended to be developed);

### the Company is not in breach of any such agreement and has complied with all requirements around attribution of the ownership of the Intellectual Property;

### is done so on usual terms made available by the relevant third party owner; and

### is able to be replaced with another solution without any material effort or costs on the part of the Company,

or if not used by the Company pursuant to an agreement with a third party, is the full legal, beneficial and unencumbered property of the Company.

### 

* 1. **No Infringement:** The Business as now carried on and as proposed to be carried on in the Business Plan does not infringe any Intellectual Property rights of any other person and, as far as the Warrantors are aware, no claims relating to Intellectual Property used by the Company are pending or threatened by any third party.
  2. **No Rights Granted:** No rights of any nature have been granted to any other person or in relation to Intellectual Property created or developed by the Company.
  3. **Related Party Claims:** All Intellectual Property created by the Existing Shareholders and current and former contractors and employees of the Company and which is used, or proposed to be used, by the Company in connection with its current or proposed Business (as set out in the Business Plan), is vested in and beneficially owned by the Company.
  4. **Confidential Information:** As far as the Warrantors are aware, there has not been any unauthorised disclosure of any of the Company's financial or trade secrets or other Confidential Information.
  5. **Patent Rights**: In respect of any patents which are owned by the Company:

### they are the full legal, beneficial and unencumbered property of the Company;

### to the best knowledge and belief of the Company, the Company will have and enjoy quiet possession of the patents uninterrupted by any other person; and

### to the best knowledge and belief of the Company, the Company is not aware of any fact by which the patents may be declared invalid, or any claim by which the patents should be amended.

1. accounts
   1. **Preparation:** The Accounts have been prepared in accordance with applicable New Zealand legislation and GAAP and so as to give a true and fair view of the state of affairs of the Company at the end of each accounting period covered by the Accounts and of the profits and losses for that period.
   2. **Since Accounts Date:** Since the date of the Accounts, the Company has not:
      1. authorised or paid any dividend, or made any other distribution (as defined in the Companies Act 1993) or repaid any loans from Shareholders (other than with prior written consent of the Investors or as specified in this agreement); or
      2. undertaken or committed to any substantial item of capital or other expenditure, other than in the ordinary course of its ordinary business or otherwise without the Investors' prior written consent.
2. NO PROCEEDINGS
   1. **No Litigation:** The Company is not a party to any legal action or proceedings, arbitration, or statutory or governmental inquiry of any kind, nor is the Company aware of any such legal proceedings, arbitration or inquiry, pending or threatened against, or involving, the Company.
   2. **No Existing Cause of Action:** As far as the Warrantors are aware, there is not any cause of action, or facts or circumstances existing that could or might be used for commencing legal proceedings, either civil or criminal, against the Company.
3. EMPLOYMENT
   1. **No Disputes:** The Company is not involved in any employment, labour or personal grievance dispute or problem, or any dispute with any employee representative or organisation or body of employees, and no event has occurred which might give rise to any such dispute.
   2. **No Profit Sharing Arrangements:** The Company is not a party to a contract or arrangement under which any of its officers or employees is entitled to receive a share of income or profits or a bonus calculated on turnover, income or profits, or any component of any of them, or any similar benefit.
4. CONTRACTS
   1. **Material Contracts:** All material contracts, commitments or arrangements of any nature whatsoever to which the Company is party have been disclosed to the Investors.
   2. **No Breach of Contract:** As far as the Warrantors are aware, neither the Company nor any counterparty to any material contract, commitment or arrangement of any nature whatsoever:

### is in default; or

### but for the requirements of notice or lapse of time or both, would be in default where that default could be reasonably expected to have a material adverse effect on the interests, Business or assets of the Company.

* 1. **No Affect:** No party to any material contract, commitment or arrangement of any nature whatsoever is, due to the issue of Shares in this agreement or by virtue of the entry by the Company into this agreement, entitled to:

### terminate the relevant material contract, commitment or arrangement;

### require adoption of terms less favourable to the Company; or

### do anything which would adversely affect the interests, Business or assets of the Company.

* 1. **Agents:** No person is authorised to act as agent for the Company or to bind the Company (other than the Directors of the Company acting as a Board) and there are not in force any powers of attorney given by the Company.
  2. **Commission:** No one is entitled to receive from the Company any finder’s fee, brokerage or other commission in connection with financing of the Company.
  3. **Grants:** No public grants or funding received by the Company is subject to an obligation to repay on a liquidity event of the Company, and any conditions of such grants or funding have been complied with in all material respects.

1. TAXATION
   1. **Lodgement of Returns:** The Company has lodged all Taxation returns, reports, declarations, notices, certificates, reconciliations and other information required to be lodged by them with the appropriate body within the relevant time limits.
   2. **Accuracy:** All such returns, reports, declarations, notices, certificates, reconciliations and other information were accurate, complete and not misleading on lodgement, were made on a proper basis and are not the subject of any dispute.
   3. **No Taxation Consequences from IP Transfer:** The Company is not liable for any Taxation as a consequence of the transfer of Intellectual Property to the Company.
2. BOOKS AND RECORDS

## The Company has properly kept and maintained:

* 1. **Accounting Records:** all accounting records and books of account properly entered and containing true, full and accurate records of all matters required to be dealt with in accordance with GAAP;
  2. **Statutory Records:** all minute books, records, registers and other records required by law containing full and accurate records of all matters required to be recorded in them; and
  3. **Returns:** all returns, resolutions and other documents required to be made and all such documents required by relevant law to be delivered or filed with the Registrar of Companies have been delivered or filed within the time required by law and are true and accurate.

1. CONSENTS
   1. **Consents:** The Company holds all consents required for the carrying on of the Business and as far as the Warrantors are aware is not in breach of the terms and conditions of any such consents.
   2. **Consents Not Prejudiced:** None of these consents will be prejudiced or revoked by virtue of the execution, delivery and performance of this agreement.
2. OTHER OBLIGATIONS

## The Company is not affected by any material commitment or obligation which has not been reflected in the Accounts or specifically approved by the Investors in writing or disclosed to the Investors before the date of this agreement.

**SCHEDULE 4**

**EXCEPTIONS TO WARRANTIES**

**SCHEDULE 5**

**CONSTITUTION**

**SCHEDULE 6**

**BUSINESS PLAN**

**SCHEDULE 7**

**MILESTONES**

[***drafting note:*** ***insert Milestones if applicable***

***Examples of financial Milestones include:***

### ***The Company achieving*** [***sales***] ***revenue of at least*** [***insert percentage***]***% of the amount specified in the Business Plan in respect of the period from*** [***insert date***] ***to*** [***insert date***]***.***

### ***The Company not exceeding the expenses set out in the Business Plan in respect of the period from*** [***insert date***] ***to*** [***insert date***] ***by*** [***insert percentage***]***%.***

**SCHEDULE 8**

**FORM OF CONDITIONS PRECEDENT LETTER**

[***insert date***]

The Investors in [***investee company***]

c/- NZVIF Investments Limited

Unit 1B

Ascot Office Park

93-95 Ascot Avenue

Greenlane

AUCKLAND

**Investment in** [***insert name of investee company***] **– Confirmation of Satisfaction of Conditions**

Pursuant to clause [***insert***] of the Subscription and Shareholders' Agreement in relation to [***insert name of investee company***], I confirm that the Conditions in clause 2.1 have been satisfied, as follows:

|  |  |
| --- | --- |
| **Condition** | **Comments** |
|  |  |
|  |  |
|  |  |
|  |  |
|  |  |
|  |  |

Yours faithfully

[***insert name of person confirming***]

cc [***insert name of investee company***]

**SCHEDULE 9**

**COMPLETION DOCUMENTS**

|  |  |  |
| --- | --- | --- |
|  | Directors' resolutions to enter into the Subscription and Shareholders' Agreement and to take all actions required under that agreement (including the issue of the [***Ordinary Shares***][***Preferred Shares***] to the Investors and appointment of new Directors, if applicable) |  |
|  |  |  |
|  | Shareholders' resolutions in relation to the above (including adoption of the Constitution, if applicable) |  |
|  |  |  |
|  | A copy of the letter confirming that the Conditions have been satisfied |  |
|  |  |  |
|  | A copy of the Company's share register, showing the issue of [***Ordinary Shares***][***Preferred Shares***] to the Investors |  |
|  |  |  |
|  | A copy of the Companies Office records in respect of the Company, showing the issue of shares to the Investors, the appointment of Directors and the adoption of the Constitution, if applicable |  |

**SCHEDULE 10**

**FORMOF QUARTERLY REPORT**

|  |  |
| --- | --- |
| **Company** | **[Company Name]** |
| **Report Period** | Quarter ended [DD MONTH YEAR] |
| **Highlights** | *Briefly describe the highlights / key developments (positive and/or negative) from the quarter:*  ……………………………………………………………………………………………………  ……………………………………………………………………………………………………  ……………………………………………………………………………………………………  …………………………………………………………………………………………………… |
| **Key Flags** | 1. Were there any changes to the Board and / or key management in the quarter?   NO YES  *If yes, please briefly describe:*  ……………………………………………………………………………………………………  ……………………………………………………………………………………………………  ……………………………………………………………………………………………………   1. Were there any legal proceedings initiated or threatened by or against the company?   YES NO  *If yes, please briefly describe:*  ……………………………………………………………………………………………………  ……………………………………………………………………………………………………  ……………………………………………………………………………………………………   1. Was there any material charge to the type of business being carried on by the company?   YES NO  *If yes, please briefly describe:*  ……………………………………………………………………………………………………  ……………………………………………………………………………………………………  ……………………………………………………………………………………………………   1. Are there any additional capital raisings planned?   YES NO  *If yes, please briefly describe:*  ……………………………………………………………………………………………………  ……………………………………………………………………………………………………  ……………………………………………………………………………………………………   1. Are there any material items that may come up in the next quarter that we should be aware of?   YES NO  *If yes, please briefly describe:*  ……………………………………………………………………………………………………  ……………………………………………………………………………………………………  …………………………………………………………………………………………………… |
| **Runway (Cash Position)** | The company’s cash position at the end of the quarter was $ . The best estimate of the cash run out date based on the company’s current budget and cashflow forecasting is [Date] |

**SCHEDULE 11**

**FORM OF MILESTONE CERTIFICATE**

[***date***]

To: [***insert Investors***] (**Investors**)

We, the Directors of [***insert name of Company***], hereby certify that the following Milestone[***s***] has been satisfied:

[***insert description of relevant Milestones***]

Accordingly, the amount of $[***insert***] is now payable in accordance with clause 5.5(b) of the Subscription and Shareholders' Agreement. Please make payment, in your respective Investors' Proportions, to the following account:

[***insert details – use solicitors' trust account***]

Signed for and on behalf of the Board by:

Name of director

Signature of director

**SCHEDULE 12**

**FORM OF DEED OF ACCESSION**

**DEED POLL DATED**

**GIVEN BY:**

[***name of new shareholder***] (**Intending Shareholder**)

**IN FAVOUR OF:**

Every other party to the Shareholders' Agreement (as defined below) (**Shareholders**)

**THIS DEED** **POLL** **RECORDS THAT:**

1. The Intending Shareholder:

### proposes to hold [***Ordinary Shares***][***Preferred Shares***]; and

### covenants for the benefit of the other Shareholders that, from the time that the Intending Shareholder's name appears in the register of shareholders of [***insert name of Company***], the Intending Shareholder will be bound to the terms of the Shareholders' Agreement as if the Intending Shareholder was an original party to the Shareholders' Agreement [***as an Investor***][***as an Other Shareholder***]

1. In this deed poll:

### [***Ordinary Shares***][***Preferred Shares***]has the meaning given to that term in the Shareholders' Agreement.

### **Shareholders' Agreement** means the Subscription and Shareholders' Agreement dated [***date***] relating to [***insert name of Company***] between [***insert parties***].

**EXECUTED AND DELIVERED AS A DEED POLL**

SCHEDULE 13  
  
NZVIF SPECIFIC CLAUSES

The following clauses will be deemed to form part of this agreement for so long as NZVIF is a Shareholder:

# Matching capital

## **Matching Capital:** The parties acknowledge that:

## **Investor Investment Amount:** NZVIF's obligation to subscribe its Investor Investment Amount under clause 5.5 of this agreement; and

## **Other Investment Funds:** any other obligation of NZVIF to subscribe investment funds to the Company (including pursuant to any capital raising or rights issue following the Completion Date),

are conditional on reasonably satisfactory evidence being provided to NZVIF that an amount greater than or equal to the amount which NZVIF is obliged to subscribe (**Matching Capital**) has been received from the other Investor[***s***] by or on behalf of the Company (provided that NZVIF may waive this condition in its sole discretion). The Company acknowledges that any funds received from NZVIF pending receipt of Matching Capital will be held on trust for NZVIF until such time as Matching Capital is received, and will be returned to NZVIF (together with any interest accrued) upon request by NZVIF at any time before Matching Capital is received.

# Prohibited Business

## Without limiting clauses 9.13 and 9.14 of this agreement, the Company will not, whilst NZVIF remains a Shareholder, change its principal business to any NZVIF Ineligible Business unless NZVIF expressly consents to that change. If the Company wishes to alter its principal business to a NZVIF Ineligible Business and NZVIF does not consent to that change, the Company will procure the purchase of NZVIF's Shares at a fair price which is not less than the sum which reflects the full cost of those Shares to NZVIF and provides NZVIF with an internal rate of return of 6% per annum on those costs. For the purposes of this clause, "NZVIF Ineligible Business" means any business which principally involves one or more of property development, retailing, mining or hospitality (but without precluding a business which markets a technology or other innovation to any of these industries), or acting as a financial intermediary.

# Co-Sale Rights

## **Investors' Co-Sale Rights:** An Investor (**Selling Investor**) may only sell some or all of its Shares if each of the other Investors has been offered an opportunity to sell the same proportion of their respective Shares on the same terms and that offer has been available for acceptance by the other Investors for at least 10 Business Days. However, where the "tag along" rights contained in clause[***9***] of the Constitution apply to such sale, compliance with those provisions will satisfy a Selling Investor's obligations under this clause.

## **Breach:** If a Selling Investor sells Shares in breach of this obligation, the Selling Investor must, at the option of each other Investor who was not offered the opportunity to participate in that sale (each such Investor being referred to as an **Other Investor**), purchase from each Other Investor such number of their Shares, at the same sale price as was achieved by the Selling Investor, as is required so that the proportion of Shares held by the Selling Investor, relative to the proportion of Shares held by each Other Investor, is the same as existed before the sale of Shares by the Selling Investor.

# Reporting

## **Quarterly Reports:** Within 20 Business Days after the beginning of each Quarter, the Company will deliver to the Investors a report in relation to the Company's activities and financial performance in the previous Quarter in the form attached as schedule 10 to this agreement.

## **Disclosure by NZVIF:** The parties acknowledge that NZVIF is required to report on the economic impact of NZVIF's investment in the Company (including revenue generated, number of employees and tax paid), provided NZVIF will only report and disclose that information on an aggregated basis and in a form that preserves the confidentiality of such information (subject to clause 16.1(c) of this agreement).