

# MUTUAL NONDISCLOSURE AGREEMENT

This Mutual Nondisclosure Agreement (the "Agreement") is made as of the \_\_\_\_\_ (day) of \_\_\_\_\_ (month), 20\_\_\_\_

Between **FutecNZ Limited**, located at **PO Box 42, Leigh 0947, New Zealand** (the "Company")

And \_\_\_\_\_ (interested Party Company Name),

with an office located at \_\_\_\_\_ (full address).

**Purpose.** The parties intend to engage in discussions concerning the potential acquisition of the Company, or license of Technology / Intellectual Property (IP) of the Company, by (**interested Party Company Name**) (the "Designated Purpose"). In connection with this Designated Purpose, each party has disclosed or may further disclose as "Discloser" its Confidential Information to the other as "Recipient". This Agreement is intended to allow the parties to continue to pursue the Designated Purpose while protecting each party's Confidential Information (including Confidential Information previously disclosed to the other party) against unauthorized use or disclosure.

1. **Definitions.** Unless otherwise defined herein, capitalised terms used in this Agreement shall have the meaning as set forth below:

"Affiliate" means any person or entity which directly or indirectly controls, is controlled by or is under common control with such person or entity where "control" means the right to control, or actual control of management of such entity, whether by ownership of voting securities, by agreement, or otherwise.

"Confidential Information" means any oral, written, graphic or machine-readable information including, but not limited to technical or non-technical data, patents, patent applications, copyright, copyright applications, research, product or service plans, developments, inventions, processes, designs, drawings, formulations, patterns, compilations, engineering methods, techniques, devices, intellectual property, formulae, software (including source and object code), algorithms, business plans, agreements with third parties, lists of actual or potential services or customers, marketing plans, financial plans or finances and similar information relating to the Discloser, its Affiliates, the Designated Purpose, or any of their respective third party suppliers or customers furnished by or on behalf of the Discloser to the Recipient or any of its Representatives regardless of the manner in which it is furnished or obtained by the Recipient or its Representatives through observation of the Discloser's facilities or procedures (save and except communications with legal counsel which constitute attorney-privileged information). The Discloser agrees to use reasonable efforts to summarize in writing the content of any oral disclosure or other non-tangible disclosure that is proprietary or confidential to the Recipient within a reasonable time (not to exceed thirty (30) days) after the disclosure. However, failure to provide this summary will not affect the qualification of the Discloser's Confidential Information as such if the Confidential Information was identified as confidential or proprietary when disclosed orally or in any other non-tangible form.

"Representatives" means, in respect of any party, such party, such party's Affiliates, its and their respective directors, officers, employees, agents, advisors (including financial advisors and legal counsel) and any institutional lender to such party and the directors, officers and employees of any such agent, advisor or lender.

2. Nondisclosure of Confidential Information. Neither Recipient nor any of its Representatives shall use any of Discloser's Confidential Information for its own use or for any purpose other than to carry out discussions concerning, and the undertaking of the Designated Purpose. Recipient may provide Discloser's Confidential Information only to Recipient's employees who:
  - i. Have a substantive need to know about the Confidential Information in connection with the Designated Purpose.
  - ii. Have been advised of the confidential and proprietary nature of the Confidential Information.
  - iii. Have agreed to protect from unauthorized disclosure all confidential and proprietary information, of whatever source, to which they have access in the course of their employment.Recipient may provide Confidential Information to Recipient's Affiliates, consultants, contractors and agents, subject to (i) through (iii) above. Recipient and its Representatives must take all reasonable measures to protect the secrecy of and avoid disclosure or use of Discloser's Confidential Information in order to prevent it from falling into the public domain or the possession of persons other than those persons authorized under this Agreement to have this information. Such measures shall include, but not be limited to, the highest degree of care that the Recipient utilizes to protect its own Confidential Information of a similar nature, which shall be no less than reasonable care. Recipient must notify Discloser of any actual or suspected misuse, misappropriation or unauthorized disclosure of Discloser's Confidential Information, which may come to Recipient's attention. Recipient will be liable for all breaches of the terms of this Agreement by its Representatives.
3. Exceptions to Nondisclosure of Confidential Information. Notwithstanding anything to the contrary in this Agreement, Recipient shall have no liability to Discloser concerning any of Discloser's Confidential Information, which Recipient can prove beyond a reasonable doubt:
  - i. Was in the public domain at the time it was disclosed or has entered the public domain other than by a breach of this Agreement by Recipient.
  - ii. Was known to Recipient, without restriction, at the time of disclosure, as demonstrated by files in existence at the time of disclosure.
  - iii. Is disclosed with the prior written approval of Discloser.
  - iv. Was independently developed by Recipient without any use of Discloser's Confidential Information and by employees of Recipient who have not had access to the Confidential Information, as demonstrated by files created at the time of such independent development.
  - v. Becomes known to Recipient, without restriction, from a source other than Discloser without breach of this Agreement by Recipient and otherwise not in violation of Discloser's rights.
  - vi. Is disclosed pursuant to the order or requirement of a court, administrative agency, or other governmental body; except that Recipient shall provide prompt notice of such court order or requirement to Discloser to enable Discloser to seek a protective order or otherwise prevent or restrict such disclosure and fully cooperate with Discloser to appropriately protect against or limit the scope of disclosure.
4. Specific Excluded Use. Unless otherwise permitted in writing by Discloser, neither Recipient nor its Representatives shall make any attempt to reverse compile, disassemble, engineer or otherwise reverse engineer all or any part of any Confidential Information disclosed. Neither Recipient nor its Representatives shall make any attempt to copy, reproduce, modify, adapt or translate the Confidential Information in order to develop, create, evaluate, or modify a product which is in any way competitive with any current software products marketed by the Discloser.
5. Return of Materials. Within ten (10) days of the written request of Discloser, or after the parties have either conclusively achieved or not achieved the Designated Purpose and, in the latter case, if the parties have not agreed otherwise, Recipient shall:
  - i. Return any Confidential Information that have been furnished by Discloser to Recipient and/or its Representatives in connection with the Designated Purpose either in its possession, or that of Recipient's Representatives or approved third parties, accompanied by all copies thereof made by Recipient and/or its Representatives.

- ii. Delete or destroy all copies of Confidential Information including samples in its possession, power or control, including copies of Confidential Information and samples in the possession, power or control of its Representatives or approved third parties, which are present on magnetic, optical disk, volatile memory or other storage device or container, in a manner that assures the Confidential Information is rendered unrecoverable.

Upon the completion of these tasks, an officer of Recipient shall provide written confirmation to Discloser that Recipient and its Representatives have complied with the requirements of this clause.

6. No Rights Granted. This Agreement shall not be construed as granting any rights under any patent, copyright or other intellectual property right of either party, nor shall this Agreement grant Recipient any rights in or to Discloser's Confidential Information other than the limited right to review the Confidential Information solely for the purpose of the Designated Purpose.
7. Term. The term of this Agreement and the parties' obligations commence on the date first written above and extend with regard to all Confidential Information until ten (10) years from the date of execution of this Agreement. Either party shall have the right to terminate this Agreement upon ten (10) days written notice to the other party; however, the parties' obligations set forth in Sections 2, 3, 4, 5 and 14 shall survive the termination of this Agreement in accordance with their terms.
8. No Future Agreements or Obligations to Disclose. Nothing in this Agreement shall be construed as obligating or be deemed to obligate the parties:
  - i. To enter into any future agreement concerning the Designated Purpose or the Confidential Information.
  - ii. Discloser to disclose any particular Confidential Information.
9. Governing Law. This Agreement shall be governed, construed and interpreted in accordance with the laws of New Zealand and the parties attorn to the exclusive jurisdiction of the Courts of the New Zealand to resolve any disputes.
10. Successors and Assigns. This Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties, except that Discloser's Confidential Information may not be assigned without the prior written consent of Discloser, unless the assignee is the successor entity to the assignor upon dissolution of the assignor in its present form. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement.
11. Notice. Any notice, demand or other communication required or permitted to be given to either party shall be in writing and shall be personally delivered to such party, sent by prepaid overnight courier, or sent by electronic mail, confirmed by prepaid overnight courier and delivered or sent to the intended recipient at its address as described hereinabove. Any party may from time to time change its address by written notice to the other party given in accordance with this paragraph. For the purposes of convenience email will be the preferred method of written communication in the majority of cases.
12. Severability. If one or more provisions of this Agreement are held to be unenforceable under applicable law, the parties agree to renegotiate such provision in good faith. In the event that the parties cannot reach a mutually agreeable and enforceable replacement for such provision, then:
  - i. Such provision shall be excluded from this Agreement.
  - ii. The balance of the Agreement shall be interpreted as if such provision were so excluded.
  - iii. The balance of the Agreement shall be enforceable in accordance with its terms.

13. Independent Contractors. FutecNZ Limited are independent contractors, and nothing contained in this Agreement shall be construed to constitute FutecNZ Limited as partners, joint venturers, co-owners or otherwise as participants in a joint or common undertaking, or to provide either party with the right, power or authority to create any duty or obligation on behalf of the other party.
14. Remedies; Indemnification. Each party acknowledges that:
- i. Its obligations set forth in this Agreement are necessary and reasonable in order to protect Discloser and its business.
  - ii. Due to the unique nature of Discloser's Confidential Information, monetary damages would not alone be sufficient to compensate Discloser for any breach by Recipient of its covenants and agreements set forth in this Agreement.
  - iii. Any violation or threatened violation shall cause irreparable injury to Discloser. In addition to any other remedies that may be available, in law, in equity, by statute or otherwise, Discloser shall be entitled to:
    - a) Obtain injunctive relief against the threatened breach of this Agreement or the continuation of any such breach by Recipient, without the necessity of proving actual damages.
    - b) be indemnified by Recipient from any loss or harm, including but not limited to legal fees, arising out of or in connection with any breach or enforcement of Recipient's obligations under this Agreement or the unauthorized use or disclosure of Discloser's Confidential Information.
15. Amendment and Waiver. Any term of this Agreement may be amended with the written consent of FutecNZ Limited. Failure to enforce any provision of this Agreement by a party shall not constitute a waiver of any term hereof by such party.
16. Extended Meanings. In this Agreement, words importing the singular number include the plural and vice versa and words importing gender include all genders. The word "person" includes, subject to the context in which it appears, an individual, partnership, association, body corporate, trustee, executor, administrator or legal representative.
17. Entire Agreement. This Agreement is the product of both of the parties, constitutes the entire agreement between the parties pertaining to the subject matter hereof, and merges all prior negotiations and drafts of the parties with regard to the transactions contemplated herein. Any and all other written or oral agreements existing between the parties regarding such transactions are expressly cancelled.
18. Headings. The division of this Agreement into Sections and the insertion of headings are for convenience of reference only and shall not affect its construction or interpretation

The parties have executed this Mutual Nondisclosure Agreement as of the date first above written.

By: **FutecNZ Limited**

By: **(interested Party Company Name)**

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

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

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

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

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature