

[Draft 1
30 September 2015]

SCIF SUBSCRIPTION AND SHAREHOLDERS' AGREEMENT: SIMMONDS STEWART TEMPLATE MARK-UP

Simmonds Stewart has acted for many companies accepting investment from NZVIF Seed Co-Investment Fund (SCIF) partners. These SCIF partners include angel clubs like Ice Angels and Angel HQ, and a number of seed investment funds.

The standard SCIF Subscription and Shareholders' Agreement (often referred to as the SuSA) is relatively investor friendly, and has a range of terms that companies should seek to change in the negotiation process. To offset this, and to help companies and founders prepare in advance, we set out below a detailed mark-up of the standard SuSA showing the changes we think are desirable to achieve a balanced agreement. Our amendments and comments are based on the *subscription & shareholders' agreement ordinary/preference shares* available on the NZVIF website on [*insert date*].

Obviously every company and investment deal is different, so not all of the changes we recommend will apply in all situations. Equally, in some deals we recommend further changes. But we think this mark-up will still be a helpful starting point for companies embarking on a transaction with a SCIF partner.

SUBSCRIPTION AND SHAREHOLDERS' AGREEMENT

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

[NAME OF INVESTEE COMPANY]

[NAMES OF EXISTING SHAREHOLDERS]

[NAMES OF KEY PEOPLE]



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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 the Investor Shares.
- 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:

1. INTERPRETATION

In this agreement unless the context indicates otherwise:

1.1 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 9.4;]
[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 9.12;

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 due to;~~

Commented [SS1]: It is important to limit the *Key People* to the founders of the company who are material to the future success of the company. For example, the *Key People* are prevented from selling shares for a potentially lengthy period under the provisions of this agreement relating to *Restricted Transfer Shares*.

Commented [SS2]: Management accounts are not prepared in accordance with GAAP and accordingly need to be treated separately from annual accounts (see Warranties)

Commented [SS3]: See our comments to clauses 17.4 to 17.9 for a discussion of why we recommend deleting the *founder vesting* and *bad leaver* provisions. However, if a *bad leaver* provision is to be included then it should be narrowly defined (as the consequences are so severe – the potential loss of all shares by the founder).

At most we would expect the definition of *bad leaver* to be restricted to incidents where a founder's employment is terminated following a conviction for fraud or a criminal offence with a maximum sentence of no less than 1 year imprisonment, or for *serious misconduct* where the conduct and its categorisation as *serious misconduct* is either not disputed by the founder or has been disputed by the founder and determined in favour of the investors (and the founder has no further rights of appeal).

- (a) ~~Resignation: resignation within [insert] years of the date of this agreement;~~
- (b) ~~Termination: termination by the Company with cause, including because he or she has committed;~~
- (c) ~~Fraud: fraud;~~
- (d) ~~Offence: an indictable criminal offence;~~
- (e) ~~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 Investor 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 Investor 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 the 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 Investor Shares to the Investors in accordance with clause 5;—[Drafting note: "initial" not required where investment is not tranching];

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 89;

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:

(f)(a) Information Known: the information known to the recipient on the date of its receipt; or

(g)(b) 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 83 of the Financial Reporting Act 2013~~4993~~;

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 12.1(b) 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;

Investor Shares means ~~the [insert] ordinary shares~~ ~~[preferred shares]~~ in the Company to be issued to the Investors under this agreement, with the rights attaching to them as set out in the Constitution;

Issue Price means the issue price for the Investor Shares being NZ\$**[1.00]** per Investor Share;

Majority of Investors means Investors holding more than 50% of the Investor Shares;

Major Transaction has the same meaning as in the Act;

Commented [SS4]: Ordinary shares are the most common investment structure used in NZ deals. Because NZ company ordinary shares can still carry anti-dilution and liquidation preference rights, it isn't necessary to use a US style common stock/Series A stock structure.

Management Accounts means the management accounts (including statements of financial performance and position) for the period ended [insert date];

~~[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]**

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

Other Shareholders' Shares means the shares in the Company held by the Other Shareholders from time to time;

Other Shareholders' Director means a Director appointed by Other Shareholders pursuant to clause 9.3;

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 and comprising the Investor Shares and the Other Shareholders' 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 Investor Shares 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 17.4 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 ~~(including any claim for indemnity)~~.

1.2 Interpretation: In this agreement, unless the context indicates otherwise:

- (a) **Defined Expressions:** expressions defined in the main body of this agreement have the defined meaning throughout this agreement, including the background;
- (b) **Headings:** clause and other headings are for ease of reference only and will not affect this agreement's interpretation;
- (c) **Parties:** references to any **party** include that party's executors, administrators, successors and permitted assigns;
- (d) **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;
- (e) **Plural and Singular:** references to the singular include the plural and vice versa;
- (f) **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;
- (g) **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;
- (h) **Negative Obligations:** any obligation not to do anything includes an obligation not to suffer, permit or cause that thing to be done;
- (i) **Inclusive Expressions:** the term **includes** or **including** (or any similar expression) is deemed to be followed by the words **without limitation**; and
- (j) **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.

2. CONDITIONS

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

- (a) final approval by each Investor's board (where the Investor is a company);
- (b) *[the Investors in their sole discretion and judgement being satisfied with all aspects of the Investors' due diligence review of the Company;*
- (c) *finalisation of the Business Plan for the Company's activities post-Completion;*
- ~~(d) *agreement on Milestones which must be achieved for disbursement of post-Completion Date tranches of the Investment Amount;*~~
- ~~(e)(d) *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;*~~
- ~~(f)(e) *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);*~~
- ~~(g)(f) *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;*~~
- ~~(h)(g) *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*~~
- ~~(i)(h) *evidence that any third party consents or other authorisations required to issue the Investor Shares have been obtained].*~~

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

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

2.3 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.

2.4 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 **78**.

2.5 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.

2.6 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 notice, subject to clauses 13, 15 and 16 of this agreement (which will remain in effect), this agreement will have no further force or effect.

3. TERM OF AGREEMENT

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

3.1 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;

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

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

except for provisions which are intended to survive termination.

4. AGREEMENT TO ISSUE AND SUBSCRIBE FOR INVESTOR SHARES

Subject to satisfaction of the Conditions the Company agrees to issue to the Investors, and the Investors agree to subscribe for, the Investor Shares on the terms and conditions set out in this agreement.

5. COMPLETION AND SUBSEQUENT SUBSCRIPTIONS

5.1 Completion: Completion will take place on the Completion Date.

5.2 Company Obligations at Completion: On or prior to Completion the Company will:

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

(b) **Constitution:** adopt the Constitution.

5.3 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.

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

(a) **Investor Shares:** the issue of the Investor Shares to the Investors pursuant to this agreement;

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

~~(c) **Unvested Shares:** the repurchase of any Unvested Shares in accordance with clause 17.5;~~

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

(e)(c) 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.

5.5 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};~~

(a) ~~Completion Date: of \$[insert amount] on the Completion Date; and~~

(b) ~~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 tranch ed]~~

5.6 Issue of Investor 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 Investor Shares based on the Investors' Proportions.

5.7 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:

(a) **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~~; or

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

(c) ~~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.];~~

5.8 Use of Funds by Company: The Company undertakes to use the sums invested by the Investors solely materially in accordance with the Business Plan or as otherwise approved by ~~the a Majority of Investors~~ (approval not to be unreasonably withheld).

Commented [SS5]: If possible, avoid the Investment Amount being paid against milestones. Early stage companies rarely develop according to plan, and milestones that make sense today are quite likely to become less relevant or in some cases even pointless as circumstances change over time. Worst case scenario is that you are faced with a choice of pursuing milestones that no longer make commercial sense, or to go cap in hand to your investors seeking a waiver of a milestone. It is not uncommon in the latter scenario for investors to require concessions from the company in return for a milestone waiver, e.g. a reduction of the pre-money valuation for this investment tranche.

Commented [SS6]: The company may want to consider deleting this provision on the basis that the investors will still be able to claim against a warranty breach that occurs prior to closing on the same basis as a breach that occurs post closing.

6. VALUE PROTECTION

~~{Drafting note: Use the appropriate anti-dilution clause in clause 6.1 (delete the other)}~~

~~{Narrow-based Weighted-Average anti-dilution}~~

6.1 Anti-dilution: ~~Subject to clause 6.2, 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 Investor Shares ~~(other than pursuant to an approved Share Scheme)~~, then in each case the Company will issue "X" further Investor 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 Investor 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 Investor Shares on issue to the Investor and immediately prior to the issue of the New Securities.

$$IP = OIP * ((A+B) / (A+C))$$

WHERE:

OIP = the Issue Price in respect of the Investor Shares.

A = the number of ~~Investor~~ Shares on issue (on an as converted basis) 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 = the 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 Investor Shares (other than pursuant to an approved Share Scheme), then in each case the Company will issue "X" further Investor 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:~~

~~$$D = IA/DP$$~~

Commented [SS7]: Anti-dilution clauses are intended to protect investors from subsequent share issues at a lower price than they paid (a "down round"). We think this protection is reasonable but should not apply to rights issues as investors are able to protect their investment by participating in the rights issue and taking advantage of any discount offered (sometimes referred to as "pay to play").

The *full ratchet* versus *weighted average ratchet* is a complicated topic, which we discuss in our blog on anti-dilution provisions. In short, a *full ratchet* anti-dilution clause should be strongly resisted by the company as it will often vastly overcompensate the investors in the event of a down round, at the expense of the founders and other existing shareholders.

~~IA = the actual dollar amount invested by the Investor for the Investor Shares under this agreement and immediately before the time the anti-dilute is calculated.~~

~~IP = Dilutive Price per Share.~~

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

6.2 Excluded issues: The anti-dilution rights set out in clause 6.1 will not apply to any issue of Securities.

(a) Share Scheme: under any approved Share Scheme, and, if applicable, any Shares issued on the exercise of any option, warrant or other convertible Security issued under any such Share Scheme;

(b) Rights Issue: in connection with any pro rata rights issue;

(c) Reorganisation of Capital: for nil consideration under any pro rata bonus issue, consolidation or subdivision of any Shares or any reduction or cancellation of share capital (or any similar reorganisation of the capital of the Company) which effects all Shareholders equally;

(d) Conversion: on the conversion of any option, warrant or other convertible Security;

(e) Approved Acquisition: in connection with a transaction where the Company acquires a business or shares in another entity, provided that transaction has been approved by the Investor Director; or

(f) Approved IPO: in conjunction with the terms of an Approved IPO.

6.26.3 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.

6.36.4 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.

6.46.5 Sunset: The provisions of clause 6.1 will only apply for a period of two years from the ~~{Completion Date}~~{relevant Subscription Date}.

7. WARRANTIES

7.1 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~~

(a) Individual Warrantors: the Individual Warrantors warrant that, to the best of their knowledge after due and careful enquiry, the Company is not in breach of any of the Warranties.

7.2 Time Warranties Given: The Warranties referred to in clause 7.1 will be deemed to be given on the date of this Agreement ~~Completion Date~~ and each subsequent Subscription Date.

Commented [SS8]: Anti-dilution clauses are intended to protect investors from subsequent share issues at a lower price than they paid. We think this protection is reasonable but should not apply to securities issued:

- ▲ under employee share schemes that have been approved in advance by the investors, similarly in respect of approved acquisitions and IPOs;
- ▲ under a rights issue, as investors are able to protect their investment by participating in the rights issue and taking advantage of any discount offered (sometimes referred to as "pay to play"). Excluding rights issues from the anti-dilution provision is also an important mechanism for encouraging investors to participate in future rights issues, an important consideration as rights issues are typically undertaken when a company is in critical need of cash from existing shareholders;
- ▲ as part of a share split or similar, as anti-dilution rights should not apply where the investors' shareholding % is unaffected by the relevant transaction; and
- ▲ on the exercise of an option or warrant, as any associated anti-dilution rights would have been triggered on the date that those securities were first granted and should not apply again at the time they are exercised.

Commented [SS9]: Very generally, if a representation is given by the company which turns out to be false, the investors may be able to set aside the agreement and be restored to their pre-contractual position. In contrast, the remedy for breach of a warranty is damages, assessed so as to put the investors in the position they would have been in had the warranty been true. We think that the latter is the more appropriate remedy if any of the warranties are determined to be untrue.

Commented [SS10]: Warranties should be given by the company only, not shareholders (other than the founders, if the company is very early stage and has been managed by the founder). The effect of shareholders giving warranties is that those shareholders are personally liable for any breach of those warranties. If a shareholder is to give any warranties, the liability of that shareholder should be limited to his or her knowledge (in which case retain the section highlighted in yellow) and to a specified amount, say \$50,000 (in which case retain the deleted section highlighted in yellow below).

Commented [SS11]: From the companies perspective, the warranties should be made as at the date the company executes the agreement, so that the company is able to assess the accuracy of the warranties at that time and disclose against them as necessary. To the extent that the investors require the warranties to be repeated at closing, the company will need a mechanism to update its disclosures to cover any matters that arise between the date of the agreement and closing.

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

- (a) Disclosed in Exceptions Schedule: are ~~fully and~~ fairly disclosed ~~with sufficient particularity~~ in schedule 4; ~~or~~
- (b) Disclosed During Due Diligence: are fairly disclosed in writing to the Investors by or on behalf of the Company in connection with the Investors' due diligence investigation of the Company;
- (c) Publicly Available Information: were available on a public register, file or record maintained by the New Zealand Companies Office, the Intellectual Property Office of New Zealand or the Personal Property Securities Register as at the date of this agreement;
- (a)(d) Provided for in this Agreement: are expressly provided for, or contemplated by, this agreement; or
- (b)(e) Actions with Consent: arise because of an action taken by the Company with ~~the~~ a Majority of Investors' or the Investor Directors' prior express written consent.

Commented [SS12]: The investors should not be able to bring a warranty claim that relates to any matter that was sufficiently disclosed in writing to the investors during due diligence, or that is a matter of public record. These are matters for the investors to consider during their due diligence investigation and, to the extent that they are accepted at that stage of the investment process (by the investors confirming that the due diligence condition is satisfied), it is not appropriate for the investors to subsequently bring a warranty claim based on those same matters.

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

Commented [SS13]: If the company has agreed to provide the warranties on an indemnity basis, then that indemnity should (i) apply only in respect of breaches of the warranties, (ii) only be provided by the company, and not any founders, officers, shareholders, employees or similar, and (iii) be subject to the same limitations and caps set out in clauses 7.3, 7.5 and 7.7 (as is the case in this amended version of the agreement).

7.5 Timing: The Company will have no obligation to the Investors in respect of any Warranty Claim unless written notice of the Warranty Claim setting out the specific details of the Warranty Claim is given to the Company within 24 months of Completion (or within 7 years of Completion in the case of a Warranty Claim relating to paragraph 8 of schedule 3);

Commented [SS14]: The warranties should be provided for a maximum of 24 months following completion. This period will cover at least one full financial year and the preparation of full year financial accounts for that year. This process should be sufficient for the investors to identify any potential warranty claims. The company must be able to draw a line under any warranties that it provides after a reasonable period of time.

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

- (a) 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
- (b) Binding Obligation:** this agreement constitutes valid and binding obligations of that party enforceable against that party in accordance with its terms.

7.6.7 Warranty Cap: The Company's liability to the Investors under or in connection with a Warranty Claim will not exceed the total amount invested in the Company by the Investors in accordance with this Agreement.

Commented [SS15]: In no circumstance should the company be liable under a warranty claim for an amount in excess of the amount received from the investors.

7.7 [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**].

8. THE COMPANY'S OBJECTS AND BUSINESS

8.1 Primary Objects: The Company's primary objects are to:

- (a) **Business:** where consistent with clause 8.1(b) develop and grow the Business in a manner consistent with the Business Plan; and
- (b) **Maximise:** maximise the value of the Company.

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

9. BOARD AND PROTECTIVE PROVISIONS

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

9.2 Investor Directors: ~~While the Investors hold, in aggregate, at least [15]%~~ 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.

9.3 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.~~

Commented [SS16]: Director appointment rights should fall away if the percentage of the company held by the investors ceases to be material.

9.49.3 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.

Commented [SS17]: Allowing all investors to have an observer at board meetings is likely to make board meetings something of a circus. If a specific investor (e.g. NZVIF) requires an observer right, this can be dealt with explicitly.

9.59.4 [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.]

9.69.5 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.

9.79.6 Initial Directors: The initial Directors of the Company will comprise:

- (a) **Investor Director[s]:** **[insert names]** as the Investor Director[s]; **[and]**
- (b) **Other Shareholders' Director[s]:** **[insert names]** as the Other Shareholders' Director[s]; **[and]**
- (c) **[Additional Director[s]:** **[insert names]** as the Additional Director[s].]

9.89.7 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.

9.99.8 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.

9.109.9 Meetings: The Board will meet [~~bf:~~ **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:

- (a) **Report:** a report from the [**Managing Director**][**Chief Executive Officer**] setting out the key issues relating to the Business;
- (b) **Cashflow:** a cashflow forecast showing forecast cashflows for each of the [**insert number**] months from and including the current month; [**and**]
- (c) [**Statements: the most up-to-date financial statements as described in clause 11.3; and**]
- (d) **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.

9.119.10 Directors' Fees and Expenses:

- (a) **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
- (b) **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.

9.129.11 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.

9.139.12 Matters Requiring Support of Investor Director: [**For a period of two years following the Completion Date, [i]n 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]:**

- (a) [**Approval of Business Plan: approving each Business Plan and all material amendments to or departures from the current Business Plan, such approval not to be unreasonably withheld;**
- (b) **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];**

Commented [SS18]: From the Company's point of view, minority rights of veto over the conduct of the business potentially limit the commercial freedom of the company and in a worst case scenario could allow a minority to "greenmail" the majority. Consider asking for the protective provisions to apply for a fixed period, on the basis that these provisions are reasonable while the company is expending investor funds, but would ideally then drop away. An alternative (but less desirable) approach would be for the rights of veto to cease to apply if the investor's shareholding falls below a stated %.

Commented [SS19]: The adoption of budgets and business plans of the company are important operational matters for the business which affect all shareholders. Investors should be required to act reasonably in respect of any such decision.

- (c) ~~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);~~
- (d)(c) **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], such approval not to be unreasonably withheld;
- (e)(d) **Borrowings:** borrowing any money or otherwise providing any guarantee, indemnity or other contingent commitment or granting any security over assets of the Company, the value of which is greater than \$[insert amount];
- (f)(e) **Purchase of Securities:** any purchase by the Company of any securities of any other company;
- (g)(f) **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;
- (h)(g) **Appointment:** any change to the Director appointment rights (otherwise than pursuant to clauses 9.2 or 9.3); and
- (i) ~~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)]~~
- (j)(h) [insert any other matters]

Commented [SS20]: It is critical that the board has the power to raise further capital when required without any party having a unilateral right of veto, since the growth company model almost always involves future funding rounds. Investors do not need a right of veto if the term sheet provides for pre-emptive rights on new share issues, and anti-dilutes.

Commented [SS21]: The appointment and remuneration of senior employees are important operational matters for the business which affect all shareholders. Investors should be required to act reasonably in respect of any such decision.

9.149.13 Matters Requiring Special Shareholder Approval: In addition to the requirements of clause 9.12 the parties will ensure that the following only occur where approved by a Special Resolution:

- (a) **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;
- (b) **Business:** any significant change in the nature of the Company's business (whether by acquisition or otherwise); and
- (c) **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).

10. MANAGEMENT OF THE COMPANY

- 10.1 General Management:** The management structure of the Company will be determined by the Board from time to time.
- 10.2 [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.

10.3 ~~[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 referred to the Board for~~
~~approval supported by the Investor Director member. The remuneration~~
~~committee will be responsible for]~~~~[The Board will be responsible for]:~~

- (a) ~~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~~
- (b) ~~[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] (with the support~~
~~of the Investor Director) 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.]~~

10.4 **Key Person Insurance:** The Company will procure and maintain and at least once annually review, such key man life insurance policies for such Key People as the Board determines is prudent (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.

Commented [SS22]: Consider whether key man insurance is something the company wishes to have/can afford.

11. ANNUAL BUDGETS AND REPORTING

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

11.2 **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).

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

- (a) **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;
- (b) **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];~~
- (c) **Six (6) Monthly/Quarterly Statements:** within **[20]** Business Days after the end of each second Quarter, unaudited financial statements;
- (d) **[Monthly Cashflow Statements: within [5] Business Days after the end of each calendar month, a cashflow statement for that month,**

Commented [SS23]: It will very rarely be cost effective for an early stage company to engage an auditor.

and for the financial year to date and a cashflow forecast for the next [3] months; and]

- (e) **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.
- 11.4 **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.
- 11.5 **Annual Budget:** Subject to clause 9.12, 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.
- 11.6 **Compliance:** The Board will:
- (a) **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
- (b) **Compliance Breaches:** adopt appropriate procedures to ensure that any material breach of the compliance procedures is reported to it without delay.
- 11.7 **Investors' Access:** The parties will procure:
- (a) **Company Records:** the Company, upon receiving reasonable notice, to make available to the Investors or any observer appointed by an Investor pursuant to this agreement clause 4.4 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
- (b) **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.
- (c) **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:
- (i) any development relating to the Company which might prejudice the reputation of any Investor; and
- (ii) 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).

12. FURTHER CAPITAL RAISING

- 12.1 **Issued Securities:** No third party will be issued Securities unless:

(a) Pre-emptive Rights: subject to clause 12.2, 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) (**Declined Securities**) will be offered to those Investors that took up all of their entitlement within that 30 day period and those Investors will be given not less than 15 Business Days to notify the Company if they wish to purchase some or all of the Declined Securities. If there are insufficient Declined Securities to satisfy those requests, the Declined Securities must be divided amongst those Investors who request Declined Securities on a pro rata basis, except no Investor will be allocated more Declined Securities than the number which that Investor has requested and any Declined Securities remaining unallocated after that proportional division (or any subsequent division) will be used to satisfy any requests for Declined Securities which remain unsatisfied, on a pro rata basis in respect of the relevant Investors (on the same terms and on a pro rata basis in each case).

(a) Other Investors: ~~to the other Investor(s); and~~

(b) 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 this clause 12.1(a) or 12.1(b) within 15 Business Days of the offer under clause 12.1(a) may, at any time within 4 months of the date the Securities are offered to the Investors under this clause 12.1(a), be offered to third parties on terms which are not more favourable than were offered to the Investors, other than the giving of warranties and indemnities which are common in an agreement of that type with a third party investor; and~~

(b) Accession: that third party has signed a deed of accession, in [~~the form attached as schedule 1042 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.

12.2 Exempted Issues: The provisions of clause 12.1(a) will not apply to any issue of Securities that is:

(a) Share Scheme: expressly contemplated by this Agreement (including any Securities issued under a Share Scheme);

(b) Majority Investor Consent: approved in writing by a Majority of Investors; or

(c) Subdivision or Consolidation: for nil consideration under any pro rata bonus issue, consolidation or subdivision of any Securities or any reduction or cancellation of Securities (or any similar reorganisation of the capital of the Company) which affects all Shareholders equally.

Commented [SS24]: We have inserted standard carve-outs to the investors' pre-emptive rights in clause 12.1(a).

13. TRANSACTION FEES AND COSTS

13.1 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]~~.

Commented [SS25]: The transaction fee sought by Angel groups is up to 6% of all funds raised through them including on the NZVIF money. This % is negotiable depending on the circumstances.

13.2 Reasonable Costs: ~~Subject to Completion,~~ ~~T~~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 ~~documented~~ 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].~~

Commented [SS26]: Ensure these costs are limited to a maximum amount - \$10,000 (plus GST) is common – and are payable only if the investment is completed.

~~13.3 [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).]~~

The legal and professional expenses which may be incurred by the company in negotiating the investment should not be capped.

13.4-13.3 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.

14. AGREEMENT TO TAKE PRIORITY

In the case of any conflict or inconsistency between:

14.1 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

14.2 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.

15. 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.

16. CONFIDENTIALITY

16.1 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:

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

- (b) **Officers, etc:** on a confidential basis, in the case of each Shareholder, to an officer, employee or professional adviser of that Shareholder;
- (c) **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~~
- (d) **Agreement:** as required in connection with the implementation or enforcement of this agreement; ~~or~~
- (e) **Transaction:** as is reasonably necessary in connection with any proposed:
 - (i) financing of that party;
 - (ii) sale of that party's interest in the Company; or
 - (iii) sale of all or part of the business of, or the shares in, that party.

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.

- 16.2 **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.
- 16.3 **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.
- 16.4 **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.

17. **ASSIGNMENT AND [RESTRICTED TRANSFER SHARES][VESTING]**

- 17.1 **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 1012 or any other][an]** approved form reasonably acceptable to the Company, agreeing to be bound by this agreement.
- 17.2 **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).
- 17.3 **[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:

- (a) **Tag Along:** the sale is pursuant to the exercise of the "tag along" or "drag along" rights in the Constitution, if any;
- (b) **IPO:** the sale is an Approved IPO, ~~or other~~ transaction approved by the Investors ~~or any other transaction~~ where the Investors have the opportunity to sell on identical terms; ~~or~~
- (c) **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. ~~;~~
- (d) **Majority Investor Consent:** The sale, transfer or disposal is approved by a Majority of Investors; ~~or~~
- (e) **Minority Transfer:** following the sale, transfer or disposal the Key Person will have sold, transferred or otherwise disposed of no more than 25% of the Shares held by that Key Person as at the date of this agreement.

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

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

- (a) ~~Initial Vesting: 25% will vest on the date that is 12 months after the Completion Date; and~~
- (b) ~~Subsequent Vesting: at a rate of 1/36th of the balance of the end of each month thereafter, provided that the relevant Key Person remains engaged by the Company to provide services, whether as a contractor or employee at the date of vesting.~~

17.5 ~~Buy Back: If a Key Person:~~

- (a) ~~No Longer Engaged: ceases to be employed or engaged by the Company to provide services;~~
- (b) ~~Non-permitted Transfer; attempts to transfer any of its Unvested Shares (other than as permitted by this agreement); or~~
- (c) ~~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.~~

17.6 ~~Bad Leaver: Without limiting clause 17.5, if:~~

- (a) ~~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.~~

Commented [SS27]: Founder vesting is common with Silicon Valley start ups and is becoming more popular in New Zealand as co-founders are increasingly meeting through incubators or accelerator programs, rather than longstanding business, professional or social relationships. However, in our view founder vesting arrangements (if any) should ideally be agreed and dealt with separately amongst the co-founders before seeking investment, rather than negotiated as part of the SuSA. For an example co-founder agreement see Simmonds Stewart's *template co-founder agreements* under the *governance* section of the templates page of our website.

Commented [SS28]: If any founder vesting is to be included then the 'bad leaver' wording in clauses 17.6 to 17.9 should still be removed as a right to buy back all of a founder's shares is particularly draconian. The concept of a *bad leaver* is relatively common in situations like employee share options where a person is receiving an equity interest for free in order to incentivise future commitment to the company. In that case, if their future behaviour is sufficiently poor so as to be terminated as a *bad leaver* then it makes sense for them to potentially lose all of their equity interests. That logic does not hold in the case of a founder who has earned their shares or other equity as a result of their past blood, sweat, tears and/or investment.

- (b) ~~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.~~
- (c) ~~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.~~
- 17.7 ~~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.~~
- 17.8 ~~Suspension: To the extent permitted by law, from time to time the Company gives notice under clause 17.6(b):~~
- (a) ~~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~~
- (b) ~~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.~~
- 17.9 ~~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]~~

- ~~17.4017.4 [Insert nominee company name] Holds Investor Shares: The parties acknowledge that the [insert nominee company name] holds the Investor Shares as nominee of and as bare trustee for the Beneficial Investors and that clause 3 of schedule 11 this agreement and clause 6 of the Constitution will not apply to a transfer of Investor Shares to one or more Beneficial Investors who already beneficially own those shares. [insert nominee company name]:~~
- (a) ~~Deal Separately: may deal with Investor Shares held on behalf of one Beneficial Investor independently of the other Investor Shares it holds (provided it complies with the requirements of this agreement and the Constitution in respect of that dealing); and~~
- (b) ~~Transfer Notice: must, if it receives notice of a transfer of beneficial ownership of any of the Investor Shares [but subject to clause Error! Reference source not found.14.3], deliver a Transfer Notice to the Company pursuant to clause 6.2 of the Constitution.]~~

Commented [SS29]: The suggested buy-back price is very punitive. In addition to the 50% discount stated, using *fair market value* rather than *fair value* would also include a discount to reflect the illiquidity of the buy-back shares and a minority interest discount (where the buy-back shares represent less than 50% of the company's issued capital). Those illiquidity/minority interest discounts may be in the range of 30-40%.

Commented [SS30]: In no circumstances should the board be able to unilaterally determine the FMV of a founder's shares. Both parties should seek to agree, and if they cannot an independent third party should be engaged to determine the relevant price.

~~17.11~~^{17.5} **[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.]**

18. EXISTING SHAREHOLDERS' ACKNOWLEDGMENT

- 18.1 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.
- 18.2 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.

19. NOTICES

- 19.1 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:
- (a) delivered by hand to the intended recipient's address as set out in schedule 1;
 - (b) 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
 - (c) 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.
- 19.2 Time of Delivery:** Any notice transmitted by facsimile or email or 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).

20. NO RELIANCE

Each party confirms to each other party that it:

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

Commented [SS31]: Each of the *Existing Shareholders* should carefully consider whether any amounts (such as shareholder loans, shareholder current accounts or declared but unpaid dividends) should be carved out of this acknowledgement.

20.2 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.

21. INVESTOR DISCLAIMERS

21.1 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.

21.2 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.

22. GENERAL

22.1 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.

22.2 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:

- (a) **Affects Specific Right:** affects any special right given to an individual Shareholder; or
- (b) **Increases Obligations:** materially increases the obligations imposed on a Shareholder;

must also be approved in writing by the affected Shareholder.

22.3 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.

22.4 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.

22.5 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.

- 22.6 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.
- 22.7 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:
- (a) **Proof:** the transmission will be deemed proof of signature of the original; and
 - (b) **Counterpart:** the signed counterpart copy will be deemed an original for the purposes of this agreement.
- 22.8 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.
- 22.9 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.
- 22.10 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.

23. [TRUSTEE LIABILITY

- 23.1 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).*
- 23.2 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.*
- 23.3 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]

**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

- 1.1 Schedules:** The details set out in schedule 1 are true and accurate.
- 1.2 Information:** All written 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 materially misleading in its context, whether by omission or otherwise), excluding budgets, projections, forecasts and other forward looking information. All documents given to the Investors are true and complete copies of the originals.
- 1.3 Full Disclosure:** As far as the Warrantor is aware, All information relating to the Company which is material for the evaluation of its financial condition and trading prospects has been fairly fully and accurately disclosed to the Investors in a manner that would not mislead a reasonable investor as to the state of the Company.
- 1.4 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.~~

Commented [SS32]: The information warranty should apply to written, historical and factual information only.

Commented [SS33]: A number of the warranties set out in this schedule should be limited to the awareness of the company so that the warranty will not be breached if a claim subsequently arises over matters that the company was not aware of at the time of the investment.

2. SHARES AND OPTIONS

- 2.1 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.
- 2.2 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

- 3.1 Arrangements with Existing Shareholders:** There are no:
- (a) loans made by the Company to the Existing Shareholders, or any Associate of any Existing Shareholder;
 - (b) 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
 - (c) 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.
- 3.2 Related Contracts:** Except for services provided to the Company by the Existing Shareholders and/or any Associate of them:

- (a) there are no existing and continuing contracts or arrangements between the Company and Existing Shareholders and/or any Associate of any Existing Shareholder; and
- (b) 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.

3.3 Competition by Existing Shareholders: As far as the Warrantor is aware, 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 Investor Shares and the execution of this agreement and the allotment and issue of the Investor 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.

5. 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, other than:

- (a) encumbrances arising by operation of law; or
- ~~(a)(b)~~ purchase money security interests as defined in the Personal Property Securities Act 1999.

6. INTELLECTUAL PROPERTY

6.1 Ownership: As far as the Warrantor is aware, 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).

6.2 Rights: All Intellectual Property used by the Company in, or in connection with, the Business:

- (a) 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);
- (b) 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;
- (c) is done so on usual terms made available by the relevant third party owner; and

Commented [SS34]: These are standard carve outs for encumbrances that commonly arise in the ordinary course of business. For example, the lease of office equipment.

(d) 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.

6.3 No Infringement: As far as the Warrantor is aware, ~~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 is aware, no claims relating to Intellectual Property used by the Company are pending or threatened by any third party.

6.4 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.

6.5 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.

6.6 Confidential Information: As far as the Warrantors is aware, there has not been any unauthorised disclosure of any of the Company's financial or trade secrets or other Confidential Information.

6.7 Patent Rights: In respect of any patents which are owned by the Company:

(a) as far as the Warrantor is aware, they are the full legal, beneficial and unencumbered property of the Company;

(b) as far as the Warrantor is aware~~to the best knowledge and belief of the Company,~~ the Company ~~will have~~ has and enjoys quiet possession of the patents uninterrupted by any other person; and

(c) as far as the Warrantor is aware,~~to the best knowledge and belief of the Company,~~ the Company is not aware of any there are no facts or circumstances existing by which the patents may be declared invalid, or any claim by which the patents should be amended.

7. ACCOUNTS

7.1 Preparation of Accounts: The Accounts have been prepared in accordance with applicable New Zealand legislation and GAAP. ~~The Accounts 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.

7.2 Preparation of Management Accounts: The Management Accounts contain no material inaccuracies and were prepared applying accounting practices consistent with those used to prepare the unaudited management accounts of the Company during the 6 month period ending on the date of this agreement.

7.27.3 Since Management Accounts Date: Since the date of the Management Accounts, the Company has not:

(a) authorised or paid any dividend, or made any other distribution (as defined in the Companies Act 1993) or repaid any loans from Shareholders (other

Commented [SS35]: It is only appropriate to provide these warranties in respect of the company's full year financial accounts. Management accounts are typically not prepared in accordance with GAAP.

than with prior written consent of ~~the~~ the Majority of Investors or as specified in this agreement); or

- (b) 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~~ the Majority of Investors' prior written consent.

8. NO PROCEEDINGS

8.1 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.

8.2 No Existing Cause of Action: As far as the Warrantors ~~is~~ 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.

9. EMPLOYMENT

9.1 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, as far as the Warrantor is aware, no event has occurred which might give rise to any such dispute.

9.2 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.

10. CONTRACTS

10.1 Material Contracts: All material contracts, commitments or arrangements of any nature whatsoever to which the Company is party have been disclosed to the Investors.

10.2 No Breach of Contract: As far as the Warrantors ~~is~~ are aware, neither the Company nor any counterparty to any material contract, commitment or arrangement of any nature whatsoever:

- (a) is in material default; or
- (b) 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.

10.3 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:

- (a) terminate the relevant material contract, commitment or arrangement;
- (b) require adoption of terms less favourable to the Company; or

(c) do anything which would materially adversely affect the interests, Business or assets of the Company.

10.4 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.

10.5 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.

10.6 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.

11. TAXATION

11.1 Lodgement of Returns: The Company has lodged all Taxation returns, reports, declarations, notices, certificates, reconciliations and other information required to be lodged by ~~it~~them with the appropriate body within the relevant time limits.

11.2 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.

11.3 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.

12. BOOKS AND RECORDS

The Company has properly kept and maintained:

12.1 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;

12.2 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

12.3 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.

13. CONSENTS

13.1 Consents: The Company holds all consents required for the carrying on of the Business and as far as the Warrantors isare aware is not in breach of the terms and conditions of any such consents.

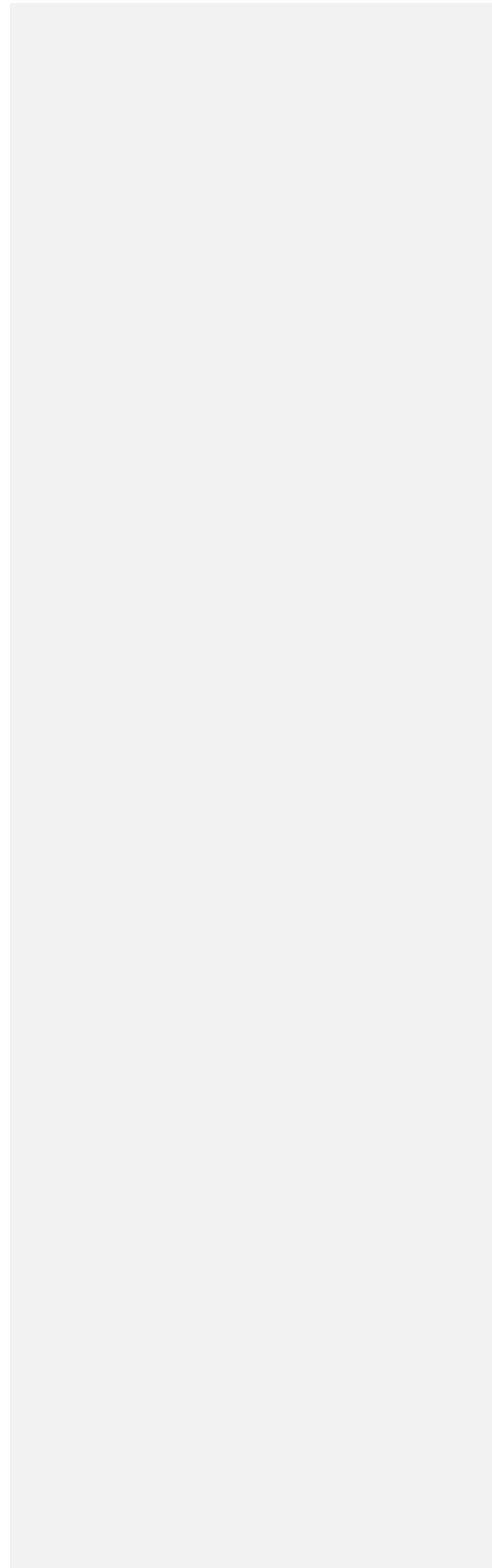
13.2 Consents Not Prejudiced: None of these consents will be prejudiced or revoked by virtue of the execution, delivery and performance of this agreement.

14. OTHER OBLIGATIONS

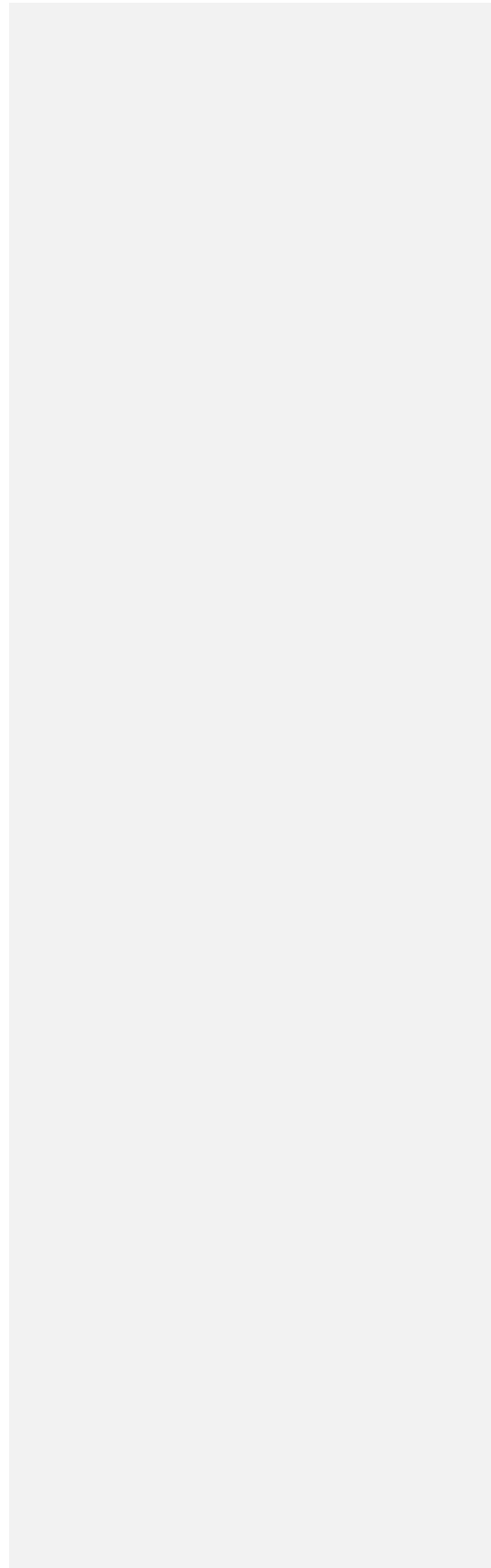
The Company is not affected by any material commitment or obligation which has not been reflected in the Accounts or the Management Accounts or specifically approved by ~~the~~ Majority of Investors in writing or disclosed to the Investors before the date of this agreement.

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:

- (d) ~~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].~~
 - (e) ~~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 78

FORM OF CONDITIONS PRECEDENT LETTER

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 89

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 Investor Shares 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 Investor 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 910
FORM OF QUARTERLY REPORT

Company	[Company Name]
Report Period	Quarter ended [DD MONTH YEAR]
Highlights	<p><i>Briefly describe the highlights / key developments (positive and/or negative) from the quarter:</i></p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>
Key Flags	<p>1. Were there any changes to the Board and / or key management in the quarter?</p> <p>NO <input type="checkbox"/> YES <input type="checkbox"/></p> <p><i>If yes, please briefly describe:</i></p> <p>.....</p> <p>.....</p> <p>.....</p> <p>2. Were there any legal proceedings initiated or threatened by or against the company?</p> <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p><i>If yes, please briefly describe:</i></p> <p>.....</p> <p>.....</p> <p>.....</p>

3. Was there any material change to the type of business being carried on by the company?

YES NO

If yes, please briefly describe:

.....
.....
.....

4. Are there any additional capital raisings planned?

YES NO

If yes, please briefly describe:

.....
.....
.....

5. 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 102

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:
 - (a) proposes to hold [*Investor Shares*][*Other Shareholders' Shares*]; and
 - (b) 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 Existing Shareholder*]
2. In this deed poll:
 - (a) [*Investor Shares*][*Other Shareholders' Shares*] has the meaning given to that term in clause 1.1 of the Shareholders' Agreement.
 - (b) **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

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NZVIF SPECIFIC CLAUSES

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

1. MATCHING CAPITAL

Matching Capital: The parties acknowledge that:

- 1.1 **Investor Investment Amount:** NZVIF's obligation to subscribe its Investor Investment Amount under clause 5.5 of this agreement; and
- 1.2 **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.

2. PROHIBITED BUSINESS

Prohibited Businesses: Without limiting clauses 9.12 and 9.13 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.

3. CO-SALE RIGHTS

- 3.1 **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.
 - 3.2 **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,
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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.

4. REPORTING

- 4.1 **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 940 to this agreement.
- 4.2 **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).