
CONFIDENTIALITY AGREEMENT

between

EMERGE MOBILE PROPRIETARY LIMITED

(Registration Number 2012/067507/07)

and

(Registration Number _____)

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THE PARTIES AGREE THAT –

1 DEFINITIONS

In this Agreement, unless a contrary intention clearly appears, the following terms shall bear the meanings assigned to them and cognate expressions shall have corresponding meanings –

- 1.1 **“Agreement”** means this confidentiality agreement;
- 1.2 **“Business Day”** means a day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;
- 1.3 **“Confidential Information”** means all information and data of any nature whatsoever, whether tangible, intangible, oral or in writing and in any format or medium, that is obtained or learned by, disclosed to or comes to the knowledge of a Party (**“Receiving Party”**) by or from the other Party (**“Disclosing Party”**) during the course or arising out of the relationship between the Parties, including carrying out the Purpose, which information or data by its nature or content is, or ought reasonably to be, identifiable as confidential or proprietary to the Disclosing Party or which is provided or disclosed in confidence. Without limitation, Confidential Information of the Disclosing Party shall include the following even if it is not marked as being ‘confidential’, ‘restricted’ or ‘proprietary’ (or any similar designation) –
 - 1.3.1 information relating to its strategic objectives and business plans;
 - 1.3.2 information relating to its business relationships, customers and Staff;
 - 1.3.3 information contained in or constituting any information technology system of the Disclosing Party or used by it;
 - 1.3.4 Intellectual Property that is proprietary to the Disclosing Party;
 - 1.3.5 Intellectual Property that is proprietary to a third party and in respect of which the Disclosing Party has rights of use or possession.

Confidential Information excludes information or data which –

- 1.3.6 is in the public domain at the time of its disclosure to the Receiving Party or subsequently becomes part of the public domain by publication or otherwise, other than by breach of an obligation of confidentiality by the Receiving Party or any third party;
- 1.3.7 becomes available to the Receiving Party from a source, other than the Disclosing Party, which is lawfully entitled to disclose such Confidential Information to the Receiving Party;
- 1.3.8 is disclosed pursuant to a requirement or request by operation of law, regulation or court order but then only to the extent so disclosed, and then only in the specific instance and under the specific circumstances in which it is obliged to be disclosed;

provided that –

- 1.3.9 the onus shall at all times rest on the Receiving Party to establish that such information or data falls within an exclusion;
- 1.3.10 the information or data disclosed is deemed not to be within the foregoing exclusions merely because such information or data is embraced by more general information or data in the public domain or in a third party’s possession;
- 1.3.11 a combination of features is deemed not to be within the foregoing exclusions merely because individual features are in the public domain or in a third party’s possession. Such combination of features shall be excluded only if the combination itself is in the public domain or was already in a third party’s possession.

The determination of whether information is Confidential Information shall not be affected by whether or not such information is subject to, or protected by, common law or statute related to copyright, patent, trade marks or otherwise;

- 1.4 **“Counter-Party”** means _____, registration number _____, a company duly registered and incorporated with limited liability in accordance with the laws of _____ and incorporating its Subsidiaries and its Holding Company and each of their Subsidiaries and all of their respective Related companies, herein represented by Mr/s. _____ in his/her capacity as director, s/he being duly authorised thereto;

- 1.5 **“Effective Date”** means _____, notwithstanding the Signature Date;
- 1.6 **“Emerge Mobile”** means Emerge Mobile Proprietary Limited, registration number 2012/067507/07, a company duly registered and incorporated with limited liability in accordance with the laws of the Republic of South Africa and incorporating its Subsidiaries and its Holding Company and each of their Subsidiaries and all of their respective Related companies, herein represented by Mr. Matthew Putman in his capacity as director, he being duly authorised thereto;
- 1.7 **“Holding Company”** shall bear the meaning assigned thereto in the Companies Act, 2008;
- 1.8 **“Intellectual Property”** means, collectively, copyright, registered and unregistered trade marks, logos, style names, slogans, designs, models, methodologies, Know-How, inventions, trade and business secrets and any other type of intellectual property (whether registered or unregistered including applications for and rights to obtain, use or for their protection) which are used or held, whether or not currently, in connection with the business and operations of a party;
- 1.9 **“Know-How”** means ideas, designs, documents, diagrams, information, devices, technical data, scientific data, secret and other processes and methods used in connection with the business and operations of a party, and, all available information regarding marketing and promotion of the products and services of a party, and, all and any modifications or improvements to any of them which do not constitute entirely new products or services;
- 1.10 **“Losses”** means all losses, damage, damages (including direct, general, indirect, special and consequential damages), liabilities, costs, expenses, fines, penalties, and claims, and all related costs and expenses (including legal fees on the scale as between attorney and own client, tracing and collection charges, costs of investigation, interest and penalties);
- 1.11 **“Parties”** means Emerge Mobile and Counter-Party and **“Party”** (including when used as a reference to Disclosing Party and Receiving Party) shall be a reference to one of them as determined by the context;
- 1.12 **“Purpose”** means to investigate the potential for Emerge Mobile (with its product/service offerings and its capabilities) and Counter-Party (with its product/service offerings and its capabilities) to _____
as well as other strategic relationships between the Parties based on the Parties’ respective businesses, Know-How, customer bases, Intellectual Property and other competencies;
- 1.13 **“Related”** shall bear the meaning assigned thereto in the Companies Act, 2008;
- 1.14 **“Signature Date”** means the date of signature of this Agreement by the Party signing last in time;
- 1.15 **“Staff”** means a Party’s employees, independent contractors, agents, consultants, professional advisers or other representatives;
- 1.16 **“Subsidiary Company”** or **“Subsidiary”** shall bear the meaning assigned thereto in the Companies Act, 2008.

2 INTERPRETATION

- 2.1 Clause headings in this Agreement are for the purpose of convenience and reference only and shall not be used in the interpretation of nor modify nor amplify its terms nor any of its clauses.
- 2.2 In this Agreement unless a contrary intention clearly appears, words importing: any one gender include the other two; the singular include the plural and *vice versa*; natural persons include legal entities (corporate or unincorporate) and the state and *vice versa*.
- 2.3 Any reference to an enactment in this Agreement is to that enactment as at the Signature Date and as amended or re-enacted from time to time.
- 2.4 Any substantive provision in any definition in this Agreement which confers rights or imposes obligations on a Party shall, notwithstanding that it is only in a definition, be given effect to as if it were a substantive provision in the body of the Agreement.
- 2.5 When a number of days is prescribed in this Agreement, they shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a Saturday, Sunday or public holiday, in which case the last day shall be the next succeeding Business Day.
- 2.6 Defined expressions in this Agreement shall bear the same meanings in schedules to this Agreement which do not themselves contain their own definitions.

- 2.7 Reference to days, months or years in this Agreement shall be construed as Gregorian calendar days, months or years.
- 2.8 The use in this Agreement of any expression covering a process available under South African law such as a winding-up (without limitation *eiusdem generis*) shall, if any Party to this Agreement is subject to the law of another jurisdiction, be construed as including equivalent or analogous proceedings under that law.
- 2.9 Any term defined within the context of any particular clause in this Agreement shall, unless otherwise determined by the context, bear the meaning ascribed to it for all purposes in terms of this Agreement, notwithstanding that such term is not defined in the definition clause.
- 2.10 Expiration or termination of this Agreement shall not affect such of its provisions as expressly provide that they shall continue to operate thereafter or which of necessity must continue to have effect thereafter notwithstanding that the clauses themselves do not expressly provide for this.
- 2.11 In this Agreement the rule of construction that a contract shall be interpreted against the party responsible for the drafting or preparation of the contract, shall not apply.
- 2.12 Any reference in this Agreement to a Party shall, if such Party is liquidated or sequestrated, be applicable also to and binding upon that Party's liquidator or trustee, as the case may be.
- 2.13 In this Agreement the words "include", "including" and "in particular" shall be construed as being by way of example or emphasis only and shall not be construed nor shall they take effect as limiting the generality of any preceding words.
- 2.14 In this Agreement the words "other" and "otherwise" shall not be construed *eiusdem generis* with any preceding words where a wider construction is possible.

3 COMMENCEMENT AND APPLICATION

This Agreement shall commence on the Effective Date and endure indefinitely thereafter unless otherwise terminated in accordance with its terms. Notwithstanding anything to the contrary herein contained, it is expressly agreed between the Parties that the provisions of this Agreement shall apply to all Confidential Information that has been disclosed or provided by the Disclosing Party or received by the Receiving Party at any stage during the relationship between them, regardless of whether such Confidential Information was disclosed or provided by the Disclosing Party or received by the Receiving Party prior to the Signature Date.

4 CONFIDENTIALITY

- 4.1 The Receiving Party undertakes to treat all Confidential Information of the Disclosing Party as strictly confidential and not to use the Confidential Information of the Disclosing Party other than for the Purpose and for the sole and exclusive benefit of the Disclosing Party. The Receiving Party shall not directly or indirectly use the Confidential Information for its own benefit or the benefit of any other person unless expressly authorised to do so in writing by the Disclosing Party, which may withhold such consent in its sole and absolute discretion.
- 4.2 The Receiving Party shall not disclose the Confidential Information of the Disclosing Party to any person whomsoever other than to the Receiving Party's Staff who are directly involved in carrying out the Purpose and then only on a need-to-know basis. Before revealing any Confidential Information to any such Staff, the Receiving Party shall procure that such Staff have signed a similar undertaking in favour of the Disclosing Party and that they are made aware of the confidential nature of the Confidential Information being made available to them. The Receiving Party will ensure and procure that such Staff observe and comply with these confidentiality obligations, whether or not they are still employed or contracted by the Receiving Party.
- 4.3 The Receiving Party will initiate internal security procedures reasonably acceptable to the Disclosing Party to prevent unauthorised disclosure of the Disclosing Party's Confidential Information.
- 4.4 The Receiving Party agrees to use the same standard of care (which shall not amount to less than a reasonable standard of care) in protecting the Disclosing Party's Confidential Information, as its uses to protect its own confidential information.
- 4.5 The Receiving Party agrees that in the event it is required to disclose the Confidential Information pursuant to clause 1.3.8, it will advise the Disclosing Party thereof prior to disclosure, if possible, and will further, to the extent that it is lawfully able to –
- 4.5.1 take such steps to limit the extent of the disclosure;
- 4.5.2 afford the Disclosing Party a reasonable opportunity to intervene in the proceedings;

- 4.5.3 comply with the Disclosing Party's requests as to the manner and terms of any such disclosure.
- 4.6 Upon termination or expiry of this Agreement, the Receiving Party will either deliver to the Disclosing Party, or, at the Disclosing Party's election as evidenced in writing, destroy, all originals and copies (including partial copies) of the Disclosing Party's Confidential Information disclosed or provided to or received by the Receiving Party or in its possession, as well as all notes (in any media or format) which the Receiving Party may have prepared or may have obtained as a result of the Confidential Information being made available to the Receiving Party. The Receiving Party shall certify its compliance with the aforesaid requirements, to the Disclosing Party, by way of a written notice addressed by a director of the Receiving Party to the Disclosing Party.
- 4.7 The Receiving Party acknowledges that the Disclosing Party's Confidential Information disclosed or provided to or received by the Receiving Party shall include inside information. The Receiving Party further acknowledges that the direct or indirect source of all such inside information is an insider. Any use by the Receiving Party of any such inside information in contravention of the Financial Markets Act, 2012 shall be deemed to be a material breach by the Receiving Party of its obligations in terms of this Agreement. For the purposes hereof, "insider" and "inside information" shall bear the same meanings as defined in the Financial Markets Act, 2012.

5 INTELLECTUAL PROPERTY

All Intellectual Property of a Party shall at all times be and remain that Party's sole property and the other Party shall not acquire any rights, title or interest of any kind in or to any or all of such Intellectual Property. Except as expressly permitted in this Agreement, neither Party shall make use of the Intellectual Property of the other Party without the prior written consent of that other Party, which may withhold its consent in its sole and absolute discretion.

6 INDEMNITY

Each Party hereby indemnifies and holds harmless the other Party and its respective officers, directors, Staff, successors, and assigns (in whose favour this constitutes a *stipulatio alteri*, a benefit for a third party), harmless from any and all Losses arising from, in connection with, or based on allegations of, any claim or action (including product liability) arising from the first-mentioned Party's breach of or failure to observe or perform any of its duties or obligations under this Agreement.

7 BREACH

Should either Party breach any material provision or term of this Agreement (other than those which contain their own remedies or limit the remedies in the event of a breach thereof) and fail to remedy such breach within 3 days of receipt of notice requiring it to do so and warning that if the breach is not so remedied, the other Party may exercise its rights in terms of this clause, or even if the provision or term is not material but a breach thereof has been again committed after 2 warnings from the other Party, then the other Party shall be entitled without notice, in addition to any other remedy available to it at law or under this Agreement, including obtaining an interdict, to cancel this Agreement or to claim specific performance of any obligation whether or not the due date for performance has arrived, in either event without prejudice to its right to claim Losses.

8 NOTICES AND DOMICILIA

8.1 Each Party chooses as its *domicilium citandi et executandi* its address set out herein, for all purposes arising out of or in connection with this Agreement, at which address all processes and notices arising out of or in connection with this Agreement, its breach or termination may validly be served upon or delivered to it.

8.2 For the purpose of this Agreement, the Parties' respective addresses shall be –

8.2.1 as regards Emerge Mobile at:

Unit 4, 12 Frosterley Park, Frosterley Crescent, La Lucia Ridge, Kwa-Zulu Natal, 4051, Republic of South Africa;
 fax number: +27 (0) 315661967;
 marked for the attention of: Mr. Matthew Putman;

8.2.2 as regards Counter-Party at:

_____;
 fax number: _____;
 marked for the attention of: Mr/s. _____;

or at such other address in the Republic of South Africa, not being a post office box or *poste restante*, or other fax number, of which the Party concerned may notify the others in writing.

- 8.3 Any notice given in terms of this Agreement shall be in writing and shall –
- 8.3.1 if delivered by hand, be deemed to have been received by the addressee on the date of delivery;
 - 8.3.2 if delivered by courier service, be deemed to have been received by the addressee on the Business Day following the date of such delivery by the courier service concerned;
 - 8.3.3 if transmitted by fax, be deemed to have been received by the addressee 1 Business Day after dispatch.
- 8.4 Notwithstanding anything to the contrary contained herein, a written notice or communication actually received by any Party from the other shall be adequate written notice or communication to such Party notwithstanding that it was not sent to that Party's chosen *domicilium*.

9 RELATIONSHIP OF PARTIES

The Parties' relationship shall be governed by this Agreement. Nothing in this Agreement shall be deemed to constitute any Party the partner of the other nor constitute any Party the agent or legal representative of the other. It is not the Parties' intention to create nor shall this Agreement be construed to create any commercial or other partnership. Neither Party shall have any authority to act for or to assume any obligation or responsibility on behalf of the other Party nor hold itself out as a partner or agent of the other Party.

10 WARRANTY OF AUTHORITY

Each Party warrants to the other that it has the power, authority and legal right to sign and perform this Agreement and that this Agreement has been duly authorised by all necessary actions of its directors (if applicable) and constitutes valid and binding obligations on it in accordance with the terms of this Agreement.

11 SEVERABILITY

Any provision in this Agreement which is or may become illegal, invalid or unenforceable shall be ineffective to the extent of such prohibition or unenforceability and shall be treated *pro non scripto* and severed from the balance of this Agreement, without invalidating the remaining provisions of this Agreement.

12 WHOLE AGREEMENT, NO AMENDMENT

- 12.1 This Agreement constitutes the whole agreement between the Parties as to the subject matter hereof and no agreement, representations or warranties between the Parties other than those set out herein are binding on the Parties. This Agreement supersedes and replaces all prior commitments, undertakings or representations, whether oral or written, between the Parties in respect of the subject matter hereof.
- 12.2 No addition to or variation, consensual cancellation or novation of this Agreement and no waiver or relaxation of any right arising from this Agreement or its breach or termination shall be of any force or effect unless reduced to writing and signed by the Parties or their duly authorised representatives (or, in the case of a waiver or relaxation, signed by the Party granting such waiver or relaxation).
- 12.3 No latitude, extension of time or other indulgence which may be given or allowed by any Party to the other in respect of the performance of any obligation hereunder or enforcement of any right arising from this Agreement and no single or partial exercise of any right by any Party shall under any circumstances be construed to be an implied consent by such Party or operate as a waiver or a novation of, or otherwise affect any of that Party's rights in terms of or arising from this Agreement or estop such Party from enforcing, at any time and without notice, strict and punctual compliance with each and every provision or term hereof.

13 GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa. All disputes, actions and other matters relating to his Agreement will be determined in accordance with such law.

14 SUBMISSION TO JURISDICTION

The Parties hereby irrevocably submit to the exclusive jurisdiction of the South Gauteng High Court of South Africa (or any successor to that court) in respect of all matters arising out of or in connection with this Agreement. Each Party appoints any person at the address chosen as its *domicilium citandi et executandi* to receive for and on its behalf, service of process in such jurisdiction in any legal action or proceedings with respect to this Agreement. The Parties irrevocably waive any objection they may now or hereafter have that such action or proceeding has been brought in an inconvenient forum. The Parties further irrevocably consent to the service

of process in any such action or proceeding as contemplated in the *domicilium* clause. Nothing herein shall affect the right to serve process in any other manner permitted by law.

15 **COSTS**

Save as expressly agreed otherwise, each Party shall pay its own costs of negotiating, drafting, preparing and implementing this Agreement.

16 **COUNTERPARTS**

16.1 This Agreement may be executed in counterparts and by each Party in a separate counterpart, each of which so executed shall be an original, but all of which shall together constitute one and the same instrument.

16.2 Each Party hereto hereby waives any right which it may have to dispute the validity or enforceability of Agreement by virtue of its failure to either initial each page of this Agreement and/or have its signatory's signature verified by a witness.

Signed at on this the day of 20____

For: **EMERGE MOBILE (RF) PROPRIETARY LIMITED**

Duly Authorised

Name:

Designation:

Signed at on this the day of 20____

For: **COUNTER-PARTY**

Duly Authorised

Name:

Designation: