

CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT

THIS MUTUAL CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT ("Agreement") is made effective this ____ day of _____, 20____ ("Effective Date") by and between Arena Merchandising, LLC, an Arizona limited liability company with an address at 2375 E. Camelback Road, 6th Floor, Phoenix, AZ 85016 ("Recipient") and , [_____NAME, _____ADDRESS] ("Discloser").

The parties to this Agreement are collectively referred to as the “Parties” and each individually as a “Party.”

RECITALS

- A. Discloser possesses certain proprietary and confidential concept, design and business information and materials, including “Confidential Information” as defined below.
- B. The Parties are engaged in discussions relating to the possible [acquisition, license or other], and/or otherwise a future business relationship between the Parties (“Limited Purpose”).
- C. To facilitate such discussions, it may be necessary for Discloser to disclose to Recipient certain Confidential Information of the Discloser, which Recipient agrees to use only to the extent necessary to engage in such discussions and to evaluate the underlying business concept(s) in connection with the Limited Purpose.

The Parties agree as follows:

1. DEFINITIONS.

- 1.1. “Confidential Information” means all information, including, but not limited to, all forms and types of business, technical, scientific, engineering, financial, economic and employment information, customers (including customer lists and accounts), systems, procedures, methods and techniques, inventions, unpublished patent applications, ideas, discoveries, improvements, designs, characters, slogans, prototypes, concepts, know-how, show-how, production and marketing costs, development plans, computer programs, databases, flow charts, diagrams, forms, economic and financial analyses, financial information, marketing plans, employee files, trade secrets of every kind and character, and the like belonging to, used by, developed by, or in the possession of Discloser that derive actual or potential economic value from not being generally known or readily ascertainable to the public or to Discloser’s competitors. Confidential Information also includes any of the foregoing information or materials that Discloser obtains from any affiliates, subsidiaries or any third party and that Discloser treats as proprietary, designates as Confidential Information or is otherwise obligated to keep confidential, whether or not owned or developed by Discloser.

2. MARKING OF CONFIDENTIAL INFORMATION.

- 2.1. Discloser will use reasonable efforts to identify, describe or indicate disclosures of Confidential Information as “confidential” or “proprietary” at the time of disclosure or confirm the same as “confidential” or “proprietary” in writing within thirty (30) days after disclosure.
- 2.2. Notwithstanding the foregoing, Discloser’s failure to designate or mark Confidential Information in accordance with the above shall not negate the confidential or proprietary nature of the Confidential Information, nor shall such failure affect Recipient’s obligations thereto if Recipient

knows or reasonably should have known that such information was, in fact, confidential or proprietary.

3. NON-DISCLOSURE OBLIGATIONS.

- 3.1. Recipient shall not disclose to any third party Confidential Information received hereunder, and shall not use Confidential Information received hereunder except for internal evaluation with respect to the Limited Purpose identified above. Nothing in this Agreement shall restrict the disclosure or use of Confidential Information that:
 - 3.1.1. Recipient can show, by written records, was in its possession prior to receipt thereof from Discloser;
 - 3.1.2. is or becomes part of the public domain through no improper act (or failure to act) of Recipient;
 - 3.1.3. is disclosed to Recipient without obligation of confidentiality by a third party who did not obtain the Confidential Information directly or indirectly from Discloser; or
 - 3.1.4. Recipient can show, by written records, was independently developed by Recipient without recourse or reference to Discloser's Confidential Information provided hereunder.
- 3.2. If Recipient is requested or required (by law, regulation, interrogatories, requests for information, subpoena, civil investigative demand, or similar process) to disclose any Confidential Information of Discloser, Recipient will provide Discloser with prompt written notice thereof so that Recipient may seek an appropriate protective order and/or waive compliance with the provisions of this Agreement. If, failing the entry of a protective order or the receipt of a waiver hereunder, Recipient is, in the opinion of its counsel, as the case may be, compelled to disclose Confidential Information under penalty of liability for contempt or other censure or penalty it may disclose only that portion of such information as is legally required without liability hereunder; provided that Recipient agrees to exercise reasonable efforts to obtain assurance that confidential treatment will be accorded such Confidential Information and it notifies Discloser of its intention to do so prior to such disclosure.
- 3.3. Any Confidential Information disclosed hereunder shall not be deemed within the foregoing exceptions merely because such Confidential Information is embraced by more general Confidential Information in the public domain or in Recipient's possession, nor shall any combination of items of Confidential Information be deemed within the exceptions unless the combination itself and its principle of operation are within the exceptions. In claiming exemption for any disclosures under these exceptions, Recipient shall bear the burden of proof.
- 3.4. Recipient shall protect Confidential Information received hereunder to the same extent it would protect its own confidential and proprietary information, but in no event shall Recipient use less than commercially reasonable protection measures. Recipient shall have the right to disclose Confidential Information only to those of its employees who have a need to know for the Limited Purpose identified above and who have been bound, in writing, to maintain Confidential Information in confidence both during and after the term of their employment with Recipient.
- 3.5. Recipient shall not decompile, disassemble or otherwise reverse engineer any Confidential Information or any portion thereof, or determine or attempt to determine any source code, algorithms, methods or techniques embodied in any Confidential Information or any portion thereof.

4. DISPOSITION OF CONFIDENTIAL INFORMATION.

Upon termination or expiration of this Agreement, Recipient shall, upon Discloser's request, return all original copies and duplicate copies of Confidential Information received under this Agreement, or where not possible to return, then Recipient shall destroy and confirm such destruction in writing to Discloser within thirty (30) days. Upon termination or expiration of this Agreement, Recipient shall not use Confidential Information in any way for any purpose.

5. TERM.

- 5.1. Either Party may terminate this Agreement at any time upon written notice to the other Party.
- 5.2. The nondisclosure obligations of Section 3 of this Agreement with respect to any item of Confidential Information shall survive any termination or expiration of this Agreement and shall continue for five (5) years from the Effective Date, or, if applicable, as long as trade secret law shall allow, whichever is longer.

6. INTELLECTUAL PROPERTY.

- 6.1. Ownership. Discloser shall retain all right, title and interest in and to all Confidential Information. Nothing in this Agreement is intended to give or shall be interpreted as giving Recipient a right to use Confidential Information or a license under any of Discloser's patents or Confidential Information, other than to use for the Limited Purpose identified above.
- 6.2. Confidential Information and Inventions Agreements. Recipient hereby covenants, warrants and represents that any person having access to the Confidential Information has executed (or prior to gaining such access, shall execute) a confidentiality agreement and a written agreement with Recipient in which such person assigns to Recipient all right, title and interest in and to any inventions, discoveries, or other intellectual property that may result from use of the Confidential Information in order that Recipient may fully grant the rights to Discloser as provided herein.

7. REMEDIES.

- 7.1. Recipient agrees that, due to the unique nature of the Confidential Information, the unauthorized disclosure or use of the Confidential Information may cause irreparable harm and significant injury to Discloser, the extent of which may be difficult to ascertain and for which there may be no adequate remedy at law. Accordingly, Recipient agrees that Discloser, in addition to any other available remedies, shall have the right to seek an immediate injunction and other equitable relief enjoining any breach or threatened breach of this Agreement without the necessity of posting any bond or other security. Recipient shall notify Discloser in writing immediately upon Recipient's becoming aware of any such breach or threatened breach.
- 7.2. In any action to enforce this Agreement, the prevailing Party shall be entitled to recover its reasonable attorneys' fees, court costs, and related expenses from the other Party.
- 7.3. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona, without giving effect to the principles of conflict of laws. Any legal action arising out of or relating to this Agreement shall be brought in a state or federal court of competent jurisdiction in the State of Arizona.

8. NO WARRANTY.

8.1. Except as may be otherwise agreed to in writing, no warranties of any kind, whether express or implied, are given by Discloser with respect to any Confidential Information or any use thereof, and the Confidential Information is provided on an "AS IS" basis.

8.2. Discloser hereby expressly disclaims all such warranties, including any implied warranties of merchantability, fitness for a particular purpose, for non-infringement, and any warranties arising out of course of performance, course of dealing or usage of trade.

9. ENTIRE AGREEMENT.

This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and may not be modified except by written agreement of the Parties.

10. SURVIVAL.

Sections 3- 8 and 12 shall survive the expiration or termination of this Agreement.

11. NO OBLIGATION TO IMPLEMENT ANY BUSINESS TRANSACTION.

11.1. Neither this Agreement nor any action taken pursuant thereto shall obligate either Party to enter into any further business relationship with the other Party, to negotiate any transaction for any specified period of time, to take any action not expressly agreed to herein. The terms and conditions of any further relationship involving the Parties to this Agreement shall be negotiated and agreed to separately.

11.2. Neither Party shall not rely on any Confidential Information disclosed or received as a commitment or an inducement to act or not to act in any given manner. Correspondingly, a Party shall not be liable to the other Party in any manner whatsoever for any decisions, obligations, costs or expenses incurred, changes in business practices, plans, organization, products, services, or otherwise, based on one Party's decision to use or rely on any Confidential Information disclosed or received hereunder.

12. ASSIGNMENT.

This Agreement shall inure to the benefit of and be binding upon the Parties hereto, their successors, and assigns of the entire business to which this Agreement relates, but shall not otherwise be assignable by _____ **NAME** without the express written consent of **Arena Merchandising**.

13. SEVERABILITY.

If any provision or provisions of this Agreement shall be held to be invalid, illegal, or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

14. PUBLICITY.

Neither Party may make a public notice concerning the subject matter or existence of this Agreement without the prior written consent of the other Party.

15. NO WAIVER.

Failure to enforce any provision of this Agreement does not constitute waiver of any term hereof. This Agreement may be amended, waived, or revoked only by written agreement of both Parties.

REMAINDER INTENTIONALLY BLANK

16. COUNTERPARTS.

This Agreement may be executed in two counterparts, which taken together constitute a single agreement between the Parties. Each Party intends the facsimile of its signature printed by a receiving fax machine to be an original signature.

Arena Merchandising, LLC

NAME

By: _____

By: _____

Title: _____

Title: _____

Date: _____

Date: _____