# Confidentiality Agreement

CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

GOVERNING THE INSPECTION OF BOOKS AND RECORDS

This Confidentiality and Non-Disclosure Agreement Governing the Inspection of Books and Records (the “Agreement”) is entered into between Acme Corp. (“Acme” or the “Company”), and the Institutional Investor (“Investor” or the “Stockholder”). The Company and the Stockholder are each individually referred to herein as a “Party” and are collectively referred to as the “Parties.”

WHEREAS, on or about January 2, 2013, the Stockholder made a demand (the “Demand”) to inspect certain books and records of the Company pursuant to 8 Del. C. § 220;

WHEREAS, pursuant to the Demand and subject to the Stockholder executing this Agreement, the Company has agreed to allow the Stockholder to inspect certain books and records responsive to the Demand that are in the possession, custody or control of the Company (which, together with information or analyses derived from information made available for inspection, is referred to as the “Inspection Information”);

WHEREAS, the Company believes that many of the books and records that are the subject of the Stockholder’s request contain confidential or proprietary information;

IT IS HEREBY AGREED, by and between the Parties, this \_\_\_ day of April 2013, as follows:

1. The voluntary disclosure of documents pursuant to the Demand is without prejudice to and shall not constitute a waiver of any defenses or objections of the Company to the Demand.
2. The Stockholder and any Advisor (defined below) shall not be deemed entitled to the production of any books and records of the Company as a result of the voluntary production of documents in response to the Demand.
3. Stockholder and each Advisor further agree that the Confidential Information and any other information produced by Company is being produced to them only for the purposes set forth in the Demand and that Stockholder and each Advisor shall not utilize Confidential Material, any other information produced by the Company or anything derived from Confidential Material or derived from any other information produced by the Company for any other purpose including that neither Stockholder nor any Advisor shall utilize Confidential Material, or anything derived from Confidential Material for the purpose of asserting any claim against the Company, any of the Company’s directors, officers, employees, or agents, or any other person or entity except for a derivative action filed on behalf of the Company, any demand made on the Company’s directors to institute litigation, and any proceedings relating to such a demand on the Company’s directors (the “Litigation”).
4. The Company may designate as “Confidential” any material or information contained in the Inspection Information that it in good faith reasonably believes to contain non-public, confidential, proprietary, or commercially sensitive information that requires the protections provided in this Confidentiality Agreement (“Confidential Material”). The Stockholder will not disclose, publish, or communicate Confidential Material to any person or entity in any form (written, oral, electronic or through any other medium), either directly or indirectly, except as provided in this Confidentiality Agreement.
5. The designation of “Confidential Material” shall be made by affixing the legend “Confidential” to each page containing any Confidential Material, except that in the case of multi-page documents bound together by staple or other permanent binding, the word “Confidential” need only be stamped on the first page of the document in order for the entire document to be treated as Confidential; provided that the failure to designate a document as “Confidential” does not constitute a waiver of such claim of confidentiality, and Company may so designate a document after such document has been produced, with the effect that such document is thereafter subject to the protections of this Agreement.
6. The Stockholder and each Advisor inspecting any Confidential Material must hold all Confidential Material in confidence, and may not disclose, publish, disseminate, or communicate the Confidential Material (or the content thereof) to anyone, either directly or indirectly, except as provided in this Agreement. For the avoidance of doubt, the Stockholder or any Advisor may not communicate the Confidential Material (or the content thereof) to any other Acme stockholder, or an Advisor to any other Acme stockholder without the Company’s written consent, except as provided for under this Agreement.
7. Subject to the terms of this Agreement, the Stockholder may provide the Confidential Material to an Advisor, once it has first received from such advisor a duly executed Undertaking in the form attached hereto as Exhibit A. For purposes of this Confidentiality Agreement, “Advisor” shall mean the Stockholder’s attorneys, accountants, consultants, representatives or agents. Notwithstanding the foregoing, attorneys of the law firm of Shareholder Law Group LLP and their staff shall not be required to execute the Undertaking attached hereto, but the Stockholder shall instruct them to hold the Confidential Material confidential in accordance with the terms of this Agreement.
8. If the Stockholder or any Advisor is required (by interrogatory, subpoena, civil investigatory demand, or any similar process relating to any legal proceeding, investigation, hearing, or otherwise) to disclose in any manner any Confidential Material, the Stockholder and such Advisor( s) will provide the Company with prompt notice (i.e., within 2 business days of receipt of such interrogatory, subpoena, demand, or any similar process), so that the Company may seek a protective order or other appropriate remedy and/or waive compliance with this Agreement in the event that such protective order or other remedy is not obtained, or if the Company waives compliance with the provisions of this Agreement, the Stockholder and the Advisor(s) may furnish only such Confidential Material as they are advised is legally required and must exercise their best efforts to obtain assurance that confidential treatment will be accorded to any Confidential Material.
9. To the extent that the Stockholder wishes to commence a Litigation using any of the Confidential Material in a complaint or other pleading in a court or other tribunal, the Stockholder agrees to comply with the procedures for obtaining confidential treatment under Delaware Court of Chancery Rule 5.1, or any amended or substituted Rule adopted by the Court, with respect to Confidential Material contained in or attached to an initial pleading filed in the Delaware Court of Chancery to the extent the Litigation is pending in that Court or, with respect to Confidential Material contained in or attached to an initial pleading filed in any other Court of competent jurisdiction, pursuant to the rules of that jurisdiction regarding the application for an appropriate sealing order. The Stockholder shall thereafter comply with all applicable court rules to preserve the confidentiality of Confidential Material, including, if applicable, filing a public version of the complaint within 3 days as required by Court of Chancery Rule 5.1(e)(3). This undertaking is without prejudice to the Stockholder’s right to challenge the confidential treatment of any information under Rule 5.1(f), or any amended or substituted Rule adopted by the Court, or equivalent rule in another jurisdiction.
10. All documents of any nature filed with the Court following the filing of an initial pleading that disclose Confidential Material shall comply with the procedures for obtaining and maintaining confidential treatment under Delaware Court of Chancery Rule 5.1, or any amended or substituted Rule adopted by the Court, to the extent the Litigation is pending in the Delaware Court of Chancery and, to the extent the Litigation is pending in other jurisdictions, in accordance with the applicable rules of that jurisdiction regarding the filing and continued sealing of such documents.
11. Nothing in this Agreement is intended to prohibit any party to this Agreement from using the Confidential Material in a Litigation in accordance with the provisions of Court of Chancery Rule 5.1, or any amended or substituted Rule adopted by the Court, and any protective order entered in a Litigation.
12. Stockholder recognizes that Acme does not intend to include privileged material in its production of Inspection Information. Notwithstanding this intention, if Inspection Information alleged to be subject to attorney-client privilege, attorney work product, or any other applicable privilege or immunity is disclosed to the Stockholder, such disclosure shall in no way prejudice or otherwise constitute a waiver of, or estoppel as to, any claim of privilege, work product, or other applicable privilege or immunity that the Company would otherwise have and the Stockholder agrees not to assert that voluntary production of such Inspection Information under this Agreement constitutes a waiver of any privilege or immunity. If a claim of inadvertent production is made pursuant to this paragraph with respect to Inspection Information then in the custody of the Stockholder or any Advisor(s) (the “Receiving Party”), such Receiving Party shall promptly return to the Company the material as to which the claim of inadvertent production has been made.
13. Notwithstanding any other provision of this Agreement to the contrary, Inspection Information will lose its status as Confidential Material to the extent that: (i) the Confidential Material was in the public domain at the time it was received by the Stockholder; or (ii) the Confidential Material enters the public domain, through no action of the Stockholder or any of its employees, agents, Advisors subsequent to the time it was received by the Stockholder.
14. Each Party and each Advisor who receives Confidential Material pursuant to this Agreement agrees to submit to the exclusive jurisdiction of the Delaware Court of Chancery in any action to enforce any provision of, or based on any right or claim arising out of, this Agreement including any action to determine any dispute as to the confidentiality of any information or document produced by the Company. For avoidance of doubt, a Litigation shall not be considered a claim arising out of this Agreement. Each Party and each Advisor hereby expressly waives any and all objections such Party or Advisor may have to personal jurisdiction or to venue, including without limitation the inconvenience of such forum, in the Court of Chancery.
15. All notices under this Agreement shall be in writing and shall be given (and shall be deemed to have been duly given upon receipt) by delivery in person, or by overnight delivery, or by email with attachments in portable document format (.pdf) or other similar format, as follows:

If to Acme:

[Contact information for Acme’s counsel]

If to Stockholder and/or its Advisor(s)

[Contact information for plaintiff’s counsel]

Each Party and each Advisor agrees that notice pursuant to this Section 15 constitutes effective service of process on such Party or Advisor in any suit, action, or other proceeding arising out of this Agreement. For avoidance of doubt, a Litigation shall not be considered a claim arising out of this Agreement.

1. Each Party and each Advisor agrees that the Company does not have an adequate remedy at law in the event of a breach of this Agreement by the Stockholder or its Advisor(s). The Parties and each Advisor further agree that, in the event of a breach of this Agreement by the Stockholder or its Advisor(s), the Company will suffer irreparable harm and will be entitled to specific performance and/or injunctive relief to enforce the terms of this Agreement. Such remedies shall not be deemed to be the exclusive remedies for any breach of this Agreement but shall be in addition to any other remedies to which the Company may be entitled at law or in equity.
2. The Stockholder and its Advisors shall make commercially reasonable efforts to return or destroy all Inspection Information in its original format and all copies thereof, and to destroy any notes or other documents created by the Stockholder and its Advisors that reproduce or reflect Confidential Material, other than documents constituting attorney work product (a) within 90 days of completing the purposes described in paragraph 3 of this Agreement or (b) immediately, if the Stockholder should cease to be a beneficial stockholder of the Company.
3. This Agreement may not be amended, changed, waived, discharged, or terminated (except as explicitly provided herein), in whole or in part, except by an instrument in writing that refers specifically to this Agreement and that is signed by the Party against whom enforcement of such amendment, change, waiver, discharge, or termination is sought. The waiver by any Party of any breach of this Agreement will not be deemed or construed as a waiver of any other breach of this Agreement, whether prior, subsequent, or contemporaneous. No failure or delay in exercising any right, power, or privilege hereunder shall operate as a waiver thereof.
4. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective agents, executors, heirs, beneficiaries, successors, and assigns.
5. This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without regard to its conflict of laws principles.
6. This Agreement may be executed in multiple counterparts by any of the signatories hereto and as so executed shall constitute one agreement.
7. This Agreement constitutes the entire agreement between the Parties with regard to the subject matter hereof, and supersedes all prior agreements and understandings, written and oral, between the Parties with regard to the subject matter hereof.
8. This Agreement will be deemed to have been mutually prepared by the Parties and will not be construed against either of them by reason of authorship.
9. To the extent the Company determines to make available for inspection any additional documents to the Stockholder in response to the Demand and designates any such documents as Confidential Material as defined in this Agreement, the use of such documents and any information derived from them shall be governed by the terms of this Agreement.

[Signatures and dates]