mutual nondisclosure agreement

(SOURCING)

This Mutual Nondisclosure Agreement (this “Agreement”) is entered into by White Cap Supply Holdings, LLC, a Delaware limited liability company on behalf of it and its affiliates and direct and indirect subsidiaries (collectively “White Cap”), and      , a      (“Company”), effective as of      .

BACKGROUND

White Cap and Company (each, a “Party”, and collectively, the “Parties”) intend to enter into discussions concerning a possible business transaction (the “Transaction”). In connection with those discussions, each Party will need to disclose certain of its confidential and proprietary information and materials to the other Party. The Parties wish to enter into this Agreement to provide for the disclosure of such confidential and proprietary information and to restrict the use and disclosure of that information and materials by the receiving Party.

The Parties agree as follows:

1. Definition of Confidential Information. For the purposes of this Agreement, “Confidential Information” means (a) information and materials that are identified in writing as CONFIDENTIAL at the time of disclosure, (b) information disclosed orally and subsequently identified in writing as CONFIDENTIAL within 30 days following the initial disclosure of such information, (c) information or materials that the disclosing Party treats as confidential and does not disclose publicly, or (d) the information and materials identified in Exhibit A to this Agreement. The Party disclosing Confidential Information is referred to in this Agreement as the “Disclosing Party”, and the Party receiving such Confidential Information is referred to as the “Receiving Party”. Confidential Information includes any modifications or derivatives prepared by the Receiving Party that contain or are based upon Confidential Information disclosed by the Disclosing Party, including analysis, reports, or summaries of the Confidential Information.
2. Limitations on Use. Confidential Information shall be used by the Receiving Party only in connection with the analysis of and discussions concerning the Transaction or as otherwise permited in writing by the Disclosing Party. The Receiving Party must not use Confidential Information at any time, in any fashion, form or manner, for any other purpose.
3. Limitations on Disclosure. The Receiving Party will use the same measures to protect the confidentiality of the Confidential Information as it uses to protect the confidentiality of its own proprietary and confidential information and materials of like kind, but in no event less than a reasonable standard of care. The Receiving Party will take (and will cause its employees and agents to take) any steps required to avoid inadvertent disclosure of Confidential Information in the Receiving Party’s possession.
4. Access to the Confidential Information. Access to the Confidential Information must be restricted to personnel or third-party contractor’s of the Receiving Party engaged in the analysis and discussions concerning the Transaction. The Receiving Party will furnish access to the Confidential Information to its employees and third-party contractors solely on a need‑to‑know basis. Each Party will furnish the other with a complete list of its employees and agents who have been given access to the Confidential Information of the Disclosing Party.
5. Ownership of Confidential Information; No Licenses. Confidential Information disclosed by the Disclosing Party to the Receiving Party will at all times remain the property of the Disclosing Party. No license under any trade secrets, copyrights, or other rights is granted under this Agreement or by any disclosure of Confidential Information under this Agreement.
6. Copies of Confidential Information. Confidential Information must not be copied or reproduced by the Receiving Party without the Disclosing Party’s prior written approval.
7. Return of Confidential Information. All Confidential Information made available under this Agreement, including copies of Confidential Information, must be returned to the Disclosing Party upon the termination of discussions concerning the Transaction, or, if earlier, upon the request by the Disclosing Party. Any materials prepared by the Receiving Party that include any Confidential Information of the Disclosing Party, including summaries or extracts thereof, must be destroyed, and written certification of such destruction provided to the Disclosing Party. Notwithstanding the foregoing, the Receiving Party may retain one copy of the Confidential Information (i) for the purpose of the defense of its rights and obligations under this Agreement, (ii) for regulatory compliance or legal purposes, or (iii) for the purpose of storing archival copies in the ordinary course of business on the electronic back-up systems of the Receiving Party. All retained Confidential Information remains subject to the confidentiality provisions of this Agreement.
8. Exceptions. Nothing in this Agreement will prohibit or limit Receiving Party’s use of information (a) known to the Receiving Party prior to disclosure by the Disclosing Party as evidenced by the written records of the Receiving Party, (b) that is independently developed by the Receiving Party, without reference to the Confidential Information as evidenced by the written records of the Receiving Party, or (c) that is or becomes publicly available through no breach of this Agreement by the Receiving Party, (d) is authorized in writing by the Disclosing Party to be disclosed without restriction, or (e) becomes available on a non-confidential basis from a source other than one of the Disclosing Party, provided that such source is not bound by a confidentiality agreement or obligation to the Disclosing Party
9. Binding Agreement. This Agreement is and will be binding upon the Parties and each of their respective affiliates, and upon their respective heirs, successors, representatives, and assigns.
10. Governing Law. The validity, performance, construction, and effect of this Agreement will be governed by the laws of the State of Georgia, without regard to Georgia’s conflict of laws provisions.
11. Equitable Remedies. The Parties acknowledge and agree serious injury could result to the Disclosing Party and its business if the Receiving Party breaches its obligations under this Agreement. The Parties further acknowledge and agree that money damages would not be a sufficient remedy for any breach of this Agreement by the Receiving Party. Therefore, the Receiving Party agrees that the Disclosing Party will be entitled to a restraining order, injunction, or other equitable relief if the Receiving Party breaches or attempts to breach its obligations under this Agreement, in addition to any other remedies and damages that would be available at law or equity.
12. Compelled Disclosures. If the Receiving Party receives a subpoena or other validly issued administrative or judicial process demanding Confidential Information, the Receiving Party must promptly notify the Disclosing Party and tender to it the defense of such demand. Unless the demand has been timely limited, quashed, or extended, the Receiving Party will thereafter be entitled to comply with such demand to the extent permitted by law. If requested by the Disclosing Party, the Receiving Party will cooperate (at the expense of the Disclosing Party) in the defense of a demand.
13. No Use of Names. Company may not use the name or logo of White Cap or any of its affiliates, or any abbreviation or adaptation thereof, in any advertising, trade display, or published statement or press release, or for any other commercial purpose, without the prior written consent or an authorized representative of White Cap, such consent to be withheld in White Cap’s sole discretion. The fact that the Parties are engaged in discussions concerning the Transaction, and the terms of those discussions, is Confidential Information and may not be disclosed for any purpose except as may be expressly permitted under this Agreement.
14. Term; Survival of Obligations. This Agreement will terminate upon the termination of discussions between the Parties concerning the Transaction (or if a Transaction is entered into, upon termination of the Transaction). Following termination, the obligations of the Receiving Party under this Agreement with respect to the Confidential Information of Disclosing Party will continue in full force and effect as follows: (a) in the case of any information or materials that constitute a trade secret within the meaning of applicable law, for as long as such information and materials remain as a trade secret, or (b) in the case of any other information or materials, for a period of two years from the date of termination.
15. Interpretation. The following rules of interpretation shall be applied in interpreting this Agreement:  (1) the headings used in this Agreement are for reference and convenience only and will not enter into the interpretation of this Agreement, (2) the provisions of the Exhibits to this Agreement are incorporated into this Agreement as if set forth fully herein, (3) as used in this Agreement, the term “including” will always be deemed to mean “including, without limitation,” and (4) this Agreement shall not be construed against either Party as the drafter of this Agreement.
16. No Commitment. Nothing in this Agreement will constitute a commitment by either Party to develop or disclose any information or materials, including any Confidential Information, or to acquire or recommend any product, service, or asset of the other Party. The provision of Confidential Information to the Receiving Party as contemplated under this Agreement and discussions held in connection with the Transaction will not prevent either Party from pursuing similar discussions with third parties or obligate either Party to continue discussions with the other Party, nor will either Party otherwise be obligated to take, continue, or forego any action with respect to the Transaction. ALL CONFIDENTIAL INFORMATION IS PROVIDED “AS IS”. Without limiting the foregoing, the Disclosing Party makes no warranty, guarantee, or representation, either express or implied, as to the accuracy or completeness of any of its Confidential Information or materials provided in connection with this Agreement.
17. Entire Agreement. This Agreement constitutes the entire agreement and understanding of the Parties with respect to the subject matter of this Agreement and supersedes all prior discussions and agreements, either oral or written, relating to the subject matter of this Agreement.
18. Delay or failure to exercise any right or remedy hereunder shall not impair such right or remedy or be construed as a waiver thereof or as an acquiescence in any breach of this Agreement. Any single or partial exercise of any right or remedy shall not preclude any other or further exercise thereof or the exercise of any other right or remedy.
19. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. A counterpart signed and transmitted by email as a .pdf, .tif, or similar electronic file is to be treated as an original document. The signature of any Party thereon, for purposes hereof, is to be considered the same as an original signature, and the document transmitted is to be considered to have the same binding effect as an original signature on an original document.
20. Each Party represents and warrants to the other that it is authorized by all required corporate action to enter into this Agreement, and the individual(s) signing this Agreement on behalf of a Party are authorized to bind such Party by its terms.

|  |  |  |
| --- | --- | --- |
| Agreed and Accepted: |  | Agreed and Accepted: |
|  |  |  |
| **WHITE CAP SUPPLY HOLDINGS, LLC** |  |  |
|  |  |  |
|  |  |  |
| By:  *[Signature]**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**[Print Name]* |  | By:  *[Signature]* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_*[Print Name]* |
|  |  |  |
|  *[Title]* |  |  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  *[Title]* |
|  |  |  |
|  *[Date]* |  |  *[Date]* |

EXHIBIT A

CONFIDENTIAL INFORMATION

Confidential Information will include:

1. All application, operating system, database, communications and other computer software, whether now or hereafter existing, and all modifications, enhancements, and versions thereof and all options with respect thereto, and all future products developed or derived therefrom;
2. All source and object codes, flowcharts, algorithms, coding sheets, routines, sub-routines, compilers, assemblers, design concepts and related documentation and manuals, and methodologies used in the design, development and implementation of software products;
3. Marketing and product plans, customer lists, prospect lists, and pricing information (other than published price lists);
4. Financial information and reports;
5. Employee and contractor data; and
6. Research and development plans and results.