

## Annexure B

### Confidentiality and Non-Disclosure Agreement

Kindly complete, initial each page and sign the Confidentiality and Non-Disclosure Agreement shown in Annexure B. Submit with your written intention to bid.

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# **CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT**

entered into between:

**OPHTHALMOLOGY MANAGEMENT GROUP (RF) (PTY) LTD**

(Registration No: 1996/013656/07)

(hereinafter referred to as “OMG”)

and

**THE RECIPIENT**

(cumulatively referred to as the “Parties”)

OMG and the Recipient hereby agree to the following:

**1. Interpretation**

- 1.1. In this Agreement, clause headings are for convenience and are not to be used in its interpretation.
- 1.2. unless the context indicates a contrary intention, an expression that denotes:
  - 1.2.1. any gender includes the other gender;
  - 1.2.2. a natural person includes a juristic person and vice versa; and
  - 1.2.3. the singular includes the plural and vice versa.
- 1.3. The following expressions bear the meanings assigned to them below and cognate expressions bear corresponding meanings:
  - 1.3.1. "Agreement" means this written document together with all written appendices, annexures, exhibits or amendments attached to it from time to time;
  - 1.3.2. "Commencement Date" means the date reflected at clause 4.1 of the Schedule;
  - 1.3.3. "Confidential Information" means:
    - 1.3.3.1. any information, communication, data, documents, voice recordings or know-how, in any form whatsoever, obtained and/or come across by the Recipient in respect of OMG including, but not limited to, that which relates to the Disclosing Purpose (including any contract/agreement seeking to deal with any aspect of the Disclosing Purpose), products, production facilities, intellectual property, trade secrets, product risk, formulations, methodologies, services, customers, employees, markets, software, developments, inventions, processes, designs, drawings, marketing, research, finances and commercial plans, mergers, acquisitions, dispositions and other commercial transactions, litigation (including threatened and pending litigation), together with all analyses, compilations, or other materials prepared by either of the Parties to the extent that such materials

contain, otherwise reflect or are generated from such Confidential Information; and/or

- 1.3.3.2. any fault, defect or aspect of non-compliance in any aspect of the business of OMG, irrespective of whether OMG knows about such a fault, defect, or non-compliance;
- 1.3.4. “Disclosing Purpose” means that which is described in clause 6 of the Schedule;
- 1.3.5. “Party” means either one of the Parties;
- 1.3.6. “Recipient” means the person/entity described in clause 1 of the Schedule;
- 1.3.7. “Republic” means the Republic of South Africa;
- 1.3.8. “Responsible Party” means the “responsible party” as defined in section 1 of the Protection of Personal Information Act 4 of 2013, and/or “controller” as defined by the European Union Data Protection Directive 95/46/EC, whichever may be applicable;
- 1.3.9. “Schedule” means Annexure C to this Agreement, entitled “Information Schedule”;
- 1.3.10. “Signature Date” means the date upon which the last party to sign this Agreement, signs this Agreement.

## **2. Commencement and duration**

- 2.1. This Agreement shall commence on the Commencement Date.
- 2.2. The term of this Agreement, and accordingly the period for which the obligations set forth in this Agreement regarding confidentiality shall continue to apply, shall be as specified in clause 5.1 of the Schedule.

## **3. Obligations of the Recipient**

- 3.1. The Recipient shall use the Confidential Information only in respect of, and for the benefit of OMG and the Disclosing Purpose.
- 3.2. The Recipient shall however be entitled to disclose Confidential Information to satisfy an order of a competent Court of law or to comply with the provisions of

any act or regulation in force from time to time, provided that in such circumstances, the Recipient shall advise OMG in writing prior to such disclosure as to enable OMG to take whatever steps OMG may deem necessary to protect OMG's rights. The Recipient shall furthermore only disclose that portion of the Confidential Information which the Recipient is legally required to disclose, and the Recipient will use its best endeavours to protect the Confidential Information in question as far as reasonably possible under the prevailing circumstances.

- 3.3. All the Confidential Information shall at all times remain the sole and exclusive property of OMG, and the Recipient shall not at any time be entitled to deny OMG's ownership in this regard. In circumstances where OMG is not the owner of the Confidential Information, it shall nonetheless, for all purposes hereof, be deemed that OMG is the owner of such Confidential Information.
- 3.4. The Recipient shall keep, store and treat as proprietary and strictly confidential all the Confidential Information and shall protect same with at least the degree of care expected from registered chartered accountants, registered with the South African Institute of Chartered Accountants, in circumstances where such chartered accountants are entrusted with confidential information. Without derogating from the aforesaid, the Recipient shall at all times exercise reasonable care in keeping, storing and protecting the Confidential Information.
- 3.5. The Recipient shall not at any time without the prior written consent of OMG:
  - 3.5.1. disclose or reveal the Confidential Information to any other person or party whatsoever, other than persons/parties who are in each case required in the course of their duties to receive and consider the Confidential Information with a view to achieve and/or further the Disclosing Purpose. The said persons/parties shall be made aware by the Recipient of the obligations of the Recipient under this Agreement, and the Recipient shall ensure that such persons/parties observe the same restrictions on the use of the Confidential Information as are contained in this Agreement. In this regard the Recipient shall ensure that the relevant persons/parties sign appropriate confidentiality and non-disclosure undertakings. The Recipient shall take such steps as may be reasonably necessary to enforce such obligations on the part of the relevant persons/parties. Notwithstanding the Recipient's compliance with the provisions of this clause, any breach by any persons/parties of the provisions of the confidentiality and non-disclosure undertakings signed by such

persons/parties, shall be deemed to be a breach by the Recipient of this Agreement, with the Recipient remaining liable towards OMG;

- 3.5.2. disclose or reveal to any person or party whatsoever, either the fact that discussions or negotiations are taking, or have taken, place between the Recipient and OMG, or the content of any such discussions or other facts relating to the Disclosing Purpose, except where required by law or any governmental, or regulatory body, having due regard to the provisions of clause 3.2 above.
- 3.6. Except with the prior written consent of OMG's representative, the Recipient shall not make copies, extracts or reproductions of the Confidential Information, except for, and exclusively to allow, the Recipient to achieve and/or further the Disclosing Purpose.
- 3.7. Any written notes, memoranda, reports, computer/electronically generated or stored information, software or other documentation and/or records of any nature whatsoever, including any copies thereof, relating to any of the Confidential Information obtained and/or generated by the Recipient, its employees, representatives or others acting on the Recipient's behalf, shall at all relevant times be deemed to be the property of OMG, and shall be returned/handed over by the Recipient to OMG at any time, and immediately upon, written notice by OMG to the Recipient, calling upon the Recipient to do so.
- 3.8. The Recipient acknowledges that the Confidential Information may contain personal data, the handling or processing of which may be subject to the requirements of the following South African legislation, namely (i) the Protection of Personal Information Act 4 of 2013 ("POPI"); (ii) Electronic Communications and Transactions Act 25 of 2002; and (iii) the Promotion of Access to Information Act 2 of 2000; as well as possibly being subject to compliance with international standards such as the European Union Data Protection Directive (95/46/EC), and/or any implementing legislation thereunder, and other equivalent statutory or regulatory data protection requirements in any other jurisdiction. The Recipient agrees that it will take appropriate measures to ensure compliance with all such data protection requirements, where applicable.
- 3.9. Where POPI applies, the Recipient undertakes to take appropriate technical and organisational measures against the unauthorised or unlawful processing of

personal data and against the accidental loss or destruction of, or damage to, personal data; which measures will include:

- 3.9.1. taking reasonable steps to ensure the reliability of any employees who have access to such personal data; and
  - 3.9.2. ensuring a level of security appropriate to the harm that may result from such unauthorised or unlawful processing or accidental loss, destruction or damage and appropriate to the nature of such personal data.
- 3.10. The Recipient agrees to process any personal data only in accordance with OMG's instructions and to provide OMG with such information regarding compliance with the Recipient's duties under clauses 3.8, 3.9, 3.9.1, 3.9.2 and 3.10 as OMG may from time to time require to enable OMG to comply with its obligations as the Responsible Party in respect of such personal data.
- 3.11. The Recipient shall inform OMG in writing immediately upon the Recipient becoming aware, or reasonably suspects, that the security of the Confidential Information has been, or may be, compromised in any manner.
- 3.12. The Recipient shall not create the impression with, or lead any third party to interpret or construe any condition contained in this Agreement, that this Agreement is an agency agreement and/or partnership agreement and/or a joint venture and/or any other similar arrangement;
- 3.13. The Recipient shall not allege that this Agreement grants it, either directly, or by implication, or by estoppel or otherwise a license under any patent or patent application, or that it is entitled to utilise the Confidential Information in any way contrary to the stipulations contained in this Agreement;
- 3.14. The Recipient shall promptly, upon OMG's written request, alternatively upon the termination or cancellation of any agreement regulating the relationship between the Parties in respect of the Disclosing Purpose, and/or upon the achievement/fulfilment of the Disclosing Purpose, return to OMG, or destroy, depending upon OMG's election in this regard, the Confidential Information furnished to/obtained by the Recipient, as well as all copies and extracts thereof.
- 3.15. The Recipient shall promptly upon OMG's request supply OMG with any and all documents requested by OMG, which documents may serve to evidence the Recipient's compliance with the Recipient's obligations under this Agreement.

#### **4. Exclusions**

4.1. Confidential Information does not include information that:

4.1.1. is prior to the disclosure part of public knowledge or literature, or after the time of disclosure, becomes part of the public knowledge or literature, provided that it is not as a result of any inaction or action of the Recipient;

4.1.2. is approved by OMG, in writing, for release; or

4.1.3. is developed by the Recipient without any use of, reference to, or access to, the Confidential Information.

4.2. Should the Recipient rely upon any of the foregoing exceptions, the Recipient shall have the burden of proving (upon a preponderance of probabilities) the applicability of the exceptions set out in clauses 4.1.1 to 4.1.3 above.

#### **5. Penalty**

5.1. Should the Recipient be in breach of any of its obligations under this Agreement, the Recipient shall be liable to OMG in the sum specified in clause 7 of the Schedule.

5.2. Notwithstanding the foregoing OMG shall in its sole discretion be entitled to recover damages from the Recipient in lieu of the penalty, if any, specified in clause 7 of the Schedule.

5.3. In the event that clause 7 of the Schedule reflecting a penalty amount, the Recipient acknowledges that such a penalty is reasonable and not excessive in view of the damage which OMG stands to suffer in the event that the Recipient is in breach of its obligations set out in this Agreement.

#### **6. Domicilium**

6.1. The Parties choose the following physical *domicilium citandi et executandi* (domicilium) within the Republic of South Africa for the purpose of the giving of any notice (including legal notice), the serving of any process (including legal process) and for any other purpose arising out of this Agreement as follows: -

6.1.1. **OMG**

Physical Address : Unit 16, Northcliff Office Park, 203 Beyers Naude Drive, Northcliff, 2195, South Africa

Telephone Number : 011 340 9000

E-mail address : [rfp@nationaleyeregistry.com](mailto:rfp@nationaleyeregistry.com)

(All notices must be marked for the attention of the person/s described in clause 3.2 of Annexure C of the Schedule)

6.1.2. **THE RECIPIENT**

Physical Address : See clause 2.1 of Annexure C of the Schedule

Telephone Number : See clause 2.1 of Annexure C of the Schedule

Telefax Number : See clause 2.1 of Annexure C of the Schedule

E-mail address : See clause 2.1 of Annexure C of the Schedule

(All notices must be marked for the attention of the person/s described in clause 2.2 of Annexure C of the Schedule)

6.2. The Parties shall be entitled from time to time by written notice, to vary their domicilium to any other address within the Republic of South Africa which is not a post office box or *poste restante*. If the Recipient is not of South Africa, then the Recipient shall be entitled to vary its domicilium to any other address within the borders of the country reflected in clause 2.1 of Annexure C the Schedule, or to an address located within the borders of the Republic of South Africa.

6.3. Any notice given by any Party to any other ("the addressee") shall be in writing and if: -

6.3.1. delivered by hand on any business day (Monday – Friday) during normal business hours (between 09h00 and 16h00) of the addressee at the addressee's domicilium for the time being shall be presumed, until the contrary is proved by the addressee, to have been received by the addressee at the time of delivery;

6.3.2. any notice given by any Party to another which is transmitted by telefax or e-mail from an address within the Republic of South Africa to the addressee at the addressee's telefax number or e-mail address for the time being shall be presumed, until the contrary is proved by the addressee, to have been

received by the addressee on the first business day after the date of transmission; and

- 6.3.3. any notice actually received by a Party hereto, shall be deemed to have been properly served on such Party, and should such a Party deny receipt of such notice, such Party shall bear the onus of proof to prove that delivery did not take place.

## **7. Dispute resolution and jurisdiction**

- 7.1. Any dispute arising under or in connection with the Agreement may at the option of OMG be referred to arbitration.

- 7.2. Should OMG choose to have a dispute arbitrated upon,

7.2.1. such arbitration shall be conducted in terms of the UNCITRAL Arbitration Rules (as revised in 2010) for arbitration by a single arbitrator nominated by the Association of Arbitrators (Southern Africa);

7.2.2. the seat of the arbitration will be the Republic;

7.2.3. The venue of the arbitration proceedings will be situated in Pretoria, Gauteng, South Africa, with the specific address to be agreed upon between the Parties, alternatively determined by the Association of Arbitrators (Southern Africa) or the arbitrator in the event that the Parties fail to reach agreement in this regard;

7.2.4. The substantive governing law (the law governing the merits of the dispute), will be that of the Republic;

7.2.5. The language of the arbitration proceedings and the language to be used in all documents submitted during arbitration proceedings will be English;

7.2.6. The IBA Rules of Evidence will apply to discovery as well as to the reception and admissibility of evidence during arbitration proceedings;

7.2.7. The arbitration proceedings will be conducted confidentially.

- 7.3. In the case where OMG does not opt for arbitration and in the event of the Recipient being a *peregrinus* of the Republic of South Africa (where the Recipient is not of South Africa) the Parties agree that the Recipient submits to the

jurisdiction of the High Court of South Africa, South Gauteng Division, Johannesburg or its successor in title, or to the jurisdiction of any other High Court in whose jurisdiction the head office of OMG may be situated at the time of the institution of legal action.

- 7.4. The submission by the Recipient to the jurisdiction of the aforementioned court covers all causes of action which has as their substance and/or arose in connection with the Agreement.
- 7.5. In the event that both OMG and the Recipient are South African, the Parties consent that any Magistrates' Court which has jurisdiction over the Recipient shall have jurisdiction to entertain any action or proceedings that may arise out of the Agreement, despite the fact that the amount involved may exceed the monetary jurisdiction of the Magistrates' Court as same may be varied from time to time by Government Notice in terms of Act 32 of 1944. This clause constitutes the consent contemplated in section 45 of the Magistrates' Courts Act 32 of 1944.
- 7.6. Should OMG incur costs in the collection of any amounts owing to it by the Recipient, the Recipient shall pay such costs on an attorney and client scale as well as collection costs at 10% (ten percent) of each and every payment made in reduction of the capital amount.
- 7.7. This clause will bind successors in title.

## **8. General**

- 8.1. This Agreement incorporates the entire agreement between OMG and the Recipient in respect of the subject matter hereof and no alteration, consensual cancellation or variation hereof shall be of any force or effect unless it is in writing and signed by both OMG and the Recipient who hereby acknowledge that no representations or warranties have been made by either OMG or the Recipient, nor are there understandings or terms of the Agreement, other than those set out herein.
- 8.2. Neither Party shall be regarded as having waived, or be precluded in any way from exercising, any right under or arising from this Agreement by reason of such Party having at any time granted any extension of time for, or having shown any indulgence to, the other Party with reference to any payment or performance

hereunder, or having failed to enforce, or delayed in the enforcement of, any right of action against the other Party.

8.3. Should any one or more of the provisions of this Agreement be unenforceable, then the remaining provisions, which are not affected, shall be of full force and effect.

## **9. Counterparts**

9.1. This Agreement:

9.1.1. may be executed in separate counterparts, none of which needs to contain the signatures of both Parties, each of which shall be deemed to be an original and all of which taken together shall constitute one agreement; and

9.1.2. shall be valid and binding upon the Parties, notwithstanding that one or both of the Parties may sign an electronic mail copy thereof and whether or not such electronic mail copy contains the signature of the other Party.

## **10. Provisions in respect of ECTA**

10.1. For the purposes of this Agreement –

10.1.1. no data message, as defined in the Electronic Communications and Transactions Act No 25 of 2002 ("ECTA"), other than an email or facsimile, shall constitute writing;

10.1.2. electronic signatures or advanced electronic signatures, as defined in ECTA, shall not be regarded as signatures for purposes of this Agreement.

## **11. Authority of the representatives of OMG and of the Recipient**

11.1. The persons signing this Agreement on behalf of OMG and on behalf of the Recipient, warrant that they are duly authorised to do so on behalf of such Parties, and to bind such Parties to the terms hereof.

SIGNED at \_\_\_\_\_ on this \_\_\_ day of \_\_\_\_\_ 2021

AS WITNESSES:

1. \_\_\_\_\_ **OMG REPRESENTATIVE**

2. \_\_\_\_\_ who warrants that he is duly authorised hereto  
Name: \_\_\_\_\_  
ID No: \_\_\_\_\_

SIGNED at \_\_\_\_\_ on this \_\_\_ day of \_\_\_\_\_ 20\_\_

AS WITNESSES:

1. \_\_\_\_\_ **THE RECIPIENT**

2. \_\_\_\_\_ who warrants that he is duly authorised hereto  
Name: \_\_\_\_\_  
ID No: \_\_\_\_\_