

MUTUAL CONFIDENTIAL DISCLOSURE AGREEMENT

This **MUTUAL CONFIDENTIAL DISCLOSURE AGREEMENT** (“**Agreement**”) is effective this ___ day of _____, 20____, and is made by and between _____, a _____ corporation, having its principal place of business at _____ (“**Company**”), and **THE KROGER CO.**, an Ohio corporation, through its Manufacturing division, having a place of business at 1014 Vine Street, Cincinnati, OH 45202 (the “**Kroger**”).

AGREEMENT

1. **DEFINITIONS.**

1.1. **Confidential Information.** Information, intellectual property, formulations, principles of formulation, pricing, trade secrets or know-how (i) disclosed during the Information Exchange Period, verbally, visually or in writing (including computer-readable optical and magnetic media), in a manner reasonably calculated to alert the recipient to its secret and confidential nature or (ii) shared for the accomplishment of the Objective and/or performance of related services. “Confidential Information” may mean Kroger Confidential Information, Company Confidential Information, or both, as called for by the context of the provision.

1.2. **Disclosure Period.** Defined in **Section 5** below.

1.3. **Employees.** Defined in **Section 2** below.

1.4. **Objective.** To disclose Confidential Information in order for the parties to enter into a business agreement.

2. **DISCLOSURE.**

2.1. Each party shall treat as confidential and shall not directly or indirectly use or disclose, except in pursuit of the Objective or as directed in writing by the disclosing party, the other party’s Confidential Information marked in accordance with **Section 3** below. Neither party may disclose the other’s interest in the Objective, or the fact that the parties are working toward the Objective, without the other party’s prior written consent. If applicable, neither party shall conduct, have conducted or allow to be conducted, any analyses, testing or reverse engineering with respect to samples supplied by the other party unless expressly authorized to do so by the supplying party. Neither party shall allow the other party’s

Confidential Information to be transferred to any other person or entity without the express written permission of the supplying party and shall return any unused sample portions to the supplying party or shall dispose of same in accordance with written instructions from the supplying party.

2.2. The receiving party shall take reasonable steps to limit disclosure of the disclosing party’s Confidential Information to the receiving party’s employees, officers, agents, attorneys, accountants, auditors, or consultants (“**Employees**”) who have a need to know related to the Objective. The receiving party shall instruct its Employees that the disclosing party’s Confidential Information is proprietary, is to be held in strict confidence by said Employees and take all reasonable precautions to safeguard and preserve the confidential status thereof. In addition, the receiving party may disclose the Confidential Information only to a person or entity other than its Employees only after such person or entity has entered into a confidential disclosure agreement that is no less stringent than the terms and conditions herein.

2.3. The receiving party shall take reasonable steps to exclude unauthorized personnel and visitors from areas where the disclosing party’s Confidential Information is or may be available or observable.

2.4. Confidential Information does not include information that: (i) was rightfully in receiving party’s possession prior to the date of initial disclosure, (ii) is published or becomes otherwise available to the general public or part of the public domain through no act or failure to act of the receiving party, (iii) was in receiving party’s possession from a third party who had a bona fide right to make such information available, (iv) was disclosed in accordance with written direction from the disclosing party, (v) was independently developed, or (vi) the receiving party is obligated to produce pursuant to applicable laws and regulations or under order of a court of competent jurisdiction, provided that said party agrees to notify the disclosing party of the facts pertaining to the action as soon as practicable under the circumstances in order to give the disclosing party an opportunity to protect its interests.

2.5. For the purpose of complying with the obligations set forth herein, the party receiving any Confidential Information shall use efforts commensurate with those that such party employs for the protection of corresponding sensitive information of its own, and such receiving party

shall not be liable for any inadvertent disclosure of Confidential Information provided that (i) it has used substantially the same degree of care to avoid disclosing such Confidential Information as it uses for its own information of like importance, and (ii) upon discovery of any inadvertent disclosure it shall use reasonable efforts to prevent further disclosure of such Confidential Information.

3. MARKING. The disclosing party shall use reasonable efforts to mark all materials containing Confidential Information. The receiving party shall not remove such markings, and shall include such markings on permitted copies. However, failure to mark does not by itself disqualify information from being Confidential Information if other factors or circumstances, or a party's course of performance, clearly indicate to the receiving party at the time of disclosure or the receiving party acknowledges that the information is confidential.

4. RETURN OF MATERIALS. Upon the request of the disclosing party, the receiving party shall promptly return or destroy the originals and any copies of the Confidential Information and certify in writing that it has complied fully with the provisions of this **Section 4**.

5. TERM. The period for exchange and disclosure of Confidential Information under this Agreement begins on the effective date of this Agreement and continues for two (2) years after expiration or termination of this Agreement or the Agreement under which the Confidential Information is delivered/exchanged, except for trade secrets with respect to which the obligations hereunder shall continue for as long as they remain trade secrets under applicable law.

6. GENERAL

6.1. Notices. Notices given under this Agreement shall be in writing and delivered by certified or registered U.S. mail, postage paid with return receipt requested; by United States express mail or other established express delivery service (such as Federal Express), postage or delivery charge prepaid; by facsimile, email or other telecommunication device capable of transmitting or creating a written record; or personally. Each party shall give notice to each other party of its address for notice by written notice to the other party. Unless a party designates another address for

notice by notice given pursuant to this Section, notice to party should be sent to the address listed on page 1 or:

If to Company:

Attn: _____

Facsimile No.: (____) _____

Phone No.: (____) _____

If to Kroger:

The Kroger Co.

Attn: Group Vice President, Manufacturing

1014 Vine Street

Cincinnati, OH 45202

Facsimile No.:

Phone No.: (513) 762-4000

In the absence of such notice of party's address for notice purposes, any notice under this Agreement may be given to the address of a party's registered agent. For the purposes of this Agreement, the term "receipt" shall mean the earlier of any of the following: (i) the date of delivery of the notice or other document to the address specified pursuant to this Section as shown on the return receipt or by the records of the courier; (ii) the date of actual receipt of the notice or other document by the office of the person or entity specified pursuant to this Section; or (iii) in the case of refusal to accept delivery or inability to deliver the notice or other document, the earlier of (A) the date of the attempted delivery or refusal to accept delivery; (B) the date of the postmark on the return receipt; or (C) the date of receipt of notice of refusal or notice of nondelivery by the sending party.

6.2. Nothing contained in this Agreement shall be construed to restrict or prevent a party from working internally or with other parties in or on, or from acquiring other parties that work in or on, fields, products or processes similar or identical to or competitive with those set forth in the Objective, and such actions shall not be used as a basis for a claim of "inevitable disclosure or use" of Confidential Information in contravention or breach of this Agreement.

6.3. Except as expressly set forth in this Agreement, nothing in this Agreement shall be construed as a grant of any right or license or an offer to grant any right or license by either party to

the other with respect to the Confidential Information exchanged hereunder.

6.4. No Representations or Further Obligations. Neither this Agreement nor the disclosure or receipt of Confidential Information shall constitute or imply any promise or intention to make any purchase of products or services by either party or any commitment by either party with respect to the present or future marketing of any product or service. None of the Confidential Information which may be disclosed or exchanged by the parties shall constitute any representation, warranty, assurance, guarantee or inducement by either party to the other of any kind, and in particular, with respect to the accuracy or completeness of any Confidential Information or the non-infringement of trademarks, patents, copyrights, mask protection rights or any other intellectual property rights, or other rights of third persons or of either party. It is understood that this Agreement does not obligate either party to enter into any further agreements or to proceed with any possible relationship or other transaction.

6.5. Neither party shall assign, delegate or subcontract this Agreement or any rights or obligations hereunder without the prior written consent of the other party hereto, which consent may be withheld in its sole discretion.

6.6. This Agreement shall be interpreted and construed in accordance with the laws of the state of Ohio.

6.7. If a court of competent jurisdiction finds any provision hereto so overly broad as to be unenforceable, the court may reduce such provision in scope to the extent it deems necessary to render the provision reasonable and enforceable.

6.8. This Agreement may not be modified or amended except by a writing signed by an authorized representative of both parties.

6.9. The parties agree that neither is under an obligation to enter into any further agreement regarding the Objective.

6.10. This Agreement and any exhibits attached hereto contain the entire agreement between the parties, and supersede any previous oral or written understandings, commitments, or agreements pertaining to the subject matter hereof.

6.11. This Agreement will be construed simply according to its fair meaning and not strictly for or against either party. No rule of construction requiring interpretation against the drafter will apply in the interpretation of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the day and year first above written.

COMPANY

Name: _____

Title: _____

THE KROGER CO.

Name: _____

Title: _____