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SAMPLE

DEED OF GUARANTEE

between

CAP'N JACK SPARROW

&

NOT SO SAVVY INVESTOR

and

CAP'N JACK SPARROW ENTERPRISES PTY LTD
(ACN 343 784 343)

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SAMPLE

Date

Parties

Guarantors	<p>CAP'N JACK SPARROW Address: Never See Me Again Estate, Savvyville NSW 2656 Email: jack@piratemail.com</p> <p>NOT SO SAVVY INVESTOR Address: 54-54A Must Be High Street, Kensington SA 5068 Email: notsosavvy@investor.com</p> <p>(together, the <i>Guarantors</i> and each a <i>Guarantor</i>)</p>
Benefitting Party	<p>CAP'N JACK SPARROW ENTERPRISES PTY LTD (ACN 343 784 343) Address: Never See Me Again Estate, Savvyville NSW 2656 Email: jack@piratemail.com</p> <p>(the <i>Benefitting Party</i>)</p>

Recitals

- A The Benefitting Party is a party to the Principal Agreement along with the Principal Obligor.
- B The Guarantors have agreed to guarantee to the Benefitting Party the performance of the obligations of the Principal Obligor under the Principal Agreement in accordance with the terms of this deed.

Operative provisions

1. Definitions and interpretation

Definitions

- 1.1 The following definitions apply in this deed unless the context requires otherwise:

Business Day means a day (other than a Saturday, Sunday or public holiday) when banks in Sydney, New South Wales are open for business.

Claims means any claims including actions, complaints, debts, demands, dues, proceedings, suits or other legal recourse (whether in contract or tort, at law or in equity or under statute) and including any causes of action or rights to bring or make any such claim.

Controller has the meaning given in the Corporations Act.

Corporations Act means the *Corporations Act 2001* (Cth).

Encumbrance means any mortgage, charge (fixed or floating), pledge, lien, hypothecation, guarantee, trust, right of set-off or other third party right or interest (legal or equitable) including any assignment by way of security, reservation of title or other security interest of any kind, howsoever created or arising, or any other agreement or arrangement (including a sale and repurchase agreement) having similar effect.

Governmental Agency means any government or governmental, semi governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity whether foreign, federal, state, territorial or local.

GST has the same meaning given to that expression in the GST Law.

GST Act means *A New Tax System (Goods and Services Tax) Act 1999* (Cth), as in force from time to time.

GST Law has the same meaning given to that expression in the GST Act.

Guaranteed Obligations means the obligations of the Principal Obligor under the Principal Agreement.

Insolvency Event means, in respect of a particular person, the occurrence of any one or more of the following events in relation to that person:

- (a) for a person that is a body corporate:
 - (i) except for the purpose of a solvent reconstruction or amalgamation:
 - (A) process is filed in a court seeking an order that it be wound up or that a Controller be appointed to it or any of its assets, unless the application is withdrawn, struck out or dismissed within 7 days of it being filed; or
 - (B) an order is made that it be wound up or that a Controller be appointed to it or any of its assets; or
 - (C) a resolution that it be wound up is passed or proposed;
 - (ii) a liquidator, provisional liquidator, Controller or any similar official is appointed to, or takes possession or control of, all or any of its assets or undertakings;
 - (iii) an administrator is appointed to it, a resolution that an administrator be appointed to it is passed or proposed, or any other steps are taken to appoint an administrator to it;
 - (iv) it enters into, or resolves to enter into, an arrangement, compromise or composition with any of, or any class of, its creditors or members, or an assignment for the benefit of any of, or any class of, its creditors, or process is filed in a court seeking approval of any such arrangement, compromise or composition;
 - (v) a reorganisation, moratorium, deed of company arrangement or other administration involving one or more of its creditors is proposed or effected;

- (vi) any action is taken by the Australian Securities and Investments Commission with a view to its deregistration or its dissolution, or an application is made to the Australian Securities and Investments Commission that any such action be taken;
 - (vii) it is insolvent within the meaning of section 95A of the Corporations Act, states that it is unable to pay its debts or it is presumed to be insolvent under any applicable law;
 - (viii) as a result of the operation of section 459F(1) of the Corporations Act, it is taken to have failed to comply with a statutory demand;
 - (ix) it stops or suspends or threatens to stop or suspend the payment of all or a class of its debts;
 - (x) any event or circumstance set out in section 461 of the Corporations Act occurs in relation to it; or
 - (xi) anything having a substantially similar effect to any of the events specified in paragraphs (a)(i) to (a)(x) of this definition happens to it under the law of any jurisdiction; and
- (b) for a person that is a natural person:
- (i) a bankruptcy notice is issued against the person;
 - (ii) a receiver or a trustee for creditors or in bankruptcy is appointed to any of the person's property;
 - (iii) the person proposes or enters into an arrangement or composition with, or an assignment for the benefit of, any of the person's creditors;
 - (iv) the person proposes or effects a moratorium involving any of the person's creditors;
 - (v) the person stops or suspends, or threatens to stop or suspend, the payment of all or a class of its debts;
 - (vi) the person is unable to pay all of the person's debts as they fall due or is presumed to be insolvent under any applicable law;
 - (vii) the person becomes an "insolvent under administration" as defined in section 9 of the Corporations Act; or
 - (viii) anything having a substantially similar effect to any of the events specified in paragraphs (b)(i) to (b)(vii) of this definition happens to the person under the law of any jurisdiction.

Liability includes a present, prospective, future or contingent liability.

Loss means any loss, damage, debt, cost, charge, expense, fine, outgoing, penalty, diminution in value, deficiency or other Liability of any kind or character (including any direct, indirect, special or consequential losses, loss of profit and/or loss of reputation) that a party pays, suffers or incurs or is liable for, including all:

- (a) Liabilities on account of Tax;
- (b) interest, penalties and other amounts payable to third parties;

- (c) legal and other professional fees and expenses (on a full indemnity basis) and other costs incurred in connection with investigating, defending or settling any Claim, whether or not resulting in any Liability; and
- (d) all amounts paid in settlement of any Claim.

Principal Agreement means the agreement between the Principal Obligor and the Benefitting Party the title, date and subject matter of which is set out in Schedule 1 Part 2 of Schedule 1.

Principal Obligor means the person listed in 0 of Schedule 1.

Stamp Duty means any stamp, transaction or registration duty or similar charge imposed by any Governmental Agency and includes any interest, fine, penalty, charge or other amount in respect of the above.

Tax or Taxation means:

- (a) any tax, levy, impost, deduction, charge, rate, compulsory loan, withholding or duty by whatever name called, levied, imposed or assessed under the Tax Acts or any other statute, ordinance or law by any Governmental Agency (including profits tax, property tax, interest tax, income tax, tax related to capital gains, tax related to the franking of dividends, bank account debits tax, fringe benefits tax, sales tax, payroll tax, superannuation guarantee charge, group or Pay as You Go withholding tax and land tax);
- (b) unless the context otherwise requires, Stamp Duty and GST; and
- (c) any interest, penalty, charge, fine or fee or other amount of any kind assessed, charged or imposed on or in respect of the above.

Tax Acts means the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth).

Interpretation

1.2 The following rules of interpretation apply in this deed unless the context requires otherwise:

- (a) headings in this deed are for convenience only and do not affect its interpretation or construction;
- (b) no rule of construction applies to the disadvantage of a party because this deed is prepared by (or on behalf of) that party;
- (c) where any word or phrase is defined, any other part of speech or other grammatical form of that word or phrase has a cognate meaning;
- (d) a reference to a document (including this deed) is a reference to that document (including any schedules and annexures) as amended, consolidated, supplemented, novated or replaced;
- (e) references to recitals, clauses, subclauses, paragraphs, annexures or schedules are references to recitals, clauses, subclauses, paragraphs, annexures and schedules of or to this deed;
- (f) a reference to any statute, proclamation, rule, code, regulation or ordinance includes any amendment, consolidation, modification, re-enactment or reprint of it or any statute, proclamation, rule, code, regulation or ordinance replacing it;

- (g) an expression importing a natural person includes any individual, corporation or other body corporate, partnership, trust or association and any Governmental Agency and that person's personal representatives, successors, permitted assigns, substitutes, executors and administrators;
- (h) a reference to writing includes any communication sent by post, facsimile or email;
- (i) a reference to time refers to time in Sydney, New South Wales and time is of the essence;
- (j) all monetary amounts are in Australian currency;
- (k) the word "*month*" means calendar month and the word "*year*" means 12 calendar months;
- (l) the meaning of general words is not limited by specific examples introduced by "*include*", "*includes*", "*including*", "*for example*", "*in particular*", "*such as*" or similar expressions;
- (m) a reference to a "*party*" is a reference to a party to this deed, and a reference to a "*third party*" is a reference to a person that is not a party to this deed;
- (n) a reference to any thing is a reference to the whole and each part of it;
- (o) a reference to a group of persons is a reference to all of them collectively and to each of them individually;
- (p) words in the singular include the plural and vice versa; and
- (q) a reference to one gender includes a reference to the other genders.

2. Guarantee

- 2.1 The Guarantors (jointly and severally) unconditionally and irrevocably guarantee to the Benefitting Party the performance in full of all of the Guaranteed Obligations as and when those obligations fall due for performance in accordance with the terms of the Principal Agreement.
- 2.2 If, and each time that, the Principal Obligor fails to perform any Guaranteed Obligation in full when due, the Guarantors must, on demand, without requiring the Benefitting Party to first:
 - (a) take any steps against the Principal Obligor or any other person; or
 - (b) enforce any Encumbrance that it may hold in relation to that Guaranteed Obligation, perform that Guaranteed Obligation in full and when due in accordance with the terms of the Principal Agreement as if the Guarantors were the principal obligors in respect of that Guaranteed Obligation.

Actions to bind Guarantors

- 2.3 Any agreement, waiver, consent or release given by the Principal Obligor under or in connection with the Principal Agreement will bind the Guarantors.

3. Indemnity

The Guarantors must indemnify and forever keep fully indemnified the Benefitting Party at all times against any and all Losses that are:

- (a) suffered or incurred by the Benefitting Party; and
- (b) caused, whether directly or indirectly, by any breach of this deed by the Guarantors.

4. Preservation of obligations

The obligations of the Guarantors under this deed are not affected by any matter or thing which, but for this clause 4, might operate to affect or prejudice those obligations, including:

- (a) any time, indulgence or concession granted to, or composition with, the Principal Obligor or any other person;
- (b) any variation, renewal, release, replacement, extinguishment, abandonment or transfer of, or neglect to perfect or enforce, the Principal Agreement, any other agreement or document contemplated by, or referred to in, the Principal Agreement or any right, guarantee, remedy or security from or against the Principal Obligor or any other person;
- (c) any waiver, consent or notice given under the Principal Agreement or any other agreement or document contemplated by, or referred to in, the Principal Agreement;
- (d) any obligation of the Principal Obligor being or becoming unenforceable, invalid, illegal, void, voidable or disclaimed by a liquidator or trustee for creditors or in bankruptcy, so that the Principal Agreement must be construed as if there were no such unenforceability, invalidity, illegality or other impediment to enforceability;
- (e) the occurrence of an Insolvency Event in relation to the Principal Obligor, any Guarantor or any other person;
- (f) the Benefitting Party not giving any Guarantor notice of any default by the Principal Obligor or any other person;
- (g) the Benefitting Party not disclosing any information to any Guarantor;
- (h) any legal limitation, disability or incapacity in relation to the Principal Obligor, any Guarantor or any other person;
- (i) any invalidity or irregularity in the execution of this deed, the Principal Agreement or any other agreement or document contemplated by, or referred to in, the Principal Agreement;
- (j) any deficiency in the powers of the Principal Obligor or any Guarantor;
- (k) any assignment by the Benefitting Party, with or without the knowledge of the Principal Obligor or any Guarantor;
- (l) any person who was intended to be bound as a guarantor or surety in relation to the Guaranteed Obligations not becoming bound or ceasing to be bound;
- (m) any laches, acquiescence, delay, action, omission or mistake on the part of, or suffered by, the Benefitting Party or any other person in relation to this deed or any other guarantee, Encumbrance or agreement;
- (n) the receipt by the Benefitting Party or any other person of any dividend or money after an Insolvency Event in relation to the Principal Obligor, any Guarantor or any other person;

- (o) any judgment or right that the Benefitting Party may have or exercise against the Principal Obligor, any Guarantor or any other person;
- (p) the adoption, amendment or replacement of, or any breach of, the constitution, trust deed or other constituting document of the Principal Obligor, any Guarantor or any other person; or
- (q) any change in the ownership or control of the Principal Obligor, any Guarantor or any other person.

5. Limitation of rights

- 5.1 The Guarantors irrevocably waive, and must not exercise, any right of indemnity or subrogation that they otherwise might be entitled to claim and enforce against, or in respect of, the Benefitting Party. Without limitation to the foregoing, the Guarantors must not:
- (a) share in any guarantee, Encumbrance or money received or receivable by the Benefitting Party in relation to the Guaranteed Obligations, or stand in the place of the Benefitting Party in relation to any such guarantee, Encumbrance or right to receive money;
 - (b) take any steps to enforce a right or claim against the Principal Obligor relating to any money paid by any Guarantor to the Benefitting Party under this deed;
 - (c) exercise, or purport to exercise, any rights as surety in competition with the Benefitting Party;
 - (d) receive, claim or have the benefit of any payment (including a payment under a guarantee), distribution or Encumbrance from or on account of the Principal Obligor or any other person;
 - (e) in reduction, or attempted reduction, of its liability under this deed, raise a defence, set-off or counterclaim available to itself, the Principal Obligor or a co-surety or co-indemnifier against the Benefitting Party; or
 - (f) claim to be entitled by way of contribution, indemnity, subrogation, marshalling or otherwise to the benefit of any agreement or document to which the Benefitting Party is a party.

No marshalling

- 5.2 The Benefitting Party is not under any obligation to marshal or appropriate in favour of any Guarantor, or to exercise, apply, perfect or recover, any Encumbrance that the Benefitting Party holds at any time or any funds or property that the Benefitting Party may be entitled to receive or claim.

6. Effect of Insolvency Event

- 6.1 If the Principal Obligor is the subject of an Insolvency Event, the Guarantors irrevocably authorise the Benefitting Party to:
- (a) prove for all money that any Guarantor is liable to pay under this deed; and
 - (b) retain and carry to a suspense account, and appropriate, at the Benefitting Party's discretion, any dividends or other money received in relation to the Guaranteed Obligations,