TEMPLATE CO-FOUNDER AGREEMENT – LONG FORM – USER NOTES

This document is intended for use by the founders of a new startup who wish to provide for some level of claw-back of a co-founder's initial shareholding if he or she:

- ceases to work for the company (whether as an employee or contractor); or
- fails to make the contribution required of them to the business.

This type of arrangement is referred to in the startup and venture capital world as "founder vesting".

Founder vesting is common with Silicon Valley startups, and is becoming more popular in New Zealand as co-founders are increasingly meeting through incubators or accelerator programmes rather than through longstanding business, professional or social relationships.

The approach taken in this document is to provide for progressive vesting of a co-founder's shares over a set period (e.g. 36 months). If the co-founder leaves the company or fails to make the required contribution to the business during that period, the company has the option to repurchase unvested shares for the price originally paid by the co-founder for those shares (which will usually be nil, if the shares were issued on incorporation of the company).

Silicon Valley vesting agreements most commonly apply only if a co-founder leaves a startup before the end of the agreed vesting period (i.e. they do not have "expected contribution" provisions). However, Californian startups invariably take advantage of "at will" employment contracts allowing them to fire staff (including founders) without cause or compensation, meaning it is generally not necessary to deal with expected contributions in vesting agreements. I.e. if a co-founder is not performing, the company can fire them and cancel any unvested stock without the need to justify cancellation on contribution grounds.

There are a number of important "health warnings" that go with the use of founder vesting arrangements in New Zealand, and to the use of this document in particular:

- founders wishing to set up a vesting arrangement must obtain tax advice on the proposed arrangement before using this document. In some circumstances, the implementation of vesting arrangements in New Zealand companies may give rise to tax liabilities;
- founders need to think carefully about the % of each co-founder's shares that are subject to vesting, and about the overall vesting period. The forced sale of shares is a blunt instrument, and could result in harsh outcomes if you get the % and/or vesting period wrong;
- the right to repurchase shares for a failure to make the expected contribution, as provided in this document, is particularly

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blunt, given that whether or not a co-founder is pulling their weight can be quite subjective. If you are uncomfortable with this concept, consider using the short form of this document on our website instead;

- the vesting provisions in this document are administered by the Board. This may not work where there is an even number of directors on the Board, as a majority vote of directors will be required for any actions taken by the company under this document. This is likely to be a particular problem for startups owned 50/50 by two co-founders, and an amended version of this document is probably required in those circumstances;
- similarly, this document is not likely to work well if the co-founder entering into it owns more than 50% of the company or otherwise controls the Board. The short form co-founder agreement would work better in this circumstance, although a majority owner of a startup may not wish to be subject to any form of vesting arrangement and may want this to only apply to his or her minority co-founders; and
- while vesting can be an equitable way to manage the comings and goings of co-founders in the early stages of a venture, we think founders should think carefully about whether the original vesting arrangements should continue once a company is ready to raise capital from professional investors. If investors require some element of founder vesting to ensure the commitment of the co-founders to the company, it may be appropriate to agree a new vesting schedule and an updated purchase price.

Founders using this document will need to ensure that their company's constitution expressly permits share buy backs (see the Kindrik Partners **template constitution**, which expressly permits share buy backs, in the resources section of our website).

This document is not intended to cover broader matters relating to the management and governance of the company, and the relationship between its shareholders (e.g. the right to appoint directors, matters requiring special approvals, non-competes, etc).

Those matters can be covered in a **shareholders' agreement** (see the resources section of our website).

USING THIS TEMPLATE

The ***User Notes*** and the statements in the footer (all marked in red) are included to assist you to prepare this document. They are for reference only. You should delete all user notes and the statements in the footer from the final form of your document.

The use of [*square brackets*] around black text means that:

- the requested details need to be inserted
- there are different options for you to consider within a clause
- the whole clause is optional and you need to consider whether to include it, based on your circumstances and the user notes.

Before finalising your document, check for all square brackets to ensure you have considered the relevant option and deleted the brackets.

If you delete any clause or schedule, remember to cross reference check the document.

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CO-FOUNDER AGREEMENT

[*INSERT NAME OF COMPANY*]

DATE

PARTIES

1 [***INSERT***] (**Co-Founder**)

2 ***[User note: Use the following description for the company in which shares are held.]*** [***INSERT NAME OF COMPANY***] **LIMITED**, company number [*insert*] (**Company**)

[User note: If the shares are held personally by the co-founder, delete party 3. If the co-founder holds the shares through another entity (e.g. through a trust or a company) or jointly with another person, use the relevant party 3 wording from the options below.]

3 ***[User note: Use this party 3 wording if the Co-Founder's shares are held in a trust.]*** [***INSERT***], [***INSERT***] and [***INSERT***] as trustees of [*insert name of trust*] (**Shareholder**)

3 ***[User note: Use this party 3 wording if the Co-Founder's shares are held by the Co-Founder jointly with another person.]*** [***INSERT***], and [***INSERT***] (**Shareholder**)

3 ***[User note: Use this party 3 wording if the Co-Founder's shares are held by a company.]*** [***INSERT NAME OF COMPANY***] **LIMITED**, company number [*insert*] (**Shareholder**)

BACKGROUND

- The Co-Founder has become a shareholder of the Company with the expectation that he or she will make a material contribution to the establishment and development of the Company's business.
- The parties have agreed that the Company will have an option to repurchase some of the Co-Founder's Shares if the Co-Founder ceases to work for the Company or otherwise ceases to make the expected contribution to the Company's business during the term stated in Schedule 1.
- This Agreement sets out the terms of the Company's repurchase option.

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SIGNED

[User note: Use the following signature block for each party that is a company.]

SIGNED for and on behalf of **[*INSERT NAME OF COMPANY*] LIMITED** by:)
)

Signature of authorised signatory

Print full name of authorised signatory

[User note: Use the following signature block for each party that is an individual.]

SIGNED by **[*INSERT NAME OF INDIVIDUAL*]**:)
)

Signature

[User note: If any shares are held by trustees on behalf of a trust, each trustee of that trust will need to sign this agreement. Use the following signature block for each party signing as trustee of a trust.]

SIGNED by **[*INSERT NAME OF TRUSTEE*]** as trustee of the **[*INSERT NAME OF TRUST*]**:)
)
)

Signature of [*Insert name of trustee*]

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TERMS OF THIS AGREEMENT

1 INTERPRETATION

1.1 **Definitions:** In this Agreement:

TERM	MEANING
Agreement	this agreement, including the Schedules attached to it.
Board	the board of directors of the Company.
Business Day	Monday to Friday, other than any public holiday within the meaning of section 44 of the Holidays Act 2003 that occurs in [*insert the city where the Company is located*].
Co-Founder's Shares	the total number of shares in the Company held by the Shareholder at the date of this Agreement, as set out in Schedule 1.
Constitution	the constitution of the Company.
Exit Date	the date on which the Co-Founder ceases to work for the Company as referred to in clause 4.2a, or the date on which the Co-Founder is given notice under clause 2.3.
Expected Contribution	the contribution that the Co-Founder is expected to make to the business of the Company during the Term as set out in Schedule 1.
Purchase Price	the price originally paid by the Co-Founder for the number of Shares purchased by the Company on the exercise of its repurchase option, as set out in Schedule 1. If the original purchase price paid by the Co-Founder was nil or only nominal consideration, the Purchase Price will be $1.
Shareholder	the entity defined as the "Shareholder" in the Parties section of this Agreement, or if there is no entity defined, the Co-Founder.
Term	the term set out in Schedule 1.
Unvested Shares	the number of Co-Founder's Shares that are subject to the Company's repurchase option on the date of exercise of that option, calculated in accordance with clause 3.3 and Schedule 1.

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1.2 **Interpretation:**

a A reference to:

i a **clause** or a **Schedule** is to a clause in or a schedule to this Agreement;

ii a **person** includes a body corporate, an association of persons (whether corporate or not), a trust, governmental or other regulatory body, authority or entity, in each case whether or not having a separate legal personality;

iii **including** and similar words do not imply any limit;

iv a **statute** includes references to that statute as amended or replaced from time to time;

v a **party** is a reference to a party to this Agreement, and includes that party's permitted assigns; and

vi **$** or **dollars** are to New Zealand currency.

b The **headings** in this Agreement are for convenience only and have no legal effect.

c The **singular** includes the plural and vice versa.

1 CONSIDERATION AND TERM

1.1 **Consideration:** The Company agrees to pay to each of the Co-Founder and the Shareholder $1 on demand in consideration for their entry into this Agreement (including the grant of the repurchase option to the Company in clause 3.2).

1.2 **Term:** This Agreement may be terminated by the agreement in writing of all parties to it, and if not terminated prior will expire at the end of the Term.

2 EXPECTED CONTRIBUTION

2.1 **Contribution**: It is intended that the Co-Founder will make the expected contributions stated in Schedule 1, including performing any roles and tasks specified in that Schedule as being the responsibility of the Co-Founder.

2.2 **Nature of role**: The manner in which the Co-Founder is engaged by the Company (e.g. as an employee or contractor) to perform the roles and tasks required of him or her and the remuneration payable will be as separately agreed between the Board and the Co-Founder.

2.3 **Failure to contribute**: If the Board considers that the Co-Founder has failed to make the Expected Contribution in one or more material respects, the Company may give notice to the Co-Founder providing details of the shortfall in contribution. The Co-Founder may respond within five Business Days of receipt of the notice under this clause either accepting the

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matters stated in the notice and proposing remedial action that he or she will take to remedy those matters, or setting out the reasons why he or she disagrees with the matters stated in the notice.

2.4 **Board decision:** If the Board:

a is satisfied with the remedial action proposed by the Co-Founder in response to the Company's notice or is satisfied based on the reasons provided by the Co-Founder that there was not a shortfall in contribution, the Company must withdraw the notice given under clause 2.3; or

b is not satisfied with the remedial action proposed or continues to consider that the Co-Founder has failed to make the Expected Contribution in one or more material respects, the Company may give the Co-Founder a further notice stating that he or she has failed to make the Expected Contribution and that the Company intends to exercise its repurchase option under clause 3.2.

2.5 **Co-Founder may dispute:** If the Co-Founder receives a notice from the Company under clause 2.4b, he or she may, by giving notice to the Company within 10 Business Days of the date of the Company's notice, dispute the Board's decision and require the matter to be referred for determination by an expert under clause 4.

3 VESTING AND REPURCHASE OPTION

3.1 **Vesting:** The initial percentage of the Co-Founder's Shares that are Unvested (and are accordingly subject to the Company's repurchase option) is specified in Schedule 1. This percentage will reduce on a monthly basis from the start of the vesting period specified in Schedule 1 to the end of the Term, in the monthly amounts specified in that Schedule.

3.2 **Option:** The Company has an option to repurchase the Unvested Shares for the Purchase Price if:

a the Co-Founder ceases to work for the Company for any reason, including due to the death or disability of the Co-Founder; or

b the Company gives notice to the Co-Founder in accordance with clause 2.4b that he or she has failed to make the Expected Contribution and the Company intends to exercise its repurchase option.

3.3 **Exercise of option:** The Company may exercise a repurchase option arising under clause 3.2 by giving notice of exercise to the Shareholder (with a copy to the Co-Founder if he or she is not the Shareholder) no later than 60 Business Days after the Exit Date, stating the number of shares to which it applies (which may be some or all of the Unvested Shares). Upon that notice being given, the Company will become the legal and beneficial owner of the number of Co-

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Founder's Shares the subject of the notice, and the Company may transfer those shares into its own name and immediately cancel them without further action by the Shareholder.

3.4 **Accelerated vesting:** If:

a the Company enters into a listing agreement with the New Zealand Stock Exchange, or other national stock exchange of similar or better standing;

b the Company or a shareholder (or shareholders) of the Company enters into a binding agreement with a third party (or a group of associated third parties) on arms length terms under which the third party is to acquire (other than by way of a subscription for new shares) 50% or more of the voting shares of the Company, and that agreement becomes unconditional;

c the Company enters into a binding agreement to dispose of assets comprising more than half the value of the Company's assets, and the shareholders of the Company approve the disposition of those assets; or

d the Company resolves to amalgamate with any other company (whether or not it is the continuing company), in a transaction that is in substance the same as those in b and c above,

the Company's repurchase option in clause 3.2 will lapse.

3.5 **Adjustments:** If there is any bonus issue, consolidation or subdivision of any shares in the Company or any reduction or cancellation of share capital (or any similar reorganisation of the capital of the Company), the number of Unvested Shares and the Purchase Price will be adjusted by the Board to ensure that the effect of the Company's repurchase option remains the same.

3.6 **Agreement of entitled person:** This clause is an agreement of the Shareholder as an entitled person to any share purchase made by the Company under this Agreement for the purposes of section 107(1)(c) of the Companies Act 1993. The parties agree that the pre-emptive rights and other share transfer provisions of the Constitution do not apply to any share purchase made by the Company under this Agreement.

4 EXPERT DETERMINATION

If a notice is given by the Co-Founder in accordance with clause 2.5, the following procedure applies:

a an independent expert will be appointed by agreement of the parties, or failing agreement, by the President of the New Zealand Law Society (or his or her delegate) on application by either party;

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b the role of the expert will be to decide whether or not the Co-Founder failed to make the expected contribution to the Company in one or more material respects;

c in reaching his or her decision, the expert must have regard to a single set of written submissions from the Company and from the Co-Founder;

d the Company and the Co-Founder must each provide the expert with any assistance that the expert may request to issue his or her opinion;

e the expert must not act as a mediator or arbitrator and the Arbitration Act 1996 does not apply;

f unless otherwise specified by the expert, the expert's fees must be borne equally between the Company and the Co-Founder; and

g (in the absence of manifest error) the expert's decision is final and binding on the parties.

4.2 **Effect of decision:** If the expert's decision is that the Co-Founder failed to make the expected contribution to the Company in one or more material respects, the Company may exercise its repurchase option as if the Co-Founder was given notice under clause 2.4b on the date of the expert's determination being given. If the expert finds that the Co-Founder did not fail to make the expected contribution, the Company's notice given under clause 2.4b will be of no effect and the Company may not give another notice under clause 2.3 in respect of the same matter.

5 SHARE TRANSFERS

Unless the Board approves otherwise by unanimous resolution, the Shareholder must not transfer any Co-Founder's Shares while the Company retains an option to purchase any of those shares under this Agreement.

6 INDEPENDENT TRUSTEE

The liability of any independent trustee under this Agreement is not an unlimited or personal liability and instead is limited to the funds from time to time belonging to the trust on behalf of which he or she has entered into this Agreement, in the proper course of the administration of that trust. In this clause, an **independent trustee** is any party who has signed this Agreement in his or her capacity as the trustee of a trust and who is not a beneficiary of the trust nor has

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any right to, or interest in, any of the assets of the trust except in his or her capacity as trustee of that trust.

7 RECEIPT OF DOCUMENTS BY ELECTRONIC MEANS

The Shareholder notifies the Company that:

a it wishes to receive by electronic means all notices, statements, reports, accounts and other documents to be sent to shareholders of the Company; and

b the email address to send those documents to is the email address of the Shareholder listed in Schedule 2, or as otherwise notified to the Company in writing.

8 GENERAL

8.1 **Confidentiality:** Each party must keep this Agreement, its terms and information it receives about the Company and its business in connection with this Agreement (**Confidential Information**) confidential, and must not use or disclose that Confidential Information without the prior written consent of the other parties except to the extent that:

a disclosure is required by law;

b the relevant information is already in the public domain;

c it is reasonably required to obtain professional advice; or

d it is reasonably necessary in connection with any proposed:

i financing of that party;

ii sale of that party's interest in the Company; or

iii sale of all or part of the business of, or the shares in, that party,

and the party receiving the Confidential Information has entered into confidentiality undertakings substantially the same as those set out in this clause.

8.2 **Notices:** All notices and communications given under this Agreement must be in writing and will be delivered personally, sent by post or sent by email, to the address or email address set out in Schedule 2 (or at such other address as notified from time to time by the party changing its address).

8.3 **Time of service:** Any notice given under this Agreement will be deemed to be validly given:

a in the case of delivery, when received;

b in the case of posting, on the second day following the date of posting; or

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c if emailed, one hour after the email is sent unless a return email is received by the sender within that one hour period stating that the addressee's email address is wrong or that the message cannot be delivered,

provided that any notice received after 5pm on a Business Day or on any day that is not a Business Day will be deemed to have been received on the next Business Day.

8.4 **Entire agreement:** This Agreement contains all of the terms agreed between the parties relating to the matters dealt with in this Agreement and supersedes and cancels all prior discussions and agreements covering the subject matter of this Agreement. The parties have not relied on any representation, warranty or agreement relating to the matters dealt with in this Agreement that is not expressly set out in this Agreement, and no such representation, warranty or agreement has any effect from the date of this Agreement.

8.5 **Further assurances:** The parties must each sign all further documents and do all other things as the Board considers necessary or desirable to give effect to this Agreement.

8.6 **Amendments:** This Agreement may only be amended by agreement of the parties in writing.

8.7 **Waiver:** No exercise or failure to exercise or delay in exercising any right or remedy will constitute a waiver by that party of that or any other right or remedy available to it.

8.8 **No partnership:** Nothing contained in this Agreement will be deemed or construed to constitute any party to be a partner, agent or representative of any other party, or to create any trust or commercial partnership.

8.9 **No assignment:** No party may assign any of its rights or obligations under this Agreement without the prior written consent of the other parties.

8.10 **Costs:** Except as otherwise provided in this Agreement, the parties will meet their own costs relating to the negotiation, preparation and implementation of this Agreement.

8.11 **Partial invalidity:** If any provision of this Agreement becomes invalid or unenforceable to any extent, the remainder of this Agreement and its application will not be affected and will remain enforceable to the greatest extent permitted by law.

8.12 **Signature:** This Agreement may be executed in two or more counterparts, each of which is deemed an original and all of which constitute the same Agreement. A party may enter into this Agreement by signing and sending (including by email) a counterpart copy to each other party.

8.13 **Governing law and jurisdiction:** This Agreement will be governed by New Zealand law, and the parties submit to the non-exclusive jurisdiction of the New Zealand courts.

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SCHEDULE 1

1 Term

2 Purchase Price

3 Expected Contribution

[*Insert the contribution the Co-Founder is expected to make to the business of the Company during the Term*]

4 Co-Founder's Shares

Total number of Co-Founder's Shares:	[*Insert total number of shares in the Company held by the Shareholder at the date of this Agreement*]

5 Co-Founder's Shares subject to repurchase option

Unvested Shares (% of Co-Founder's Shares subject to repurchase option):	[*Insert %*]
Start of the vesting period:	The vesting period starts on [*the date of this Agreement*]
Monthly reduction in the number of Unvested Shares:	[*x% of the Co-Founder's Shares per month until the end of the Term*]

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[USER NOTE: THE FOLLOWING IS AN EXAMPLE TO ILLUSTRATE HOW SCHEDULE 1 COULD BE USED IN PRACTICE]

SCHEDULE 1

1 Term

From the date of this Agreement to the date that is 36 months after the date of this Agreement.

2 Purchase Price

Nil (shares issued on incorporation).

3 Expected Contribution ***[User note: This is a high level description provided as an example only. You may want to be more specific in your description of the expected contribution.]***

a *completing successful commercial release of the company's web platform by [date];*

b *undertaking the role Chief Technical Officer for the company on a full time basis; and*

c *ensuring that the company's technical and development activities are carried out in accordance with industry best practice, and ensuring that this can be demonstrated to other stakeholders such as potential and current customers and investors.*

4 Co-Founder's Shares

Total number of Co-Founder's Shares:	*100 ordinary shares*

5 Co-Founder's Shares subject to repurchase option

Unvested Shares (% of Co-Founder's Shares subject to repurchase option):	*75%*
Start of the vesting period:	*The vesting period starts on the date of this Agreement*
Monthly reduction in the number of Unvested Shares:	*2.08% of the Co-Founder's Shares per month until the end of the Term*

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SCHEDULE 2

DETAILS FOR NOTICES

[INSERT NAME OF CO-FOUNDER]	
Contact Name	
Company	
Address (Physical Address & PO Box)	
Email address	

[INSERT NAME OF SHAREHOLDER]	
Contact Name	
Company	
Address (Physical Address & PO Box)	
Email address	

[INSERT NAME OF COMPANY]	
Contact Name	
Company	
Address (Physical Address & PO Box)	
Email address	

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