

## **CONFIDENTIALITY AGREEMENT**

<u>Section</u>	<u>Annotation</u>
THIS CONFIDENTIALITY AGREEMENT (the "Agreement") dated this _____ day of _____, _____, is made and entered into by and between ABC, Inc., a Delaware corporation having a place of business at 1 North Market Street, Wilmington, Delaware 19801 ("Owner") and XYZ, LLC, a Delaware limited liability company having a place of business at 2 North King Street, Wilmington, Delaware 19801 ("Recipient").	
<b>1. Introduction.</b>  Owner or its Affiliates plan to provide Recipient with certain Confidential Information regarding _____ and related technologies including, but not limited to: _____, for the purpose of _____.	At the beginning of a Confidentiality Agreement, it is useful to identify in general terms the nature of the Confidential Information that will be delivered or the purpose for delivery. Further detail can be provided later in the Confidentiality Agreement, but the opening description provides a means for each party to determine easily, when necessary, the subject, and importance, of the Confidentiality Agreement. This provision is desirable but not essential.  This agreement is drafted as a unilateral (one-way) agreement whereby "Owner" is providing information to Recipient. If both parties are to disclose confidential information to each other this introduction might begin, "Party 1 and Party 2 plan to provide Confidential Information to the other Party regarding . . ."
<b>2. Parties and Affiliates.</b>  The term "Affiliate" shall mean (a) any person or entity directly or indirectly controlled by, controlling, or under common control with Owner and (b) any officer, director, management employee, or trustee of Owner or any such person or entity.	Frequently, it is not a single organization that will be disclosing Confidential Information, but a number of affiliated organizations and individuals. A clear definition of "Affiliate" can make it easier to deal with this issue later.  In some cases, the parties may want affiliates to be signatories as well.
<b>3. Identification of Confidential Information.</b>  The term "Confidential Information" shall mean all	A critical provision in any Confidentiality Agreement is the definition of "Confidential Information."

financial, technical and other information, including all copies thereof (including, without limitation, all agreements, files, books, logs, charts, records, studies, reports, surveys, schedules, plans, maps, and statistical information) that may be furnished or disclosed to Recipient by, or acquired by Recipient directly or indirectly from, Owner or Owner's Affiliates, including as a result of an inspection of any facility of Owner or Owner's Affiliates, or Owner's or Owner's Affiliates' licensors, licensees, or other customers. Such term shall also include all memoranda, notes, reports, documents, and other media containing Confidential Information, as well as any copies and extracts of Confidential Information and any computer-generated studies and data containing Confidential Information prepared by or for the benefit of Recipient in connection with carrying out any Project.

In some cases, "Confidential Information" is defined as all information disclosed concerning a particular subject, subject to expressly stated exceptions (see next section). In other cases, "Confidential Information" is defined in a Confidentiality Agreement to have the same meaning as "trade secrets" under the Uniform Trade Secret Act or other applicable legal authority. In this regard, the parties should consider whether they can properly protect by contract, under applicable law, types of nonpublic or restricted information that might not constitute a trade secret in the pertinent jurisdiction.

Yet another approach for defining "Confidential Information" is to list by subject and content the specific information that the Recipient agrees to receive and keep confidential or to refer to other signed agreements or acknowledgments in which the Confidential Information is listed by subject and content. Such an approach has the advantage that it helps the Recipient evaluate and comply with its confidentiality obligations. Large research organizations, particularly organizations that compete or potentially compete with each other, frequently choose this approach because of the potential conflict that the confidentiality obligations could impose on their business operations and strategies.

Additionally, it may make sense to define subclasses of Confidential Information and include what is included in each subclass and the restrictions regarding access of each.

Note that there is a possible distinction between media, materials and lists that contain information, and the information

	<p>itself. In some cases, as illustrated here, both the information and the tangible form in which it is presented are included in the definition of "Confidential Information."</p> <p>A question can arise as to whether any results derived by the Recipient from use of the Owner's Confidential Information or any jointly conceived inventions, improvements, discoveries, or know-how constitute part of the Owner's Confidential Information--i.e., owned by Owner--or represent something else perhaps owned separately. If such an issue is applicable, it should be addressed directly.</p>
<p><b>4. Exceptions: Public Information.</b></p> <p>For purposes of this Agreement, Confidential Information shall not include, and the obligations herein shall not apply to, information that:</p> <ul style="list-style-type: none"> <li>A. Is now or subsequently becomes generally available to the public through no fault of Recipient;</li> <li>B. Can be demonstrated by Recipient was rightfully in its possession prior to disclosure to Recipient by Owner;</li> <li>C. Is independently developed by Recipient without the use of any Confidential Information provided by Owner;</li> <li>D. Can be rightfully obtained by Recipient from a third party [without restriction and without breach of this Agreement] [who has the right, without obligation to Owner, to transfer or disclose such information];</li> <li>E. Is released or approved for release by Owner without restriction; or</li> <li>F. Is inherently disclosed in the use, lease, sale, or other distribution of any present or future product or service produced by, for, or under authorization of Owner or in publicly available supporting documentation for any such product or service.</li> </ul>	<p>If the definition of "Confidential Information" is open-ended, the Recipient can limit the definition by including a statement of exceptions for public information. Such a provision is sometimes viewed as essential by the Recipient, but not the Owner. There are many ways of describing the exceptions for public information.</p>
<p><b>5. Protection: General Standard.</b></p>	<p>It is common for the Confidentiality Agreement to include a general</p>

<p>Recipient agrees to use reasonable care, but in all events at least the same degree of care that it uses to protect its own confidential and proprietary information, to prevent the unauthorized use, disclosure, or availability of Confidential Information of the Owner.</p> <p>[Optional Additional Provision] Recipient shall not be liable for inadvertent disclosure or use of any Confidential Information, provided that upon discovery of such inadvertent disclosure or use, Recipient notifies Owner and cooperates to prevent any further unauthorized disclosure or use of the Confidential Information in Recipient's possession. Recipient shall not be liable for unauthorized disclosure or use by persons who are or who have been in its employ, unless it fails to protect such Confidential Information with the same degree of care as it uses in handling its own confidential and proprietary information of similar importance.</p>	<p>provision requiring the Recipient to protect the Confidential Information as "confidential" or "secret." This provision may be stated in terms of "best efforts," "reasonable efforts," or "efforts consistent with Recipient's own internal business practices for the protection of its own Confidential Information."</p> <p>The Recipient may seek to include a disclaimer, as shown in this agreement, that excuses the Recipient from liability for an inadvertent breach of confidentiality, so long as the Recipient responds appropriately to the breach.</p>
<p><b>6. Protection: Specific Actions.</b></p> <p>Such care shall include securing writings, documents, and other media containing such Confidential Information in a safe or locked file cabinet or the equivalent and maintaining a written agreement with each employee [or contractor] who may have access to such Confidential Information sufficient to comply with the terms of this Agreement.</p>	<p>For effective protection of any Confidential Information, it is most important that the Recipient take precautions to avoid any unauthorized use or disclosure of the Confidential Information. In some cases, the Owner of the Confidential Information may want to enumerate those precautions in the Confidentiality Agreement. The precautions can include limiting the Recipient's copying of media or materials that contain Confidential Information; limiting the Recipient's own internal distribution of such media or materials; requiring the Recipient to maintain a log of all personnel who are given access to the Confidential Information; or even requiring all personnel who are given access to the Confidential Information to sign a separate Confidentiality Agreement to be provided to the Owner of the Confidential Information.</p>
<p><b>7. Authorized Use of Confidential Information.</b></p> <p>Recipient may use the Confidential Information only for purposes of [evaluation of the Product or for internal business purposes in support of the Project(s)]. The term "Project(s)" means projects or tasks requested of Recipient</p>	<p>It is fundamental that the Confidentiality Agreement define and limit the use and disclosure authorized for the Recipient. Frequently, the authorized use is limited to internal business use relating to a specific, mutually</p>

<p>by Owner as expressly set forth in written instructions or agreements signed by an authorized representative of Owner.]</p>	<p>defined project. Sometimes the authorized use is limited to noncommercial, nonproductive evaluation of a business opportunity or product. There are other possibilities. The enumeration of authorized uses is technically effective as a license.</p>
<p><b>8. Authorized Disclosure of Confidential Information.</b></p> <p>Recipient may disclose the Confidential Information only to employees [and contractors] of Recipient who have a "need to know" such Confidential Information in order to enable Recipient to use such Confidential Information for purposes of the Projects and are legally bound to use and disclose such Confidential Information for no other purpose. Recipient may make a reasonable number of copies of materials or media containing such information as appropriate to accomplish the purpose agreed to by Owner.</p> <p>Any reproduction or copies made of any Confidential Information shall remain the property of Owner and shall contain any and all confidential or proprietary notices or legends which appear on the original, unless otherwise authorized in writing by Owner.</p>	<p>Defining the scope of disclosure permitted of the Recipient helps the Owner confine the dissemination of the Confidential Information and, thus, strengthens the protection of the Confidential Information. In some cases, the Confidentiality Agreement can limit the Recipient's authorized disclosure of the Confidential Information to a number of specifically identified persons. In other cases, the Confidentiality Agreement permits disclosure only to employees who have a "need to know" the Confidential Information in order to carry out the purposes for which the Recipient is authorized to have the Confidential Information. A common question is whether the Recipient is entitled to share the Confidential Information with consultants or contractors the Recipient has hired either specifically to assist with the Project or, more generally, to help the Recipient run its organization.</p> <p>If the Recipient is permitted to make copies of copyrighted materials in order to carry out the purposes for which the Confidential Information is provided, it is best for the Owner to be explicit about what is authorized, rather than leave it to implication.</p>
<p><b>9. Compelled Disclosure of Confidential Information.</b></p> <p>Recipient may, in addition, use or disclose Confidential Information if and to the extent: (1) required by any request or order of any government authority; (2) otherwise required by law; or (3) necessary to establish its</p>	<p>The Recipient may be compelled to disclose the Confidential Information in order to comply with its legal obligations. For example, a public company may need to disclose the existence of material plans or projects to some degree in order to comply with its public reporting</p>

<p>rights under this Agreement; provided that, in each case, Recipient will first notify Owner of such requirement, permit Owner to contest such requirement if reasonably appropriate, and cooperate with Owner in limiting the scope of the proposed use or disclosure and/or obtaining appropriate further means for protecting the confidentiality of the Confidential Information.</p>	<p>obligations under applicable securities laws. Court-ordered discovery is another example of an instance in which the Recipient can be compelled to disclose Confidential Information. Ordinarily, the Owner should be willing to permit disclosure in these cases (and, in fact, it is probably implied if not made explicit), but the Owner should condition disclosure on the Recipient's prior notification of the Owner of the impending disclosure and the Recipient's cooperation with the Owner for purposes of limiting the scope of disclosure or obtaining an adequate protective order.</p> <p>Sometimes, the Confidentiality Agreement will also permit the Recipient to disclose the Confidential Information in order to "establish its rights" under the Confidentiality Agreement or another agreement between the parties. There are instances in which the Recipient chooses to sue the Owner for reasons related to the Confidentiality Agreement (for example, if a computer program provided by the Owner is defective), and the Confidential Information may be relevant to that action.</p> <p>It is not unusual for the Recipient to include these exceptions for compelled disclosure in the definition of Confidential Information. That approach is inappropriate, however, because the exceptions apply to the prohibition on disclosure: the exceptions should not imply the Confidential Information is public or unrestricted generally.</p> <p>Owner should make it very clear that before ANY compelled disclosure, Owner must be contacted. Some disclosures can be deadly to keeping Confidential Information confidential. For example, disclosures to government entities</p>
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	<p>can result in a mandatory license to the government and when dealing with universities, FOIA laws may cause public disclosure of the information.</p>
<p><b>10. Third-Party Information.</b></p> <p>To the extent Owner discloses, or provides for the disclosure of, Confidential Information of a third party, that third party shall be a third-party beneficiary with respect to the confidentiality provisions of this Agreement and shall be entitled to enforce such provisions directly against Recipient as the third party's interests may warrant. Recipient agrees, without charge, to sign such further agreements or acknowledgments as Owner may request in order to evidence more clearly which parts of the Confidential Information may derive from such third parties and how such Confidential Information is required to be protected hereunder.</p>	<p>It is more and more common for the Owner to include Confidential Information it has obtained from third parties as part of the Confidential Information it provides the Recipient. This presumes that the Owner has authority from the third parties to make such a disclosure and to authorize the further use by the Recipient of the third parties' Confidential Information.</p> <p>In order to help the Owner comply with restrictions imposed by such third parties, it is useful for the Confidentiality Agreement to include an acknowledgment that the Owner's Confidential Information can include Confidential Information provided to the Owner by third parties. The Confidentiality Agreement may also give the third parties the right to enforce the Confidentiality Agreement directly against the Recipient in the event of the Recipient's breach of the Confidentiality Agreement. Finally, the Confidentiality Agreement may require the Recipient to sign other agreements or acknowledgments, at the Owner's request, in order for the Owner to evidence more clearly which parts of the Confidential Information derive from which third parties, and how that Confidential Information is protected.</p>
<p><b>11. Administration.</b></p> <p>All disclosures of Confidential Information pursuant to this Agreement shall be made by or under the supervision of the "Principal Contact(s)." The Principal Contacts for the parties are identified at the end of this Agreement. Each party may change its Principal Contact at any time and from time to time during the term of this Agreement by notifying the Principal Contact of the other party in writing at the</p>	<p>It is not unusual for the parties, for their mutual protection, to provide that Confidential Information should be provided by only a specified representative of the Owner to only a specified representative of the Recipient. In some cases, the Confidentiality Agreement requires a "paper trail" for all of the Confidential Information, so the</p>

<p>designated address.</p> <p>Information considered to be Confidential Information by the Owner may be disclosed orally or in writing. Oral disclosures of Confidential Information shall be orally noted, at the time of disclosure, to comprise Confidential Information. Owner shall, within 10 days after disclosure, summarize any such oral disclosure in writing for delivery to the Principal Contact for the Recipient.</p> <p>All written disclosures of Confidential Information or summaries of Confidential Information that have previously been disclosed orally shall be marked "Owner Confidential Information" or terms of similar import.</p> <p>[Additional Provision] All information exchanged between the parties will be non-confidential except to the extent disclosed, and identified as confidential, in the manner required by this Agreement.</p>	<p>Recipient is clearly aware of the information and materials to be protected, and presumably so the Recipient can practically store or retrieve at least the relevant materials as needed.</p> <p>Note that there is a difference between an undertaking or covenant to exchange Confidential Information in this manner, and a condition or qualification that information or materials do not constitute Confidential Information unless exchanged in this manner. In general, the condition or qualification is more absolute in the sense that there is no protection for the Owner's Confidential Information unless the condition or qualification is satisfied. In contrast, an undertaking or covenant can be found waived or excused by operation of law or conduct of the parties, or the courts may conclude that there are adequate other remedies for violation of an undertaking or covenant besides depriving the Confidential Information of any protection.</p> <p>An optional additional provision is featured here to illustrate how the Recipient can be explicit that it has no obligation except for Confidential Information exchanged in the manner required by the Confidentiality Agreement.</p>
<p><b>12. Term; Termination.</b></p> <p>The term of this Agreement shall commence as of the date of first disclosure of Confidential Information by the Owner [or commence on the date of this Agreement] and shall end on _____, 20__ [or __ years after the final return or destruction of all Confidential Information as provided below].</p> <p>Upon the earlier of _____, 20__, or Owner's request, Recipient will either return or, if requested by Owner, destroy all copies of any media or materials containing Confidential Information; [provided that</p>	<p>It is not essential that the Confidentiality Agreement include a specific term or termination date; the confidentiality obligations can extend indefinitely (unless applicable law, in the rare case, provides otherwise). Nonetheless, it is not unusual for a Confidentiality Agreement to include such a provision.</p> <p>The termination date gives the Recipient practical assurance that its confidentiality obligations have</p>

<p>Recipient may, if it so notifies Owner, retain a limited number of copies for archival purposes only for reference with respect to the prior dealings between the parties]. Upon Owner's request, Recipient agrees to certify it has completed such requested action.</p>	<p>ended. In some cases, it may be unrealistic to expect certain kinds of confidential information to have significance, or to still be secret, after a certain time in the future.</p> <p>The termination date can be defined based on the expiration of a specified period of time following (1) the date of execution of the Confidentiality Agreement; (2) the date of the Owner's disclosure of the relevant Confidential Information to the Recipient; or (3) the date of the Recipient's final return or destruction of all media and materials containing the Confidential Information. Obviously, these options are progressively more beneficial to the Owner.</p> <p>Note the separate issue of whether the Confidentiality Agreement provides only for protection of the Confidential Information after the commencement date for the term of the Confidentiality Agreement. Such a limitation may be administratively useful for the Recipient, but the Owner should be on guard against the possibility the Owner could have disclosed the Confidential Information to the Recipient prior to the commencement date for the term of the Agreement. The same issue comes up if the statement of exceptions for public information (see Item 4) includes as public information any information that was obtained by the Recipient prior to the commencement date of the Confidentiality Agreement.</p> <p>Sometimes the Confidentiality Agreement will provide that the Recipient may no longer use the Confidential Information, and that the Recipient is obligated to return or destroy all media and materials containing any Confidential Information, at a specified time or upon the Owner's request, whichever comes first. If the parties</p>
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	<p>agree to such a provision, it is typical for the Owner also to have the right to require the Recipient to certify, upon the Owner's request, that the Recipient has indeed returned or destroyed all media and materials containing any Confidential Information. Certification has the value of demonstrating that an individual representative of the Recipient has determined to his own satisfaction that the Recipient is in compliance with the requirements of the Confidentiality Agreement in this regard.</p>
<p><b>13. Remedies for Noncompliance.</b></p> <p>It is agreed that the unauthorized use or disclosure of any Confidential Information by Recipient in violation of this Agreement will cause severe and irreparable damage to Owner and/or Owner's Affiliates. In the event of any violation of this Agreement, Recipient agrees that Owner and/or Owner's Affiliates shall be authorized and entitled to obtain from any court of competent jurisdiction preliminary and/or permanent injunctive relief, as well as any other relief permitted by applicable law. Recipient agrees to waive any requirement that Owner or Owner's Affiliates post bond as a condition for obtaining any such relief.</p> <p>Recipient shall notify Owner immediately, and cooperate with Owner at Owner's reasonable request, upon Recipient's discovery of any loss or compromise of Owner's Confidential Information.</p>	<p>It is common for a Confidentiality Agreement to include the Recipient's agreement that it can and should be enjoined from any violation of the Confidentiality Agreement. Sometimes, the Recipient may object to such a provision and, in those cases, the Recipient may agree only that injunctive relief should be presumed to be an appropriate remedy, or perhaps the Recipient will agree only to acknowledge that the Owner expects to obtain injunctive relief as an appropriate remedy.</p> <p>Applicable law generally favors the availability of injunctive relief for the violation of a confidentiality obligation, and so it is debatable whether any of these remedy provisions will have a significant impact on a court's decision whether to grant injunctive relief in a specific case.</p> <p>It is a question of state (or, as applicable, federal) law whether the Recipient can waive in advance bond or similar requirements that may condition the Owner's right to seek or obtain injunctive relief.</p> <p>It is common for the Recipient to be bound to notify the Owner and cooperate with the Owner upon the</p>

	discovery of any violation of the Confidentiality Agreement.
<p><b>14. Disclaimers.</b></p> <p>Owner understands that Recipient may currently or in the future be developing information internally, or receiving information from other parties that may be similar to Owner's information. Accordingly, nothing in this Agreement will be construed as a representation or inference that Recipient will not develop products, or have products developed for it, that, without violation of this Agreement, compete with the products or systems contemplated by Owner's Confidential Information.</p> <p>It is understood that the receipt of Confidential Information under this Agreement shall not create any obligation in any way limiting or restricting the assignment and/or reassignment of either party's employees within its own organization.</p> <p>Nothing contained in this Agreement shall be construed as obliging either party to furnish or receive any goods or services that may be referenced herein or as granting or conferring any rights by license or otherwise, expressly, impliedly, or otherwise, for any invention, discovery, or improvement hereafter made, conceived, or acquired, or for any invention, discovery, or improvement made, conceived, or acquired prior to the date of this Agreement.</p>	<p>It is common for a Confidentiality Agreement to include express disclaimers of any potential oral agreement or implied obligation of either party that may exceed the confidentiality obligations contained in the Confidentiality Agreement. For parties that compete or potentially compete with one another, it is not unusual for the disclaimers to be very explicit about the freedom of action that the Recipient is reserving.</p>
<p><b>15. Ownership; Authority.</b></p> <p>Owner warrants that it has the right to disclose the Confidential Information to Recipient. Otherwise, all information is provided "As Is" and without any warranty, express, implied, or otherwise, regarding its use, results, accuracy, or performance.</p> <p>Recipient recognizes and agrees that except as expressly set forth in Section 14 above, nothing contained in this Agreement shall be construed as granting any property rights, by license or otherwise, to any Confidential Information of Owner disclosed pursuant to this Agreement, or to any invention or any patent, copyright, trademark, or other intellectual property right that has issued or that may issue, based on such Confidential Information. Recipient shall not make, have made, use or sell for any purpose any product or service or other item using, incorporating or</p>	<p>In some cases, the Recipient may seek assurance from the Owner that it has the right to disclose the Confidential Information to Recipient and to authorize the Recipient to use the Confidential Information as provided in the Confidentiality Agreement. Such assurance may be implied anyway, but sometimes the Recipient may see a need to be explicit in building a case for reliance on Owner's authority to provide the Recipient with the Confidential Information.</p> <p>If the Owner authorizes the Recipient to use the Confidential Information in any way that may affect the Recipient's plans, products, or business, the Owner</p>

<p>derived from any Confidential Information of Owner absent separate written agreement.</p>	<p>should consider stipulating that it gives no warranty as to the use, results, accuracy or performance of the Confidential Information.</p>
<p><b>16. Miscellaneous.</b></p> <p>This Agreement constitutes the entire agreement with respect to the Confidential Information disclosed herein and supersedes all prior or contemporaneous oral or written agreements concerning such Confidential Information.</p> <p>This Agreement may not be amended except by the written agreement signed by authorized representatives of both parties.</p> <p>This Agreement will be governed by and construed in accordance with the laws of the State of _____, as it would apply to contracts negotiated, executed, delivered, and performed solely in such jurisdiction.</p> <p>The parties acknowledge that the terms and conditions of this Agreement and the existence of the discussions between them are confidential, and shall not be disclosed, except as provided elsewhere in this Agreement, without the written consent of the other party.</p> <p>No failure or delay by a party hereto in enforcing any right, power, or privilege created hereunder shall operate as an implied waiver thereof, nor shall any single or partial enforcement thereof preclude any other or further enforcement thereof or the enforcement of any other right, power, or privilege.</p> <p>This Agreement may not be assigned by Recipient. This Agreement shall inure to the benefit of Owner, its successors, and assigns.</p>	<p>This section illustrates additional supporting provisions, all of which can be important in certain circumstances.</p>