

SAMPLE -- Mutual Nondisclosure Agreement

<p>[1] In consideration of mutual promises and for other valuable consideration, this Mutual Nondisclosure and Non-Circumvention Agreement (“Agreement”) between _____ (“Company”), a _____ having its primary place of business located _____, and _____, a(n) _____ having its primary place of business located at _____, is entered into as of the _____ day of _____, 20 ____ (“Effective Date”).</p>	<p>[1] As is customary with contract/agreement introductions, establish the parties. This includes the legal entity name, the type of entity (e.g., Partnership, LLC, Corporation, etc.), the state of formation, and the principle place of business. Note that “Company” is defined in order to make it easy to clearly distinguish between disclosing party and receiving party if necessary.</p> <p>Some routinely include an effective date while others do not. The Effective Date can be chosen as the earliest date on which proprietary information may have been disclosed in order to capture disclosures made prior to the date of signing.</p>
<p style="text-align: center;">Recitals</p> <p>WHEREAS, Both parties possess confidential and proprietary information relating to [2]; and</p> <p>WHEREAS, it is the desire of both parties to [3] (“Permitted Purpose”) and it may be necessary for both parties to furnish or receive information that is non-public, confidential, or proprietary in nature.</p> <p>NOW, THEREFORE, both parties confirm their desire to enter into an Agreement that will provide for the exchange of non-public, confidential, and proprietary information for the sole-purpose of Permitted Purpose [4]:</p>	<p>While some consider Recitals to be merely flourish, they serve an important function of starting to frame the boundaries of the agreement.</p> <p>[2] General statement of the subject matter of the agreement.</p> <p>[3] This can either be for evaluating a product, a business proposal, etc. The important aspect is that the purpose defines the boundaries for which the confidential information is being revealed.</p> <p>[4] Of course this can be modified if the scope of the agreement is intended to be broader.</p>
<p>1. Definitions.</p> <p>1.1. [5] The term “Confidential Information” refers to all technical, engineering, and scientific information, including drawings, calculations, designs, sketches, computer models or files, software, bills of materials, contemplated products or services, and manufacturing processes; all business information, including the identity or structure of the Permitted Purpose, transactions being considered by the</p>	<p>[5] A generally standard laundry list of items that qualify as Confidential Information. A word of caution. Although long lists capture a lot, they can generate their own set of interpretation issues. For example, according to this list there is a distinction between drawings and sketches. This agreement is geared toward a manufacturing company, so in this case, the term drawing refers to engineering drawings.</p>

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<p>parties, strategic plans, general records, research and development initiatives, financial statements or projections, customer lists, identity of subcontractors, pricing information, supplier agreements, partnership or joint venture agreements, marketing plans, employee lists, policies and procedures; [6] provided that such information is designated in writing (either at the time of disclosure or within thirty (30) days after disclosure, or prior to the last date of signing below if disclosure has been made prior to such date) as confidential. [7] "Confidential Information" shall not include information, technical data or know-how that (i) is known to or in the possession of, the Recipient before its disclosure by the Disclosing Party as shown by the Recipient's files and records immediately prior to the time of disclosure; (ii) is now or hereafter becomes available to the public through no fault of the Recipient; (iii) is disclosed with the prior written approval of the Disclosing Party; (iv) is independently developed by the Recipient without any use of the Disclosing Party's Confidential Information, as demonstrated by files and records created at the time of such independent development; (v) is disclosed to the Recipient by a third party, which, to the Recipient's knowledge, is under no obligation of secrecy or confidentiality to the Disclosing Party, and such disclosure occurs without a violation by the Recipient of this Agreement or the Disclosing Party's rights; or (vi) is disclosed routinely to third parties by the Disclosing Party without restrictions at least as restrictive as those contained in this Agreement</p> <p>1.2. [8] "Confidential Material" refers to records, information or things that use, incorporate, or rely on Confidential</p>	<p>[6] The requirement to designate information in writing as confidential makes the transaction more predictable, and generally safer for the party that receives information. It does, however, require a certain level of attention to the management of the transaction. This is critical for the disclosing party, who may reveal important secrets during a meeting but risks losing its rights if the notice is not given as prescribed. But the receiving party may also be burdened with the perceived need to "correct the record" if the notice is inaccurate or vague.</p> <p>[7] These categories of exceptions are quite common, and can serve to discourage over-designation by a disclosing party.</p> <p>[i] & [iv] Ensures that the recipient cannot merely state they knew or independently developed the Confidential Information, they have to prove it.</p> <p>[v] prevents the wrong-doing workaround where the receiving party attempts to absolve itself from its obligations by obtaining information from an alternate source that it knows should not disclose the information. The important aspect is to establish a third-party wrong will not remove recipient's obligations.</p>
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<p>Information provided by Disclosing Party, including technical analysis, business analysis, calculations, documents, drafts of documents, notations on Confidential Information, notes, memoranda, sketches, computer models or files, software.</p> <p>1.3. The term “Disclosing Party” means any party that provides Confidential Information pursuant to this Agreement.</p> <p>1.4. The term “Recipient” means any party that receives Confidential Information pursuant to this Agreement.</p> <p>1.5. The term “Server” shall mean either a single device or multiple devices working together, regardless of whether the device or devices are functioning as a connected network, cloud storage device, network drive, or a remote or mobile access platform.</p>	<p>[8] This term becomes significant at the end of the relationship, when Confidential Information needs to be returned or destroyed. It should include notes, records and other works that contain or were derived from the information as originally provided.</p>
<p>2. [9] Designation of Confidential Information. Unless explicitly stated otherwise, there shall be no discrepancy in the treatment of Confidential Information based on the term used to designate such Confidential Information. All indications of Confidential Information shall be treated in accordance with the provisions of this Agreement.</p>	<p>[9] OPTIONAL – If the client prefers to have a tiered level of confidentiality, this clause should be altered. For example, some documents may be restricted to certain personnel, internal dissemination, or attorney’s eyes. More generally each party needs to consider the relative risks of disclosing its proprietary information and assuming the burden of protecting the other party’s proprietary information, and advocate for changes in the agreement required to bring these risks in balance under the circumstances of the Permitted Purpose.</p>

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<p>3. Restriction on Use and Disclosure. Recipient shall hold the Confidential Information disclosed to it by the Disclosing Party in strictest confidence and shall restrict access to its employees and contractors on a need-to-know basis, requiring written nondisclosure agreements from anyone to whom access is given with terms at least as restrictive as those contained in this Agreement. Recipient shall not, without Disclosing Party's prior written consent, use, disclose, or permit the use or disclosure of Confidential Information, other than for purposes of Permitted Purpose. Recipient shall not modify, reverse engineer, or create other products from any Confidential Information, without the Disclosing Party's prior written consent.</p> <p>3.1. Disclosure or Misuse of Confidential Information. Recipient shall promptly notify Disclosing Party of any disclosure, misuse, or misappropriation of Confidential Information, regardless of whether such disclosure, misuse, or misappropriation was intentional or inadvertent. Recipient agrees to cooperate fully as necessary [10] to mitigate the effects of such disclosure, misuse or misappropriation.</p> <p>3.2. Responses to Legal Process. If Recipient is requested to disclose Confidential Information pursuant to subpoena or other legal process, Recipient shall provide the Disclosing Party with immediate notice so that Disclosing Party may seek a protective order or other appropriate remedy. [11]</p>	<p>[10] The types of actions and which party is responsible for taking those actions should be delineated. I.e., is the Receipt responsible for taking any action beyond notification?</p> <p>[11] Providing the Disclosing Party with the opportunity to redact information, file a motion to quash the subpoena, etc.</p>
<p>4. [12] Title to Confidential Information. Recipient agrees that no license, either express or implied, is created or granted by this Agreement to use Confidential Information other than solely for the purpose of Permitted Purpose. Title to Confidential Information shall at all times remain with</p>	<p>[12] Clearly indicating that access to information does not transfer any rights to the information.</p>

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<p>Disclosing Party. No rights to patents, trademarks, or copyrights are granted</p> <p>4.1. [13] Return of Confidential Information. Upon reasonable request from Disclosing Party, Confidential Information, including all duplications and reproductions, whether authorized or not, shall be returned in a timely manner [14] to Disclosing Party by Recipient pursuant to Disclosing Party's instructions.</p> <p>4.2. [15] Destruction of Confidential Information. Confidential Information and Confidential Material may be promptly destroyed in lieu of being returned by Recipient; provided that Recipient certifies in writing that this has been accomplished in a secure manner.</p>	<p>[13] Returning of Confidential Information is applicable for physical items.</p> <p>[14] It is common to include a specific timeframe, for example, 30 days.</p> <p>[15] Destruction of Confidential Information is a realistic alternative in the digital age. It also allows the receiving party to elect between returning and destroying.</p>
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<p>5. [16] Time Periods. Recipient's restrictions on disclosure and use of the Confidential Information shall survive the termination of this Agreement and shall remain in effect until the Confidential Information no longer qualifies as such or until Disclosing Party sends Recipient written notice releasing it from this Agreement, whichever occurs first.</p>	<p>[16] Occasionally parties suggest that nondisclosure obligations expire after a fixed period of time. This has the advantage of reducing the administrative burden and risk of indefinite obligations to respect confidentiality. Because it effectively terminates the trade secret nature of the information, such time restrictions should be used with care; alternatively information qualifying as trade secrets at the end of the fixed period can be excluded from the termination.</p>
<p>6. [17] Remedies. The parties agree that disclosure of Confidential Information by Recipient in violation of this Agreement may cause irreparable immediate harm, the amount of which would be impossible to ascertain, but the balance of harm likely weighs in favor of Disclosing Party, and there may be no adequate remedy at law for any breach by Recipient. Therefore, in addition to any other rights and remedies Disclosing Party may have, Disclosing Party shall have available the right to obtain an injunction from a court of competent jurisdiction restraining such breach or anticipatory breach [18] and to specific performance of any provision of this Agreement. Recipient further agrees that no bond or other security shall be required in obtaining such equitable relief and consents to the issuance of such injunction and the ordering of specific performance by a court of competent jurisdiction.</p> <p>6.1. [19] Indemnity. Recipient agrees to indemnify Company against all losses, damages, claims, or expenses, including reasonable attorneys' fees, incurred or suffered by Company as a result of Recipient's breach of this Agreement. Recipient further agrees that all actions by its Agents will be deemed to have been by Recipient for purposes of determining whether Recipient</p>	<p>[17] OPTIONAL – Remedy clauses are falling out of favor because judges may ignore them. If they are included, set forth the elements for injunctive relief in the relevant jurisdiction. Do not simply state that injunctive relief is "authorized."</p> <p>[18] Some judges refuse to uphold injunction clauses, so you should not expect to be able to rely on them. <i>See e.g., First Health Group Corp. v. National Prescription Administrators, Inc.</i>, 155 F.Supp.2d 194, 234-235 (M.D. Pa. 2001) ("[T]his Court has found [no authority], in support of the proposition that the parties may contractually bind themselves and the Court to injunctive relief before any breach has occurred.")</p> <p>[19] This provision is not common in an NDA and may be omitted.</p>

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<p>breached its obligations under this Agreement.</p>	
<p>7. Attorneys' Fees. In the event litigation is instituted to enforce this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and expenses incurred in such litigation in addition to any other recovery to which such party may be legally entitled.</p>	
<p>8. Miscellaneous</p> <p>8.1. [15] Choice of Law and Venue. This Agreement shall be governed by and construed in accordance with the laws of the _____. Recipient consents to the exclusive court jurisdiction of the U.S. federal or state courts in _____.</p> <p>8.2. Assignment. A first party shall not have the right to assign its obligations under this Agreement, expressly or by operation of law without written permission of the second party. This Agreement shall be binding upon and inure to the benefit of the permitted successors and assigns of the parties hereto.</p> <p>8.3. Severability. If a court of competent jurisdiction holds any term or provision of this Agreement invalid or unenforceable, such determination shall not affect the validity or enforceability of the remaining terms and provisions of this Agreement.</p> <p>8.4. Modification; Waiver. No oral modifications shall be effective and no delay or failure to insist on strict performance with any provision shall constitute a waiver of the right to enforce such provision.</p>	<p>[15] State laws for the protection of trade secrets vary, notwithstanding the widespread adoption of the Uniform Trade Secrets Act. With passage of the federal Defend Trade Secrets Act in May 2016, there are clear advantages in establishing jurisdiction in the U.S. to enforce trade secret rights.</p>

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<p>8.5. Integration. This Agreement may be executed in two (2) or more counterparts each of which shall be deemed an original, but all of such taken together shall constitute only one Agreement, superseding all prior understandings, oral or written; and it is expressly understood and that this Agreement does not obligate either party to enter into any other or further agreements.</p>	
<p>The undersigned acknowledge they have read and understand this Agreement, are authorized to enter into a legally enforceable agreement on behalf of the aforementioned entities, and voluntarily accept the duties and obligations set forth herein.</p> <p>First Party: _____ Name: _____ Title: _____ Signature: _____ Date: _____</p> <p>Second Party: _____ Title: _____ Signature: _____ Date: _____</p>	