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Practical Guidance: Non-Disclosure and Confidentiality Agreements

Purpose : This Practical Guidance discusses key issues that should be considered in drafting confidentiality agreements in view of the Defense Against Trade Secrets Act of 2016. It identifies key clauses typically included in such agreements and provides guidance on considerations in drafting clause.

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Introduction

On May 11, 2016, President Obama signed the Defend Trade Secrets Act of 2016 ("DTSA") into law. See Defend Trade Secrets Act of 2016, 130 Stat. 376 (codified at 18 U.S.C. §§ 1831-1836). For the first time, the DTSA creates a federal cause of action for trade secret misappropriation that allows private parties to bring civil trade secret claims in federal court. Prior to the DTSA, confidentiality agreements were traditionally governed under state law. While, like most state trade secrets laws, the DTSA is modeled after the Uniform Trade Secrets Act, its unique provisions require fresh consideration on how to draft confidentiality agreements with employees and potential and actual business partners.

The following topics and provisions should be freshly considered when drafting new confidentiality and/or non-disclosure agreements:

Choice of law: U.S., a Particular State, or Both

Unlike many federal statutory schemes, the DTSA expressly does not preempt state law. See 18 U.S.C. § 1838. Thus, in drafting confidentiality agreement, care should be taken to determine whether to invoke a particular state law, as was typically done in the past, invoke just the "laws of the United States" to make clear that the DTSA is intended to apply, or to invoke both the "laws of the United States" in addition to the laws of a particular state. It is anticipated by invoking both the laws of the United States and the laws of a particular state, it will avail the parties of both federal and state causes of action.

The DTSA does not include any waiver of sovereign immunity. Therefore, any claim of trade secret misappropriation against a state entity would need to be filed in state court under the appropriate state law, unless another federal law is applicable that would waive the state entity's sovereign immunity under the circumstances.

Furthermore, certain states have significantly different rules when it comes to NDAs in areas such as marking requirements, so a practitioner needs to closely monitor what law is being chosen.

Sample Clauses:

U.S. Law (to invoke the DTSA):

> **Applicable Law**. This Agreement will be construed, interpreted and applied in accordance with the laws of the United States of America, excluding the jurisdiction's body of law controlling conflicts of

law.

State Law (in this case New York):

> **Applicable Law**. This Agreement will be construed, interpreted and applied in accordance with the laws of the State of New York, excluding the jurisdiction's body of law controlling conflicts of law.

Both Federal and State Law (in this case New York):

> **Applicable Law**. This Agreement will be construed, interpreted and applied in accordance with the laws of the United States of America and the State of New York, excluding those jurisdictions' body of law controlling conflicts of law.

Scope of Activities Covered: Intrastate vs. Interstate

One of the prerequisites to invoking the DTSA is that the trade secret converted "is related to a product or service used in or intended for use in interstate or foreign commerce." 18 U.S.C. § 1832(a). Thus, in order to invoke the DTSA, care should be taken to evidence that the subject matter of the confidentiality agreement relates to a product or service "used in or intended for use in interstate or foreign commerce." Conversely, if the parties wish to avoid the DTSA, and the nature of the products and/or services involved in the agreement is offered merely within the borders of a single state, then inclusion of a statement to that effect can help support a state law-only choice of law clause. Of course, if there is no intent evidenced in the agreement, the nature of the actual complained of activities may result in only state law or only federal law being invoked.

One place in an agreement where interstate or intrastate commerce can be invoked could be the recitals.

Sample Recitals:

Invoking interstate commerce:

> **Whereas**, Disclosing Party has a business opportunity associated with intellectual property and/or proprietary information relating to, *inter alia*, _____, which is intended for use in interstate or foreign commerce ("the Business Opportunity"); and

Invoking intrastate commerce only:

> **Whereas**, Disclosing Party has a business opportunity associated with intellectual property and/or proprietary information relating to, *inter alia*, _____, which is intended for use solely within the State of New York ("the Business Opportunity"); and

Choice of Venue: Federal Court, State Court, or Both

The DTSA provides "[t]he district courts of the United States shall have original jurisdiction of civil actions under" the DTSA. 18 U.S.C. § 1836(c). To the extent that there may also be a civil action under state law, a

federal district court would probably have supplemental jurisdiction if a DTSA cause of action is brought (see 28 U.S.C. § 1367), or potentially diversity jurisdiction if the parties are from different states and have a sufficient amount in controversy (see 28 U.S.C. § 1332 (a)).

Of course, not every agreement necessarily includes a choice of venue clause, but depending upon the desire to invoke the DTSA, or to avoid the DTSA, or to allow flexibility on the subject, care should be taken to select a venue clause which is consistent with such intent.

Sample Choice of Venue Clauses

Federal Court First, or State Court if Federal Court is Not Available

> **Choice of Venue**. The Parties consent to the jurisdiction of the United States District Court for the Southern District of New York, or the state court located in New York if it is determined that the federal court lacks subject matter jurisdiction, for all disputes arising out of, related to, or connected with this Agreement or the Litigation. In connection with such disputes, the Parties expressly and irrevocably waive any objection or defense of personal jurisdiction, venue, or convenience of the forum.

State Court First, or Federal Court if State Court is Not Available

> **Choice of Venue**. The Parties consent to the jurisdiction of the state court located in New York, or the United States District Court for the Southern District of New York if it is determined that the state court lacks subject matter jurisdiction, for all disputes arising out of, related to, or connected with this Agreement or the Litigation. In connection with such disputes, the Parties expressly and irrevocably waive any objection or defense of personal jurisdiction, venue, or convenience of the forum.

Definition of Confidential Information

Generally, most confidentiality agreements include a definition of the type of Confidential Information that is to be protected. In order to invoke protection under the DTSA, the Confidential Information may include “all forms and types of financial, business, scientific, technical, economic, or engineering information,” but only “if … the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.” 18 U.S.C. § 1839 (3).

These requirements have two implications on Confidentiality Agreements.

1. If the type of information is something other than “financial, business, scientific, technical, economic, or engineering,” then state law may be necessary, to the extent available, to invoke protection. Of course, it is hard to image a trade secret that does not fall somewhere within one of these categories.

2. There must be some economic value derived from the information being secret and not readily ascertainable.

Both of these requirements should be considered in drafting the definition of “Confidential Information” in such agreements. Similarly, if the definition goes beyond these limitations, then consider invoking state law instead of or in addition to the laws of the United States in the choice of law provisions.

Sample Definition of Confidential Information Clause

Confidential Information. As used in this Agreement, “Confidential Information” shall mean any facts, opinions, conclusions, projections, data, information, trade secrets, patents, patent applications, inventions, software, hardware or know-how relating to any work in process, future development, sales, marketing, financial or personnel matter relating to (i) the Business Opportunity; and (ii) Disclosing Party or its affiliates, its present or future development, sales, marketing, financial or personnel matter relating to Disclosing Party, its present or future products, patents, patent applications, technology, inventions, know-how, sales, customers, employees, investors, prospects, markets or business, whether communicated orally or in writing or obtained by the Receiving Party through observation or examination of Disclosing Party's facilities, documents, or procedures.

Marking Confidential Information

Including a clause requiring marking of confidential information is a common practice in a confidentiality agreement. Requiring that any information covered by the agreement be marked to be protected increases certainty as to what information is confidential, but a marking requirement may lead to confidential information being unprotected after an inadvertent failure to be marked. A so-called “catch up” clause allowing retroactive marking of information is recommended to allow a chance to remedy any failures to mark. Careful consideration should be given to the inclusion of this type of clause, as courts have held that failure to mark removes the information in question from the agreement. Some states have stricter marking requirements than others, and a practitioner should be careful to follow the guidelines of the relevant state.

Sample Clauses

Marking. Any [written] information disclosed under this Agreement must be marked “Confidential” to be considered Confidential Information.

(Optional - catch up clause) For information that is disclosed orally, in a form that is difficult to mark, or in written form without marking, Disclosing Party shall have fifteen days to deliver a written version of the information appropriately marked, or in the case of information that is not amenable to written recording, a writing describing the information and designating the information as “Confidential.”

Exclusions from Confidential Information, Required Disclosures, and Whistle Blower Exceptions

Of course there are times when even a trade secret is no longer deemed protectable. This is often addressed in confidentiality agreements by including a Traditional Exclusions from Confidential Information

clause. For example, when the alleged confidential information is no longer confidential through no fault of the receiving party, courts generally do not continue enforcement of confidentiality obligations. Similarly, if the receiving party already knew about the alleged trade secret, without any wrongdoing, the trade secret is typically excluded as confidential information in the exclusions section often included in confidentiality agreements. These traditional exclusions still make sense under the DTSA.

Traditionally, confidentiality agreements may also include Required Disclosures, such as when required by law, e.g., disclosure by the Securities and Exchange Commission, or pursuant to a subpoena or Court order. Again, such a provision would still make sense under the DTSA.

Finally, as a result of the DTSA, additional "whistleblower" protection is required. The DTSA provides immunity to both criminal and civil liability for trade secret misappropriation under the "Whistleblower Immunity" section, which provides immunity if the trade secret disclosure is:

a. "made … in confidence to a Federal, State, or local government official, … or to an attorney; and … solely for the purpose of reporting or investigating a suspected violation of law; or"

b. "is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal."

18 U.S.C. § 1833 (b)(1)(A)-(B)

Failure to provide notice waives the employer's rights to exemplary damages or attorney's fees against the employee who did not get notice. There are two ways to give notice according to the statute.

1) Put the notice directly into the applicable agreement:

Employment Agreement:

"Federal law now provides that there is no civil or criminal penalty for disclosure of a trade secret that (A) is made (i) in confidence to a Federal, State, or local government official, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal."

Confidentiality Agreement:

"Confidential Information shall not include information which is disclosed (A)(i) in confidence to a Federal, State, or local government official, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal."

2) For applicable agreements, which probably include most employment agreements, the employer may put the notice in an employee manual and include language in the agreement indicating that the employee has read and understood the manual:

Employee Manual: “Federal law now provides that there is no civil or criminal penalty for disclosure of a trade secret that (A) is made (i) in confidence to a Federal, State, or local government official, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.”

Employment Agreement: “I acknowledge that I have read and understood all provisions of the Employee Manual” (If the manual contains the language recited above).

Sample Exclusion Clauses

Traditional Exclusions from Confidential Information Clause

Exclusions. Receiving Party, however, shall have no liability to Disclosing Party under this Agreement with respect to the disclosure and/or use of any such Confidential Information that it can establish:

(a) has become generally known or available to the public without breach of this Agreement by the Receiving Party;

(b) was known by the Receiving Party, as established by its records, before receiving such information from Disclosing Party; or

(c) has become known by or available to Receiving Party from a source other than Disclosing Party, without any breach of any obligation of confidentiality owed to Disclosing Party to Receiving Party's knowledge, subsequent to disclosure of such information to it by Disclosing Party.

Sample Required Disclosures Clause

Required Disclosures. Receiving Party may disclose the Confidential Information if and to the extent that such disclosure is required by applicable law, provided that the Receiving Party uses reasonable efforts to limit the disclosure by means of a protective order or a request for confidential treatment at Disclosing Party's expense and provides Disclosing Party a reasonable opportunity of at least ten (10) business days to review the disclosure, if permitted, before it is made and to interpose its own

objection to the disclosure.

Sample Whistle Blower Exception in conformance with DTSA

Whistleblower Protection. Pursuant to 18 U.S.C. § 1833, the Parties have immunity from criminal or civil liability under applicable state or federal trade secret law for disclosing any trade secrets included in the Confidential Information when such disclosure is made

(A) (i) in confidence to a Federal, State, or local government official, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or

(B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

This provision does not act as a waiver of any of the Parties' rights or remedies which are consistent with the protection described herein.

Alternative Whistle Blower Exception clause

Whistleblower Protection. I acknowledge that I have read and understood all provisions of the Employee Manual, including the section describing the whistleblower protection of 18 U.S.C. § 1833. (Only available if the language in the whistleblower clause above is found in the Employee Manual).

Confidentiality Obligations

Generally, the purpose of entering into a confidentiality agreement is to make sure that confidential information is protected as confidential. The DTSA recognizes that an element of establishing that a trade secret is protectable under the act is that "reasonable measures" have been taken to protect the trade secret ("the owner thereof has taken reasonable measures to keep such information secret" 18 U.S.C. § 1839 (3)(A)).

Such measures can be evidenced in the NDA by the clauses included to require the recipient to maintain confidence, as well as measures taken by the Owner to maintain the confidentiality of such information within its own organization. Care should be taken to make sure that the agreements contain appropriate obligations on the recipient, and that the disclosing party meet at least the same level of confidentiality in its own organization.

The United States Code also defines the type of activity involving trade secrets which violates the law as including "knowingly –

(1) steal[ing], or without authorization appropriate[ing], tak[ing], carr[ying] away, or conceal[ing], or by

fraud, artifice, or deception obtain[ing] such information;

(2) without authorization cop[ying], duplicat[ing], sketch[ing], draw[ing], photograph[ing], download[ing], upload[ing], alter[ing], destroy[ing], photocop[ying], replicat[ing], transmit[ing], deliver[ing], send[ing], mail[ing], communicat[ing], or convey[ing] such information; [or]

(3) receiv[ing], buy[ing], or possess[ing] such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization …."

18 U.S.C. § 1832 (a)(1)-(3).

Traditional confidentiality agreements often use broader prohibition language than that listed in the DTSA. Presumably, as long as the potentially claimed acts fall within the type of protection provided under the DTSA, such broader language should be sufficient.

To the extent protection beyond that set forth in the DTSA is desired, it may make sense to include a state law choice of law either in addition or instead of the laws of the United States.

It may also be worth considering including language that mirrors the DTSA in an obligations paragraph, to ensure that the agreement can be enforced against such actions.

Sample Clause

General Obligations Language

Obligations. The Receiving Party acknowledges that irreparable injury and damage may result from disclosure of Confidential Information to any parties or individuals not expressly authorized under this Agreement or from utilization for any purpose other than the Business Purpose. Receiving Party agrees:

(a) to hold the Confidential Information in strict confidence;

(b) to disclose such Confidential Information only to individuals each of whom Receiving Party warrants and represents has agreed in writing to be bound under the terms and conditions of this Agreement;

(c) to use all reasonable precautions, consistent with or better than the Receiving Party's treatment of its own confidential information of a similar nature, to prevent the unauthorized disclosure of the Confidential Information, including, without limitation, protection of documents from theft, unauthorized duplication and discovery of contents, and restrictions on access by other persons to such Confidential Information; and

(d) not to use any Confidential Information for any purpose other than the Business Purpose.

Specific DTSA Obligations Language

Obligations.

. . .

(e) to take reasonable precautions, consistent with or better than the Receiving Party's treatment of its own confidential information of a similar nature, to prevent unauthorized copying, duplication, sketching, drawing, photographing, downloading, uploading, alteration, destruction, photocopying, replicating, transmitting, delivering, sending, mailing, communicating, or conveying of the Confidential Information, and to take reasonable precautions, consistent with or better than the Receiving Party's treatment of its own confidential information of a similar nature, against theft, unauthorized sale, or unauthorized conveyance obtained through fraud, deception, misrepresentation, or bribery of the Confidential Information.

Permitted Disclosures

Typically, in addition to including an obligations paragraph, the confidentiality clause may also include a “permitted disclosure” paragraph that identifies the type of circumstances in which the receiving party may be permitted to disclose. For example, allowing disclosure to advisers, or those who need to know to perform the subject matter of the project, which is the basis of the disclosure.

Sometimes greater restrictions may be necessary. In such cases, for example, parties may wish to limit disclosure to only those individuals listed in a schedule or notified in advance of such disclosure and approved. This is often employed in protective orders at court.

Sample Clause:

General Permitted Disclosures Clause

Permitted Disclosures. Receiving Party may disclose the Confidential Information to its employees with a bona fide need to know such Confidential Information, but only to the extent necessary to carry out the Business Purpose and only if such persons are advised of the confidential nature of such Confidential Information and the terms of this Agreement and agree to be bound in writing by the confidentiality obligations contained in this Agreement.

Listed Individual Disclosures Clause

Permitted Disclosures. Receiving Party may disclose the Confidential Information to the following individuals to the extent necessary to carry out the Business Purpose: Individual A, Individual B, ... Such disclosure may only take place if the individuals are advised of the confidential nature of the Confidential Information and the terms of this Agreement and agree to be bound in writing by the confidentiality obligations contained in this agreement. Disclosure of the Confidential Information to individuals not included in this section may only occur with the written permission of the Disclosing Party prior to any such disclosure occurring.

Return of Confidential Information

It is often desirable to include a section which details a procedure governing the return of any confidential information to the disclosing party. This ensures that both parties have agreed to the handling of confidential information after it is no longer useful for the purposes of the agreement, which is especially relevant when a confidentiality agreement is terminated.

Sample Clause:

Return of Confidential Information. Upon Disclosing Party's request, or three months from the date set forth above, whichever comes first, the Receiving Party will promptly return to Disclosing Party all copies of the Confidential Information, will destroy all notes, abstracts and other documents that contain Confidential Information, and will provide Disclosing Party a written certification of an officer of the Receiving Party that it has done so. Subject to the continuing confidentiality obligations hereunder the Receiving Party (i) shall not be obligated to erase the information contained in archived computer system backups in accordance with its security and/or disaster recovery procedures, and (ii) may maintain one copy of any of the information in the Receiving Party's records in accordance with the Receiving Party's usual and customary business practices and as may be required by the regulations and rules of any governmental agency or other regulatory authority, including any self-regulatory organization having or claiming to have jurisdiction.

Ownership of Disclosed Information and Retention of Rights

It is necessary to include a clause that ensures that the disclosing party is not waiving or transferring any rights, remedies, or ownership of the confidential information governed under the agreement.

Sample Clause:

Retention of Legal Rights. Disclosing Party retains all rights and remedies with respect to the Confidential Information afforded it under the laws of the United States and the States both during and after the term of this Agreement, including without limitation any patent, trade secret or other laws designed to protect proprietary or confidential information.

No Creation of Ownership/License

Similar to the retention of legal rights clause described above, it is usually desirable to include a clause that denies the creation of any ownership interest or license in the confidential information covered by the

agreement.

Sample Clause:

> **No Creation of Ownership Rights.** Nothing in this Agreement, nor any action taken by the Receiving Party, including, without limitation, any payment of monies by the Receiving Party to Disclosing Party, during any discussions prior to the consummation of the proposed acquisition or other business relationship, shall be construed to convey to the Receiving Party any right, title or interest in the Confidential Information, or any license to use, sell, exploit, copy or further develop in any way any Confidential Information. No license is hereby granted or implied under any patent, copyright or trademark, any application for any of the foregoing, or any trade name, trade secret or other proprietary information, in which Disclosing Party has any right, title or interest.

Common Interest Disclosures

Another common section found in a confidentiality agreement is a Common Interest Disclosure. This section acts to authorize both parties to disclose the confidential information if the disclosure is in furtherance of the parties' common legal interest in exploring business opportunities related to the purpose of the agreement. This allows a party to disclose information in pursuit of an unanticipated opportunity without having to obtain an amendment to the agreement.

Sample Clause:

> **Common Interest Disclosures.** The parties agree that they may disclose Confidential Information in furtherance of their common legal interest in exploring business opportunities related to the Business Purpose of this Agreement. Such Confidential Data may be subject to the attorney-client privilege, work product doctrine or other applicable privilege. The parties understand and agree that it is their desire, intention and mutual understanding that the sharing of such Confidential Data is not intended to, and shall not, waive or diminish in any way the confidentiality of such material or its continued protection under the attorney-client privilege, work product doctrine or other applicable privilege. All Confidential Data provided by a party that is entitled to protection under the attorney-client privilege, work product doctrine or other applicable privilege shall remain entitled to such protection under these privileges, this Agreement, and under the common interest doctrine. Nothing in this Paragraph shall be interpreted to mean that a party hereto would be prevented from using Confidential Data in a legal proceeding against the other party hereto based upon a dispute arising out of this Agreement, provided that the other party has been notified in advance of such use or disclosure and been afforded sufficient opportunity to seek and obtain confidential treatment by the court or other entity having jurisdiction over the matter at hand.

Non-Competition

Another common section found in a confidentiality agreement is a Non-Competition clause. This section acts to prevent a party from using confidential information to create its own work that it would then have rights to. This is to prevent a party from gaining access to confidential information and using it to compete. A party with greater leverage may refuse to sign a non-competition clause in an NDA to prevent any other conflicts,

but it can also be a useful tool when dealing with parties in similar industries.

> **Non-Competition.** During the term of this Agreement, and for at least three years from its termination in writing, Receiving Party (and each of the Designated Personnel) shall not, in any way:
>
> (a) directly or indirectly provide services to, work for, advise, consult with, or otherwise assist any Competitor during the engagement or for up to three years after the termination of the engagement; or
>
> (b) use any Confidential Information in any way that may assist any Competitor.
>
> For purposes of this paragraph, a **"Competitor"** shall mean any person, corporation, partnership, trust, group, organization, or other entity that competes with, or has plans to compete with, Disclosing Party and its Affiliates or any person, corporation, partnership, trust, group, organization, or other entity that [describe the business field].

Non-Disparagement

Non-Disparagement clauses are often used in NDAs because a receiving party disparaging a disclosing party after seeing its private information can carry more influence than just standard disparagement between competitors or unfamiliar parties.

> **Non-Disparagement.** Each party agrees that it will not at any time engage in any action either directly or indirectly that disparages or results in the disparagement of any other party.

Injunctive Relief, Liquidated Damages and Other Remedies for Breach

Including a section discussing remedies may be desirable depending on the type of information being protected by the confidentiality agreement. If the information includes valuable trade secrets, it is highly desirable to include a paragraph discussing the pursuit of injunctive relief to stop dissemination of the trade secrets.

Another remedy that may be discussed is Liquidated Damages. Liquidated Damages is an agreement between the parties on a monetary value for a breach of the agreement. It is used to add certainty to an agreement which covers subject matter which makes the cost of breach difficult to calculate during drafting of the agreement. Courts do not favor Liquidated Damages in general, and such clauses must be drafted carefully to avoid being held invalid. The damage amount must be reasonable in light of the value of the agreement and actual damages caused by the breach. The clause below is a sample that should be tailored to meet the requirements of the specific jurisdiction of the agreement. Liquidated Damages typically takes the place of other types of monetary damages, as courts will not typically enforce an optional Liquidated Damages clause.

Sample Clause:

Injunctive Relief. Receiving Party acknowledges that the unauthorized use or disclosure of the Confidential Information may cause irreparable harm to Disclosing Party which may not be made whole by monetary damages alone. Accordingly, the Receiving Party agrees that Disclosing Party may have the right to obtain an immediate injunction against any breach or threatened breach of this Agreement (without the posting of any bond and without proof of actual damages), as well as the right to pursue any and all other rights and remedies available at law or in equity for such a breach. Receiving Party also agrees to reimburse the Disclosing Party for all costs and expenses, including attorneys' fees, incurred by the Disclosing Party in any successful effort of Disclosing Party to enforce the obligations of the Receiving Party hereunder.

Liquidated Damages. In the event of a breach of any of the Obligations of this Agreement, Receiving Party agrees to pay Disclosing Party $**X** (“Liquidated Damage Amount”). Receiving Party acknowledges that the actual damages likely to result from breach of this Agreement are difficult to estimate on the date of this Agreement and would be difficult for Disclosing Party to prove. The parties intend that Receiving Party's payment of the Liquidated Damage Amount would serve to compensate Disclosing Party for any breach of Receiving Party's obligations under this Agreement, and they do not intend for it to serve as punishment for any such breach by Receiving Party.

Other Remedies. Nothing in the preceding Paragraphs [Remedies Paragraphs] shall be construed to limit or waive Disclosing Party's remedies available in the case of a breach of this the Agreement. Such remedies may be, but are not limited to, actual damages, compensation for unjust enrichment, a reasonable royalty rate, or exemplary damages. Disclosing Party may also receive attorneys’ fees in the case of a breach of this agreement that involves a disclosure of a trade secret as defined by the law of the applicable jurisdiction.

Term of Agreement and Duty of Confidentiality

It is necessary to include a section specifying the term of the agreement, as well as any continuing duty to maintain confidentiality per the agreement.

Sample Clause:

Term of Agreement. This Agreement applies to all Confidential Information that is disclosed by Disclosing Party to the Receiving Party during the period in which Receiving Party is carrying out the Business Purpose [from January 1, 2017 to January 1, 2018]. The obligations of Receiving Party shall survive for a period of two years from the date of termination.

Fixed Date Sample Clause:

Term of Agreement. This Agreement applies to all Confidential Information that is disclosed by Disclosing Party to the Receiving Party from [January 1, 2017 to January 1, 2019]. The obligations of Receiving Party shall survive for a period of two years from the date of termination.

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