Confidentiality Agreement: General (Short Form, Mutual) (FL)

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A short-form mutual confidentiality agreement, governed by Florida law, for general use in connection with commercial transactions. This Standard Document has integrated notes with important explanatory drafting and negotiating tips, and includes links to general and state-specific standard documents, standard clauses, and practice notes.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Parties to a potential commercial transaction often use a confidentiality agreement (also known as a nondisclosure agreement or NDA) to:

- Preserve the confidentiality of the disclosing party's sensitive information.
- Restrict the recipient's use of the disclosing party's confidential information except for limited purposes that are expressly permitted under the agreement.
- Protect the confidential nature of the potential transaction and the discussions they are holding.

Sometimes, only one party is disclosing confidential information and a unilateral confidentiality agreement should be used (see, for example, Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Discloser) (5-535-7285)). In other situations, both parties are disclosing and receiving confidential information. In these instances, the parties enter into a mutual confidentiality agreement that applies the same set of rights and obligations to each party based on its role as disclosing party or recipient.

Under some circumstances, both parties are disclosing confidential information but not on a fully mutual basis (for example, if one party is disclosing more sensitive information that requires different types of protection). In these situations, instead of entering into a mutual confidentiality agreement, the parties enter into a reciprocal confidentiality agreement, in which:

- The scope and nature of the confidential information disclosed by each party is separately defined.
- Each party's use and nondisclosure obligations may differ accordingly.

This Standard Document is a short-form mutual general confidentiality agreement for use in Florida. It assumes that each party is disclosing and receiving confidential information under a mutual set of rights and

obligations. This agreement can be used for many types of commercial relationships and transactions that support the use of a short-form mutual agreement.

For a sample of a more comprehensive mutual general confidentiality agreement, see Standard Document, Confidentiality Agreement: General (Mutual) (1-501-7108). For more information on confidentiality agreements and overall protection of confidential information, see Practice Note, Confidentiality and Nondisclosure Agreements (FL) (w-008-7912).

Because each of the rights and obligations in a mutual confidentiality agreement applies to both parties, this agreement is drafted to address the high-level concerns of both a disclosing party and a recipient, reflecting a balanced and relatively moderate approach under Florida law. When drafting or reviewing this agreement, each party should:

- Determine whether it is more likely to be disclosing or receiving confidential information (and the nature of that information, including whether that information qualifies as a trade secret).
- If appropriate, revise the provisions of this agreement to better support its primary position.

For a sample short-form unilateral confidentiality agreement drafted with terms favorable to the disclosing party, see Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Discloser) (5-535-7285). For a sample short-form unilateral confidentiality agreement drafted with terms favorable to the recipient, see Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Recipient) (3-532-3908).

ASSUMPTIONS

This Standard Document assumes that:

- **The agreement is governed by Florida law.** If the law of another state applies, this agreement may have to be modified to comply with the laws of the applicable jurisdiction.
- **The parties to the agreement are US entities and the transaction takes place in the US.** If any party is organized or operates in, or if any part of the transaction takes place in a foreign jurisdiction, this agreement may have to be modified to comply with applicable laws in the relevant foreign jurisdiction. For examples of a confidentiality agreement that may be used when one or both of the parties are non-US entities or if the transaction takes place outside of the US, see Confidentiality Agreement (US-Style, Unilateral, Pro-Discloser): Cross-Border Commercial Transactions (w-006-7778) and Confidentiality Agreement (US-Style, Mutual): Cross-Border Commercial Transactions (w-002-9375).
- **This agreement is being used in a business-to-business transaction.** This Standard Document should not be used in a consumer contract, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource. This Standard Document also should not be used in the employment context, as that may involve other requirements and practical considerations that are beyond the scope of this resource.
- **This is a mutual agreement, which assumes that both parties are disclosing and receiving confidential information.** This agreement should not be used if only one party is disclosing confidential information (see Standard Documents, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Recipient) (3-532-3908) and Confidentiality Agreement: General (Short Form, Unilateral, Pro-Discloser) (5-535-7285)). In addition, this agreement must be revised if the parties are not sharing confidential information on a fully mutual basis and the parties are instead entering into a reciprocal confidentiality agreement that contains party-specific rights and obligations to reflect any differences in the scope and type of confidential information that each party expects to disclose (see Practice Note, Confidentiality and Nondisclosure Agreements (FL): Mutual Confidentiality Agreements (w-008-7912)).
- **This agreement is being used for a single discrete project, with all**

confidential information disclosed shortly after the execution of the confidentiality agreement. This agreement must be revised if:

- the parties desire to enter into a confidentiality agreement that covers multiple projects; or
- confidential information is being disclosed over an extended period of time.

- (See, for example, Section 7 and its related Drafting Note.)
- **The parties are not direct competitors.** If the parties to the confidentiality agreement are direct competitors (who are, for example, pursuing a potential joint venture arrangement), they may need to revise this agreement to:
  - confirm that the agreement does not restrict the parties' ongoing competitive activities;
  - protect independent development;
  - restrict the persons at each company that a party may contact to request, receive, and discuss any confidential information;
  - restrict access to certain types of confidential information to each party's independent external advisors or to executives working at the corporate (non-operating) level; or
  - provide for non-solicitation of either party's customers, suppliers, or employees (noting that a mutual non-solicitation provision is more likely to be held anti-competitive and, therefore, unenforceable).
- For a sample non-solicitation provision, see Standard Clauses, Confidentiality Agreement: Non-Solicitation Clause (8-524-3805).
- **This agreement is not industry-specific.** This Standard Document does not account for any industry-specific laws, rules, or regulations that may apply to certain transactions, products, or services.
- **This is a short-form agreement that does not include every provision that parties may include in a longer agreement.** For a sample of a more comprehensive mutual general confidentiality agreement, see Standard Document, Confidentiality Agreement: General (Mutual) (1-501-7108).

BRACKETED ITEMS

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices, to be selected, added, or deleted at the drafter's discretion.

Confidentiality Agreement

This Confidentiality Agreement (the "**Agreement**"), dated as of [DATE] ("**Effective Date**"), is between [PARTY A NAME], a [STATE OF ORGANIZATION] [ENTITY TYPE] located at [ADDRESS], and [PARTY B NAME], a [STATE OF ORGANIZATION] [ENTITY TYPE] located at [ADDRESS] (each, a "**Party**" and, collectively, the "**Parties**").

DRAFTING NOTE: PREAMBLE

The preamble should include the full name, business address, entity type, and applicable state of incorporation or organization of each party. Each party should include an accurate street address because, in this short-form agreement, notices must be sent to the counterparty's address stated in the preamble (see Section 11). The parties should also ensure that the effective date is correctly identified because the term of the parties' rights and obligations is defined as a specified period of time following the effective date (see Section 7).

1. In connection with [DESCRIPTION OF PURPOSE] (the "**Purpose**"), either Party ("**Disclosing Party**") may disclose Confidential Information (as defined below) to the other Party ("**Recipient**"). Recipient shall use the Confidential Information solely for the Purpose and, subject to Section 3, shall not disclose such Confidential Information other than to its [affiliates and its or their] employees, officers[, directors][, shareholders][, partners][, members][, managers][, agents][, independent contractors][, service providers][, sublicensees][, subcontractors], attorneys, accountants, and financial advisors (collectively, "**Representatives**") who: (a) need access to such Confidential Information for the Purpose; (b) are informed of its confidential nature; and (c) are bound by [written] confidentiality obligations no less protective of the Confidential Information than the terms contained herein. Recipient shall safeguard the Confidential Information from unauthorized use, access, or disclosure using at least the same degree of care as the Recipient would protect its own Confidential Information, but in no event with less than a commercially reasonable degree of care. Recipient will be responsible for any breach of this Agreement caused by its Representatives. [Recipient agrees to notify Disclosing Party in writing [within [NUMBER] days] of any misuse, misappropriation, or unauthorized disclosure of the Confidential Information of Disclosing Party that may come to Recipient's attention.]

DRAFTING NOTE: DISCLOSURE AND USE OF CONFIDENTIAL INFORMATION

The recipient's obligations regarding the use and protection of confidential information are central to any confidentiality agreement. Section 1 is a short-form provision that:

- Broadly prohibits disclosure of confidential information except to the recipient's "Representatives" that satisfy certain conditions.
- Restricts use of the confidential information by the recipient and its representatives to the potential transaction. Many confidentiality agreements limit the disclosure or exchange of confidential information to a specified business purpose, such as "to evaluate a potential marketing arrangement between the parties." A defined business purpose is especially useful as a basis for access and use restrictions in the agreement. For more information on restricting use of confidential information for a specific business purpose, see Practice Note, Confidentiality and Nondisclosure Agreements (FL): Business Purpose (w-008-7912).
- Requires the recipient to protect the confidential information from unauthorized disclosure using at least a commercially reasonable degree of care.
- Makes the recipient legally responsible for any breaches of the agreement by the recipient's representatives.
- Optionally requires the recipient to notify the disclosing party in writing of any misuse, misappropriation, or unauthorized disclosure of the confidential information of the disclosing party that may come to the recipient's attention. The disclosing party may require notice within a specified period of time. Where a specified time is not listed, the disclosing party may require "timely," "prompt," or "reasonable" notice of the disclosure. The recipient may resist the inclusion of this bracketed requirement as too one-sided.

Some provisions also:

- Contain more onerous conditions for permitting disclosure to the recipient's representatives.
- Require the recipient, in addition to notifying the disclosing party of any unauthorized use or disclosure of confidential information (see optional bracketed language), to take specified actions to prohibit further unauthorized use or disclosure.

In addition to making the recipient liable for breaches caused by its representatives, the disclosing party may seek to require the recipient to:

- Secure each representative's agreement that the disclosing party may seek recourse directly against that representative for its breach of the confidentiality agreement.
- Cause its representatives to comply with the recipient's non-disclosure and use obligations.

However, most recipients are unwilling to accept these additional obligations because:

- Recipients rarely have the ability to control the activities of all of their representatives.
- The burden involved in obtaining signed agreements from each representative can be overwhelming.

For more information on drafting and negotiating provisions addressing the use and protection of confidential information, see Standard Document, Confidentiality Agreement: General (Mutual): Section 3 (1-501-7108) and its related Drafting Note, and Practice Note, Confidentiality and Nondisclosure Agreements (FL): Nondisclosure Obligations (w-008-7912).

DEFINING REPRESENTATIVES

The definition of "Representatives" is a fundamental term under most confidentiality agreements because the recipient is typically prohibited from disclosing confidential information except to its representatives. The universe of persons and entities included in this definition should be customized to reflect the facts and circumstances of each recipient's legal, business, and operational structure, as well as the facts and circumstances of the potential transaction. The definition should be consistent with any other use of the term in the agreement to avoid ambiguity and litigation over intended coverage.

To better protect its confidential information, the disclosing party desires to keep this definition as narrow as possible. Conversely, as recipient, each party looks for sufficient flexibility to ensure that all relevant individuals and entities are able to have access to the confidential information without breaching the principal nondisclosure obligation under the agreement.

The second sentence of Section 1 includes certain categories of representatives that are consistently included in this definition, as well as additional categories that may be appropriate to include, depending on applicable legal-, business-, and transaction-related considerations. The parties should include any appropriate optional categories.

2. "**Confidential Information**" means all non-public proprietary or confidential information, including, but not limited to, trade secrets [of Disclosing Party/relating to Disclosing Party's [DESCRIPTION OF CONFIDENTIAL INFORMATION]], in oral, visual, written, electronic, or other tangible or intangible form, [whether or not marked or designated as "confidential,"/ that, if disclosed in writing or other tangible form, is clearly labeled as "confidential," or if disclosed orally, is identified as confidential when disclosed and within [NUMBER] days thereafter, is summarized in writing and confirmed as confidential,] and all notes, analyses, summaries, and other materials prepared by Recipient or any of its Representatives that contain, are based on, or otherwise reflect, to any degree, any of the foregoing ("**Notes**"); provided, however, that Confidential Information does not include any information that: (a) is or becomes generally available to the public other than as a result of Recipient's or its Representatives' [material] breach of this Agreement; (b) is obtained by Recipient or its Representatives on a non-confidential basis from a third party that[, to Recipient's knowledge,] was not legally or contractually restricted from disclosing such information; (c) [Recipient establishes by documentary evidence,] was in Recipient's or its Representatives' possession prior to Disclosing Party's disclosure hereunder; or (d) [Recipient establishes by documentary evidence,] was or is independently developed by Recipient or its Representatives without using any Confidential Information. Confidential Information also includes (x) the facts that the Parties are in discussions regarding the Purpose (or, without limitation, any termination of such discussions) and that Confidential Information has been disclosed; and (y) any terms, conditions, or arrangements discussed.

DRAFTING NOTE: DEFINITION OF CONFIDENTIAL INFORMATION

The definition of "Confidential Information" is another essential component of a confidentiality agreement. The disclosing party generally wants to protect its confidential information with as broad a definition as possible, while the recipient seeks to include a narrower definition to minimize its burden under the agreement. Some confidential information may also rise to the level of a trade secret and receive automatic protection under state or federal law (see Practice Note, Confidentiality and Nondisclosure Agreements (FL): Trade Secrets (w-008-7912) and State Q&A, Trade Secret Laws: Florida: Definition of Trade Secret (6-506-3485)).

In this short-form mutual agreement, the definition of confidential information:

- Covers information in all types of tangible and non-tangible forms.
- Does not expressly restrict the definition of confidential information to information disclosed after the execution and delivery of the confidentiality agreement.
- Can be customized (using the alternative bracketed language selections) to either:
  - require the discloser to label tangible information and notify the recipient that information disclosed orally is confidential; or
  - more broadly cover information whether or not it is marked or otherwise identified as confidential.
- Includes all notes, analyses, and summaries prepared by the recipient and its representatives that contain any confidential information. This short-form agreement uses "other materials" to cover possible forms of information not enumerated, but the parties can list additional items if they have particular concerns about protecting certain types of confidential information (for example, reports, models, compilations, studies, or interpretations).
- Extends to:
  - the fact that the parties are in discussions and that confidential information has been disclosed; and
  - any terms, conditions, or arrangements discussed.

Even though confidential information may not qualify as trade secrets, parties are permitted to enter into contracts to prevent its use or disclosure (§ 542.335(1)(b)(2), Fla. Stat.; see also *Concept, Inc. v. Thermotemp, Inc.*, 553 So. 2d 1325, 1327 (Fla. 2d DCA 1989)). In *Concept*, the Court noted that even though the confidential information did not rise to the level of a trade secret:

- The discloser intended to keep the information secret.
- Disclosure of the information provided the recipient with an unintended competitive advantage.
- The confidentiality agreement did not violate public policy.
- The parties' confidential relationship justified enforcement of the agreement.

(*Concept*, 553 So. 2d at 1327.)

Florida has adopted a modified version of the Uniform Trade Secrets Act (FUTSA) (§§ 688.001 to 688.008, Fla. Stat.). Congress also enacted the Defend Trade Secrets Act of 2016 (DTSA) (18 U.S.C. § 1831 to 1839), which creates a federal civil cause of action for trade secrets misappropriation. The DTSA substantially overlaps with various state versions of the Uniform Trade Secrets Act, including the FUTSA, in terms of elements and definitions, but it preempts no state laws.

For further discussion of trade secrets under the FUTSA, see Practice Note, Confidentiality and Nondisclosure Agreements (FL): Florida Uniform Trade Secrets Act (w-008-7912). For a standard clause incorporating DTSA language, see Standard Clauses, General Contract Clauses: Confidentiality Agreement Clauses After the Defend Trade Secrets Act (w-002-9194).

BROADER OR NARROWER SCOPE

When drafting and negotiating the definition of confidential information in a mutual confidentiality agreement, each party should consider:

- Whether it is more likely to be the discloser or the recipient.

- The nature and magnitude of the information likely to be disclosed by each party, including whether the information qualifies as a trade secret.
- The party's willingness to assume administrative and operational obligations regarding the information it receives.

A broader definition of confidential information may provide the disclosing party with greater protection. However, an overly broad definition may be unenforceable. Florida courts must modify or "blue-pencil" a restrictive covenant if it is overbroad or not reasonably necessary to protect a legitimate business interest (§ 542.335(1)(c), Fla. Stat.).

In Florida, a party cannot protect information commonly known in an industry or that is readily accessible from unprotected sources (see *Anich Indus., Inc. v. Raney*, 751 So. 2d 767, 771 (Fla. 5th DCA 2000) (citing *Keel v. Quality Med. Sys., Inc.*, 515 So. 2d 337 (Fla. 3d DCA 1987)); see also *Blackstone v. Dade City Osteopathic Clinic*, 511 So. 2d 1050, 1051-52 (Fla. 2d DCA 1987)). Therefore, either party likely to be a discloser of confidential information should consider whether it is feasible to limit this definition depending on the type and extent of information to be disclosed and other relevant facts and circumstances.

Section 2 includes optional and alternative language that permits the discloser of confidential information to:

- Retain a broad definition of confidential information, which includes all non-public proprietary or confidential information of the disclosing party.
- Create a more limited definition, which describes the specific types and categories of information that is covered (for example, business and marketing plans; financial budgets; employee, contractor, and vendor lists; business methods; production procedures; technical processes; formulas; software or source code; and customer prospects).
- Retain a broad definition, but add a list of specific types and categories of information (for example, information about business affairs, products/services, confidential intellectual property, third-party confidential information, and other sensitive or proprietary information), and clarify that the definition is not limited to the list (see Standard Document, Confidentiality Agreement: General (Mutual): Section 1 (1-501-7108)).

To minimize its own procedural burden, a party more likely to be receiving confidential information wants to narrow this definition. Common restrictions include limiting this definition to confidential information that:

- Is actually disclosed by the disclosing party to the recipient.
- Is disclosed after the parties have entered into the confidentiality agreement.
- If disclosed:
  - in writing or other tangible format, is conspicuously marked as "confidential"; and
  - orally, is confirmed as confidential by the disclosing party in writing within a fixed period of time from the date of initial disclosure (typically between ten and 30 days).

A party more likely to be disclosing confidential information should carefully consider the practical implications of being required to mark all tangible materials confidential and send notice confirming orally disclosed confidential information. For example, in *Cubic Transp. Sys., Inc. v. Miami-Dade County*, the court held that Cubic's failure to both identify information as "confidential" when disclosed and to assert a post-delivery confidentiality claim effectively destroyed any confidential character it might otherwise have enjoyed as a trade secret (899 So. 2d 453, 454 (Fla. 3d DCA 2005); see also *Sepro Corp. v. Florida Dept. of Envtl. Prot.*, 839 So. 2d 781, 783 (Fla. 1st DCA 2003)). Therefore, if this requirement is included, failing to identify information as confidential may prevent a disclosing party from protecting what would otherwise be considered confidential information.

Courts only protect a party's trade secrets from unauthorized use or disclosure if that party has taken "reasonable efforts" under the circumstances to maintain the secrecy of the information (§ 688.002(4)(b), Fla. Stat.). In addition to identifying and labeling

confidential information or trade secrets as "confidential", "reasonable efforts" may include:

- Restricting access to the information (for example, security measures).
- Limiting the number of people who know the information.
- Having employees or others sign confidentiality agreements.

(See *Liberty Am. Ins. Grp. Inc. v. WestPoint Underwriters, LLC*, 199 F. Supp. 2d 1271, 1286 (M.D. Fla. 2001) and *Premier Lab Supply, Inc. v. Chemplex Indus., Inc.*, 10 So. 3d 202, 206 (Fla. 4th DCA 2009).)

For more information on defining confidential information, see Standard Document, Confidentiality Agreement: general (Unilateral, Pro-Discloser): Section 1 (9-501-6497) and its related Drafting Note, and Practice Note, Confidentiality and Nondisclosure Agreements (FL): Definition of Confidential Information (w-008-7912).

EXCLUSIONS FROM CONFIDENTIAL INFORMATION

Section 2 includes standard (but narrowly drafted) exclusions. The party more likely to be receiving confidential information may seek to broaden these exclusions to minimize its operational and administrative burden under the agreement. Common revisions include:

- Eliminating the requirement to provide documentary evidence of information:
  - in its possession before disclosure under the confidentiality agreement; or
  - that is independently developed.
- Adding one or more knowledge qualifiers.

(See, for example, Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Recipient): Section 2 (3-532-3908) and its related Drafting Note.)

For more information on exclusions from the definition of confidential information, see Practice Note, Confidentiality and Nondisclosure Agreements (FL): Exclusions from the Definition (w-008-7912).

3. If Recipient or any of its Representatives is required by [applicable law or] a valid legal order to disclose any Confidential Information, Recipient shall, before such disclosure and unless legally prohibited, notify Disclosing Party of such requirements so that Disclosing Party may seek, at Disclosing Party's expense, a protective order or other remedy, and Recipient shall reasonably assist Disclosing Party therewith. If Recipient remains legally compelled to make such disclosure, it shall: (a) only disclose that portion of the Confidential Information that it is required to disclose; and (b) use reasonable efforts to ensure that such Confidential Information is afforded confidential treatment.

DRAFTING NOTE: REQUIRED DISCLOSURE

Section 3 is a standard provision that addresses the conditions under which the recipient may disclose the disclosing party's confidential information if it is legally compelled to do so, such as pursuant to court order or other legal process (for example, CPA firms often receive record requests from civil and criminal investigators). This short-form provision:

- Can be drafted narrowly for disclosure required by "a valid legal order" or more broadly to also include disclosure required by applicable law generally (which also permits disclosures required under statutory or regulatory requirements).
- Obligates the recipient to:
  - notify the disclosing party of a required disclosure to give the disclosing party time to seek a protective order or other remedy; and
  - reasonably assist the disclosing party in its efforts to do so.
- If the recipient is still required to disclose any confidential information, unless

legally prohibited from doing so, obligates the recipient to:

- limit disclosure to that information which the recipient is required to disclose; and
- use reasonable efforts to obtain confidential treatment for required disclosure.

A party more likely to be the discloser of confidential information may seek to include language in the second sentence to require the recipient to obtain an opinion of counsel (sometimes in writing) regarding the portion of confidential information it is legally compelled to disclose (see, for example, Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 6 (9-501-6497)).

The recipient usually tries to soften these obligations (see Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Recipient): Section 4 (3-532-3908) and its related Drafting Note).

4. On Disclosing Party's request, Recipient shall, at [its/Disclosing Party's] discretion, promptly return to Disclosing Party or destroy all Confidential Information in its and its Representatives' possession other than Notes, and destroy all Notes[, and, at Disclosing Party's written request, certify in writing the destruction of such Confidential Information]; provided, however, that Recipient may retain copies of Confidential Information that are stored on Recipient's IT backup and disaster recovery systems until the ordinary course deletion thereof. Recipient shall continue to be bound by the terms and conditions of this Agreement with respect to such retained Confidential Information.

DRAFTING NOTE: RETURN OR DESTRUCTION OF CONFIDENTIAL INFORMATION

Confidentiality agreements typically address when and how the recipient loses its access to the confidential information. In this short-form mutual agreement, Section 4 can be customized to favor either the discloser or the recipient.

A party more likely to be disclosing confidential information should:

- Select the alternative in the first set of bracketed alternative language that grants the disclosing party discretion over whether confidential information is returned or destroyed.
- Consider revising the first sentence to automatically obligate the recipient to return or destroy confidential information at the expiration of the agreement (in addition to requiring return or destruction at any time at the disclosing party's request) (see Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Discloser): Section 4 (5-535-7285)).
- Include the second bracketed language selection requiring the recipient to deliver a certificate of destruction (and consider making the delivery of the certificate automatic rather than at the disclosing party's request).
- Consider deleting or narrowing the proviso permitting retention of backup and archival copies.

A party more likely to be receiving confidential information should negotiate to:

- Itself determine whether to return or destroy the confidential information.
- Have the right to redact confidential information contained in notes and other internal work product created by it or its representatives, instead of being required to destroy them.
- If required to deliver a certificate of destruction, obligate the disclosing party to request the certificate as a condition to the recipient's delivery obligation.

- Broaden the scope of the provision permitting retention of backup copies to include:
  - copies that must be retained under the recipient's document retention policy (for the required duration);
  - copies to be retained for evidentiary purposes;
  - documents prepared for the recipient's board of directors (or other similar management group) for purposes of seeking approval or determining not to proceed with the potential transaction; and
  - information retained as required by applicable law or professional standards (for example, a party may be required to retain certain internal records that may contain another party's confidential information, such as accounting records or board minutes (see, for example, § 607.1601, Fla. Stat. and FL Eth. Op. 06-1, 2006 WL 2502807).
- (See, for example, Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Recipient): Section 5 (3-532-3908) and its related Drafting Note.)

5. This Agreement imposes no obligation on either party to disclose any Confidential Information or to negotiate for, enter into, or otherwise pursue the Purpose. Disclosing Party makes no representation or warranty, expressed or implied, as to the accuracy or completeness of the Confidential Information, and will have no liability to Recipient or any other person relating to Recipient's use of any of the Confidential Information or any errors therein or omissions therefrom.

DRAFTING NOTE: NO OBLIGATION TO DISCLOSE OR NEGOTIATE; NO REPRESENTATIONS OR WARRANTIES

Section 5 protects the parties against potential claims that by entering into the confidentiality agreement:

- Either party has accepted an implied obligation to:
  - disclose some or all relevant confidential information; or
  - pursue the potential transaction.
- The disclosing party has made any express or implied representations and warranties about the accuracy and completeness of the confidential information that the recipient may rely on for purposes of negotiating and entering into the potential transaction.

6. [Disclosing Party retains its entire right, title, and interest in and to all Confidential Information, and no disclosure of Confidential Information hereunder will be construed as a license, assignment or other transfer of any such right, title, and interest to Recipient or any other person.]

DRAFTING NOTE: NO TRANSFER OF RIGHTS, TITLE, OR INTEREST

Optional Section 6 is included in many confidentiality agreements to protect the disclosing party against any claims that the recipient was implicitly granted a license or other right to use the confidential information for any purposes outside the confidentiality agreement.

7. The rights and obligations of the Parties under this Agreement expire [NUMBER] year[s] after the Effective Date[; provided that with respect to Confidential Information that constitutes a trade secret under applicable law, such rights and obligations will survive such expiration until, if ever, such Confidential Information loses its trade secret protection other than due to an act or omission of Recipient or its Representatives].

DRAFTING NOTE: TERM

This short-form agreement includes a simple term provision, which assumes that:

- All confidential information will be disclosed on or shortly after the execution of the confidentiality agreement.
- The recipient's use restrictions and confidentiality obligations (and all other related obligations) expire after a stated period of time following the effective date of the agreement (commonly, from one to five years), regardless of when it is actually disclosed.

As an alternative, if the parties are not able to agree on a stated period of time, they could provide that the provisions, restrictions, and obligations under Sections 1, 2, and 8 shall survive the expiration or termination of this agreement.

The optional language at the end of the sentence can be included if the disclosing party is concerned about protecting any trade secrets contained in the confidential information throughout the time that the information qualifies for protection under applicable law.

Otherwise, the parties should select a term length that is appropriate under the circumstances. While disclosing parties usually seek longer terms, recipients are likely to object to any period that is longer than is reasonably necessary to protect the type of information that is being disclosed. Some information becomes obsolete fairly quickly, such as marketing strategies or pricing arrangements. Other information may need to remain confidential long into the future, such as:

- Customer lists.
- Certain technical information.
- Business methods.

The disclosing party must be careful when including term limits in confidentiality agreements involving trade secrets to avoid undermining efforts to maintain trade secret status. Courts only protect a party's trade secrets from unauthorized use or disclosure if that party has taken reasonable efforts under the circumstances to maintain the secrecy of the information (§ 688.002(4)(b), Fla. Stat.; see, for example, *Yellowfin Yachts, Inc. v. Barker Boatworks, LLC*, 898 F.3d 1279, 1299-301 (11th Cir. 2018) and *M.C. Dean, Inc. v. City of Miami Beach, Florida*, 199 F. Supp. 3d 1349, 1354-56 (S.D. Fla. 2016)).

Although no Florida court has ruled on this specific matter, the expiration of a confidentiality obligation of a limited duration may be evidence that the trade secret owner is not exercising reasonable efforts to maintain the secrecy of the information beyond the expiration date (see, for example, *Structured Capital Sols., LLC v Commerzbank AG*, 177 F. Supp. 3d 816, 835 (S.D.N.Y. 2016); *DB Riley, Inc. v. AB Eng'g Corp.*, 977 F. Supp. 84, 90-91 (D. Mass. 1997); and *Alta Devices, Inc. v. LG Elecs., Inc.*, 343 F. Supp. 3d 868, 878 (N.D. Cal. 2018) (the fact that a contract expired does not automatically render any information incapable of receiving trade secret protection, but it is a fact that may be considered to determine whether trade secrets were adequately protected)).

Alternative term structures include:

- A set agreement term, often from one to three years, during which it is expected that confidential information will or may be disclosed (either continuously or from time to time) and a discrete survival period for the recipient's confidentiality obligations, often for an additional one-to-three-year period, which may begin on:
  - the expiration or termination of the agreement; or
  - the date on which the particular confidential information is disclosed.

- An indefinite term without a stated survival period.
- An indefinite or stated term with a perpetual survival period.
- A term that ends on a specified date or on the occurrence of certain events or conditions, such as the conclusion of the defined business purpose or the signing of a principal agreement.

Some confidentiality agreements also permit one or both parties to terminate the term of the agreement before its contractual expiration date under certain circumstances.

For more information on term and termination, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 8 (9-501-6497).

8. Recipient acknowledges and agrees that any breach of this Agreement will cause injury and irreparable harm to Disclosing Party for which money damages would be an inadequate remedy and that, in addition to remedies at law, Disclosing Party is entitled to equitable relief as a remedy for any such breach or potential breach, including without limitation, injunctive relief[without the posting of bond or other security]. Recipient waives any claim or defense that Disclosing Party has an adequate remedy at law in any such proceeding. Nothing herein shall limit the equitable or available remedies at law for Disclosing Party.

DRAFTING NOTE: EQUITABLE RELIEF

Because of the potentially serious consequences of an unauthorized disclosure by a recipient and the difficulty of ascertaining monetary damages in that event, confidentiality agreements usually include a provision acknowledging the parties' agreement that the disclosing party should be entitled to obtain injunctive (or more broadly, equitable) relief, in addition to other available remedies, for a breach of the recipient's confidentiality obligations (see Practice Note, Temporary Injunctions: Initial Considerations (FL) (w-000-0842) and Practice Note, Confidentiality and Nondisclosure Agreements (FL): Equitable Relief (w-008-7912)). For trade secret violations, the FUTSA provides injunctive relief for both actual or threatened misappropriation (§§ 688.003 and 688.006, Fla. Stat.; see also *Norton v. American LED Technology, Inc.*, 245 So. 3d 968, 969 (Fla. 1st DCA 2018)).

If a party enters into a contract in which they agree not to use or disclose confidential information and that contract does not violate any established public policy, Florida courts generally enforce the injunctive provisions of the contract (see, for example, *Concept*, 553 So. 2d at 1327-28).

Absent a specific statutory right to the contrary, the granting of equitable relief is solely in the court's discretion. Because of this judicial discretion, an equitable remedies clause cannot compel a court's decision, but should carry evidentiary weight as an expression of the parties' intentions.

While this clause includes optional language stating that no bond or security is required for the issuance of an injunction, the bond requirement generally is left to the discretion of the court. Some courts, by local rules or otherwise, require the posting of a bond, or may specify a minimum bond amount. This language may still be helpful in preventing a party from arguing that an injunction is not warranted or that a bond is necessary to protect against any harm resulting from issuing an injunction. However, in Florida, a party may not be able to contractually avoid posting bond when seeking a temporary injunction and challenges to the waiver of bond in the case of a temporary injunction would likely

be successful (see *Premier Compounding Pharmacy, Inc. v. Larson*, 250 So. 3d 94, 97-98 (Fla. 4th DCA 2018) (holding that an unenforceable "no bond" provision does not invalidate the remaining contract provisions)).

For more information on equitable remedies provisions, see Standard Clauses, General Contract Clauses: Equitable Remedies (6-518-8602).

In some confidentiality agreements, the disclosing party also tries to include a provision permitting recovery of attorneys' fees and court costs by the prevailing party to any litigation. Because the disclosing party is more likely to sue the recipient for breach of the confidentiality agreement, a party more likely to be receiving than disclosing confidential information often resists including an attorneys' fees provision. However, for trade secret violations, both the FUTSA and the DTSA provide for the recovery of attorneys' fees in certain circumstances (§ 688.005 Fla. Stat. and 18 U.S.C. § 1836(b)(3)(D)).

For a sample attorneys' fees provision, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 14 (9-501-6497); see also Standard Clause, General Contract Clauses: Litigation Costs and Expenses (FL) (w-000-0651).

9. This Agreement and all related documents [including all exhibits attached hereto][, and all matters arising out of or relating to this Agreement, whether sounding in contract, tort, or statute] are governed by, and construed in accordance with, the laws of the State of Florida, United States of America [(including [its statutes of limitations] [and] [§ 685.101, Fla. Stat.])][, without giving effect to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of Florida].

DRAFTING NOTE: CHOICE OF LAW

This section allows parties to choose the substantive law of Florida to apply to the contract.

Florida deems choice of law provisions presumptively valid and enforceable unless the law of the chosen forum violates the strong public policy of the forum state (*AutoNation, Inc. v. Hankins*, 2003 WL 22852206, at *7 (Fla. Cir. Ct. Nov. 24, 2003) (citing *Mazzioni Farms, Inc. v. E.I. DuPont*, 761 So.2d 306, 311 (Fla.2000)).

Florida, with certain exceptions, has a special statute that allows parties to choose Florida law to govern their contracts if the aggregate of the transaction is not less than $250,000 and either:

- The contract bears a substantial or reasonable relation to Florida.
- One of the parties is:
  - a Florida resident or citizen (if a natural person); or
  - incorporated or organized under Florida law or maintains a place of business in Florida (if a business).

(§ 685.101, Fla. Stat. and *Jetbroadband WV, LLC v. MasTec N. Am., Inc.*, 13 So. 3d 159, 161-62 (Fla. 3d DCA 2009); see also *Lienemann v. Cruise Ship Excursions, Inc.*, 349 F. Supp. 3d 1269, 1273–75 (S.D. Fla. 2018) (discussing *Jetbroadband*).)

Related to § 685.101 is § 685.102, Fla. Stat., which covers personal jurisdiction. Read together, the two sections stand for the proposition that, if certain requirements are met, parties may, by contract alone, confer personal jurisdiction on the courts of Florida (*Jetbroadband*, 13 So. 3d at 162). To satisfy the statutory requirements, the contract must:

- Include a choice of law provision designating Florida law as the governing law (see *Dollar Rent a Car, Inc. v. Westover Car Rental, LLC*, 2017 WL 5495126, at *6 (M.D. Fla. Nov. 16, 2017), agreements at issue did not include required choice of law provision).
- Include a Florida choice of forum provision.
- Involve consideration of $250,000 or more.
- Not violate the United States Constitution.
- Either:
  - bear a substantial or reasonable relation to Florida; or
  - have at least one of the parties be a resident of Florida or incorporated under its laws.

(*Jetbroadband*, 13 So. 3d at 162; see also *Corporate Creations Enterprises LLC v. Brian R. Fons Attorney at Law P.C.*, 225 So. 3d 296, 301 (Fla. 4th DCA 2017) (applying the Jetbroadband factors).)

Parties typically try to maintain consistency regarding governing law, jurisdiction, and venue across all transactions they undertake together. Because the confidentiality agreement is often the first document that the parties execute, each party should carefully consider the selection of state law and forum.

For more information on the optional language in brackets, see Standard Clause, General Contract Clauses: Choice of Law (FL) (w-000-0204): Drafting Notes:

- Extra-Contractual Matters (w-000-0204).
- Statutes of Limitations (w-000-0204).
- Choice of Law Rules (w-000-0204).

For more information on drafting and negotiating choice of law clauses, see Practice Note, Choice of Law and Choice of Forum: Key Issues (7-509-6876).

10. Each Party irrevocably and unconditionally agrees that it will not commence any action, litigation, or proceeding of any kind whatsoever against the other Party in any way arising from or relating to this Agreement, including all exhibits, schedules, attachments, and appendices attached to this Agreement, and all contemplated transactions[, including, but not limited to, contract, equity, tort, fraud, and statutory claims], in any forum other than the US District Court for the [APPLICABLE DISTRICTS] District of Florida or[, if such court does not have subject matter jurisdiction,] the courts of the State of Florida sitting in [POLITICAL SUBDIVISION], and any appellate court from any thereof. Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of such courts and agrees to bring any such action, litigation, or proceeding only in the US District Court for the [APPLICABLE DISTRICTS] District of Florida or[, if such court does not have subject matter jurisdiction,] the courts of the State of Florida sitting in [POLITICAL SUBDIVISION]. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

DRAFTING NOTE: CHOICE OF FORUM

In this section, the parties confer personal jurisdiction on the courts of Florida and agree that the selected forum is the exclusive forum for bringing any claims under (and sometimes, more broadly relating to) the agreement. For more information on drafting and negotiating choice of forum clauses, see Standard Clauses, General Contract Clauses: Choice of Forum (FL) (w-000-0202) and Practice Note, Choice of Law and Choice of Forum: Key Issues (7-509-6876).

To settle or avoid protracted forum selection negotiations, the parties sometimes elect to include a floating forum selection clause that forces a party initiating litigation to do so in the home jurisdiction

of the counterparty being sued. For a sample floating forum selection clause, see Standard Clauses, General Contract Clauses: Choice of Forum (Floating: Reciprocal) (FL) (w-000-0203).

If the parties prefer to resolve disputes by arbitrating rather than litigating them, then they must replace this provision with an arbitration clause. For more information on arbitration and other alternative dispute resolution agreements, including sample clauses, see:

- Practice Note, Drafting Arbitration Agreements Calling for Arbitration in the US (2-500-4624).
- Practice Note, Standard recommended arbitration clauses (1-381-8470).
- Standard Clauses, American Arbitration Association (AAA)/International Centre for Dispute Resolution (ICDR): Standard Arbitration Clauses (3-520-8381).
- Drafting Contractual Dispute Provisions Toolkit (FL) (w-007-8922).

This Standard Document does not contain a dispute resolution escalation provision. Escalation provisions first require the parties to resolve their disputes by alternative dispute resolution (ADR), including a period of negotiation and then mediation before submitting the dispute to litigation or ad hoc arbitration. For more information on drafting and negotiating escalation clauses, see Standard Clauses, General Contract Clauses, Alternative Dispute Resolution (Multi-Tiered) (FL) (w-006-6234).

11. All notices must be in writing and addressed to the relevant Party at its address set forth in the preamble (or to such other address as such Party specifies in accordance with this Section 11). All notices must be personally delivered or sent prepaid by nationally recognized courier or certified or registered mail, return receipt requested, and are effective upon actual receipt.

DRAFTING NOTE: NOTICES

Under a confidentiality agreement, notices are used for significant communications (such as requesting the return or destruction of confidential information or notifying the disclosing party of a required disclosure). This notice provision does not permit email and fax notices because:

- It is not always possible to track with certainty when an email has been received.
- There may be a greater risk of an email being intercepted by a third party, arriving late or not at all, or being inadvertently deleted or overlooked by the intended recipient.
- Even when the sender receives a fax confirmation, the recipient may not have actually received and read the fax.

For more information on notices, see Standard Clause, General Contract Clauses: Notice (6-533-1025).

12. This Agreement constitutes the entire agreement of the Parties with respect to its subject matter, and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, whether written or oral, with respect to such subject matter. This Agreement may only be amended, modified, waived, or supplemented by an agreement in writing signed by both Parties.

DRAFTING NOTE: ENTIRE AGREEMENT AND OTHER MISCELLANEOUS CLAUSES

An entire agreement clause (also referred to as a merger or integration clause) protects against liability from representations or warranties other than those included in the agreement. For more information, see Standard Clause, General Contract Clauses: Entire Agreement (FL) (w-008-0973).

Although this is a short form agreement, the parties should consider including additional clauses (see, for example, Standard Clauses, General Contract Clauses: Severability (FL) (w-000-0642), Waiver (FL) (w-000-1871), and Successors and Assigns (FL) (w-002-4374)).

In executing the agreement, the parties may also want to include;

- A counterparts clause.
- Restrictions on assignment by either party.
- The ability to amend or modify the agreement with the written consent of both parties.
- If corporate parties, authority that the person signing the agreement has the authority to bind the corporation or other entity to the terms of the agreement.

For more information, see Standard Clauses, General Contract Clauses:

- Counterparts (5-564-9425).
- Assignment and Delegation (FL) (w-000-0878).
- Amendments (FL) (w-000-0498).
- Representations and Warranties: Sections 1.1(d) and 1.2(d) (2-519-9438).

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the Effective Date hereof.

[PARTY A NAME]	[PARTY B NAME]
By_____	By_____
Name:	Name:
Title:	Title:

06-19