

Pre-Formation Confidentiality Agreement [For Project [Code Name]]

Comment

The following form of confidentiality agreement is designed to protect confidential information and trade secrets each Member discloses to the other in connection with the formation of the Joint Venture. By contrast, the confidentiality provisions of Article 16 of the Model JV Agreement protect confidential information and trade secrets of the joint venture itself. Model JV Agreement § 16.12 provides that this Pre-Joint Venture Formation Confidentiality Agreement continues in effect following the formation of the joint venture with respect to information of either Large Member or Small Member that does not become either confidential information of the joint venture or information subject to the terms of the Technology License Agreement.

The two-way exchange of information in the joint venture context raises some special issues, and the attached pre-formation confidentiality agreement highlights those considerations.

Because of business and other considerations, Section 3 contemplates special procedures as to certain information. Such procedures may be applicable in certain acquisitions (such as those involving competitors), but are almost always applicable in joint ventures. See Preliminary Considerations—Antitrust and Choice of Entity.

Otherwise, a review of confidentiality agreements is beyond the scope of this publication. For a discussion of confidentiality agreements, the drafter should consult the commentary to Article 12 of the *Model Asset Purchase Agreement with Commentary*, the Confidentiality Agreement included as an Ancillary Document to the *Model Asset Purchase Agreement with Commentary* and as an

Ancillary Document to the *Model Stock Purchase Agreement with Commentary*.

See also the commentary to Article 16 of the Model JV Agreement.

THIS IS A CONFIDENTIALITY AGREEMENT by and between _____, a _____ corporation (“Large Company”), and _____, a _____ corporation (“Small Company”), dated as of _____, 20____, by which the parties, in consideration of the agreements set forth in this Agreement and other good and valuable consideration (the adequacy, mutuality, receipt and sufficiency of which are hereby acknowledged), agree as follows.

1. **Background.** In contemplation of a proposed joint venture between the parties, each of the parties will provide information about itself and certain of its properties for use solely in connection with the other party’s evaluation of the proposed joint venture. Such supplying of information is in consideration of, and in reliance upon, the agreements in this Agreement.

2. **Definitions—Protected Information and Other.**

(a) *Protected Information.* “Protected Information” means all information (whether written, oral or in another form) (i) that (A) the Discloser (as defined below) or its Representatives (as defined below) provides to a Recipient (as defined below) concerning the Discloser, (B) is obtained by the Recipient from its examination of the Discloser’s facilities or records or from discussions with the Discloser’s Representatives, or (C) is developed by the Recipient from such information and (ii) that consists of, or includes, Trade Secrets or Confidential Information (each as defined below).

(b) *Trade Secrets.* “Trade Secrets” means trade secrets under applicable trade secret or other law; and includes, however documented, concepts, ideas, designs, know-how, methods, data, processes, formulae, compositions, improvements, inventions, discoveries, product specifications, past, current and planned research and development and manufacturing or distribution methods and processes, lists of actual or potential customers or suppliers, current and anticipated customer requirements, price lists, market

studies, business plans, computer software and programs (including object code and source code), computer software and database technologies, systems, structures and architectures, the materials dated _____, 200__ and disclosed to _____ by _____, and any other information that is a trade secret within the meaning of § _____ - _____ - _____ [applicable state trade secret law]).

(c) *Confidential Information*: “Confidential Information” means written or other information concerning the Discloser, other than trade secrets, not generally known to the public; and to the extent consistent with the foregoing definition, includes historical financial statements, financial projections and budgets, historical and projected sales, capital spending budgets and plans, , and any information that is marked “confidential” or in some comparable manner.

(d) *Recipient*. “Recipient” means the party to whom Protected Information is disclosed or made available by observation, inspection or otherwise.

(e) *Discloser*. “Discloser” means the party to whom Protected Information relates or that discloses Protected Information to the other party.

(f) *Representatives*. “Representatives” means a party’s directors, officers, employees, agents, consultants, advisors or other representatives, including legal counsel, accountants, tax, financial and other advisors.

3. Requests for Information & Certain Limitations. Large Member will make all requests for any information concerning Small Member to _____.¹ Small Member will make all requests for any information concerning Large Member to _____.² The Recipient will not make any inquiries of the Discloser’s customers, suppliers, lenders, employees or other persons having dealings with the Discloser without the express prior written consent of the representative of the Discloser designated in this Section (which may be withheld for any reason and for no reason). In recognition of the competitive relationship between the parties as to certain products and in order to protect the parties’ operations and business if the proposed joint venture is not formed, the parties will

develop procedures to protect certain sensitive information (including each party's customer lists, prices, costs, and _____) and the persons who may have access to it. All disclosures will be made in accordance with the requirements of applicable antitrust laws.

Comment

The list of potentially sensitive information is merely illustrative.

4. Basic Limitations on Use of the Other's Protected Information:

(a) *Generally.* Acknowledging the foregoing, each Recipient agrees that it:

(i) *Use Only to Evaluate Transaction:* will use the Protected Information of the other party only to evaluate the merits of the proposed joint venture,

(ii) *No Detrimental Use:* will not use the Protected Information of the other party to the detriment of the Discloser or any of its affiliates, and

(iii) *Hold in Strict Confidence:* will hold the Protected Information of the other party in strict confidence and without limiting the

¹ Small Member's designated "gatekeeper."

² Large Member's designated "gatekeeper."

foregoing, will not disclose any of the Protected Information to, or discuss the proposed joint venture with, any other person (including one that has the Protected Information, however obtained), indefinitely in the case of Trade Secrets and until _____, 200__ in the case of Confidential Information. Without limiting the foregoing, each Recipient will use no less than the same degree of care, and no less than a reasonable degree of care, to protect the Protected Information of the other party as it uses to protect its own trade secrets and confidential information.

Comment

A time period is included in the case of the use or disclosure Confidential Information because the laws of some states require one. *Cf.* Model JV Agreement § 16.10.

(b) *Certain Exceptions.* The foregoing agreements in (a) (i) and (iii) above will not apply only to the extent that:

(i) *Previously in Possession:* The Recipient (A) demonstrates through written records that the same Protected Information was in its possession prior to disclosure to it and (B) the Recipient provided the Discloser with written notice of such prior possession either (1) prior to the execution and delivery of this Agreement or (2) if the Recipient later becomes aware of (through disclosure by the Discloser or otherwise) some aspect of the Protected Information as to which it had prior possession, promptly upon its becoming aware of the Protected Information;

(ii) *Becomes Public:* The Recipient demonstrates (A) that the same information is currently publicly available or has become publicly available *and* (B) that such public availability does not result from (1) the misappropriation or improper disclosure of such Protected Information by the Recipient or (2) the obtaining of such Protected Information by improper means of the Recipient;

(iii) *Independently Developed:* The Recipient demonstrates that the same information was developed independently by the Recipient without the use of Protected Information; or

(iv) *Legal Obligation to Disclose:* The Recipient demonstrates that applicable law, applicable stock exchange rules or the rules and regulations of the U.S. Securities and Exchange Commission requires it to disclose the Protected Information, but then only (A) to the extent disclosure is required and (B) after giving the Discloser

notice of the obligation so that it may seek a protective order or other similar or appropriate relief; and in the absence of an order or relief, the Recipient must use reasonable efforts to have the disclosed information treated confidentially consistent with this Agreement.

5. Certain Limited Permitted Disclosures. Notwithstanding the prohibitions of Section 4(a) above, the Recipient may disclose the Protected Information to its Representatives directly involved in the proposed joint venture but:

(i) only to the extent necessary for the Representative to accomplish his assigned task in evaluating the proposed joint venture and otherwise strictly on a need to know basis; and

(ii) only if the Representative (A) is provided a copy of this Agreement, and (B) is advised in writing by the Recipient (1) that he is obligated to keep confidential, not disclose and retain in strictest confidence the Protected Information strictly in accordance with the terms of this Agreement and (2) that the Discloser may directly enforce the obligation.

Each Recipient will be responsible for violations of this Agreement by its Representatives regardless of whether the Discloser has rights against the Representative.

6. Confidentiality of Discussions; [Use of “Project [Code Name]”]. Except as provided in Sections 4 and 5 above, no Recipient will disclose to, or discuss with, any person (including one that has the Protected Information or is aware of the proposed joint venture) either (a) the fact that information concerning a Discloser has been provided to, or obtained by, the Recipient or (b) the fact of discussions or negotiations concerning a proposed joint venture. [Consistent with the foregoing, the parties will, and each will cause its Representatives to, refer to the proposed joint venture as “Project [Code Name].”]

7. Return of Materials. If the proposed joint venture is not consummated or either party otherwise terminates discussions concerning the proposed joint venture, then

immediately thereafter each Recipient and its Representatives: (a) will deliver to the Discloser all materials provided by the Discloser or its Representatives to the Recipient involving the Protected Information and/or concerning the Discloser (or otherwise obtained by the Recipient from its examination of the facilities, records and Representatives of the Discloser); and (b) will [(i)] destroy all copies of all such materials and all materials (including notes, summaries and analyses) prepared by them from such materials [and (ii) provide an officer's affidavit as to such destruction].

8. No Solicitation of Employees. Each party agrees that until _____, 20____, neither it nor any of its affiliates will, directly or indirectly (whether through an affiliate, a designated person or otherwise), solicit, request or induce any person who was an employee of any other party or any subsidiary or affiliate at any time during the [six] month period ending on the date of this Agreement to terminate his employment with such other party or any such subsidiary or affiliate and accept employment with another person; *provided, however*, that general advertisements with respect to a position that are not directed to a party's employees will not violate this Section.

9. Other. Any Trade Secrets of a Discloser will also be entitled to all of the protections and benefits under applicable law. If a court of competent jurisdiction determines that any Protected Information that a Discloser deems to be a Trade Secret is not a Trade Secret, or ceases to be a Trade Secret under applicable law, then the Protected Information will be considered Confidential Information for purposes of this Agreement.

10. Disclaimers. Although each party understands that the other party has undertaken, or will undertake, to provide it with information that the other party believes to be relevant for the purpose of its evaluation of the proposed joint venture, no representation or warranty is made as to the accuracy or completeness of the information provided to another party, it being understood that any representations and warranties concerning any such information will be only those, if any, made in an agreement entered into between the parties concerning the proposed joint venture (but it is further

understood that neither party is under any obligation whatsoever to either negotiate or enter into any such agreement). Each Recipient agrees that neither the Discloser nor any of its Representatives will have any liability to the Recipient or any of its Representatives resulting from the use of the information provided to, or obtained by, the Recipient concerning the Discloser.

11. **Remedies.** Each Recipient recognizes that violations of this Agreement will result in irreparable damage and harm to the Discloser and that the Discloser and its affiliates may be without an adequate remedy at law in the event of any such activities. Therefore, each Recipient agrees that, if this Agreement is breached or is threatened to be breached, the Discloser and each of its affiliates may: (a) obtain specific performance; (b) enjoin any person that has breached or threatens to breach from engaging in any activity proscribed by this Agreement; and (c) pursue any one or more of the foregoing or any other remedy available to it under applicable law, including actual and/or punitive damages and set-off rights. A person seeking or obtaining any such relief will not be deemed to be precluded from obtaining any other relief to which that person may be entitled. Each party waives on behalf of itself and each of its affiliates any requirement that a person seeking to enforce the provisions of this Agreement submit proof of the economic value of any Trade Secret or posts any bond or other security in connection therewith.

12. **Attorney-Client Privilege.** To the extent that any Protected Information may include materials subject to the attorney-client privilege, the Discloser is not waiving and will not be deemed to have waived or diminished its attorney work-product protections, attorney-client privileges or similar protections and privileges as a result of disclosing any Protected Information (including Protected Information related to pending or threatened litigation) to the Recipient, whether or not the Discloser has asserted, or is or may be entitled to assert, such privileges and protections. The parties (a) share a common legal and commercial interest in all such Protected Information that is subject to such

privileges and protections; (b) are or may become joint defendants in proceedings to which such Protected Information covered by such protections and privileges relates; and (c) intend that such privileges and protections remain intact should either party become subject to any actual or threatened proceeding to which such Protected Information covered by such protections and privileges relates. In furtherance of the foregoing, the Recipient shall not claim or contend, in proceedings involving either party, that the Discloser waived its attorney work-product protections, attorney-client privileges or similar protections and privileges as a result of disclosing any Protected Information (including Protected Information related to pending or threatened litigation) to the Recipient.

13. **No Agency or Partnership.** No party is the agent or representative of another. Nothing in this Agreement will be construed (a) to make a party liable to any third party for or on account of any claim or act or omission of any other party or (b) to create a partnership or joint venture among any of the parties.

14. **Miscellaneous.**

(a) *Assignment; Binding Nature.* No assignment, transfer or delegation, whether by merger or other operation of law or otherwise, of any rights or obligations under this Agreement by a party will be made without the prior written consent of the other party (but given the nature of this Agreement, it is not expected that consent to assignment, transfer or delegation will be granted). This Agreement is binding upon the parties and their respective successors and assigns and inures to the benefit of the parties and their respective permitted successors and assigns.

(b) *Certain Additional Definitions.* For purposes of this Agreement: (i) “*applicable law*” means each provision of any applicable constitution, statute, law, rule, regulation, decision, order, decree, judgment, release, license, permit, stipulation or other official pronouncement enacted, promulgated or issued by any governmental authority or arbitrator or arbitration panel; (ii) “*governmental authority*” means any

legislative, executive, judicial, quasi-judicial or other public authority, agency, department, bureau, division, unit, court or other public body or person; (iii) “*party*” and “*parties*” and variations of such means each or all, as appropriate, of the persons who have executed and delivered this Agreement, each permitted successor or assign of such a party, and when appropriate to effect the binding nature of this Agreement for the benefit of another party, any other successor or assign of such a party; (iv) “*person*” means any individual, sole proprietorship, partnership, corporation, joint venture, limited liability company, estate, trust, unincorporated organization, association, institution, or other entity or governmental authority; and (v) “*this Agreement*” includes any amendments or other modifications and supplements, and all exhibits, schedules and other attachments, to it.

(c) *Certain Rules of Construction.* For purposes of this Agreement: (i) “including” and any other words or phrases of inclusion will not be construed as terms of limitation, so that references to “included” matters will be regarded as non-exclusive, non-characterizing illustrations; (ii) “will” has the same meaning as “shall” and thus means an obligation and an imperative and not a futurity; (iii) “Section” or “Subsection” refers to such item of or to this Agreement; (iv) titles and captions of or in this Agreement are inserted only as a matter of convenience and in no way define, limit, extend or describe the scope of this Agreement or the intent of any of its provisions; and (v) whenever the context requires, the singular includes the plural and the plural includes the singular, and the gender of any pronoun includes the other genders; and (vi) the parties have participated jointly in the negotiation and drafting of this Agreement, if an ambiguity or question of intent or interpretation arises as to any aspect of this Agreement, then it will be construed as if drafted jointly by the parties and no presumption or burden of proof will arise favoring or disfavoring any party by virtue of the authorship of any provision of this Agreement.

(d) *Controlling Law; Judicial Proceedings.* This Agreement is governed by, and will be construed and enforced in accordance with, the laws of the State of (except the laws of that state that would render such choice of law ineffective). All actions or proceedings relating to this Agreement (whether to enforce a right or obligation or obtain a remedy or otherwise) will be brought solely in the state or federal courts located in or for County, . Each party hereby unconditionally and irrevocably consents to the jurisdiction of those courts and waives its rights to bring any action or proceeding against the other party except in those courts. Process in any action or proceeding referred to in the preceding sentence may be served on any party anywhere in the world. Each of the parties irrevocably waives any right to a jury trial with respect to any matter arising out of or in connection with this Agreement. If any party seeks to enforce its rights under this Agreement by joining another person to a proceeding before a jury in which the third party is a party, the parties will request the court to try the claims between the parties without submitting the matter to the jury.

(e) *Counterparts.* This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original copy of this Agreement and all of which, when taken together, will be deemed to constitute one and the same agreement.

DULY EXECUTED and delivered by the parties as of the date first above written.

Large Member

By: _____

Name: _____

Title: _____

Small Member

By: _____

Name: _____

Title: _____