



## 711 Confidentiality & Non-Compete Agreements- Does One Size Fit All?

**Eileen Barish**

*Counsel*

Twentieth Century Fox

**Jonathan R. Spencer**

*Vice President and General Counsel*

Shentel

**John E. Thomas**

*Technology Counsel*

Thomson West

## Faculty Biographies

Confidential

**Eileen Barish**  
Counsel  
Twentieth Century Fox

### Jonathan R. Spencer

Jonathan Spencer is currently vice president and general counsel at Shentel.

Previously he was vice president- general counsel of Genesys S.A. Genesys is a global provider of teleconferencing, video conferencing, and webcasting services. Prior to Genesys, Mr. Spencer was vice president, general counsel and secretary of Shenandoah Telecommunications Company; a diversified telecommunications company providing both regulated and unregulated telecommunications services. Before joining Shentel as general counsel, Mr. Spencer was vice president and associate general counsel of Cable & Wireless Global, a global telecommunications provider, and he served as senior corporate counsel and assistant secretary of Cable & Wireless USA, Inc. Mr. Spencer also was an attorney in private practice in Washington, D.C., where he specialized in telecommunications, corporate and securities law.

Mr. Spencer is currently chair of ACC's Information Technology and E-Commerce Law Committee.

Mr. Spencer received an A.B. and a J.D. from Duke University School of Law.

### John E. Thomas

John E. Thomas is technology counsel for Thomson West in Eagan, Minnesota.

A "seasoned corporate generalist," Mr. Thomas has practiced in-house for with Ford Motor Company, ITT, Wells Fargo, and Thomson and also on contract with 3M, BellSouth, MoneyGram, Imation, and Andersen Windows.

Mr. Thomas is one of the founding members of the ACC Minnesota Chapter and served as its president.

He did his undergrad at Lawrence University and graduated from the University of Wisconsin Law School.

### FORM OF M&A NDA WHERE SELLER IS IN BANKRUPTCY

[Potential Bidder]

Attention:

Ladies and Gentlemen:

You have requested information from [SELLER] (together with its affiliates, and including any successor thereto, the "Company") in connection with your consideration of a possible negotiated purchase and sale transaction involving the Company, whether by merger, asset sale, stock sale or otherwise (a "Transaction"). The Company is willing to furnish or otherwise make available such information to you in consideration for your agreement to abide by the confidentiality and other terms of this letter agreement (this "Agreement").

#### 1. Confidentiality.

(a) You agree to keep confidential and to use only for the purpose of evaluating a possible Transaction between us and not in a manner that would be detrimental to the Company all information the Company or its Representatives (as hereinafter defined) furnishes or otherwise makes available to you or your Representatives, whether before or after the date of this Agreement, and whether oral, written or electronic, together with any reports, analyses, compilations, forecasts, memoranda, notes, studies and any other written or electronic materials prepared by or for you or your Representatives that contain, reflect or are based upon such information (collectively, the "Evaluation Material"); provided, however, that (i) any Evaluation Material may be disclosed to officers, directors, employees, accountants, counsel, investment bankers, commercial banks, consultants, and other representatives (such persons being generally referred to herein as "Representatives") of yours who need to know such information for the purpose of evaluating a Transaction between us so long as you cause your Representatives to treat the Evaluation Material in a confidential manner and in accordance with the terms hereof (it being understood that you will be liable for any breach of the terms of this Agreement by any of your Representatives) and (ii) any disclosure of the Evaluation Material may be made to which the Company consents in writing. Notwithstanding the above, the term "Evaluation Material" does not include information that (i) was or becomes available to you on a non-confidential basis from a source other than the Company or its Representatives provided such other source is not bound by a confidentiality obligation to the Company or (ii) was or becomes generally available to the public (other than as a result of a breach by you or your Representatives of this Agreement).

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(b) You agree that neither you nor any of your Representatives will, without the prior written consent of the Company, directly or indirectly, (i) disclose to any other person the fact that discussions or negotiations may take place, are taking place or have taken place concerning a possible Transaction or any of the terms or other facts relating thereto, including the status thereof, (ii) disclose to any other person (other than your Representatives) the existence or the terms of this Agreement or (iii) disclose to any other person that you or your Representatives have received or produced any Evaluation Material; provided, however, that any disclosure prohibited by this paragraph 1(b) may be made to the extent you have received the written opinion of your outside counsel that such disclosure is required to be made by you in order to avoid violating the federal securities laws of the United States or rules of a national securities exchange to which you are subject, and you are otherwise not in breach of this Agreement; and, provided further, that you will notify the Company prior to making any such disclosure.

(c) It is understood that all questions regarding procedures will be submitted or directed to {Investment Banker Contact} at [Investment Bank] and all requests for Evaluation Material and management meetings or discussions will be submitted or directed to \_\_\_\_\_, or such other persons designated and notified to you in writing from time to time by the Company (together the "Company Designees"). You also agree that without the prior written consent of the Company, you will not initiate or maintain contact (except for those contacts made in the ordinary course of business) with any officer, director, employee, or agent of the Company other than the Company Designees regarding a possible Transaction or the Company's business, operations, prospects or finances.

(d) In the event that you or any of your Representatives are required to disclose any Evaluation Material in connection with any judicial or administrative proceedings (by oral questions, interrogatories, requests for information or documents, subpoena, Civil Investigation Demand or similar process), to the extent practicable and not prohibited by law or court order, you will provide the Company with prompt notice of such requirement(s) in advance of such disclosure. You also agree, to the extent legally permissible, (i) to provide the Company with a list of any Evaluation Material you or any of your Representatives intend to disclose (and, if applicable, the text of the disclosure language itself) in advance of any such disclosure, and (ii) to cooperate with the Company to the extent it may seek to limit such disclosure, including, if requested, taking reasonable steps to resist or avoid any such judicial or administrative proceedings referred to above in this paragraph 1(d). In the absence of a protective order or the receipt of a waiver from the Company after a request in writing therefor is made by you (such request to be made as soon as practicable to allow the Company a reasonable amount of time to respond thereto), you or your Representatives, as applicable, shall use reasonable best efforts to obtain assurances that confidential treatment will be accorded to any Evaluation Material that you or your Representatives are legally required to disclose to avoid censure or penalty after complying with the provisions of this paragraph 1(d).

(e) You agree to notify us promptly upon your determination to cease to consider a Transaction. In the event that no Transaction between us is effected after you have been furnished with Evaluation Material or upon the request of the Company, you will (and you will cause your Representatives to) promptly deliver to the Company or destroy, as requested by the Company, all Evaluation Material without retaining any copy thereof, including, without limitation, expunging to the extent practicable all Evaluation Material from any computer, word processor or other device in your possession. If requested by the Company, an appropriate officer of yours will certify to the Company promptly that all Evaluation Material has been so delivered or destroyed. Notwithstanding the delivery or destruction of the Evaluation Material required by this paragraph 1(e), any and all duties and obligations existing under this Agreement shall remain in full force and effect.

(f) You hereby confirm that you and your Representatives will take any action necessary or appropriate to prevent the use of any Evaluation Material in a way which might violate any antitrust, bankruptcy or other applicable law.

2. No Contact. You agree that without the prior written consent of the Company neither you nor your affiliates nor any of your Representatives will knowingly initiate any contact, directly or indirectly, with any creditor or security-holder of the Company (or any of their advisors) in their capacity as such ("Stakeholder"). You agree promptly to notify the Company of any contacts received by you or any of your Representatives from any Stakeholder and the details thereof.

3. No Cross-Talk. You represent that as of the date hereof and other than as disclosed to the Company in writing neither you nor your affiliates nor any of your Representatives have entered into, directly or indirectly, any agreements or understandings with any person (other than any of your Representatives) with respect to a possible Transaction or a transaction involving any assets of the Company or that could otherwise affect such third party's decisions or actions with respect to a possible Transaction. Based on the Company's representation that it will permit you to engage in discussions with certain persons, subject to the Company's reasonable judgment (such approved persons "Approved Persons"), you agree that without the prior written consent of the Company neither you nor your affiliates nor any of your Representatives will enter into, directly or indirectly, any discussions, negotiations, agreements or understandings with any person (other than any of your Representatives and Approved Persons) with respect to a possible Transaction or a transaction involving any assets of the Company or that could otherwise affect such third party's decisions or actions with respect to a possible Transaction; provided, however, that the prohibitions set forth in this paragraph 3 shall not apply to any alternative Transaction you propose if the Company has entered into a definitive agreement providing for or announces a Transaction with any person.

4. Standstill. You agree that until the date that is 18 months from the date hereof, unless the Company's Board of Directors shall otherwise specifically request in writing in advance, you and your affiliates will not, and you will cause your

Representatives (in their capacity as such) not to (and you and they will not assist or form a group within the meaning of Section 13(d)(3) of the Exchange Act, act in concert or participate with or encourage other persons to), directly or indirectly, (a) acquire or offer to acquire, seek, propose or agree to acquire, by means of a purchase, tender or exchange offer, business combination or in any other manner, beneficial ownership of any securities, claims of creditors or assets of the Company, including, without limitation, rights or options to acquire such ownership, (b) seek or propose to influence, advise, change or control the management, Board of Directors, governing instruments or policies or affairs of the Company, including, without limitation, contacting any person relating to any of the matters set forth in this Agreement or seeking to influence, advise or direct the vote of any creditor of the Company or holder of securities of the Company or making a request to amend or waive this provision or any other provision of this paragraph 4, or (c) make any public disclosure, or take any action which could require the Company to make any public disclosure, with respect to any of the matters set forth in this Agreement; provided, however, that the prohibitions set forth in clauses (b) and (c) of this paragraph 4 shall not apply to (i) any alternative Transaction you propose to the Company if the Company has entered into a definitive agreement providing for or announces a Transaction with any person or (ii) any Transaction you propose to make or participate in making if the United States Bankruptcy Court for the [NAME OF COURT] (the "Bankruptcy Court"), after notice and hearing, finds cause to release you from the restrictions set forth herein with respect to any such Transaction. Notwithstanding anything in the foregoing to the contrary, nothing in clauses (a), (b) and (c) of this paragraph 4 will prevent you or your affiliates from acquiring outstanding securities or claims of creditors of the Company so long as such acquisition would not make you the beneficial owner (within the meaning of Rule 13d-3 of the General Rules and Regulations under the Securities Exchange Act of 1934, as amended) of more than 5% of any class of outstanding securities of the Company or more than 5% of any class of claims of creditors of the Company identified in the Company's Disclosure Statement, dated \_\_\_\_\_. It being understood that any such acquisition is subject to the Bankruptcy Court Order to Enforce the Automatic Stay and Establish Notification and Hearing Procedures for Trading in Equity Securities, signed \_\_\_\_\_, which requires, among other things, an order from the Bankruptcy Court approving in advance any acquisition of Company stock (within the meaning of the Order) that would result in you becoming the beneficial owner of 4.5% or more of the outstanding shares of any class of Company stock.

5. Non-Solicitation and Non-Hire of Employees. For a period of 18 months from the date hereof, you agree that you and your affiliates will not, directly or indirectly, solicit to employ any management-level employees of the Company; provided that nothing herein shall prohibit you or your affiliates from hiring or seeking to hire any individual who has received notice of termination from the Company prior to the first time such individual had any communication with you or your Representatives relating to employment. The foregoing prohibitions on solicitations of employees shall not be

deemed violated by virtue of general mass solicitations of employment by you not specifically directed toward employees of the Company.

6. No Representations or Warranties. You understand and agree that neither the Company nor any of its Representatives makes any representation or warranty, express or implied, on which you or your Representatives may rely, as to the accuracy or completeness of the Evaluation Material for your or their purposes and that only those representations and warranties made by us in writing in a subsequent definitive agreement with you related to a Transaction, if any, shall have any legal effect. You agree that other than as may be set forth in such definitive agreement, neither the Company nor its Representatives shall have any liability whatsoever to you or any of your Representatives, including, without limitation, in contract, tort or under federal or state securities laws, relating to or resulting from the use of the Evaluation Material or any errors therein or omissions therefrom.

7. Equitable Relief. The Company, without prejudice to any rights to judicial relief it may otherwise have, shall be entitled to equitable relief, including, without limitation, injunction and specific performance, in the event of any breach of the provisions of this Agreement. You agree that you will not oppose the granting of such relief on the basis that the Company has an adequate remedy at law and that you will pay any fees which the Company may incur in enforcing this Agreement. You also agree that you will not seek and agree to waive any requirement for the securing or posting of a bond in connection with the Company's seeking or obtaining such relief. You acknowledge that the Evaluation Material is valuable and unique and that any disclosure thereof in breach of this Agreement will result in irreparable injury to the Company.

8. No Obligation. It is further understood and agreed that unless and until there is an executed and delivered definitive agreement between us with respect to a Transaction, neither the Company nor you intends to be, nor shall either of us be, under any legal obligation of any kind whatsoever with respect to a Transaction or otherwise, except for the matters specifically agreed to in this Agreement.

9. Compliance with Law.

(a) You hereby confirm that you are aware and that your Representatives have been advised that the United States securities laws prohibit any person who has material non-public information about a company from purchasing or selling securities of such company or from communicating such information to any other person under circumstances in which it is reasonably foreseeable that such person may purchase or sell such securities.

(b) You hereby confirm that you are aware and that your Representatives have been advised that the United States Bankruptcy Code imposes sanctions, including, without limitation, disqualification in certain situations, upon

participants in an auction process who fail to abide by the terms of the auction, including the failure to abide by the anti-collusion provisions of this Agreement.

10. Miscellaneous.

(a) Unless terminated earlier pursuant to the terms hereof, each party's obligations under this Agreement expires two years from the date hereof.

(b) It is agreed that no failure or delay by the Company in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege.

(c) The term "person" as used in this Agreement shall be broadly interpreted to include, without limitation, the media and any corporation, company, firm, group, limited liability company, partnership trust, joint venture, governmental entity or individual. The term "affiliate" as used in this Agreement shall have the meaning ascribed to such term in Rule 12b-2 of the General Rules and Regulations under the Securities Exchange Act of 1934, as amended.

(d) This Agreement shall be governed by, and construed in accordance with, the internal laws of the State of \_\_\_\_\_, and, to the extent applicable, United States bankruptcy laws without regard to any conflict of laws principles.

(e) It is understood and agreed that if any provision contained in this Agreement or the application thereof to you, the Company, or any other person or circumstance shall be invalid, illegal or unenforceable in any respect under any applicable law, as determined by a court of competent jurisdiction, the validity, legality and enforceability of the remaining provisions contained in this Agreement, or the application of such provision to such persons or circumstances other than those as to which it has been held invalid or unenforceable, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby. In the case of any such invalidity, illegality or unenforceability, a suitable and equitable provision shall be substituted therefor in order to carry out, so far as may be valid and enforceable, the intent and purpose of such invalid or unenforceable provision.

(f) Each of the parties hereto agrees that any proceeding arising out of or in relation to this Agreement shall be brought (i) in the Bankruptcy Court so long as the jointly administered case of the Company and certain affiliates as debtor and debtors in possession pending under Chapter 11 of the United States Bankruptcy Code in the Bankruptcy Court (the "Reorganization Case") remains open and (ii) after the completion of the Reorganization Case, in the courts of the United States District Court for the \_\_\_\_\_ or of the State of \_\_\_\_\_ sitting in \_\_\_\_\_. Each of the parties hereto irrevocably and unconditionally

(i) submits to the exclusive jurisdiction of the courts referred to in the prior sentence and agrees not to commence any lawsuit, action or other proceeding arising out of or relating to this Agreement except in such courts, (ii) waives any objection to the laying of venue of any such lawsuit, action or other proceeding in such courts, (iii) agrees not to plead or claim in any such court that any such lawsuit, action or other proceeding brought in any such court has been brought in an inconvenient forum and (iv) waives all rights to trial by jury in any such lawsuit, action or other proceeding. Each of the parties hereto agrees that a final judgment in any lawsuit, action or other proceeding arising out of or relating to this Agreement brought in the courts referred to in the first sentence of this paragraph 10(f) shall be conclusive and binding upon each of the parties hereto and may be enforced in any other courts to the jurisdiction of which each of the parties is or may be subject, by suit upon such judgment.

(g) Any notice hereunder shall be made in writing, by overnight courier, personal delivery or by facsimile (if telephonically confirmed) to (or to such other address or facsimile number as identified in accordance with this paragraph):

If to the Company:

If to you:

(h) This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and verbal, between the parties with respect to the subject matter hereof. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Any assignment of this Agreement by you without the prior written consent of the Company shall be void. The Company may assign this Agreement and/or the benefits hereunder to one or more purchasers of all or a portion of the Company.

(i) This Agreement may only be amended by a separate writing signed by the Company and you expressly so amending this Agreement. Any provision of this Agreement may be waived by the party entitled to the benefit thereof, if in writing and signed by the party entitled to the benefit thereof.

(j) This Agreement may be executed in two counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same document.

**LIMITED PURPOSE NONDISCLOSURE AGREEMENT**

If you are in agreement with the foregoing, please so indicate by signing and returning one copy of this Agreement, whereupon this Agreement will constitute our agreement with respect to the subject matter hereof.

Very truly yours,

[SELLER]

By: \_\_\_\_\_  
Name:  
Title:

CONFIRMED AND AGREED TO:

[BIDDER]

By: \_\_\_\_\_  
Name:  
Title:

Dated: \_\_\_\_\_

**THIS LIMITED PURPOSE NONDISCLOSURE AGREEMENT** (the "Agreement") is made as of enter date,

**BY AND BETWEEN:**

- (1) \_\_\_\_\_, a \_\_\_\_\_ corporation with and address of insert business address and country ("Purchaser"); and
- (2) **Vendor legal entity name** a \_\_\_\_\_ corporation with an address of insert business address and country (hereinafter "Vendor").

**THE PARTIES AGREE** as follows:

- 1. **Purpose.** Purchaser wishes to explore with Vendor the purchase of certain goods and/or services (including but not limited to software) from Vendor (the "Transaction") in connection with which each party has disclosed and/or may further disclose its Confidential Information (as defined below) to the other. This Agreement is intended to allow the parties to discuss and evaluate the Transaction while protecting each party's Confidential Information against unauthorized use or disclosure.
- 2. **Definition of Confidential Information.** "Confidential Information" means:
  - a. With respect to Vendor, Vendor's proposed Pricing and
  - b. With respect to Purchaser, Purchaser' requirements (including both mandatory and optional requirements) for the goods and/or services that are the subject of the Transaction.

No other information, whether or not marked confidential or proprietary, shall be deemed "Confidential Information" for the purpose of this Agreement, and the non-disclosing party shall have no obligation to keep such other information confidential or otherwise refrain from making use thereof.

- 3. **Nondisclosure of Confidential Information.** Purchaser and Vendor each agree not to use any Confidential Information disclosed to it by the other party for its own use or for any purpose other than to (i) carry out discussions concerning, and the undertaking of, the Transaction and (ii) use of the goods and services.
  - a. Neither party shall disclose or permit disclosure of any Confidential Information of the other party to third parties or to employees of the party receiving Confidential Information, other than directors, officers, employees, consultants or agents (together "Representatives") who are required to have the information in order to carry out the discussions regarding the Transaction. Accordingly, the party to whom Confidential Information is disclosed (the "receiving party") agrees that prior to any of its Representatives being given access to the Confidential

Information, the receiving party will procure that each of its Representatives shall comply with the terms of this Agreement.

- b. Each party agrees that it shall take all reasonable measures to protect the secrecy of and avoid disclosure or use of Confidential Information of the other party in order to prevent it from falling into the public domain or the possession of persons other than those persons authorized under this Agreement to have any such information. Such measures shall include, but not be limited to, the same degree of care that the receiving party utilizes to protect its own Confidential Information of a similar nature, which shall be no less than reasonable care.
- c. Each party agrees to notify the other in writing of any actual or suspected misuse, misappropriation or unauthorized disclosure of Confidential Information of the disclosing party which may come to the receiving party's attention.
- d. If any material non-public information is disclosed, the receiving party agrees that it will comply with SEC Regulation FD (Fair Disclosure), and refrain from trading in the disclosing party's stock until that material non-public information is publicly disseminated

**4. Exceptions to Nondisclosure of Confidential Information.** Notwithstanding paragraph 3, neither party shall have liability to the other with regard to any Confidential Information of the other, which the receiving party can prove:

- a. Was in the public domain at the time it was disclosed or has entered the public domain through no fault of the receiving party;
- b. Was known to the receiving party, without restriction, at the time of disclosure, as demonstrated by files in existence at the time of disclosure;
- c. Is disclosed with the prior written approval of the disclosing party;
- d. Was independently developed by the receiving party without any use of the Confidential Information of the disclosing party and by employees of the receiving party who have not had access to the Confidential Information, as demonstrated by files created at the time of such independent development;
- e. Is disclosed generally to third parties by the disclosing party without restrictions similar to those contained in this Agreement; or
- f. Is disclosed pursuant to the order or requirement of a court, administrative agency, or other government body; provided, however, that the receiving party shall provide prompt notice of such court order or requirement to the disclosing party to enable the disclosing party to seek a protective order or otherwise prevent or restrict such disclosure.

**5. Accidental Disclosure.** Neither party shall be liable for inadvertent, accidental or mistaken use or disclosure of data obtained under this Agreement despite the exercise of the same reasonable precautions as the receiving party takes to safeguard its own proprietary

information. Any copies of the data made by the receiving party shall reproduce the proprietary markings and any other legends contained thereon.

**6. Warranties.** Each party warrants and represents that it is entitled to disclose to the other party, the material described as Confidential Information. Each party warrants that the data it provides hereunder to the other party is the same in form and content as that used for its own purposes and that to the best of its knowledge and belief it has the right and power to disclose such data for the purposes stated above. Neither party warrants that the data it discloses hereunder will meet the requirements of the other party or that such data when combined with other information or when used in a particular manner by recipient will be sufficient or suitable for recipient's purposes. Neither party assumes any responsibility or liability whatever under this Agreement for any use of data by the recipient or its customers or agents.

**7. Return of Materials.** Any materials or documents that have been furnished by one party to the other in connection with the Transaction and all copies of such documentation shall be promptly destroyed or returned by the receiving party, within ten (10) days after (a) the Transaction has been rejected or concluded or (b) a written request of the disclosing party.

**8. No Rights Granted.** Nothing in this Agreement shall be construed as granting any rights under any patent, copyright or other intellectual property right of either party, nor shall this Agreement grant either party any rights in or to the other party's Confidential Information other than the limited right to review such Confidential Information solely for the purpose of determining whether to enter into the Transaction.

**9. Term.** The foregoing commitments of each party shall survive any termination of the Transaction between the parties, and shall continue for a period terminating on the following date; whichever is later; (a) two (2) years following the date of this Agreement or (b) one (1) year from the date on which Confidential Information is last disclosed under this Agreement.

**10. Successors and Assigns.** The term and conditions of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties, provided that Confidential Information of the disclosing party may not be assigned without the prior written consent of the disclosing party. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement.

**11. Severability.** If one or more provisions of this Agreement are held to be unenforceable under applicable law, the parties agree to renegotiate such provision in good faith. In the event that the parties cannot reach a mutually agreeable and enforceable replacement for such provision, then (a) such provision shall be excluded from this Agreement, (b) the balance of this Agreement shall be interpreted as if such provision were so excluded and (c) the balance of this Agreement shall be enforceable in accordance with its terms.

**12. Independent Contractors.** Purchaser and Vendor are independent contractors, and nothing contained in this Agreement shall be construed to constitute Purchaser and Vendor as partners, joint ventures, co-owners or otherwise as participants in a joint or common undertaking.

**13. Governing Law; Jurisdiction.** This Agreement and all acts and transactions pursuant hereto and the rights and obligations of the parties hereto shall be governed, construed and interpreted in accordance with the laws of the Commonwealth of Virginia without giving effect to principles of conflicts of law. Each of the parties hereto consents to the exclusive jurisdiction and venue of the Federal, State and local courts located in Virginia.

**14. Remedies; Indemnification.** Purchaser and Vendor each agree that its obligations set forth in this Agreement are necessary and reasonable in order to protect the disclosing party and its business. Purchaser and Vendor each expressly agree that due to the unique nature of the disclosing party's Confidential Information, monetary damages would be inadequate to compensate the disclosing party for any breach by the receiving party of its covenants and agreements set forth in this Agreement. Accordingly, Purchaser and Vendor each agree and acknowledge that any such violation or threatened violation shall cause irreparable injury to the disclosing party and that, in addition to any other remedies that may be available, in law, in equity or otherwise, the disclosing party shall be entitled (a) to obtain injunctive relief against the threatened breach of this Agreement or the continuation of any such breach by the receiving party, without the necessity of proving actual damages, and (b) to be indemnified by the receiving party from any loss or harm, including but not limited to attorney's fees, arising out of or in connection with any breach or enforcement of the receiving party's obligations under this Agreement or the unauthorized use or disclosure of the disclosing party's Confidential Information.

**15. Amendment and Waiver.** Any term of this Agreement may be amended with the written consent of Purchaser and Vendor. Any amendment or waiver affected in accordance with this Section shall be binding upon the parties and their respective successors and assigns. Failure to enforce any provision of this Agreement by a party shall not constitute a waiver of any term hereof by such party.

**16. Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one instrument.

**17. Entire Agreement.** This Agreement is the product of both of the parties hereto, and constitutes the entire agreement between such parties pertaining to the subject matter hereof, and merges all prior negotiations and drafts of the parties with regard to the transactions contemplated herein. Any and all other written or oral agreements existing between the parties hereto regarding such transactions are expressly canceled.

The parties have executed this Limited Purpose Nondisclosure Agreement as of the date first above written.

<b>Purchaser</b>	<b>Vendor</b>
By: _____	By: _____
Name: _____ (print)	Name: _____ (print)
Title: _____	Title: _____



**MUTUAL NONDISCLOSURE AGREEMENT**

**THIS MUTUAL NONDISCLOSURE AGREEMENT** (the "Agreement") is made as of \_\_\_\_\_ enter date,

**BY AND BETWEEN:**

(1) **COMPANY 1 Legal entity name**, a corporation incorporated in \_\_\_\_\_ under No. \_\_\_\_\_ insert business registration number and having its principal offices at insert business address and country (hereinafter "COMPANY 1"); and

(2) **COMPANY 2 legal entity name** a corporation incorporated in \_\_\_\_\_ under No. \_\_\_\_\_ insert business registration number and having its principal offices at insert business address and country (hereinafter "COMPANY 2").

**THE PARTIES AGREE** as follows:

1. **Purpose.** COMPANY 1 and COMPANY 2 wish to explore a possible business opportunity of mutual interest with respect to \_\_\_\_\_ (the "Relationship") in connection with which each party has disclosed and/or may further disclose its Confidential Information (as defined below) to the other. This Agreement is intended to allow the parties to discuss and evaluate the Relationship while protecting each party's Confidential Information against unauthorized use or disclosure.

2. **Definition of Confidential Information.** "Confidential Information" means any oral, written, graphic or machine-readable information including, but not limited to, that which relates to patents, patent applications, research, product plans, products, developments, inventions, processes, designs, drawings, engineering, formulae, markets, software (including source and object code), hardware configuration, computer programs, algorithms, regulatory information, business plans, agreements with third parties, services, customers, marketing or finances of the disclosing party, which Confidential Information is designated in writing to be confidential or proprietary, or if given orally, is identified as such in writing within two (2) weeks after disclosure.

3. **Nondisclosure of Confidential Information.** COMPANY 1 and COMPANY 2 each agree not to use any Confidential Information disclosed to it by the other party for its own use or for any purpose other than to carry out discussions concerning, and the undertaking of, the Relationship.

- a. Neither party shall disclose or permit disclosure of any Confidential Information of the other party to third parties or to employees of the party receiving Confidential Information, other than directors, officers, employees, consultants or agents (together "Representatives") who are required to have the information in order to carry out the discussions regarding the Relationship. Accordingly, the party to whom Confidential Information is disclosed (the "receiving party") agrees that prior to any of its Representatives being given access to the Confidential Information, the receiving party will procure that each of its Representatives shall comply with the terms of this Agreement.
- b. Each party agrees that it shall take all reasonable measures to protect the secrecy of and avoid disclosure or use of Confidential Information of the other party in

order to prevent it from falling into the public domain or the possession of persons other than those persons authorized under this Agreement to have any such information. Such measures shall include, but not be limited to, the highest degree of care that the receiving party utilizes to protect its own Confidential Information of a similar nature, which shall be no less than reasonable care.

- c. Each party shall use all reasonable efforts to maintain in confidence the fact that COMPANY 1 and COMPANY 2 are discussing a possible business Relationship.
- d. Each party agrees to notify the other in writing of any actual or suspected misuse, misappropriation or unauthorized disclosure of Confidential Information of the disclosing party which may come to the receiving party's attention.
- e. If any material non-public information is disclosed, the receiving party agrees that it will comply with SEC Regulation FD (Fair Disclosure), and refrain from trading in the disclosing party's stock until that material non-public information is publicly disseminated

4. **Exceptions to Nondisclosure of Confidential Information.** Notwithstanding paragraph 3, neither party shall have liability to the other with regard to any Confidential Information of the other, which the receiving party can prove:

- a. was in the public domain at the time it was disclosed or has entered the public domain through no fault of the receiving party;
- b. was known to the receiving party, without restriction, at the time of disclosure, as demonstrated by files in existence at the time of disclosure;
- c. is disclosed with the prior written approval of the disclosing party;
- d. was independently developed by the receiving party without any use of the Confidential Information of the disclosing party and by employees of the receiving party who have not had access to the Confidential Information, as demonstrated by files created at the time of such independent development;
- e. is disclosed generally to third parties by the disclosing party without restrictions similar to those contained in this Agreement; or
- f. is disclosed pursuant to the order or requirement of a court, administrative agency, or other government body; provided, however, that the receiving party shall provide prompt notice of such court order or requirement to the disclosing party to enable the disclosing party to seek a protective order or otherwise prevent or restrict such disclosure.

5. **Accidental Disclosure.** Neither party shall be liable for inadvertent, accidental or mistaken use or disclosure of data obtained under this Agreement despite the exercise of the same reasonable precautions as the receiving party takes to safeguard its own proprietary information. Any copies of the data made by the receiving party shall reproduce the proprietary markings and any other legends contained thereon.

Confidential

Confidential

**6. Warranties.** Each party warrants and represents that it is entitled to disclose to the other party, the material described as Confidential Information. Each party warrants that the data it provides hereunder to the other party is the same in form and content as that used for its own purposes and that to the best of its knowledge and belief it has the right and power to disclose such data for the purposes stated above. Neither party warrants that the data it discloses hereunder will meet the requirements of the other party or that such data when combined with other information or when used in a particular manner by recipient will be sufficient or suitable for recipient's purposes. Neither party assumes any responsibility or liability whatever under this Agreement for any use of data by the recipient or its customers or agents.

**7. Return of Materials.** Any materials or documents that have been furnished by one party to the other in connection with the Relationship shall be promptly returned by the receiving party, accompanied by all copies of such documentation, within ten (10) days after (a) the Relationship has been rejected or concluded or (b) a written request of the disclosing party.

**8. No Rights Granted.** Nothing in this Agreement shall be construed as granting any rights under any patent, copyright or other intellectual property right of either party, nor shall this Agreement grant either party any rights in or to the other party's Confidential Information other than the limited right to review such Confidential Information solely for the purpose of determining whether to enter into the Relationship.

**9. Term.** The foregoing commitments of each party shall survive any termination of the Relationship between the parties, and shall continue for a period terminating on the following date; whichever is later; (a) three (3) years following the date of this Agreement or (b) two (2) years from the date on which Confidential Information is last disclosed under this Agreement.

**10. Successors and Assigns.** The term and conditions of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties, provided that Confidential Information of the disclosing party may not be assigned without the prior written consent of the disclosing party. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement.

**11. Severability.** If one or more provisions of this Agreement are held to be unenforceable under applicable law, the parties agree to renegotiate such provision in good faith. In the event that the parties cannot reach a mutually agreeable and enforceable replacement for such provision, then (a) such provision shall be excluded from this Agreement, (b) the balance of this Agreement shall be interpreted as if such provision were so excluded and (c) the balance of this Agreement shall be enforceable in accordance with its terms.

**12. Independent Contractors.** COMPANY 1 and COMPANY 2 are independent contractors, and nothing contained in this Agreement shall be construed to constitute COMPANY 1 and COMPANY 2 as partners, joint venturers, co-owners or otherwise as participants in a joint or common undertaking.

**13. Governing Law; Jurisdiction.** This Agreement and all acts and transactions pursuant hereto and the rights and obligations of the parties hereto shall be governed,

construed and interpreted in accordance with the laws of insert country of COMPANY 1 without giving effect to principles of conflicts of law. Each of the parties hereto consents to the exclusive jurisdiction and venue of the applicable courts of insert country of COMPANY 1.

**14. Remedies: Indemnification.** COMPANY 1 and COMPANY 2 each agree that its obligations set forth in this Agreement are necessary and reasonable in order to protect the disclosing party and its business. COMPANY 1 and COMPANY 2 each expressly agree that due to the unique nature of the disclosing party's Confidential Information, monetary damages would be inadequate to compensate the disclosing party for any breach by the receiving party of its covenants and agreements set forth in this Agreement. Accordingly, COMPANY 1 and COMPANY 2 each agree and acknowledge that any such violation or threatened violation shall cause irreparable injury to the disclosing party and that, in addition to any other remedies that may be available, in law, in equity or otherwise, the disclosing party shall be entitled (a) to obtain injunctive relief against the threatened breach of this Agreement or the continuation of any such breach by the receiving party, without the necessity of proving actual damages, and (b) to be indemnified by the receiving party from any loss or harm, including but not limited to attorney's fees, arising out of or in connection with any breach or enforcement of the receiving party's obligations under this Agreement or the unauthorized use or disclosure of the disclosing party's Confidential Information.

**15. Amendment and Waiver.** Any term of this Agreement may be amended with the written consent of COMPANY 1 and COMPANY 2. Any amendment or waiver affected in accordance with this Section shall be binding upon the parties and their respective successors and assigns. Failure to enforce any provision of this Agreement by a party shall not constitute a waiver of any term hereof by such party.

**16. Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one instrument.

**17. Entire Agreement.** This Agreement is the product of both of the parties hereto, and constitutes the entire agreement between such parties pertaining to the subject matter hereof, and merges all prior negotiations and drafts of the parties with regard to the transactions contemplated herein. Any and all other written or oral agreements existing between the parties hereto regarding such transactions are expressly canceled.

The parties have executed this Mutual Nondisclosure Agreement as of the date first above written.

COMPANY 1 _____	COMPANY 2 _____
By: _____	By: _____
Name: _____	Name: _____
(print)	(print)
Title: _____	Title: _____

**GENERAL TWO-WAY NON DISCLOSURE (CONFIDENTIALITY) AGREEMENT**

THIS AGREEMENT is made the \_\_\_\_ day of \_\_\_\_\_ 2006 (“Effective Date”) between

- (1) the entity named and described at the end of this Agreement (“Company”); and
- (2) \_\_\_\_\_, a Virginia corporation, in and of itself and as agent for its parent company, affiliates and subsidiaries, with its principal place of business at \_\_\_\_\_ (“ACME”).

WHEREAS ACME and Company (each a “Party” and collectively “Parties”) desire to disclose certain technical and/or commercial information to each other including any directors, officers, employees and consultants, in whatever form including, but not limited to, processes, strategies, data, know-how, trade secrets, designs, photographs, drawings, specifications, technical literature and other tangible and intangible information or material whether in oral, written, graphic or electromagnetic form on a confidential basis (“Information”) in connection with the following: \_\_\_\_\_

\_\_\_\_\_ (“Purpose”);

THE PARTIES AGREE as follows:

**1. Duty.** For Information that is disclosed by one Party (“Disclosing Party”) to the other Party (“Receiving Party”), the Receiving Party shall do the following during the term of this Agreement, which is one (1) year commencing on the Effective Date, and during a period of three (3) years from the date of expiration or termination of this Agreement (as set out in clause 3 below):

- (a) keep in strict confidence and in safe custody any Information disclosed to the Receiving Party by the Disclosing Party by exercising the same duty of care used to maintain as confidential the Receiving Party’s own Information and at a minimum a reasonable duty of care;
- (b) not use or exploit any Information other than for the Purpose;
- (c) not copy or reproduce any or all of the Information except as is reasonably necessary for the Purpose;
- (d) not distribute, disclose or disseminate Information to anyone except persons as referenced in this Agreement who have a need to know such Information for the Purpose; and
- (e) if any material non-public information is disclosed, it will comply with SEC Regulation FD (Fair Disclosure) and refrain from trading in the Disclosing Party’s stock until that material non-public information is publicly disseminated.

Persons who have a need to know may also include persons who are employed by or are consultants of the Receiving Party’s parent company and of affiliates and subsidiaries that are under the control of the Receiving Party’s parent company. The Receiving Party shall notify all such persons of the existence of this Agreement at the time the information is disclosed to them. The Receiving Party will make available a copy of this Agreement to such persons upon request. The Receiving Party agrees to cooperate with the Disclosing Party in the enforcement of this Agreement against such parent company, affiliates and subsidiaries.

The Receiving Party shall have no duty to so keep Information where the Receiving Party is required by law, judicial action, the rules or regulations of a recognised stock exchange, government department or agency or other regulatory authority to disclose Information, in which event the Receiving Party shall take all reasonable steps to consult and take into account the reasonable requirements of the Disclosing Party in relation to such disclosure and limit any disclosure to that required by such law, judicial action, rules or regulations. If any material non-public information is disclosed, the Receiving Party agrees that it will comply with SEC Regulation FD (Fair Disclosure), and refrain from trading in the Disclosing Party’s stock until that material non-public information is publicly disseminated

For the avoidance of doubt, the provisions of this Clause shall survive any termination of the Agreement.

**2. Exceptions.** The Receiving Party’s duty to maintain Information as confidential in accordance with the provisions of this Agreement shall not apply to any information which the Receiving Party can show to the Disclosing Party’s reasonable satisfaction:

- (a) was known to the Receiving Party (without obligation to keep the same confidential) at the date of disclosure of the Information by the Disclosing Party;
- (b) is after the date of disclosure acquired by the Receiving Party in good faith from an independent third party who is not subject to any obligation of confidentiality in respect of such Information;
- (c) in its entirety was at the time of its disclosure in the public knowledge or has become public knowledge during the term of this Agreement otherwise than by reason of the Receiving Party’s neglect or breach of the restrictions set out in this or any other agreement; or
- (d) is independently developed by the Receiving Party without access to any or all of the Information.

**3. Termination and Renewal.** This Agreement shall expire on the date which is one (1) year from the Effective Date unless terminated earlier upon written request by either Party for any reason. This Agreement shall not be renewed or extended unless in writing between the Parties.

**4. Return of Information.** On the earlier of either the date of expiration of the term of this Agreement, termination of this Agreement, or a written request of the Disclosing Party, the Receiving Party shall return or destroy (at the Receiving Party’s option) any part of the Information that consists of original, and copies of, source material provided by it and still in the Receiving Party’s possession. The Receiving Party shall destroy all other Information within thirty days of the expiration of the term of this Agreement or receipt of a written request of the Disclosing Party and shall provide written confirmation to the Disclosing Party to that effect.

**5. Exclusion of Warranties.** Neither Party warrants the accuracy or completeness of any Information and all implied warranties or representations to that effect are hereby excluded.

**6. Title.** Nothing in this Agreement shall be construed as granting or conferring any rights in title to or licence in respect of any Information. All Information shall remain at all times the property of the Disclosing Party.

**7. Transactions and Press Releases.** The disclosure of Information by the Disclosing Party will not create an obligation on either Party to enter into any further agreement between the parties or to proceed with any possible relationship or other transaction with any third party. Neither Party shall disclose the existence of this Agreement or issue any press releases relating to the Purpose to any third party without the other Party’s consent. Nothing contained in this Agreement shall be construed as creating a joint venture, power of attorney, partnership or employment relationship between the Parties, it being understood that the Parties are independent contractors vis-a-vis one another. Except as specified herein, no Party shall have the right, power or implied authority to create any obligation or duty, express or implied, on behalf of any other Party hereto. . If any material non-public information is disclosed, the Receiving Party agrees that it will comply with SEC Regulation FD (Fair Disclosure), and refrain from trading in the Disclosing Party’s stock until that material non-public information is publicly disseminated.

**8. Waiver.** Neither Party waives its future or other rights just because it does not strictly enforce certain rights it may have.

**9. Notice.** Any notice will be written in English and will be either delivered in person, or sent to the other Party by (a) postal mail, (b) facsimile (electronically confirmed and followed up immediately by postal mail), or (c) electronic mail (followed up immediately by postal mail). A notice is considered given when it is delivered. For the purposes of this Agreement, the address of each Party shall be:

For ACME:	Attention:	Address:
	Tel:	

	Fax: E-Mail:	
For Company:	Attention:  Tel: Fax: E-Mail:	Address:

**10. Entire Agreement.** The Agreement describes the entire understanding between the Parties with regard to the disclosure of the Information relating to the Purpose. The Agreement supersedes all oral or written agreements, understandings and representations between the Parties (whether made prior to or at the same time as the Agreement).

**11. Non-Assignment.** Neither Party may assign or otherwise transfer this Agreement, or any of its rights and obligations hereunder, to any third party, except for purposes of sharing Information on a need to know basis as specified in this Agreement.

**12. Controlling Law.** The Agreement is made in, governed by and subject to the laws (other than the conflict of laws rules) of the Commonwealth of Virginia. Each of the parties submit to the exclusive jurisdiction of the courts of the country or state named above in relation to legal proceedings arising out of or in connection with this Agreement. Each party acknowledges that damages would not be an adequate remedy for any breach of this Agreement and the parties shall be entitled to the remedies of injunction, specific performance and other equitable relief for any threatened or actual breach of this Agreement without the necessity of proving actual damages.

IN WITNESS WHEREOF this Agreement has been duly executed.

<b>ACME</b>	<b>Company (Legal Name):</b>
Signature:	Signature:
Name:	Name:
Title:	Title:
Date:	Date:

DATE

**PERSONAL AND CONFIDENTIAL**

[Potential Buyer]

Attention:

Ladies and Gentlemen:

In connection with your consideration of a possible transaction with \_\_\_\_\_ and/or its subsidiaries or affiliates (collectively, with such subsidiaries or affiliates, the "Company"), the Company is prepared to make available to you certain information concerning the business, financial condition, operations and assets of the Company. As a condition to such information being furnished to you and your present or prospective directors, officers, employees, agents or advisors (including without limitation, attorneys, accountants, consultants, bankers and financial advisors) (collectively, "Representatives"), you agree to treat any information concerning the Company (whether prepared by the Company, its advisors or otherwise and irrespective of the form of communication) which is furnished to you or to your Representatives by or on behalf of the Company (herein collectively referred to as the "Evaluation Material") in accordance with the provisions of this letter agreement.

The term "Evaluation Material" shall be deemed to include all reports, notes, analyses, compilations, studies, interpretations or other documents prepared by you or your Representatives which contain, reflect or are based upon, in whole or in part, the Evaluation Material. The term "Evaluation Material" does not include information which (i) is or becomes generally available to the public other than as a result of a disclosure by you or your Representatives, (ii) was within your possession prior to its being furnished to you by or on behalf of the Company pursuant hereto, or (iii) becomes available to you on a non-confidential basis from a source other than the Company or any of its Representatives; provided that with respect to clauses (ii) and (iii) above, the source of such information was not bound by a confidentiality agreement with or other contractual, legal or fiduciary obligation of confidentiality to the Company or any other party with respect to such information.

You hereby agree that you and your Representatives shall use the Evaluation Material solely for the purpose of evaluating a possible transaction between the Company and you and not for any purpose detrimental to the Company. You further agree that the Evaluation Material will be kept confidential and that you and your Representatives will not disclose any of the Evaluation Material in any manner whatsoever; provided, however, that (i) you may make any

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disclosure of such information to which the Company gives its prior written consent and (ii) any such information may be disclosed to your Representatives who need to know such information for the purpose of evaluating a possible transaction with the Company and who agree to keep such information confidential and who are provided with a copy of this letter agreement and agree to be bound by the terms hereof to the same extent as if they were parties hereto. In any event, you shall be responsible for any breach of this letter agreement by any of your Representatives, including without limitation the prohibited or unauthorized disclosure or use of the Evaluation Material.

In addition, you agree that, without the prior written consent of the Company, you and your Representatives will not disclose to any person the fact that the Evaluation Material has been made available to you, that discussions or negotiations are taking place concerning a possible transaction involving the Company or any of the terms, conditions or other facts with respect thereto (including the status thereof); provided you may make such disclosure if (1) you have received the written opinion of your counsel that such disclosure must be made by you in order that you not commit a violation of law, (2) prior to such disclosure, you promptly advise and consult with the Company and its legal counsel concerning the information you propose to disclose, and (3) you disclose such information only to the extent required by law. You further agree not to contact any employees of the Company regarding a possible transaction or the Evaluation Materials without the Company's prior consent and that all communications regarding a possible transaction with the Company, requests for additional information and questions regarding procedures with respect to a possible transaction will be first submitted or directed to \_\_\_\_\_ ("[NAME of Seller's Investment Advisor]") and not to the Company or its Representatives. The term "person" as used in this letter agreement shall be broadly interpreted to include the media and any corporation, partnership, group, individual or other entity.

In the event that you or any of your Representatives are requested or required (by law or by oral questions, interrogatories, requests for information or documents in legal proceedings, subpoena, civil investigative demand or other similar process) to disclose any of the Evaluation Material, you shall provide the Company with prompt written notice of any such request or requirement so that the Company may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this letter agreement. In the event that such protective order or other remedy is not obtained, or that the Company waives compliance with the provisions hereof, you agree to (i) furnish only that portion of the Evaluation Material for which the Company has waived compliance or for which you are advised by written opinion of counsel, reasonably satisfactory to the Company, is legally required and (ii) exercise your best efforts to obtain assurance that the Evaluation Material will be accorded such confidential treatment.

If you decide that you do not wish to proceed with a transaction with the Company you will promptly inform the Company of that decision. In that case, or at any time upon the request of the Company for any reason, you will and will cause your Representatives to

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promptly deliver to the Company all documents (and destroy all copies thereof) furnished to you or your Representatives by or on behalf of the Company pursuant hereto. In the event of such a decision or request, all other Evaluation Material and Notes prepared by you or your Representatives shall be destroyed and no copy thereof shall be retained and, upon request, you shall certify in writing to the Company that such action has been taken. Notwithstanding the return or destruction of the Evaluation Material, you and your Representatives will continue to be bound by your obligations of confidentiality and other obligations hereunder for a period of three years from the date of this letter agreement

The Company retains the right to determine, in its discretion, what information, properties, personnel and other Evaluation Material the Company will make available to you. Although the Company has endeavored to include in the Evaluation Material information which the Company believes to be relevant for the purpose of your evaluation of a possible transaction with the Company, you acknowledge that none of the Company, [NAME OF INVESTMENT ADVISOR] nor any of their respective Representatives makes any express or implied representation or warranty as to the accuracy or completeness of the Evaluation Material. You agree that none of the Company, [NAME OF INVESTMENT ADVISOR] nor any of their respective Representatives shall have any liability to you or to any of your Representatives relating to or resulting from the receipt or use of the Evaluation Material. You also agree that you are not entitled to rely on the accuracy or completeness of the Evaluation Material and that you will be entitled to rely solely on such representations and warranties as may be included in any executed definitive agreement with respect to a transaction between the Company and you, subject to such limitations and restrictions as may be contained therein. You further agree that, if you determine to engage in a transaction with the Company, your determination will be based solely on the terms of such definitive agreement and on your own investigation, analysis and assessment of the Company and the transaction.

In consideration of the Evaluation Material being furnished to you, you agree that, without the prior written consent of the Company, for a period of one year from the date hereof you will not, directly or indirectly, (i) solicit any person or employee whom you know or have a reasonable basis to know is an employee of the Company; or (ii) solicit for employment any person employed by the Company with whom you had contact or who became known to you during your evaluation of the Company; provided, however, that general advertisements and other similar broad forms of solicitation shall not constitute direct or indirect solicitation hereunder.

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You agree that unless and until a definitive agreement regarding a transaction between the Company and you has been executed, neither the Company nor you will be under any legal obligation of any kind whatsoever with respect to such a transaction by virtue of this letter agreement except for the matters specifically agreed to herein and you hereby waive, in advance, on behalf of yourself and your Representatives, any claims (including breach of contract) in connection with any possible transaction with the Company unless and until the Company and you shall have entered into a final definitive agreement. You also acknowledge and agree that (i) the Company, [NAME OF INVESTMENT ADVISOR] and their respective Representatives may conduct the process in a manner that may or may not result in a transaction with the Company and in such manner as the Company and [NAME OF INVESTMENT ADVISOR], in their sole discretion, may determine (including, without limitation, negotiating and entering into a final definitive agreement with any third party without notice to you) and (ii) the Company and [NAME OF INVESTMENT ADVISOR] reserve the right to change (in their sole discretion, at any time and without notice to you) the procedures relating to the Company's and your consideration of the proposed transaction (including, without limitation, terminating all further discussions with you and requesting that you return all Evaluation Material to the Company and destroy all Notes). You hereby confirm that you are not acting as a broker for or Representative of any person and are considering a possible transaction with the Company only for your own account. You further acknowledge and agree that the Company shall have the right, in its sole discretion, (1) to reject or accept any potential proposal or offer from you or others, for any reason whatsoever, and (2) to terminate discussions and negotiations with you at any time and for any reason.

You acknowledge that you and your Representatives are aware that the United States securities laws prohibit any person who has material non-public information about a company from purchasing or selling securities of such company, or from communicating such information to any other person under circumstances in which it is reasonably foreseeable that such person is likely to purchase or sell such securities.

The Company reserves the right to assign all of its rights, powers and privileges under this letter agreement, including without limitation, the right to enforce all of the terms of this letter agreement. You may not assign your obligations under this Agreement without the prior written consent of the Company.

It is understood and agreed that no failure or delay by the Company in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder.

It is further understood and agreed that money damages would not be a sufficient remedy for any breach of this letter agreement by you or any of your Representatives and that the Company shall be entitled to equitable relief, including injunction and specific performance, as a remedy for any such breach. Such remedies shall not be deemed to be the exclusive remedies for a

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breach by you of this letter agreement, but shall be in addition to all other remedies available at law or equity to the Company. In the event of litigation relating to this letter agreement, if a court of competent jurisdiction determines that you or any of your Representatives have breached this letter agreement, you shall be liable and pay to the Company the reasonable legal fees incurred by the Company in connection with such litigation, including any appeal therefrom.

The terms and provisions of this letter agreement are solely for the benefit of the Company, [NAME OF INVESTMENT ADVISOR] and you and their respective successors, assigns, heirs and personal representatives, and no other person shall acquire or have any right by virtue of this letter agreement. You acknowledge that the Company is intended to be a third party beneficiary of this Agreement and that the Company shall be entitled, either alone or together with [NAME OF INVESTMENT ADVISOR], to enforce this Agreement and to obtain for itself the benefit of any remedies that may be available for the breach hereof. This letter agreement shall be governed by and construed in accordance with the laws of the State of Louisiana without giving effect to such state's principles of conflicts of laws.

This letter agreement may be waived, amended or modified only by an instrument in writing signed by the party against which such waiver, amendment or modification is sought to be enforced.

In the event that any provision or portion of this letter is determined to be invalid or unenforceable for any reason, in whole or in part, the remaining provisions of this letter shall be unaffected thereby and shall remain in full force and effect to the fullest extent permitted by applicable law.

Please confirm your agreement with the foregoing by signing and returning one copy of this letter to the undersigned, whereupon this letter agreement shall become a binding agreement between you and the Company.

Very truly yours,

[NAME OF INVESTMENT ADVISOR]  
behalf of: [Name of Seller]

By: \_\_\_\_\_

Accepted and agreed as of  
the date first written above:

{Name of Potential Buyer}

By: \_\_\_\_\_

October \_\_, 2004

\_\_\_\_\_  
 \_\_\_\_\_  
 Attention: \_\_\_\_\_

Dear \_\_\_\_\_:

In connection with your analysis of a possible negotiated transaction (a "Transaction") involving \_\_\_\_\_ (collectively with its cable television subsidiaries the "Company"), you have requested certain information concerning the Company and its affiliates from the Company's direct and indirect equityholders, affiliates, directors, officers, employees, agents and advisors (including without limitation, attorneys, accountants, consultants and financial advisors) (the "Company's Representatives"). All such information furnished or made available to you or your Representatives (as defined below) by or on behalf of the Company or the Company's Representatives (irrespective of the form of communication (whether oral, written or electronic) and whether such information is so furnished before, on or after the date hereof), including, without limitation, any analyses, compilations, data, forecasts, studies, notes, translations, memoranda, and/or other documents prepared by you or your Representatives containing or based in whole or in part on any such furnished information (such prepared analyses, compilations, data, forecasts, studies, notes, translations, memoranda or other documents being collectively referred to herein as the "Derived Information"), are collectively referred to herein as the "Confidential Information." In consideration of furnishing you with the Confidential Information, the Company requests your agreement to the following:

1. Your "Representatives" include your directors, officers, employees, agents and advisors (including, without limitation, attorneys, accountants, consultants, potential debt financing sources and financial advisors).
2. The term "Confidential Information" does not include any information that (i) at the time of disclosure or thereafter is generally publicly available other than as a result of a disclosure by you or any of your Representatives, (ii) is already in your or any of your Representatives' possession, provided that such information is not known by you or any such Representative, as the case may be, to be subject to any legal or contractual obligation of confidentiality owed to any person, (iii) is or becomes available to you on a nonconfidential basis from a source other than the Company or the Company Representatives; provided that, to your best knowledge after due inquiry, such source was not restricted from disclosing such information to you by a legal, contractual or fiduciary obligation owed to the Company or the Company Representatives, or (iv) is independently developed by you or on your behalf without violating any of your obligations hereunder and without reliance on the Confidential Information.

3. The Confidential Information will be used by you and your Representatives solely for the purpose of evaluating a Transaction and not for any other purpose. The Confidential Information will not be used in any way, directly or indirectly, that is detrimental to the Company, its direct or indirect equityholders or their respective affiliates, and the Confidential Information will be kept strictly confidential by you and your Representatives and will not be disclosed by you or any of your Representatives, except (i) as may be consented to by the Company, (ii) as you may be advised in writing by your counsel that it is required by applicable law, regulation or legal process, and only after compliance with Section 5 below, and (iii) that you may disclose the Confidential Information or portions thereof to those of your Representatives who need to know such information for the sole purpose of evaluating such Transaction, but only to the extent necessary to evaluate or carry out the Transaction and only if such Representatives are advised of the strictly confidential nature of such Confidential Information and that by receiving the Confidential Information such Representatives are agreeing to be bound by this terms of this letter agreement. You agree to be responsible for any breach of this agreement by any of your Representatives (it being understood that such responsibility shall be in addition to and not by way of limitation of any right or remedy the Company may have against such Representative with respect to any such breach).

4. Except with regard to your Representatives, you agree that, without the prior written consent of the Company, neither you nor any of your Representatives will disclose to any other person either (i) the fact that any investigations, discussions or negotiations are taking place concerning a possible Transaction, (ii) that you and/or any of your Representatives have received Confidential Information from the Company or the Company Representatives or that Confidential Information has been made available by the Company or the Company Representatives, or (iii) any of the terms, conditions or other facts with respect to any such possible Transaction, including the status thereof (collectively "Transaction Information"), except that you may make such disclosure if, upon the advice of counsel, such disclosure is required by applicable law, regulation or legal process and only after compliance with Section 5 below. The term "person" as used in this letter agreement will be interpreted broadly to include the media and any individual, corporation, company, group, partnership or other entity of any nature.

5. If you or any of your Representatives become legally compelled (including by deposition, interrogatory, request for documents, subpoena, civil investigative demand or similar process) to disclose any of the Confidential Information or Transaction Information, you shall provide the Company with prompt prior written notice of such requirement so that the Company may seek a protective order or other appropriate remedy prior to disclosure. If such protective order or other remedy is not obtained, you and your Representatives agree to disclose only that portion of the Confidential Information or Transaction Information which you are advised in writing by your counsel is legally required to be disclosed and to take all reasonable steps to preserve the strict confidentiality of the Confidential Information or Transaction Information (including by obtaining an appropriate protective order or other reliable assurance that confidential treatment will be accorded the Information). In addition, you and your Representatives will not oppose any action (and will, if and to the extent requested by the Company, cooperate with, assist and join with the Company, at the Company's expense, in any reasonable action) by the Company to obtain an appropriate protective order or other reliable

assurance that strict confidential treatment will be accorded the Confidential Information or Transaction Information.

6. If you determine not to pursue the Transaction, you will promptly notify the Company of your determination. At the time of such notice, or if at any earlier time, the Company or any Company Representative so directs (whether or not you determine to pursue the Transaction), you and your Representatives will, at your expense, promptly return to the Company all Confidential Information and promptly destroy all copies, extracts or other reproductions in whole or in part thereof (including Confidential Information stored on computer files or similar storage devices), as well as any Derived Information prepared by you or any of your Representatives containing or reflecting Confidential Information. You agree to provide a certification signed by an officer as to the return and/or destruction of all Confidential Information and Derived Information. Notwithstanding the return and/or destruction of the Confidential Information and/or Derived Information, you and your Representatives will continue to be bound by your confidentiality and other obligations hereunder.

7. Although the Company has endeavored to include in the Confidential Information all of the information which is relevant for the purposes of your investigation, you understand and acknowledge that neither the Company nor any of the Company Representatives make any representation or warranty, express or implied, as to the accuracy or completeness of the Confidential Information. You agree that neither the Company nor any of the Company Representatives shall have any liability to you or any of your Representatives relating to or resulting from the use of the Confidential Information or any errors therein or omissions therefrom. Only those representations and warranties which are made in a final, legally binding definitive agreement to engage in a Transaction (a "Definitive Agreement"), when, as and if executed and delivered, and subject to such limitations and restrictions as may be specified therein, will have any legal effect. The term "Definitive Agreement" does not include an executed letter of intent or any other preliminary written agreement, nor does it include any written or oral acceptance of any offer or bid on your part.

8. In consideration of the Confidential Information being furnished to you, you hereby agree not to knowingly initiate or maintain contact (except for those contacts made in the ordinary course of business), with any director, officer, employee or agent of the Company or its direct or indirect equityholders regarding a Transaction without the prior consent of the Company.

9. In consideration of the Confidential Information being furnished to you, you hereby agree that, until the earlier of (a) your consummation of a Transaction or (b) for a period of two years from the date of this letter agreement, you will not, directly or indirectly, without the prior written consent of the Company, (i) solicit for employment, induce or attempt to induce to leave the Company's employ, or hire, any employees of the Company or its affiliates; provided, however, that the foregoing shall not (A) prohibit any general solicitations of employment not directed principally to the employees of the Company or its affiliates or (B) prevent you from hiring any such person who contacts you on his or her own initiative without any solicitation by or encouragement from you (other than general solicitations described in clause (A) of this Section 9); or (ii) hold any discussions regarding the possibility of a Transaction with any suppliers, customers, government agencies and/or any other person or entity with whom either

the Company or any of its affiliates has a relationship or conducts business except as required by law or court order as you may be advised in writing by counsel.

10. You understand and agree that no contract or agreement providing for a Transaction shall be deemed to exist between you and the Company or its affiliates unless and until a Definitive Agreement has been executed and delivered. You also agree that unless and until a Definitive Agreement between you and the Company, its relevant subsidiaries and/or direct or indirect equityholders with respect to a Transaction has been executed and delivered, the Company has no legal obligation of any kind whatsoever with respect to such Transaction by virtue of this letter agreement, except for the matters specifically agreed to herein, and that the Company may provide the same or similar information to other parties and enter into agreements with other parties. The Company reserves the right, in its sole discretion, to reject any and all proposals made by you or any of your Representatives with regard to any Transaction between you and the Company and to terminate, in writing, discussions and negotiations with you at any time. You hereby confirm that you are not acting as a broker for or Representative of any person and are considering the Transaction only for your own account.

11. You agree that money damages would not be a sufficient remedy for any breach of this agreement by you or any of your Representatives and that the Company shall be entitled to, and you shall not oppose the granting of, equitable relief, including injunction and specific performance, in the event of any such breach, in addition to all other remedies available to the Company and its affiliates at law or in equity. You further agree to waive, and to use your best efforts to cause your Representatives to waive, any requirement for the securing or posting of any bond in connection with such remedy. You agree to indemnify the Company and the Company Representatives for, and to hold the Company and the Company Representatives harmless against, any and all liabilities, costs, expenses, losses, damages and claims arising out of your or any of the your Representatives' breach of this agreement.

12. The parties hereby agree that this letter agreement is for the benefit of the Company, the Company Representatives and their respective directors, officers, employees, representatives and agents and their respective successors and assigns and will be governed by and construed in accordance with the laws of the state of New York. The parties hereby irrevocably consent to the non-exclusive jurisdiction of the state and federal courts located in New York County, New York for any actions, suits or proceedings arising out of or relating to this letter agreement (and the parties agree not to commence any action, suit or proceeding relating thereto except in such courts), and further agree that service of any process, summons, notice or document by U.S. registered mail to the respective addresses set forth above, in your case, and to

\_\_\_\_\_ shall be effective service of process for any action, suit or proceeding brought against the parties in any such court. The parties hereby irrevocably and unconditionally waive any objection to the laying of venue of any action, suit or proceeding arising out of this agreement or the transactions contemplated hereby, in the courts described above, and hereby further irrevocably and unconditionally waive and agree not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum.

13. You agree that no failure or delay by the Company in exercising any right, power or privilege hereunder will operate as a waiver thereof, nor will any single or partial exercise



thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder.

14. If any provision of this agreement is found to violate any statute, regulation, rule, order or decree of any governmental authority, court, agency or exchange, such invalidity shall not be deemed to affect any other provision hereof or the validity of the remainder of this agreement, and such invalid provision shall be deemed deleted herefrom to the minimum extent necessary to cure such violation.

15. Neither this paragraph nor any other provision in this agreement can be waived, amended or assigned except with the written consent of each party hereto, which consent shall specifically refer to this paragraph (or such other provision) and explicitly make such waiver or amendment.

16. This letter agreement and each party's obligations hereunder shall be binding on the representatives, assigns and successors of such party and shall inure to the benefit of the assigns and successors of such party, provided, however, that your rights and obligations hereunder are not assignable, except to your Representatives as provided herein.

If you agree with the foregoing, please sign and return a copy of this letter, which will constitute our agreement with respect to the subject matter of this letter.

Very truly yours,

CONFIRMED AND AGREED  
as of the date first above written:

\_\_\_\_\_

By: \_\_\_\_\_  
Name:  
Title:



## 711: Confidentiality & Non-Compete Agreements – Does One Size Fit All?

### Part III *Focus on the Employee*

**John Thomas**  
**Technology Counsel**  
**Thomson West**  
[j.thomas@thomson.com](mailto:j.thomas@thomson.com)



@\$\*={!+#[?#&% .... IT'S MINE !!!

- Best Practices for Protecting Confidential Information
- Former Employee
- “Be Prepared”
- Remedies



## Protecting Your Intellectual Property

### ● Statutory Protection

- Patent
- Copyright
- Registered Marks
- Trade Secrets

### ● Contractual Protection

- Non-Compete Agreement (NCA)
- Non-Disclosure Agreement (CDA)
- Non-Solicitation (Employees / Customers)



## Uniform Trade Secrets Act

“ ‘Trade Secret’ means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”



## Are Your Secrets “Trade Secrets?”

- Do you have a “Protectable Interest?”
  - Independent Economic Value
  - Not Generally Known
  - Not Readily Ascertainable
- Does it Qualify for Trade Secret “Status?”
  - Reasonable Efforts Made to Keep it Secret
- Every Trade Secret is confidential information.  
All confidential information is not a Trade Secret.

## “Independent Economic Value”

- Does it provide owner with a tangible competitive edge?
- “actual or potential”
- Knowing what does not work



## “Generally Known” & “Readily Ascertainable”

- Not Generally Known (by one to whom it would have value)
- Not Readily Ascertainable By Proper Means
  - “Improper Means” includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.
  - If only known via reverse engineering at great expense and time, it’s still a Trade Secret, even though it’s been discovered.



## Trade Secret -- Treat it Right

- “Reasonable efforts under the circumstances”
- Don’t go overboard
  - Remember, just because it’s “confidential” doesn’t make it a Trade Secret
  - Don’t risk losing credibility
  - Court Needs to be able to determine what is a legitimate Trade Secret.



## Contractual Protection

- Confidential Disclosure Agreements
  - Use for both Trade Secrets and Confidential Information
  
- Non-Compete Agreements
  - Significant Limitations



## Confidential Disclosure Agreements

- One-Size-Fits-All ??
  - *ConFold Pacific v. Polaris 433 F.3d 952*
  - What is it you need to protect?
  - 1-way vs. 2-way vs. multiparty
- Needed in addition to any NCA
- Must be assignable



## CDAs – Several Functions

- Tells employees what information employer considers confidential
- Evidence of employer's efforts to maintain confidentiality (Trade Secret requirement)
- Adds claim for breach of contract on top of statutory and/or tort remedies



## CDAs – Advantages over NCAs

- Accepted by courts as an alternative to otherwise unenforceable NCAs.
- Few, if any, geographic limitations.
- No artificial expiration dates.
- Can cover all sorts of confidential information that does not qualify for Trade Secret "Status."



## Non-Compete Agreements

- Governed by State Law
  - Common Law and Statutory Variations
  - “Blue-Pencil,” Sufficient Consideration, Choice of Law, etc.
  - CA, CO, GA, LA, ND, TX, VA, WI are “problem states”
  - *Edwards v. Arthur Andersen* 2006 WL 2498013 (8/30/06)
  - Exemption for House Counsel ☺
- Definitely NOT “one-size-fits-all”



## Non-Compete Agreements

- Must be narrow in scope, limited to no more than is reasonably necessary to protect the employer's legitimate business interests.
- Liability for actions taken where the NCA is unenforceable under state law
  - Termination for refusal to sign
  - Interference with contract (employee/new employer)
  - Unfair trade practice





## When an Employee Resigns to Join a Competitor

1. **Ask about the New Job:** Ask employee to identify new employer, new job position, office location or territory, and duties/responsibilities.
2. **Confirm return of Documents & Information:** Ask employee to confirm that he/she has returned all company property, documents, records, and information, in all forms (paper, electronic, etc.). Don't forget laptops.
3. **Provide Copies of Covenant:** Provide employee with a copy of his/her employment agreement/restrictive covenant, inform employee that you expect full compliance, and instruct employee to provide a copy to new employer. Send a letter with another copy saying all of this all over again.



## When an Employee Resigns to Join a Competitor

4. **Talk to Co-Workers:** Interview other employees to gather information about the resigning employee's intentions and to determine if others noticed anything suspicious (e.g., off hours access to records, recruiting co-workers).
5. **Disable Access:** Disable employee's access to premises, company computers, email and voicemail (both in-office and remote access). Check if employee recently entered premises or computer systems at odd hours.
6. **Inspect Office and Files:** Inspect employee's office and files to ensure that company materials have not been taken, destroyed or altered.
7. **Review Recent Email and Computer System Activity:** Review employee's recent outgoing email for information emailed home or to others. Check recent computer activity for suspicious downloads or print jobs.



## When an Employee Resigns to Join a Competitor

**8. Tend to the Clients:** Re-assign client accounts to other employee(s) and follow up with clients to assure them that the transition will be smooth. Take this opportunity to determine if employee has been contacting clients.

**9. Check Outgoing Greetings:** Check employee's outgoing voicemail greeting, and any "auto-reply" on the email system. Change as necessary.

**10. Consult Legal Counsel:** Review your options with counsel, including the enforceability of any restrictive covenant, as well as possible trade secrets, duty of loyalty and other common law issues. Consider your options: "demand letter" from counsel? Negotiation? Immediate injunction action?

Courtesy of Saul Ewing [www.saul.com](http://www.saul.com)



## Facts, Facts, and MORE Facts

- Voluntary or Involuntary Termination
- Signed Documents and H.R. File
- Value of the Confidential Information
- Nature of New Position
- Governing Law



## Remedies – Litigation Checklist

- Do you have a viable claim against former employee? ... Against new employer?
- Is immediate injunctive relief likely?
- Has the company been damaged? Amount? How to prove?
- What are possible causes of action?
- Will the company win? – Define !!
- Under what theory will the company win?
- In which forum should the company proceed?
- How much will the process cost? Risk/Reward

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## Remedies – Injunctive Relief

- Civil Rules of Procedure
  - Likelihood of success on the merits
  - Irreparable harm
  - Balance of Hardships
  - Public Interest
- Tone is set by outcome of the motion for preliminary injunction / TRO

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## Available Remedies – Risks

- How clean are your hands?
- Will discovery compel disclosing the T/S?
- Court finds the information is public
- Court finds you failed to properly protect
- Court finds the NCA is unenforceable
- Decision not to prosecute seen as failure to protect?
- Message to current and former employees
- Costs



## Available Remedies

- UTSA Misappropriation
- Copyright Infringement
- Breach of Contract
- Tort



## UTSA Remedies -- Misappropriation

“Misappropriation” means

- (1) acquisition of a TS of another by a person who knows or has reason to know that the TS was acquired by improper means; or
- (2) disclosure or use of a TS of another without express or implied consent by a person who
  - (i) used improper means to acquire knowledge of the TS; or
  - (ii) at the time of disclosure or use, knew or had reason to know that her knowledge of the TS was
    - (a) derived from or through a person who acquired it improperly; or
    - (b) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
    - (c) derived from or through a person who owed a duty to the owner / holder to maintain its secrecy or limit its use; or
  - (iii) before a material change of his position, knew or had reason to know that it was a TS and that knowledge of it had been acquired by accident or mistake.



## UTSA Remedies – Injunctive Relief

- Actual or threatened misappropriation may be enjoined for as long as reasonably needed in order to eliminate the commercial advantage that otherwise would be derived from the misappropriation.
- If user made material changes in good faith prior to learning of misappropriation, injunction may condition future use upon payment of a reasonable royalty.
- Court can order return of all misappropriated materials.



## UTSA Remedies -- Damages

- Actual loss + Unjust Enrichment (no double counting) OR
- Royalty if TS was obtained in good faith
- Punitive damages up to 2X if willful and malicious
- Legal fees in specified circumstances
- Court will preserve the secrecy of the alleged TS during proceedings



## UTSA Remedies – Not Exclusive !!!

- “Not a comprehensive statement of civil remedies.” It only applies to breach of a duty to protect competitively significant secret information that is imposed by law.
- Does not apply to a duty voluntarily assumed through an express or an implied-in-fact contract.
- CDAs and NCAs, although intended to protect confidential information (including trade secrets), are governed by other laws.
- Also does not apply to a duty imposed by law that is not dependent upon the existence of competitively significant secret information, like an agent’s duty of loyalty to her principal.



## Copyright Protection – Advantages

- Federal court; No common-law copyright
- May include other bases for relief and still stay in federal court
- Statutory damages; Use in absence of proof of amount of actual damages or if actuals are less than statutory amount
- Not forced to “publicize” Trade Secrets
- Preliminary injunctions and impoundment
- Reasonable attorney’s fees



## Copyright Protection – Procedure

- Register “promptly” -- latter of 3 months after creation or prior to suit
- Presumed valid if registered within 5 years; shifts burden of proof to former employee
- Infringement is established by proof of (a) access to the material and (b) substantial similarity
- Burden shifts to defendant to show independent creation
- Partial or incomplete copying is still infringement
- Be sure to establish ownership



## Remedies – Breach of Contract (CDA)

- Tortious Interference with Contract
- Tortious Interference with Prospective Advantage
- Join new employer on inducement grounds
  - Vicarious Liability / Respondeat Superior
- For misappropriation of a Trade Secret, also invoke the UTSA remedies.



## Remedies – Inevitable Disclosure

- A former employee who is permitted to work for a competitor will – even if acting in the utmost good faith – inevitably be required to use or disclose the former employer's trade secrets in order to perform the new job.
- Departs significantly from an injunction prohibiting the use or disclosure of trade secrets
- Often frowned upon as “a means of obtaining a non-compete injunction without a non-compete agreement” or “providing the employer with a benefit of a contractual obligation it did not pay for while the employee is bound by a court-imposed contract with no opportunity to negotiate terms or consideration.”





### **Other Enforcement Options / Remedies**

#### ● **Common Law / Restatement**

- Duty of Loyalty
- Duty of Good Faith and Fair Dealing

#### ● **Other Statutes**

- Computer Fraud and Abuse Act (18 USC 1831)
- Mail and Wire Fraud



### **Other Steps to Consider**

- “Cease and Desist” letters prior to suit
  - “We wish you well in your new position and simply ask that you keep in mind ....”
  - Risk that former employee will rush to a courthouse to obtain a declaratory judgment in a more favorable jurisdiction.
- Similar correspondence with new employer



## Resources

- *Computer "trade secrets" under state law* 53 A.L.R. 4<sup>th</sup> 1046
- *CDAs -- 10 Must-Ask Questions* ACC Docket January 2006
- *Negotiating IP Clauses – 9 Key Issues in Consultancy Contracts* ACC Docket May 2005
- *Protecting Your Company's Crown Jewels* ACC Docket April 2004
- *Trade Secrets and Restrictive Covenants* ACC 2004 AM #601
- *The Employee Defection Recruitment Monitor* (published annually by Saul Ewing [www.Ewing.com](http://www.Ewing.com))
- *Enjoining The Competing Ex-Employee* DLA Piper Labor and Employment Law Alert October 4, 2004 [www.dlapiper.com](http://www.dlapiper.com)

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### MUTUAL CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

This Mutual Confidentiality and Non-Disclosure Agreement ("**Agreement**") is made as of [insert date], 20\_\_ between **CLIENT** ("**Client**") and **COMPANY** ("**Company**"). In connection with [define scope or purpose of NDA, e.g.: "**Client's evaluation of Company's products and/or services for possible use in Client's financial software development project**" - "**performance by Company of certain consulting services for Client including (LIST SERVICES)**"] ("**Approved Purpose**"), both Client and Company may be disclosing to each other Confidential Information. As a condition of the release by the disclosing party which may be Client and/or Company of Confidential Information ("**Disclosing Party**") to the party accepting Confidential Information which may be Client and/or Company ("**Accepting Party**"), both parties agree as follows with respect to Confidential Information:

1. **CONFIDENTIAL INFORMATION:** As used herein, the term "**Confidential Information**" shall include any proprietary information or materials, whether or not marked or otherwise designated as confidential, relating to the business (present or contemplated) and/or customers of Disclosing Party that Accepting Party obtains from Disclosing Party in connection with the Approved Purpose, including the terms of this Agreement, any and all information concerning techniques, processes, formulas, trade secrets, innovations, inventions, discoveries, improvements, research or development and test results, specifications, data, know-how, formats, marketing plans and programs, business plans, computer systems and programming, strategies, forecasts, financial information, budgets, projections, customer and supplier identities, addresses or characteristics, agreements between Disclosing Party and third parties, and the nature and status of discussions or negotiations between Client and Company. Confidential Information shall not include information, if any, which was or becomes generally available to the public other than as a result of a disclosure by Accepting Party or by other persons, including Accepting Party's agents, to whom Accepting Party has disclosed such information.
2. **RESTRICTIONS ON DISCLOSURE:** All Confidential Information shall be held by Accepting Party in trust and confidence on behalf of Disclosing Party, and Accepting Party shall not disclose or permit access to nor shall Accepting Party authorize or permit any other person or entity (collectively, "**Person**") to disclose or permit access to any Person of all or any part of the Confidential Information without the prior consent of Disclosing Party. In addition, Accepting Party shall use the Confidential Information only for the Approved Purpose, and not in any other manner or for any other reason, including any manner or reason that may be detrimental to Disclosing Party or any of its affiliated entities (if any). Further, Accepting Party shall take such action, legal or otherwise, to the extent necessary to ensure that only those Persons who, pursuant to this Agreement, would be permitted access to the Confidential Information are able to obtain such access.
3. **EXEMPTIONS FROM RESTRICTIONS ON DISCLOSURE:** Accepting Party may disclose the Confidential Information to comply with applicable law, administrative or court order; provided, however, that in each such instance Accepting Party shall notify Disclosing Party prior to such disclosure and Accepting Party shall use reasonable efforts to seek confidential treatment of the Confidential Information. Accepting Party may also disclose the Confidential Information to Accepting Party's bankers, attorneys, accountants, directors, employees, and other agents on a "need to know" basis; provided, however, that each such agent (except employees), prior to any disclosure, signs a copy of this Agreement with a statement that signifies that such agent agrees to be bound by this Agreement's terms. Accepting Party shall be responsible for any breach of this Agreement by such agents.

Mutual Confidentiality and Non-Disclosure Agreement

4. **REMEDIES:** Accepting Party acknowledges and agrees that the Confidential Information derives independent economic value from not being generally known to the public or to other Persons who can obtain economic value from the disclosure or use of the Confidential Information. Accepting Party further acknowledges and agrees that any breach of this Agreement shall constitute a material breach of this Agreement that will cause irreparable injury to Disclosing Party, not readily measurable in money, and for which Disclosing Party, without waiving any other rights or remedies at law or in equity, shall be entitled to injunctive relief.

5. **CHOICE OF LAW AND JURISDICTION:** The validity of this Agreement and all matters relating to its interpretation and performance shall be interpreted in accordance with the laws of the State of California applicable to contracts made and fully performed therein, but without regard to principles of conflicts of law. The courts in Los Angeles, California shall have exclusive jurisdiction over any controversy arising under this Agreement and venue in Los Angeles is appropriate. If such Receiving Party does not have assets located in California which are reasonably estimated to be sufficient to satisfy the judgment, then a claim may be brought wherever such Receiving Party has assets.

6. **AMENDMENT AND ASSIGNMENT:** No amendment, alteration or modification of this Agreement shall be effective without the prior written consent of all parties. This Agreement may not be assigned without the prior written consent of all parties and any assignment without the consent of all parties shall be void.

7. **"INCLUDING":** Whenever examples are used after the word including (or any derivation thereof), such examples are intended to be illustrative only and shall not limit the generality of the words accompanying the word including (or any derivation thereof).

8. **TERM:** This Agreement shall continue in full force and effect for a period of five years from the date hereof.

By signing in the spaces provided below, Client and Company agree to the terms set forth herein.

CLIENT ("Client")

COMPANY ("Company")

By: \_\_\_\_\_  
 Printed Name:  
 Title:

By: \_\_\_\_\_  
 Printed Name:  
 Title:



## How Do You Ensure What Is Yours Is YOURS?

- I'll Show You Mine If You Show Me Yours: Mutual or Unilateral.
- What Is Your Purpose?
- What Are You Trying to Protect: Everything and the Kitchen Sink?
- Restrictions On Disclosure/Security.
- It's YOUR Property... Say it.
- Other Thoughts...

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## I'll Show You Mine If You Show Me Yours: Mutual or Unilateral

- Mutual Mutual Mutual: A Mutual NDA allows both parties to a potential transaction to share confidential information.
  - May make for more reasonable terms.
- Unilateral will work where the parties must have different terms (e.g., the identification of Confidential Info, security, purpose, etc.)



## What Is Your Purpose?

- It's None of Their Business... Or Is It?
- You Are Disclosing Your Information For A Reason... Make It Clear.
  - "WHEREAS the Recipient is willing to receive disclosure of the Confidential Information pursuant to the terms of this Agreement for the purpose of discussing the compatibility of XYZ's security software with Company's operating system;"
  - "In connection with discussions and, ultimately, negotiations between ABC and XYZ for purposes of evaluation regarding the potential issuance of credit insurance ("Approved Purpose"), both ABC and XYZ may disclose to each other Confidential Information, including confidential customer and sales information;"



## CI: Everything and the Kitchen Sink

- Are You Disclosing or Receiving?
  - Disclosing Party Wants Ultimate Protection
    - The universe, stars, and heavens above: “‘Confidential Information’” means all information disclosed, directly or indirectly, through any means of communication or observation, by or on behalf of one party hereto (the ‘Disclosing Party’) or for the benefit of the other party hereto (the ‘Receiving Party’)...”
  - Accepting Party Wants Ultimate Specificity
    - Try this on for size: “Nothing will be considered ‘Confidential Information’ of the Disclosing Party unless either (1) it is first disclosed in tangible form and is conspicuously marked ‘Confidential’, ‘Proprietary’, or the like or (2) is first disclosed in nontangible form and orally identified as confidential at the time of disclosure and is summarized in tangible form, conspicuously marked ‘Confidential,’ and provided to the Receiving Party within 30 days of the original disclosure.”



## CI: Everything and the Kitchen Sink

- You Can Include the Universe of CI But Are You Helping or Hurting?
  - How can you make sure that the Receiving Party knows what it should protect?
  - The information at issue may be protected under the NDA but disclosed anyway



## CI: Everything and the Kitchen Sink

- To Designate or Not to Designate?
  - “‘Confidential Information’ shall mean all nonpublic information disclosed by one party or its agents (the ‘Disclosing Party’) to the other party or its agents (the ‘Receiving Party’) that is designated as confidential...
    - ...or that, given the nature of the information or the circumstances surrounding its disclosure, reasonably should be considered as confidential.”
  - “‘Confidential Information’ shall include any proprietary information or materials, whether or not marked or otherwise designated as confidential, relating to the business (present or contemplated) and/or customers of Disclosing Party that Receiving Party obtains from Disclosing Party in connection with the Approved Purpose...”



## CI: Everything and the Kitchen Sink

- Regardless of Whether You Designate... BE SPECIFIC!
  - Communicate.
  - Include a more PRECISE definition.
    - Entertainment: “As used in this Agreement ‘Creative Content’ is a subset of Confidential Information that includes all content and creative materials and information provided to Receiving Party by Disclosing Party, including but not limited to film and digital/video elements, full length features or portions thereof, and promotional or supplemental materials; scripts and props; and any information about non-released features such as plot lines, special effects, and characters.”



## Restrictions On Disclosure/Security

- Use of the Confidential Information:
  - Protect the Information
    - “hold in strict trust and confidence and protect CI with the same or greater degree of care used to protect its own similar CI”
    - “Receiving Party shall not disclose CI to any third person, except as approved in advance in writing by Disclosing Party.”
  - Only use for the “Approved Purpose”
    - “Receiving Party shall use the Confidential Information only for the Approved Purpose, and not in any other manner or for any other reason, including any manner or reason that may be detrimental to Disclosing Party or any of its affiliated entities.”



## Restrictions On Disclosure/Security

- Exemptions from Restrictions on Disclosure
  - To comply with applicable law/court order (standard)
    - Important to include requirement to “notify Disclosing Party prior to such disclosure and use reasonable [best?] efforts to seek confidential treatment of the Confidential Information”
  - Disclosure to Accepting Party's Agents on a “need to know” basis
    - Taking Responsibility: “Receiving Party shall be responsible for any breach of this Agreement by such agents.”



## Restrictions On Disclosure/Security

- Disclosure to Accepting Party's Agents on a "need to know" basis (continued)
  - Defining "Authorized Agent": "An 'Authorized Agent' is an agent or employee of Receiving Party who is performing services for Disclosing Party and has signed, prior to receiving CI, a confidentiality agreement (which may be contained in a signed employee handbook) that is no less protective than this Agreement."
  - Records: "Receiving Party shall retain such confidentiality agreement signed by any Authorized Agent as long as the Authorized Agent is associated with the Receiving Party and for a period of three (3) years after termination."
  - Training: "Receiving Party shall train its Authorized Agents frequently (and at least annually) regarding the treatment and special handling of CI required in this Agreement."



## Restrictions On Disclosure/Security

- Security Measures: depending on the nature of the CI, can be a good idea
  - Request Receiving Party Security Plan: "Receiving Party shall use all commercially reasonable security measures to safeguard the CI from unauthorized disclosure and access."
    - "keeping CI secure (both physically and electronically),"
    - "limiting and tracking access to CI,"
    - "not keeping CI on computers with internet access unless agreed upon security measures such as firewalls and monitoring software are employed."
  - Disclosing Party's Ability to Impose Security Measures
  - Inspection: "upon reasonable notice, permission to visit and inspect Receiving Party's facilities and security procedures."





## It's YOUR Property... Say it.

- **Ownership of Confidential Information**
  - **Mine Mine Mine:** "The CI represents a highly valuable asset of the Disclosing Party and, as between the Disclosing Party and Receiving Party, is and will at all times remain, the property of Disclosing Party."
  - **Return Of Property:** "Promptly upon the Disclosing Party's request or the termination or expiration of this Agreement, Receiving Party shall return to Disclosing Party the CI, together with all copies thereof."
  - **No Other Rights:** "Neither this Agreement nor the furnishing of any CI shall be construed as granting (either expressly, by implication or estoppel, or otherwise) any license or immunity under any copyright, patent, trademark, or other intellectual property right now or hereafter owned or controlled by Disclosing Party, except a non-exclusive license solely to effectuate the Approved Purpose or as permitted by Disclosing Party."



## Other Thoughts...

- **TERM: Term of Confidentiality vs. Term of Exchange of Confidential Information**
  - Could be difference of years vs. a couple of days or weeks
  - Indefinitely?
- **NO WARRANTIES: "THE CONFIDENTIAL INFORMATION IS PROVIDED 'AS IS.' DISCLOSING PARTY SPECIFICALLY DISCLAIMS ALL REPRESENTATIONS AND WARRANTIES, EXPRESS OR IMPLIED INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, AND NONINFRINGEMENT."**
  - Does it conflict with other Agreements??



## Other Thoughts...

### ● REMEDIES - INJUNCTIVE RELIEF

- “AP acknowledges that DP derives significant financial benefits, good will, and a competitive advantage in the marketplace by maintaining the CI as secret and unavailable to the DP’s competitors and the public, and relies on AP and its employees and agents to safeguard the CI entrusted to it. AP acknowledges that its breach of this Agreement will cause irreparable injury to DP and DP is entitled to injunctive relief against any breach.”
- Do not rely on ADR/Mediation alone
- Do not exclude other remedies: “DP’s rights and remedies under this Agreement are cumulative and in addition to any other rights and remedies DP may have for misuse of its proprietary information, including without limitation, under criminal and civil trade secrets laws, or theft of property laws.”



## Other Thoughts...

### ● CONCURRENT DEVELOPMENT

- An Exception to Confidential Information: “CI does not include information that is or was developed independently by or for the RP, without use of or reference to any CI of the DP and without violation of any obligation contained herein.”
- But can be helpful to also be more explicit: “Each party understands that the other party may concurrently or in the future be developing information internally, or receiving information from other parties, that may be similar to the CI furnished by such party. In addition, each party understands that either party may have, or in the future may enter into, relationships with third parties having pre-existing relationships with the other party. Provided that each party complies with its obligations contained herein, and except as otherwise expressly provided herein, this Agreement shall not in anyway limit, restrict, or preclude either party from pursuing any of its present or future business activities or interests or from entering into any agreement or transaction with any person.”



## Other Thoughts...

### ● BINDING PROBLEMS

- “XYZ Company and all affiliates..”
  - If the Agreement is with a subsidiary and yet binds all affiliates, you may have just done a deal on behalf of the parent company, which may speak to the Disclosing Party with no knowledge that it is bound by the NDA.

### ● ASSIGNMENT

- No assignment without prior express written permission.
  - Any any assignment without such consent should be “null and void” and a material breach of the Agreement.
- If assignment is allowed, then binding on all successors/assigns



## 711: Confidentiality & Non-Compete Agreements – Does One Size Fit All?

### Mergers, Acquisitions and Non-Solicits, and a Few Scenarios

**Jonathan Spencer**

**VP and General Counsel**

**Shentel**

[Jonathan.Spencer@emp.shentel.com](mailto:Jonathan.Spencer@emp.shentel.com)



## Restrictions of Communications

- You agree that (a) all communications regarding the Transaction, (b) requests for additional information, facility tours or management meetings, and (c) discussions or questions regarding procedures with respect to the Transaction, will be first submitted or directed only to Investment Banker and not to the Company. Accordingly, you agree that until the consummation of the Transaction by you, you will not, directly or indirectly, contact or communicate with any employee of the Company without the express prior consent of the Company.



## Restrictions of Communications

- You agree that (a) all communications regarding the Transaction, (b) requests for additional information, facility tours or management meetings, and (c) discussions or questions regarding procedures with respect to the Transaction, will be first submitted or directed only to Investment Banker and not to the Company. Accordingly, you agree that until the consummation of the Transaction by you, you will not, directly or indirectly, contact or communicate with any employee of the Company regarding the Transaction or any Evaluation Material without the express prior consent of the Company.



## Restrictions of Communications

- You agree that (a) all communications regarding the Transaction, (b) requests for additional information, facility tours or management meetings, and (c) discussions or questions regarding procedures with respect to the Transaction, will be first submitted or directed only to Investment Banker and not to the Company. Accordingly, you agree that until the consummation of the Transaction by you, you will not, directly or indirectly, contact or communicate with any employee of the Company, except in the ordinary course of business, without the express prior consent of the Company.



## The Standard M&A NDA

ACME Corp (hereinafter referred to as "*you*") has requested that officers, directors, employees and/or agents of TARGET COMPANY, and its affiliates (collectively, the "*Company*") provide you and your Representatives (as hereinafter defined) with certain information concerning the Company in connection with a possible transaction ("*Transaction*") between you and the Company.

You hereby agree as follows:

You shall use the Evaluation Material solely for the purpose of evaluating the Transaction and you shall keep the Evaluation Material confidential, except that you may disclose the Evaluation Material or portions thereof to those of your directors, officers, employees, affiliates



## Auction NDAs

- Most Investment Banking NDAs are one-way, they only protect the target
  - Appropriate for the Data Room Stage but not later stages
  - Possible approaches
    - Negotiate a Mutual NDA upfront
    - Negotiate specific protections upfront
      - Non-disclosure of identities and/or terms of offer
    - Limit coverage to initial round and execute a Mutual NDA if discussions proceed to a subsequent or final round



## Non-solicitation Provisions

1. Non-Solicitation and Non-Hire of Employees. For a period of 18 months from the date hereof, you agree that you and your affiliates will not, directly or indirectly, solicit to employ any employees of the Company;



## Non-solicitation Provisions

1. Non-Solicitation and Non-Hire of Employees. For a period of 18 months from the date hereof, you agree that you and your affiliates will not, directly or indirectly, solicit to employ any management-level employees of the Company;



## Non-solicitation Provisions

1. Non-Solicitation and Non-Hire of Employees. For a period of 18 months from the date hereof, you agree that you and your affiliates will not, directly or indirectly, solicit to employ any management-level employees of the Company. The foregoing prohibitions on solicitations of employees shall not be deemed violated by virtue of general mass solicitations of employment by you not specifically directed toward employees of the Company.



## Non-solicitation Provisions

1. Non-Solicitation and Non-Hire of Employees. For a period of 18 months from the date hereof, you agree that you and your affiliates will not, directly or indirectly, solicit to employ any management-level employees of the Company; provided that nothing herein shall prohibit you or your affiliates from hiring or seeking to hire any individual who has received notice of termination from the Company prior to the first time such individual had any communication with you or your Representatives relating to employment. The foregoing prohibitions on solicitations of employees shall not be deemed violated by virtue of general mass solicitations of employment by you not specifically directed toward employees of the Company.

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## Virginia

- Recent Court Case has restricted availability of Non-competes
- Noncompetition agreements in Virginia are strictly construed against the employer,
- 2-3 year terms allowed
- Geographic restrictions must relate to where the employee actually worked (unless very high level)
- Courts have been unwilling to modify the terms of an overbroad agreement to make the agreement enforceable without specific language in the agreement.
- Should specifically restrict competition by an employee only in the branches or lines of the employer's business in which the employee has performed work.

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## Virginia

- A covenant should, at a minimum, note that the agreement is not intended to restrict the employee from performing work in some role that does not compete with the business of the employer.
- Description of the employer's business should be carefully tailored to reflect the employer's actual business,
- Must be assignable by Employer to a successor
- If Employer's business is not highly competitive, less likely to be enforced



## Virginia

### ● Four Recent Cases

- *Modern Environments, Inc. v. Stinnett*,  
■ 263 Va. 491, 561 S.E.2d 694 (2002).
- *Motion Control Systems, Inc. v. East*  
■ 262 Va. 33, 546 S.E.2d 424 (2001).
- *Simmons v. Miller*  
■ 261 Va. 561, 544 S.E.2d 666 (2001).
- *Omniplex World Services. Corp. v. US Investigations Services., Inc.*  
■ 270 Va. 246, 618 S.E.2d 340 (2005).



## Some other Issues

- Separability and Severability
- Indirect Participation in a Competing Business.
- Assignability of Noncompetition Agreements
- Effect of Bankruptcy on Restrictive Covenants
- Nonrenewal of Employment Contract
- Resignation and Re-employment
- Integration of Noncompetition Agreement into Purchase Agreement
- First Breach Defense
- Choice of Law Provisions