The Tango™ NDA Protocol

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Sensible, neutral terms and conditions – "it takes two to tango."

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SUGGESTED USE: *Ask your lawyer* if you and your counterparty can use this Protocol as a binding confidentiality agreement, a.k.a. nondisclosure agreement or "NDA," *by exchanging emails to that effect.* A (fictional) email exchange between "Alice," CEO of ABC Corporation, and "Xavier," CEO of XYZ Inc., is set forth below:

> To: Xavier
> From: Alice
> Subj: **Confidentiality agreement - please confirm agreement**
>
> Hi Xavier — it was great talking to you the other day. So that we can continue our discussions, let's enter into a confidentiality agreement: **ABC proposes that ABC and XYZ agree to the attached Tango NDA Protocol as a binding contract. If XYZ agrees, please reply to this email to that effect; this email and your reply will serve as our electronic signatures agreeing to the contract.**[2]
>
> Thanks,
> Alice
> CEO, ABC Corporation

> To: Alice
> From: Xavier
> Subj: Re: Confidentiality agreement - please confirm agreement
>
> Sounds good, Alice; **XYZ agrees**.
>
> Regards,
> Xavier
> CEO, XYZ Inc.

In the U.S. and probably many other jurisdictions, the above email exchange would almost certainly result in ABC Corporation and XYZ Inc. being legally bound by this Protocol *(check with legal counsel about your specific situation, of course).*

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[1] LICENSE: This Protocol may be copied and distributed, but only in its entirety, under the Creative Commons "Attribution ShareAlike International 4.0" license. All other rights are reserved.

[2] Signatures: This establishes that the parties agree to use electronic signatures per the federal E-SIGN Act.

PROTOCOL TERMS

This Protocol is designed to be incorporated by reference (explicitly or implicitly) into an email exchange or other agreement, referred to as "the **Contract**." This Protocol's terms will control **unless the Contract unambiguously says otherwise** as to particular points.[3]

1. Checklist of issues for possible negotiation

(a) **Discloser** refers to each party to the Contract.[4]

(b) **Recipient** refers to any party to the Contract that, pursuant to the Contract, accesses Confidential Information (defined below) owned or maintained by Discloser.

(c) **Expiration?** Recipient's confidentiality obligations concerning Confidential Information will expire five years after the effective date of the Contract[5] for all Confidential Information, **EXCEPT** for any Confidential Information that, before expiration was identified by Discloser to Recipient — in writing and with reasonable specificity — as a "trade secret" as defined in the (U.S.) Defend Trade Secrets Act.

(d) **Confidentiality of dealings?** IF: The Contract unambiguously says that the parties' dealings are confidential; THEN: Neither party will publicly disclose the existence or terms of (i) the Contract, or (ii) the business relationship contemplated by the Contract, EXCEPT with the other party's prior written consent.

2. Definition: Confidential Information

(a) Subject to any additional restrictions that may be imposed by the Contract, the term "**Confidential Information**" refers to information that:

(1) is shown to have been the subject of reasonable efforts, by and/or on behalf of a Discloser (defined below) to preserve the information in confidence; and

(2) Is not excluded from Confidential Information status (see below).

(b) For the avoidance of doubt, only Confidential Information owned or maintained by or on behalf of Discloser is protected by the Contract.

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[3] SUGGESTION FOR USE: In the Contract itself, specify any desired variations from the terms of this Protocol. EXAMPLE: Consider specifying a different expiration date, or that only one party's confidential information will be protected.

[4] Two-way NDAs: (1) are likely to be signed more quickly than one-way NDAs because a two-way NDA *likely* will be more balanced if it would cover each party's information; and (2) help to reduce the risk of unpleasant future surprises if a *receiving* party were later to disclose its information in the mistaken belief that "there's already an NDA in place" — if the already-existing NDA was a one-way agreement, it would not protect the receiving party's information; this happened in Fail-Safe, LLC v. A.O. Smith Corp., 674 F.3d 889, 893-94 (7th Cir. 2012) (affirming summary judgment for defendant).

[5] Effective date of the Contract: This will typically mean the date of the last signature if a different effective date isn't specified in the Contract itself.

3. **Exclusions from confidentiality**[6]

The term Confidential Information does not include information that is shown to have been, at the relevant time:

(1) generally known or readily accessible to persons within the circles that regularly deal with the kind of information in question,[7] and (ii) are not bound by an obligation of confidence benefiting Discloser; or

(2) known by Recipient before obtaining access to it under the Contract, as shown with reasonable corroborating evidence;[8] or

(3) provided to Recipient by a third party not under an obligation of confidence benefiting Discloser; or

(4) independently developed by Recipient without use of Discloser's Confidential Information, as shown with reasonable corroborating evidence;[9] or

(5) disclosed to a third party, by Discloser or with its authorization, without confidentiality obligations comparable to those of the Contract.

4. **Precautions**[10]

(a) Recipient must take — at a minimum — prudent precautions to protect Confidential Information from use or disclosure not authorized by the Contract.

(b) Such precautions are to be not less than those Recipient uses for its own information of comparable nature and/or significance.

5. **Permitted Use of Confidential Information**[11]

(a) ***Except*** as provided in subdivision (b), Recipient must obtain Discloser's prior written consent to any use by Recipient of Confidential Information (each type of such use, a "*Permitted Use*").

(b) IF: As unambiguously shown by written evidence, the parties are entering into the Contract in conjunction with any activity listed below in subdivisions (1) and (2);

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[6] These exclusions from confidentiality are pretty standard — but they do not include a categorical exclusion of information that is the subject of a subpoena or search warrant, addressed in section 6 below.

[7] Generally known, etc.: This is more precise (and accurate) than terms such as "public domain"; it's adapted from the UK's 2018 draft regulations implementing the EU Trade Secrets Directive (2016/943) (see UK IP Office, Consultation on draft regulations concerning trade secrets at 19 (2018), https://perma.cc/PHT8-DQFJ), so as to cover confidential information even without proof of economic value (as would be required by the definition of "trade secret") in the U.S. Defend Trade Secrets Act, 18 U.S.C. § 1839(3)(B)).

[8] Corroborating evidence is required here to reduce the chances of "creative" memories (or outright perjury). See, e.g., Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U.S. 275, 284 (1892); TransWeb LLC v. 3M Innovative Properties Co., 812 F.3d 1295, 1301 (Fed. Cir. 2016).

[9] Corroborating evidence: See note 8 above.

[10] The precautions here are pretty standard; some parties might want the Contract to get more specific.

[11] Parties sometimes forget to fill in a purpose for confidential disclosures; this section reduces the need to do so.

THEN: Discloser consents to Recipient's use of Confidential Information during the term of the Contract to the extent reasonably necessary for the corresponding *Permitted Use*.

Those activities are the following:

(1) *Parties' activity:* Exploring and/or negotiating a potential business relationship between the parties.

Permitted Use: Assessing Recipient's interest in, and/or negotiating the terms of, that potential relationship.

(2) *Parties' activity:* Entering into another agreement between the parties, and/or including this in another agreement.

Permitted Use: Recipient's (i) performance of its own obligations, and (ii) exercise of its right to require performance by Discloser, under such other agreement.

6. **Disclosure of Confidential Information**

(a) Recipient may not disclose Confidential Information of Discloser except:

(i) as unambiguously set forth in this Protocol or elsewhere in the Contract; or

(ii) with Discloser's unambiguous prior written consent.

Each such disclosure is referred to as a "Permitted Disclosure."

As one (non-limiting) example of a disclosure of Confidential Information, Recipient may not confirm, to any third party, any correlation or similarity between Confidential Information and information from any other source,

except as otherwise permitted by the Contract or with Discloser's prior written consent.

(b) Recipient may disclose Confidential Information — strictly on a need-to-know basis — to its employees, officers, and directors who are bound by confidentiality obligations at least as protective of Confidential Information as this Protocol is.

(c) Recipient may disclose Confidential Information in response to a compulsory legal demand, for example in response to a subpoena or a search warrant — BUT, in any such case, Recipient must do the following:

(1) promptly advise Discloser upon learning of the compulsory legal demand — subject to any applicable legal restrictions and/or requests from law enforcement; and

(2) provide reasonable cooperation with any efforts by Discloser, at Discloser's request and expense, to limit the disclosure and/or to obtain legal protection for the information to be disclosed.[12]

[12] This is why being served with a subpoena or search warrant will *not* automatically absolve Recipient from its confidentiality obligations concerning the information being sought: Discloser might be able to go to court to obtain a protective order limiting the use and disclosure of the information.

(d) It would not be a breach of Recipient's obligations under this Protocol if Recipient were to disclose Confidential Information to the minimum extent that:

(1) the disclosure would be immune from liability under Title 18, Section 1833(b) of the United States Code (part of the Defend Trade Secrets Act),[13] and/or

(2) the disclosure is affirmatively authorized by law or regulation, for example the (U.S.) National Labor Relations Act or other applicable labor- or employment law.

Note: Recipient is strongly urged — but not required — to advise Discloser in advance of any disclosure under this subdivision (d).

7. **Copying, translation of Confidential Information**

Recipient may not copy, nor translate, Confidential Information except to the minimum extent necessary for a use or disclosure authorized by the Contract.

8. **Post-termination confidentiality obligations**

(a) For the avoidance of doubt, the confidentiality requirements of the Contract will continue to apply, notwithstanding any termination of the Contract or expiration of its term, until such time, if any, as the information in question would not be eligible to be treated as Confidential Information during the term of the Contract. *(See, however, the expiration provision in section 1 above.)*

(b) Confidential Information copies need not be returned or destroyed unless the Contract unambiguously says otherwise[14] — and even in that case:

(1) Recipient need not return or destroy copies that would be burdensome or unduly costly to locate and identify (e.g., electronically-stored information); and

(2) Recipient may maintain a reasonable number of archive copies for the purpose of providing evidence concerning just what Confidential Information Recipient did or did not receive.

GENERAL PROVISIONS

The following general provisions apply to the entire Contract (in addition to the Protocol terms and conditions above) unless unambiguously stated otherwise either (i) below, or (ii) in the Contract itself.[15]

[13] This "not a breach" provision is included as the notice required for employment- and consulting agreements by 18 U.S.C. § 1833(b)(3).

[14] Return or destruction not required: Anyone who has ever participated in litigation discovery of electronically-stored information ("ESI") can attest to the difficulty and expense of searching through electronic documents; purging Confidential Information from electronic files would normally be quite burdensome.

[15] These (bare-bones) general provisions are pretty representative of the minimal general provisions that would normally be found in a contract of this kind.

9. **Amendments in writing**

For an amendment to the Contract to be effective, it must:

(1) be in writing;

(2) refer to the Contract and state that it is being amended;

(3) set out the terms of the amendment; and

(4) be signed by the party sought to be bound by the amendment.

10. **Assignment consent**

A receiving party may not delegate its obligations under this Protocol without the prior written consent of Discloser **except** in connection with a sale or other disposition of substantially all the assets of Recipient's business to which the Contract is related. *(See also the disclosure restrictions in section 6 above.)*

11. **Entire agreement**

The Contract sets forth the parties' final, complete, exclusive, and binding statement of their agreement concerning the subject matter of the Contract; neither party has made any other promises, representations, or warranties of any kind concerning that subject matter.

12. **Independent contractors**

(a) Neither party will hold itself out as an employee, agent, partner, joint venturer, division, subsidiary, or branch of the other party in respect of the Contract — and nothing in the Contract is to be interpreted as creating any such relationship between the parties.

(b) Neither party has, nor will it hold itself out as having, authority to make commitments or representations on behalf of the other party in respect of the Contract.

(c) No signatory party, in agreeing to this Contract, intends to enter into a fiduciary relationship with any other individual or organization.

13. **Internal dispute escalation**

IF: The parties disagree about a matter relating to the Contract but are unable to resolve the disagreement at the working level;

THEN: If either party so requests in writing, each party must internally escalate the disagreement at least two levels "up" in succession if necessary.[16]

[16] Internal dispute escalation: Escalation can be effective in resolving disputes at the working level because, as one article puts it: "Superiors are unlikely to look with favor on subordinates who send problems up the line for resolution. The subordinates' job is to resolve problems, not escalate them." Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration, 109 COLUM. L. REV. 431, 481 (2009).

14. Notices

(a) All notices under the Contract: (i) must be in writing, and (ii) if addressed to an organization, must be marked for the attention of a specific individual, office, or position in the organization.[17]

(b) Permissible addresses for notice include those stated in the Contract and any other address reasonably communicated.

(c) Notices are effective upon receipt or refusal; notices addressed to an organization are effective upon receipt or refusal by an individual who is the organization's agent for purposes of receiving communications of the general type sent (for example, a mailroom clerk).

(d) A notice that is sent by email but is not read by the addressee is nevertheless deemed received if, but only if, it is delivered to an email account whose address has been expressly designated in writing, by the party being notified, as an address to which notices may be sent.[18]

(e) A notice to a party that cannot be found is deemed effective after reasonable delivery efforts.

(f) To help get disputed matters resolved early, each party is encouraged, but not required, to send a copy of significant notices to the notified party's counsel by any reasonable means; a significant notice might be, for example, a notice of breach or of termination.

15. Signatures

(a) The Contract may be signed in separate counterparts; a party may deliver its signed counterpart by transmitting a signed signature page electronically, e.g., by FAX.[19]

(c) The parties agree that electronic signatures may be used to sign the Contract, including but not limited to an exchange of emails signifying agreement.[20]

16. Survival

The rights and obligations set forth in this Protocol will survive any termination of the Contract (including for this purpose any expiration of the Contract).

17. Third-party beneficiaries

The parties do not intend for the Contract to create any right or benefit for any party except themselves, other than to the extent (if any) expressly stated in the Contract.

— END—

[17] An attention-line requirement reduces the chances that a notice to an organization might go astray during routing.

[18] Notice-by-email restrictions: These restrictions are included because (absent agreement otherwise a notice received by email might well be effective even if no human recipient ever saw it; this could occur, for example, under § 15(e) of the Uniform Electronic Transactions Act.

[19] If just the signature page will be transmitted, then the signature page should make it very clear just which version of the Contract is being agreed to — failing to do this led to one contract's being held unenforceable because the parties had signed different drafts with different terms. See Kotler v. Shipman Assoc., LLC, No. 2017-0457-JRS (Del. Ch. Aug. 27, 2019) (rendering judgment for company).

[20] Electronic signatures: See note 2 above.