Suggested Language: Non-Disclosure Agreement
WITH ANNOTATIONS

This Non-Disclosure Agreement (this "**Agreement**")[1] is entered into and made effective as of [date] (the "**Effective Date**"), between [Your Company's Full Legal Name], a [Delaware] corporation, whose address is [address] ("[**Short Name**]"), and [the other party's full legal name], a [Delaware] corporation, whose address is [address] ("**Company**").[2]

[Short Name] and Company desire to [engage in discussions regarding a potential agreement or other transaction between the parties] (the "**Purpose**").[3] In connection with such discussions, the parties may disclose to each other certain confidential information or materials.

In consideration of the foregoing, the parties agree as follows:

1. **CONFIDENTIAL INFORMATION.** For purposes of this Agreement, "**Confidential Information**" of a party means any information or materials disclosed by or on behalf of that party to the other party [before, on or after the effective date of this Agreement][4] that [a person exercising reasonable business judgment would understand to be confidential or proprietary, including without limitation: business plans, competitive strategy, capitalization tables, budgets, and financial statements; costs, prices, and marketing plans; contracts and licenses; employee, customer, supplier, shareholder, partner or investor lists; inventions, improvements, designs, formulae, algorithms, processes, technology, know-how, business processes, business models and trade secrets; notes, recordings of telephone or video calls, sketches, flow charts, formulas, blueprints, summaries and elements thereof; source code,

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[1] **Defining the Scope of "Purpose":** In most cases, "Purpose" should be defined broadly to cover general discussions between the parties in exploring the possibility of a business relationship (see broad example language in brackets). A more specific purpose is relevant to the definitive contract that is signed after the NDA (such as a joint development agreement). Such definitive contracts generally include specific confidentiality provisions relevant to an ongoing business relationship that govern that specific engagement. Where this is the case, make sure those specific provisions supersede the NDA.

At other times, the parties may intend the NDA to be specific to only a single project, teaming opportunity, or investment. In those cases, the "Purpose" is defined narrowly to refer only to that project, opportunity, or investment and the "Term" is relatively short. Where this happens, **be cautious as the disclosing party** to make sure you only share information relevant to that specific purpose. Also, **be cautious as the receiving party** to make sure you only use the information received for the specific purpose authorized.

If you are likely to be primarily the disclosing party, consider whether to narrow the scope of the term "Purpose" and also broaden the definition of "Confidential Information."

Finally, consider using this opportunity to clarify the scope of your relationship with the counterparty. For example, a startup may consider asking an established defense prime contractor: (1) Where does your business fit within their broader ecosystem? (2) Are you a "subcontractor" fulfilling a specific government customer need, or are the parties exploring potential future opportunities? (3) Is the legacy partner procuring on behalf of the government?

[2] **Disclosures Prior to NDA Execution:** Disclosing confidential or proprietary information before entering an NDA is signed may leave the disclosing party vulnerable to arguments that the information ceased to be confidential as of disclosure. To protect previously disclosed information, the definition of "Confidential Information" should specifically cover all materials disclosed "*before, on or after the effective date of this Agreement.*"

[3] **Including Potentially Patentable Inventions in Definition of "Confidential Information":** If you expect to disclose potentially patentable inventions, ensure the definition of "Confidential Information" specifically covers these kinds of disclosures. Publicly disclosing an invention "starts the clock" under US patent law on a 12-month grace period from the **earliest** date of public disclosure to file a US patent application. Patent law in the UK and the EU have no such grace period so **any** public disclosure could affect your rights in those jurisdictions.

[4] **"Confidential Information" Definition Option #1 – Broad Definition with Illustrative List**: This is a broad definition of Confidential Information without a marking requirement, which reduces the administrative burden for tracking. Individual listed items can be added or removed as appropriate for the situation.

object code, graphical design, databases, user interfaces, works of authorship, and other intellectual property[5], including that of any customer, supplier or other third party; unpublished patent applications; and strategy, activities, or contemplated activities with respect to development, acquisition, exploitation and/or enforcement of intellectual property rights.][6] [:(a) if disclosed in writing or in the form of tangible materials, is marked "confidential" or "proprietary" or with a similar designation at the time of such disclosure; (b) if disclosed orally or presented visually, is identified as "confidential" or "proprietary" at the time of such disclosure, and is summarized in a writing sent by the disclosing party to the receiving party within thirty (30) days after any such disclosure; or (c) due to its nature or the circumstances of its disclosure, a person exercising reasonable business judgment would understand to be confidential or proprietary.][7] [8] [The existence of this Agreement, the Purpose, and the fact that the parties are engaged in discussions with respect thereto will be deemed Confidential Information of each party.][9]

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[5] "**Confidential Information" Definition Option #2 – Definition with Marking and Summarizing Requirements**: This second definition is a common option that specifies different methods to indicate whether information is "confidential" or "proprietary." Startups should discuss with legacy partners if these marking and summarizing requirements are not feasible. If the NDA must include these requirements, pay attention to these details to ensure that your information is protected. Clause (c) serves as a "safety net" for a disclosing party who may have administrative challenges in complying with the marking requirements, but some may argue this makes the definition overly broad.

[6] **Disclosure of Technical Data May Trigger Export Controls:** Disclosure of technical information or software source code to non-US entities or individuals may be considered an export of "technology" or "technical data" under the Export Administration Regulations (EAR) or International Traffic in Arms Regulations (ITAR), which may require an export authorization. Technology and technical data can include information in tangible or intangible form, such as written or oral communications, blueprints, drawings, photographs, plans, instructions, or documentation about the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of an item. Whether you need an export authorization depends on how your products and services are controlled under the applicable regulations. Consult your export control counsel for specific guidance on the company's product(s) and any legal restrictions on sharing technical data outside of the US or with foreign nationals.

[7] **Preserving Confidentiality of the Relationship:** Include this language if the parties want to maintain the existence of their relationship and interactions as confidential.

[8] **Tailoring the Confidentiality Obligations for the Situation:** These obligations can be customized and tailored to be more or less permissive or restrictive to match the sensitivity of the Confidential Information and the Purpose.

[9] **Restrictions on Using Patent Information to Assert Infringement:** If the Confidential Information to be disclosed relates to patents or patent applications of the disclosing party, the receiving party may want to add language clarifying that such information may not be used to claim that the receiving party infringed the disclosing party's patent. Example language: "Neither party, as a disclosing party, nor any of its affiliates shall use (including but not limited to introduction into evidence or seeking discovery with respect to) any Confidential Information relating to the patents disclosed by the disclosing party to the receiving party in connection with the Purpose, or any information about the disclosing party's patents that the receiving party may receive in connection with the Purpose, or the review of any of the foregoing by the receiving party, for asserting or establishing that the receiving party had notice or knowledge of infringement of, or of the existence of, any of the disclosing party's patents as of the date of such disclosure of Confidential Information by the disclosing party or as of the date of receipt of information about any of the disclosing party's patents, or as of any other time during the Term, for any purpose, including but not limited to: (i) initiating the accrual of damages for infringement of any of such patents; (ii) proving willfulness in support of a claim for willful infringement of any of such patents; or (iii) establishing a basis for enhancement of damages for infringement of any of such patents. This provision shall be binding upon any successors in or assignees to the parties' respective patents."

2. **OBLIGATIONS AND RESTRICTIONS.**[10] Each party agrees: (a) to maintain the other party's Confidential Information in strict confidence, and protect and safeguard it using at least the same degree of care as it uses to protect the confidentiality of its own confidential information of similar importance, but, in any event, no less than a commercially reasonable degree of care; (b) not to disclose such Confidential Information to any third party; and (c) not to use such Confidential Information for any purpose other than the Purpose.[11] Each party may disclose the other party's Confidential Information to its employees and consultants[12] who have a *bona fide* need to know such Confidential Information solely for, and only to the extent necessary to pursue, the Purpose; *provided that* each such employee and consultant is bound by a written agreement that contains non-use and confidentiality obligations at least as protective of the other party's Confidential Information as those set forth in this Agreement. Neither party will remove, alter or obscure any markings or other restrictive legends on the other party's Confidential Information.

3. **EXCEPTIONS.** The obligations and restrictions in Section 2 will not apply to any information or materials [that] / [to the extent that the receiving party can demonstrate through written evidence that such information or materials][13][14]:

(a) were, at the date of disclosure, or have subsequently become, generally known or available to the public through no act or failure to act by the receiving party;

(b) were rightfully known by the receiving party without restriction as to use or disclosure prior to receiving such information or materials from the disclosing party;

(c) are rightfully acquired by the receiving party from a third party who has the right to disclose such information or materials without breach of any obligation of confidentiality or restricted use to the disclosing party; [or]

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[10] **Coverage of Employees / Consultants:** Generally, the NDA also covers employees and consultants who need to know the Confidential Information to further the Purpose. If the counterparty has a complex team or organizational structure, it is worth discussing with them to clarify whether this NDA covers all teams that you might interact with or whether certain teams must be subject to a separate NDA (e.g., if a team is located under a separate affiliated entity).

[11] **Proof to Meet Exceptions:** The optional language requiring the receiving party to substantiate the exceptions with written evidence raises the burden on the receiving party claiming the exception. Regardless of whether the NDA includes this kind of language, as the receiving party, you should maintain supporting evidence if you want to rely upon any of these exceptions. For example, preserve any time-stamped emails showing that you legitimately received Confidential Information prior to signing the NDA or copies of public sources of information.

[12] **Proprietary Information included in a Government Bid:** Confirm whether the counterparty has included an exception for information included in a bid under FAR 52.215-1 (or similar FAR clause). Proprietary information submitted as part of a proposal can still be limited from public disclosure under FAR 52.215-1(e) where appropriate legends are included. As a result, exempting any such information from confidentiality protections is overly broad. If you are the receiving party using proprietary information of the disclosing party in a bid, ensure appropriate legends are applied and that the disclosing party has consented to such use.

[13] **Exceptions – Independently Developed Information:** Of the 3 options provided (access, reference and use), the most commonly used standard is access.

[14] **Requiring Receiving Party to Assist with Opposing Disclosure:** Some parties may wish to add an obligation that the receiving party will also provide "reasonable assistance in opposing such disclosure or seeking a protective order or other limitations on disclosure." When adding a reasonable assistance requirement, consider whether to include a provision clarifying that the costs and expenses of these efforts are the responsibility of the disclosing party.

(d) are independently developed by the receiving party without [access to] / [reference to] / [use of][15] any Confidential Information of the disclosing party; [or]

(e) [are disclosed to a U.S. government regulatory authority for the purpose of reporting waste, fraud, or abuse pursuant to U.S. federal whistleblower laws.]

4. **COMPELLED DISCLOSURE.** Nothing in this Agreement will be deemed to restrict a party from disclosing the other party's Confidential Information to the extent required by any order, subpoena, law, statute or regulation, *provided that* the party required to make such a disclosure uses reasonable efforts to give the other party sufficient advance notice to enable the other party to prevent or limit such disclosure.[16] The receiving party shall disclose no more than that portion of the Confidential Information which[, on the advice of legal counsel,] such order, subpoena, law, statute or regulation specifically requires the receiving party to disclose.

5. **RETURN OF CONFIDENTIAL INFORMATION.[17]** Upon the completion or abandonment of the Purpose,[18] or earlier upon the disclosing party's written request, the receiving party will promptly return to the disclosing party or, at the disclosing party's option, destroy, all tangible items and embodiments containing or consisting of the disclosing party's Confidential Information and all copies thereof (including electronic copies), and any notes, analyses, compilations, studies, interpretations, memoranda or other documents (regardless of the form thereof) prepared by or on behalf of the receiving party that contain or are based upon the disclosing party's Confidential Information.[19] [20]

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[15] **Tips to Ease Administrative Burden of Returning Confidential Information**: Implement an internal organizational system to separate Confidential Information received under an NDA from other files and materials. Mark any notes or other materials prepared by your team that contain or are based upon the disclosing party's Confidential Information to easily distinguish the information later. Keep in mind that if you need to return or deliver the disclosing party's Confidential Information to them upon completion of the Purpose or termination of the NDA, your notes may constitute the Confidential Information of the disclosing party, and delivering those may result in disclosing your own confidential assessments or determinations to the disclosing party. To mitigate this, bifurcate what is based upon the disclosing party's Confidential Information and what is based on your Confidential Information or your assessment, and avoid comingling other materials that are not related to the disclosing party's information.

[16] **Return of Confidential Information:** It may be hard to know when discussions are complete or abandoned; consider tying this obligation to the expiration or termination of the agreement (*i.e.*, the NDA).

[17] **Return or Destruction of Physical Samples:** If physical samples or tangible materials will be exchanged, there should be provisions regarding no reverse engineering or reproduction and the return or destruction of samples. Talk to your attorney for specific guidance.

[18] **Exception to Retain Information Under the Attorney-Client Privilege:** If you anticipate that your attorneys may review or analyze the other party's Confidential Information in the course of representation, consider adding an exception to allow work product or communications covered by the attorney-client privilege to be retained solely in the possession of the receiving party's attorney.

[19] **No License to IP:** The IP rights and restrictions depend on the type of Confidential Information shared. For example, omitting the "no license" provision is less of a risk if the Confidential Information does not contain any IP. Generally, ensure that the disclosing party continues to own and retain all rights in their Confidential Information, and that there is no license granted to the receiving party with respect to Confidential Information (except for the limited use rights set forth in the NDA). As a related matter, consider the implications of including or not including a residuals clause See footnote 22 for additional information.

[20] **Residuals Clause:** Consider carefully the implications that including a residuals clause may have on your company's IP and proprietary information. Including a residuals clause may mitigate the risk of trade secret / IP misappropriation claims from third parties arising from your personnel inadvertently incorporating a third party's Confidential Information that has been retained in their memory into your company's IP. On the other hand, a residuals clause may imply the disclosing party has granted to the receiving party a license to the Confidential Information and trade secrets which may not have been intended or anticipated. Pay particular attention to the circumstances in which a residuals clause is included, the purpose of the NDA, and whether the counterparty may receive or potentially be exposed to critical technology or fundamental innovations that could become subject to the

6. **NO OBLIGATIONS.** Each party retains the right, in its sole discretion, to determine whether to disclose any Confidential Information to the other party. This Agreement imposes no obligation on either party to negotiate or enter into any other agreements or arrangements with the other party, whether or not related to the Purpose.

7. **NO LICENSE.**[21] All Confidential Information remains the sole and exclusive property of the disclosing party. Each party acknowledges and agrees that nothing in this Agreement will be construed as granting any rights to the receiving party, by license or otherwise, in or to any Confidential Information of the disclosing party, or any patent, copyright or other intellectual property or proprietary rights of the disclosing party, except for the limited right of use solely for the Purpose as specified in this Agreement.[22]

8. **NO WARRANTY.** ALL CONFIDENTIAL INFORMATION IS PROVIDED BY THE DISCLOSING PARTY "AS IS" WITHOUT EXPRESS OR IMPLIED WARRANTIES OF ANY KIND. Neither party shall have any liability to the other party resulting from the Confidential Information disclosed to the other party or for its use or any errors or omissions in it.

9. **TERM.** The term of this Agreement will commence on the Effective Date and expire three (3) years [thereafter] / [from the date of last disclosure of Confidential Information by either party[23]]; *provided that* either party may terminate this Agreement prior to expiration [upon thirty (30) days'] / [by giving] written notice to the other party. Notwithstanding anything to the contrary herein, each party's rights and obligations under this Agreement shall survive any expiration or termination of this Agreement for a period of three (3) years thereafter [except that, as to any Confidential Information that the disclosing party maintains as a trade secret, the receiving

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residuals clause. Consider seeking specific advice from IP counsel based on the situation. An example residuals clause: "The receiving party may use for any purpose, without breach of its obligations hereunder, the general knowledge, skills and experience, concepts, ideas, know-how, and techniques and understandings retained in the unaided memory of any of the receiving party's representatives that may have been acquired as a result of such representative's authorized access to the disclosing party's information. A representative's memory is "unaided" if the representative has not intentionally memorized information for the purpose of retaining and later using or disclosing it."

[21] **Term of NDA vs. Length of Confidentiality Obligations**: Pay attention to how the effective period of the NDA and the length of confidentiality protections or "term(s)" are measured or defined. These may not be the same length of time. For example, one provision may define the effective period of the NDA (i.e., the duration of your information-sharing relationship with the commercial partner), and another provision may define the length of the confidentiality obligations, which can survive after the termination or expiration of the NDA. The duration of the NDA is typically 2-5 years, and the duration of each party's confidentiality obligations may be for some other period measured from either the date that specific information was disclosed or for 2-3 years after the effective period of the NDA has ended. Exercise caution as the date of last disclosure can be hard to determine if multiple people on each side are disclosing information over an extended period. For greater certainty, we recommend tying the effective duration of the NDA to the Effective Date and ensuring that confidentiality obligations run the entirety of the effective duration of the NDA plus the survival period.

[22] **Trade Secret Post-Termination Confidentiality:** If a party is disclosing sensitive trade secrets under the NDA, it is common to clarify that such information is covered by a <u>perpetual</u> survival period notwithstanding a sunset clause. However, many companies prefer not to receive or disclose trade secrets under an NDA meant for general business discussions, and explicitly exclude the exchange of that type of information under such an NDA. (Trade secrets are commercially valuable information that is known only to a limited group and is protected by reasonable confidentiality measures. Patents, on the other hand, require you to disclose inventions publicly and the duration of protection is much shorter.) Consider which approach is appropriate for your company.

[23] **Exclusivity, Non-Compete, Non-Solicit Terms, and Limitation of Liability:** Be on the lookout for these kinds of restrictive provisions. They are not typical for an NDA and may be inappropriate commercial restraints given the circumstances of the NDA. If there is a limitation of liability in your draft NDA, make sure that the counterparty's liability for a breach of the NDA is <u>not</u> limited to only direct harm. (This is the opposite of most commercial agreements, where parties want more certainty around their liability exposure.) For an NDA, it may be hard for the disclosing party to provide proof of direct harm as a result of the breach, as breach of confidentiality usually results in indirect harm due to others becoming aware of your Confidential Information.

party's obligations under Section 2 will remain in effect for as long such Confidential Information remains a trade secret].[24]

10. **EQUITABLE RELIEF.** Each party hereby agrees that the unauthorized use or disclosure of the disclosing party's Confidential Information may cause the disclosing party to incur irreparable harm and significant damages for which there may be no adequate remedy at law. Accordingly, each party agrees that the disclosing party will have the right to seek immediate equitable relief to enjoin any unauthorized use or disclosure of its Confidential Information, in addition to any other rights and remedies that it may have at law or otherwise.

11. **MISCELLANEOUS.**[25] This Agreement will be governed and construed in accordance with the laws of the State of [California], without giving effect to any principles of conflict of laws that would lead to the application of the laws of another jurisdiction. Any legal action or proceeding arising under this Agreement will be brought exclusively in the federal or state courts located in the [Northern District of California] and the parties irrevocably consent to the personal jurisdiction and venue therein. This Agreement is the complete and exclusive agreement between the parties with respect to its subject matter and supersedes all prior or contemporaneous agreements, communications and understandings, both oral and written, between the parties with respect to its subject matter. This Agreement may be amended or modified only by a written document executed by duly authorized representatives of both parties. If any provision of this Agreement is held invalid, illegal or unenforceable, that provision will be enforced to the maximum extent permitted by law, given the fundamental intentions of the parties, and the remaining provisions of this Agreement will remain in full force and effect. Neither party may assign or transfer any rights or obligations under this Agreement, by operation of law or otherwise, without the other party's prior written consent, and any attempted assignment without such consent will be void. Subject to the foregoing, this Agreement is binding upon and will inure to the benefit of each of the parties and their respective successors and permitted assigns. This Agreement may be executed in counterparts, each of which will be deemed an original, and all of which together will constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Mutual Non-Disclosure Agreement by their duly authorized officers or representatives.

[YOUR COMPANY'S FULL LEGAL NAME]:	**COMPANY:**
Signature:	Signature:
Name:	Name:
Title:	Title:

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[24] **Feedback:** Some NDAs include language that allows the receiving party to use feedback or suggestions provided by the disclosing party regarding the receiving party's products and materials. If you anticipate incorporating feedback in your product or services, consider consulting an attorney to help draft these terms. Watch out for provisions that could put the receiving party at risk of paying royalties simply for using feedback, or a broad definition of "Feedback" that could be a quasi-exception to the NDA's confidentiality provisions.

[25] **Signature and Recordkeeping Procedures for Executing NDAs:** A general reminder to startups to implement a signature authority policy and recordkeeping procedure so that the sales and legal teams work together to review NDAs before signature, organize executed NDAs in an accessible location, and track ongoing obligations across various NDAs (see footnote 1 for tips on creating an NDA tracker).