



THE MORGAN LEWIS M&A ACADEMY

SELECT CONFIDENTIALITY

AGREEMENT PROVISIONS

Scope of Confidential Information.

“**Evaluation Material**” means all information, data, documents, agreements, files, and other materials, whether disclosed orally or stored in written, electronic, or other form or media, which is obtained from or disclosed by the Disclosing Party or its Representatives before or after the date hereof regarding the Company, including, without limitation, all analyses, compilations, reports, forecasts, studies, samples and other documents prepared by or for the Recipient **[which contain or otherwise reflect] [to the extent it contains or otherwise reflects]** or are generated from such information, data, documents, agreements, files, or other materials.¹

Exceptions.

The term “Evaluation Material” as used herein does not include information that (i) at the time of disclosure or thereafter is generally available to and known by the public (other than as a result of its disclosure directly or indirectly by the Recipient or its Representatives **[in violation of this Agreement]**); (ii) was available to the Recipient from a source other than the Disclosing Party or its Representatives, provided that such source[, to Recipient’s **knowledge** [after **reasonable inquiry**],]² is not and was not bound by a confidentiality agreement regarding the Company; or (iii) has been independently acquired or developed by the Recipient without violating any of its obligations under this Agreement.

Duty of Confidentiality and Non-Use.

The Recipient shall keep the Evaluation Material strictly confidential and shall not use the Evaluation Material for any purpose other than to evaluate, negotiate, and consummate the Transaction.³ The Recipient shall not disclose or permit its Representatives to disclose any Evaluation Material except (a) if required by law, regulation, or legal or regulatory process, but only in accordance with **Section [4]**, [or] (b) to its Representatives, to the extent necessary to permit such Representatives to assist the Recipient in evaluating, negotiating, and consummating the Transaction, [or (c) to Permitted Co-bidders,]⁴ or (d) as permitted in **Section [8]**; provided that the Recipient shall require each such Representative to be bound by the terms of this Agreement to the same extent as if they were parties hereto and the Recipient shall be responsible for any breach of this Agreement by any of its Representatives.⁵

Exception For Legally Required Disclosure.

¹ In the case of the Disclosing Party, the definition of Evaluation Material should be broad enough to encompass every type of material that will be disclosed to the recipient and every way that the material could be disclosed (for example, oral disclosures). If the Disclosing Party is concerned about particular information, it may want to list out certain categories of materials preceded by the words “including, but not limited to.” It is important to include materials that the Recipient creates (or materials created for the recipient) using the evaluation material.

² The Disclosing Party would typically want to impose a requirement that this other disclosure not violate another agreement and impose a duty on the Recipient to make inquiries about other sources of information about the Disclosing Party.

³ Disclosing Party will try to define Transaction to include only negotiated deals and not including any hostile acquisitions or similar actions.

⁴ This would be included only if the bidder was permitted to team up with other private equity funds for a joint bid.

⁵ Recipients will often negotiate for certain of its representatives to sign confidentiality agreements directly with the Disclosing Party and the Recipient would not be responsible for breaches by those Representatives.

If the Recipient or any of its Representatives is required, in the written opinion of the Recipient's counsel, to disclose any Evaluation Material, by law, regulation, or legal or regulatory process, the Recipient shall (a) take all reasonable steps to preserve the privileged nature and confidentiality of the Evaluation Material, including requesting that the Evaluation Material not be disclosed to nonparties or the public; (b) give the Disclosing Party prompt prior written notice of such request or requirement so that the Disclosing Party may seek, at its sole cost and expense, an appropriate protective order or other remedy; and (c) cooperate with the Disclosing Party, at the Disclosing Party's sole cost and expense, to obtain such protective order. In the event that such protective order or other remedy is not obtained, the Recipient (or such other persons to whom such request is directed) will furnish only that portion of the Evaluation Material which[, on the [written] advice of the Recipient's counsel,]⁶ is legally required to be disclosed and, upon the Disclosing Party's request, use its best efforts to obtain assurances that confidential treatment will be accorded to such information.

Obligation to Keep Transaction Discussions Confidential.

Except for such disclosure as is necessary not to be in violation of any applicable law, regulation, order or other similar requirement of any governmental, regulatory, or supervisory authority [or any applicable listing agreement], the Recipient shall not, and shall not permit any of its Representatives to, without the prior written consent of the Disclosing Party, disclose to any person (a) the fact that the Evaluation Material has been made available to it [or any Permitted Co-bidder] or that it [or any Permitted Co-bidder] has received or inspected any portion of the Evaluation Material, (b) the existence or contents of this Agreement, (c) the fact that investigations, discussions, or negotiations are taking or have taken place concerning the Transaction, including the status thereof, or (d) any terms, conditions, or other matters relating to the Transaction.

⁶ Disclosing Parties will sometimes require that the Recipient seek advice of counsel before deciding that disclosure is required, and may also sometimes require that this advice should be in writing.

Destruction or Return of Information.

At any time upon the Disclosing Party's written request, the Recipient shall promptly, and in any event no later than [five] days after the request, return all Evaluation Material (including all copies, extracts, or other reproductions) to the Disclosing Party or certify in writing to the Disclosing Party that such Evaluation Material (including any Evaluation Material held electronically) has been destroyed [and] provided that [(i) neither the Recipient nor any of its Representatives shall be required to destroy any electronic copy of any Evaluation Material that is created pursuant to such Person's standard electronic backup and archival procedures if (x) personnel whose functions are not primarily information technology in nature do not have access to such retained copies and (y) personnel whose functions are primarily information technology in nature have access to such copies only as reasonably necessary for the performance of their information technology duties (e.g., for purposes of system recovery),]⁷ [and] (ii) the Recipient and its Representatives may each retain (a) one copy of any Evaluation Material to the extent required to defend or maintain any litigation relating to this Agreement or the Evaluation Material, or established document retention policies and (b) such copies of the Evaluation Material to the extent required to comply with requirements of applicable law,⁸ [and] (iii) neither the Recipient nor any of its Representatives shall be required to destroy any proprietary financial analyses or models prepared by the Recipient or its Representatives in connection with the evaluation of the Transaction so long as all Evaluation Material is deleted from all such financial analyses and models].⁹ Notwithstanding the return or destruction of Evaluation Material, the Recipient and its Representatives shall continue to be bound by their obligations of confidentiality and other obligations hereunder.

Limitation on Co-Bidders.

The Recipient hereby represents and warrants that the Recipient is not acting as a broker for or Representative of any other Person in connection with the Transaction, and is considering the Transaction only for its own account [and for the account of its affiliates] [and Permitted Co-bidders]. Except with the prior written consent of the Disclosing Party, the Recipient agrees that (i) it will not act as a joint bidder or co-bidder with any other Person with respect to the Transaction, [other than its Permitted Co-bidders,] and (ii) neither the Recipient nor any of its Representatives (acting on behalf of the Recipient or its affiliates) will enter into any discussions, negotiations, agreements, arrangements, or understandings (whether written or oral) with any other Person regarding the Transaction, other than the Disclosing Party and its Representatives, [and] the Recipient's Representatives (to the extent permitted hereunder) [and Permitted Co-bidders].

Restrictions on Financing Sources.

Notwithstanding anything to the contrary contained herein, without the prior written consent of the Disclosing Party, the Recipient agrees that neither the Recipient nor any of its Representatives will disclose any Evaluation Material to any actual or potential sources of financing (debt, equity, or otherwise), other than [(i)] bona fide third-party institutional lenders who are or may be engaged to provide debt financing to the Buyer or its affiliates [and are disclosed on Exhibit [B] hereto] [and (ii) Permitted Co-bidders].¹⁰

Non-Solicitation.

⁷ Recipients will occasionally ask for an exception like this to avoid requirements to search extensively through archived electronic records for material to be deleted.

⁸ If the Recipient requests this provision, the Disclosing Party should require that the archived material be kept under the control of the legal department to ensure that (i) the information is kept apart from operating personnel that may for example compete with the Disclosing Party and (ii) someone in the legal department is in a position to decide whether the retrieval of information is permitted before someone accesses the information.

⁹ Sometimes this is requested by Recipients; it should not generally be controversial.

¹⁰ Occasionally sellers will want to control not only any consortium bids, but also the types of financing sources that may be approached for debt financing.

[Except with the express permission of the Disclosing Party, the Recipient agrees that for a period of [NUMBER] year[s] from the Effective Date, neither the Recipient nor its Representatives will directly or indirectly **[solicit] [or hire] [any officer, director, or employee]**¹¹ of the Disclosing Party, the Company or any of their respective subsidiaries, except pursuant to a general solicitation which is not directed specifically to any such employees.]¹²

Specific Performance.

The parties agree that money damages would not be a sufficient remedy for any breach of this Agreement by the Recipient and that in addition to all other remedies it may be entitled to, the Disclosing Party shall be entitled to seek specific performance and injunctive or other equitable relief as a remedy for any such breach.¹³

Override of Other Provisions.

The terms of this Agreement shall control over any additional purported confidentiality requirements imposed by any offering memorandum, web-based database or similar repository of Evaluation Material to which the Recipient or any of its Representatives is granted access in connection with the evaluation, negotiation, or consummation of the Transaction, notwithstanding acceptance of such an offering memorandum or submission of an electronic signature, "clicking" on an "I Agree" icon or other indication of assent to such additional confidentiality conditions, it being understood and agreed that its confidentiality obligations with respect to Evaluation Material are exclusively governed by this Agreement and may not be enlarged except by a written agreement that is hereafter executed by each of the parties hereto.¹⁴

No Representations or Warranties or Commitments.

The Recipient understands and agrees that none of the Disclosing Party, the Company, or any of their respective Representatives (a) have made or will make any representation or warranty hereunder, expressed or implied, as to the accuracy or completeness of the Evaluation Material or (b) shall have any liability hereunder to the Recipient or its Representatives relating to or resulting from the use of the Evaluation Material or any errors therein or omissions therefrom. The parties agree that unless and until a definitive agreement between the Disclosing Party and Recipient has been executed and delivered with respect to the Transaction, none of the Company or the Disclosing Party will be under any legal obligation of any kind whatsoever with respect to the Transaction, including any obligation to (i) consummate a Transaction, (ii) conduct or continue discussions or negotiations, or (iii) enter into or negotiate a definitive agreement. The Disclosing Party reserves the right, in its sole discretion, to reject any and all proposals made by the Recipient or on its behalf with regard to the Transaction, to terminate discussions and negotiations with the Recipient at any time and to enter into any agreement with any other Person without notice to the Recipient or any of its Representatives, at any time and for any reason or no reason.¹⁵

¹¹ Parties will often negotiate whether (i) this should be just a nonsolicit covenant or should also include nonhire provisions and (ii) any such covenant should be limited to a group of senior management, employees involved in the sale process, or all employees.

¹² Depending on the context, the Disclosing Party may want to extend this to suppliers or customers. If this extends to customers or suppliers, consult with antitrust lawyers.

¹³ Other issues that are sometimes covered are (i) a requirement to indemnify the Disclosing Party, (ii) an obligation to post bond in connection with an equitable remedy, (iii) an obligation to reimburse the Disclosing Party for legal fees and expenses (often recipients eventually agree to this), and (iv) a provision that entitles the Disclosing Party to a remedy without proof of damages.

¹⁴ This provision is an optional provision that provides that the terms of the confidentiality agreement supersede any of the boilerplate language that is customarily included in offering memoranda and when logging on to an electronic data room. It should not be a controversial addition to the agreement.

¹⁵ In order to avoid the risk of allegations that one side or the other waived these provisions orally or by course of conduct, the confidentiality agreement should provide elsewhere that it cannot be amended or waived except in writing.

Attorney-Client Privilege.

To the extent that any Evaluation Material includes materials subject to the attorney-client privilege, [neither of the Company nor] the Disclosing Party is waiving, and shall not be deemed to have waived or diminished, its attorney work product protections, attorney-client privileges, or similar protections and privileges as a result of disclosing any Evaluation Material (including Evaluation Material related to pending or threatened litigation) to the Recipient or any of its Representatives.¹⁶

¹⁶ Note that including this provision may not be sufficient to preserve attorney-client privilege or similar privileges. The disclosing truly should review privilege issues carefully before disclosing privileged materials to the third party.