



ADAMS
CONTRACTS
a division of LegalSifter

An Annotated Version of Practical Law's Mutual Confidentiality Agreement

29 November 2023

Highlighting used

 Bad

 Worse

For some background, see this blog post:

<https://adamscontracts.legalsifter.com/blog/i-examined-one-of-practical-laws-contract-templates-so-you-dont-have-to>.

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Mutual Confidentiality Agreement

This Mutual Confidentiality Agreement (this "Agreement"), effective as of July 23, 2022 (the "Effective Date"), is entered into by and between Acme Corporation, a Delaware corporation having its principal place of business at 1 Acme Boulevard, Acmetown, New York 12345 and Widgetco, Inc., a California corporation having its principal place of business at 666 Widget Avenue, Widgetville, California 56789 (together, the "Parties," and each, a "Party").

WHEREAS, in connection with Acme's ongoing purchase of widgets from Widgetco (the "Purpose"), the Parties desire to share certain information that is non-public, confidential, or proprietary in nature.

NOW, THEREFORE, in consideration of the mutual covenants, terms, and conditions set out herein, the Parties agree as follows:

1. **Confidential Information.** Except as set out in Section 2 below, "Confidential Information" means all non-public, confidential, or proprietary information, including, but not limited to, any trade secrets disclosed before, on, or after the Effective Date, by either Party (a "Disclosing Party") to the other Party (a "Recipient") or its affiliates, or to any of such Recipient's or its affiliates' employees, officers, directors, partners, shareholders, agents, attorneys, accountants, or advisors (collectively, "Representatives"), whether disclosed orally or disclosed or accessed in written, electronic, or other form or media, and whether or not marked, designated, or otherwise identified as "confidential," including, without limitation:

(a) all information concerning the Disclosing Party's and its affiliates', and their customers', suppliers', and other third parties' past, present, and future business affairs including, without limitation, finances, customer information, supplier information, products, services, organizational structure and internal practices, forecasts, sales and other financial results, records and budgets, and business, marketing, development, sales, and other commercial strategies;

(b) the Disclosing Party's unpatented inventions, ideas, methods, and discoveries, trade secrets, know-how, unpublished patent applications, and other confidential intellectual property;

(c) all designs, specifications, documentation, components, source code, object code, images, icons, audiovisual components and objects, schematics, drawings, protocols, processes, and other visual depictions, in whole or in part, of any of the foregoing;

(d) any third-party confidential information included with, or incorporated in, any information provided by the Disclosing Party to the Recipient or its Representatives; and

(e) all notes, analyses, compilations, reports, forecasts, studies, samples, data, statistics, summaries, interpretations, and other materials (the "Notes") prepared by or for the Recipient or its Representatives that contain, are based on, or otherwise reflect or are derived from, in whole or in part, any of the foregoing.

Summary of Comments on Confidentiality Agreement: General (Mutual)

Page: 1

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|---|-----------|---------------|--------------------------|------------------------------------|
| 1 | Number: 1 | Author: kadam | Subject: Comment on Text | Date: 11/2/2023 7:01:26 PM -04'00' |
|---|-----------|---------------|--------------------------|------------------------------------|
- The defined term *this Agreement* is unnecessary, adds clutter, and makes contracts harder to read by adding unnecessary initial capitals. See MSCD 2.123–.128.
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- | | | | | |
|---|-----------|---------------|--------------------------|------------------------------------|
| 1 | Number: 2 | Author: kadam | Subject: Comment on Text | Date: 11/2/2023 6:54:11 PM -04'00' |
|---|-----------|---------------|--------------------------|------------------------------------|
- It's standard to use initial capitals for the reference to the contract, but there's no basis in English usage for doing so. See MSCD 2.20, 17.30.
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|---|-----------|---------------|--------------------------|-------------------------------------|
| 1 | Number: 3 | Author: kadam | Subject: Comment on Text | Date: 11/3/2023 12:06:09 PM -04'00' |
|---|-----------|---------------|--------------------------|-------------------------------------|
- Is this the date the contract was signed, or does it indicate timing of performance? That should be made clear. See MSCD 2.37–.46.
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- | | | | | |
|---|-----------|---------------|--------------------------|------------------------------------|
| 1 | Number: 4 | Author: kadam | Subject: Comment on Text | Date: 11/2/2023 7:06:59 PM -04'00' |
|---|-----------|---------------|--------------------------|------------------------------------|
- Silly; use just *between*. See MSCD 2.47.
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|---|-----------|---------------|--------------------------|------------------------------------|
| 1 | Number: 5 | Author: kadam | Subject: Comment on Text | Date: 11/2/2023 7:08:51 PM -04'00' |
|---|-----------|---------------|--------------------------|------------------------------------|
- Put this in the notices provision. See MSCD 2.71.
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|---|-----------|---------------|--------------------------|------------------------------------|
| 1 | Number: 6 | Author: kadam | Subject: Comment on Text | Date: 11/2/2023 7:11:06 PM -04'00' |
|---|-----------|---------------|--------------------------|------------------------------------|
- Defining terms in the singular and plural is witless. See MSCD 6.5. But more to the point, the defined term *Party* is unnecessary. See MSCD 2.110–.13.
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|---|-----------|---------------|--------------------------|------------------------------------|
| 1 | Number: 7 | Author: kadam | Subject: Comment on Text | Date: 11/2/2023 7:11:23 PM -04'00' |
|---|-----------|---------------|--------------------------|------------------------------------|
- Archaic. See MSCD 2.144.
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- | | | | | |
|---|-----------|---------------|--------------------------|-------------------------------------|
| 1 | Number: 8 | Author: kadam | Subject: Comment on Text | Date: 10/4/2022 10:33:09 AM -04'00' |
|---|-----------|---------------|--------------------------|-------------------------------------|
- Redundant.
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- | | | | | |
|---|-----------|---------------|--------------------------|------------------------------------|
| 1 | Number: 9 | Author: kadam | Subject: Comment on Text | Date: 11/2/2023 7:12:21 PM -04'00' |
|---|-----------|---------------|--------------------------|------------------------------------|
- The word *proprietary* relates to ownership. It has nothing to do with confidentiality, so it's out of place here. See MSCD 13.695–.697.
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|---|------------|---------------|--------------------------|------------------------------------|
| 1 | Number: 10 | Author: kadam | Subject: Comment on Text | Date: 11/2/2023 7:13:18 PM -04'00' |
|---|------------|---------------|--------------------------|------------------------------------|
- Legalistic nonsense. See MSCD 2.165–.193.
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|---|------------|---------------|--------------------------|-------------------------------------|
| 1 | Number: 11 | Author: kadam | Subject: Comment on Text | Date: 10/4/2022 12:24:54 PM -04'00' |
|---|------------|---------------|--------------------------|-------------------------------------|
- See comments above.
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- | | | | | |
|---|------------|---------------|--------------------------|------------------------------------|
| 1 | Number: 12 | Author: kadam | Subject: Comment on Text | Date: 11/2/2023 7:15:36 PM -04'00' |
|---|------------|---------------|--------------------------|------------------------------------|
- It would be prudent to specify a date when one or both parties started disclosing confidential information.
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|---|------------|---------------|--------------------------|-------------------------------------|
| 1 | Number: 13 | Author: kadam | Subject: Comment on Text | Date: 11/3/2023 12:10:08 PM -04'00' |
|---|------------|---------------|--------------------------|-------------------------------------|
- This seems overbroad, as it suggests the possibility of, say, the recipient's accountants being surprised to find that something they received from the discloser is covered by this contract.
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|---|------------|---------------|--------------------------|-----------------------------|
| 1 | Number: 14 | Author: kadam | Subject: Comment on Text | Date: 11/24/2023 3:47:33 PM |
|---|------------|---------------|--------------------------|-----------------------------|
- This is a waste of space. Having the agreement cover all information relating to X, except for the standard carveouts, makes it unnecessary to list half a page of examples of that information. See MSCD 13.376.

2. Exclusions from Confidential Information. ¹Except as required by applicable federal, state, or local law or regulation, ³the term "Confidential Information" ²as used in this Agreement ⁴shall not include information that:

(a) at the time of disclosure is, or thereafter becomes, generally available to and known by the public other than as a result of, directly or indirectly, any violation of this Agreement by the Recipient or any of its Representatives;

(b) at the time of disclosure is, or thereafter becomes, available to the Recipient on a non-confidential basis from a third-party source, provided that such third party is not and was not prohibited from disclosing ⁵such Confidential Information to the Recipient by a legal, fiduciary, or contractual obligation to the Disclosing Party;

(c) ⁶was known by or in the possession of the Recipient or its Representatives, as established by documentary evidence, before being disclosed by or on behalf of the Disclosing Party under this Agreement; or

(d) was or is independently developed by the Recipient, as established by documentary evidence, without reference to or use of, in whole or in part, any ⁷of the Disclosing Party's Confidential Information.

3. Recipient Obligations. ⁸The Recipient shall:

(a) ⁹protect and safeguard the confidentiality of all ¹⁰such Confidential Information with at least the same degree of care as the Recipient would protect its own Confidential Information, but in no event with less than ¹¹a commercially reasonable degree of care;

(b) not use the Disclosing Party's Confidential Information, or permit it to be accessed or used, for any purpose other than the Purpose or any related transactions between the Parties, or otherwise in any manner to the Disclosing Party's detriment, including without limitation, to reverse engineer, disassemble, decompile, or design around the Disclosing Party's proprietary services, products, ¹²and/or confidential intellectual property;

(c) not disclose any such Confidential Information to any person or entity, except to the Recipient's Representatives who:

(i) need to know the Confidential Information to assist the Recipient, or act on its behalf, in relation to the Purpose or to exercise its rights under the Agreement;

(ii) are informed by the Recipient of the confidential nature of the Confidential Information; and

(iii) are subject to confidentiality ¹³duties or obligations to the Recipient that are no less restrictive than the ¹⁴terms and conditions of this Agreement.

1	Number: 1	Author: kadam	Subject: Comment on Text	Date: 11/3/2023 12:10:46 PM -04'00'	It's not clear what this refers to.
1	Number: 2	Author: kadam	Subject: Comment on Text	Date: 10/4/2022 6:22:29 PM -04'00'	Redundant.
1	Number: 3	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 7:27:47 PM -04'00'	Redundant. See MSCD 6.24.
1	Number: 4	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 7:30:36 PM -04'00'	This contract uses <i>shall</i> to express different meanings. MSCD recommends using it just to impose an obligation on a subject that's a party to the contract. According to MSCD's "categories of contract language" framework, <i>does not</i> should be used here. For a quick reference chart of the categories of contract language, go to https://www.adamsdrafting.com/the-mscd5-quick-reference-chart-of-the-categories-of-contract-language/ .
1	Number: 5	Author: kadam	Subject: Comment on Text	Date: 11/3/2023 12:12:32 PM -04'00'	This section states what doesn't constitute confidential information, so it doesn't make sense to use the defined term <i>Confidential Information</i> . Say instead <i>that information</i> .
1	Number: 6	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 7:35:55 PM -04'00'	This is redundant. See https://www.adamsdrafting.com/exploring-two-exceptions-to-the-definition-of-confidential-information/ .
1	Number: 7	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 7:44:48 PM -04'00'	Given how <i>Confidential Information</i> is defined, this is redundant. See MSCD 6.113–.114 for a comparable example. It's also used elsewhere in this contract.
1	Number: 8	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 7:37:21 PM -04'00'	Using just a subject and modal verb to introduce tabulated enumerated clauses offers little economy and makes the reader work harder. See MSCD 3.41–.42.
1	Number: 9	Author: kadam	Subject: Comment on Text	Date: 10/4/2022 12:57:32 PM -04'00'	Redundancy.
1	Number: 10	Author: kadam	Subject: Comment on Text	Date: 10/5/2022 11:14:37 AM -04'00'	This suggests that this provision is referring to a specified subset of Confidential Information. That doesn't make sense; delete. It occurs elsewhere in this contract.
1	Number: 11	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 7:48:19 PM -04'00'	It would be simpler to use <i>reasonable efforts</i> . And <i>commercially</i> is redundant. See MSCD 8.44, 8.108–.110.
1	Number: 12	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 7:49:17 PM -04'00'	Don't use <i>and/or</i> . See MSCD 11.90–.95.
1	Number: 13	Author: kadam	Subject: Comment on Text	Date: 10/4/2022 1:17:52 PM -04'00'	Redundancy.
1	Number: 14	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 7:49:31 PM -04'00'	Here and elsewhere in this contract, <i>and conditions</i> is redundant. See MSCD 13.860.

(d) ¹ be responsible for any breach of this Agreement caused by any of its Representatives.

4. ² **Additional Confidentiality Obligations.** Except as required by applicable federal, state, or local law or regulation, or otherwise as ³ mutually agreed in writing by the Parties, neither Party shall itself disclose, nor permit any of its Representatives to disclose to any person:

(a) that the Confidential Information has been made available to it or its Representatives, or that it has inspected any portion of the Confidential Information;

(b) ⁴ that discussions or negotiations may be, or are, underway between the Parties regarding the Confidential Information or the Purpose, including the status thereof; or

(c) ⁵ any terms, conditions, or other arrangements that are being discussed or negotiated in relation to the Confidential Information or the Purpose.

5. ⁶ **Required Disclosure.** Any disclosure by the Recipient or its Representatives of any ⁷ of the Disclosing Party's Confidential Information under ⁸ applicable federal, state, or local law, regulation, or a valid order issued by a court or governmental agency of competent jurisdiction (a "⁹ **Legal Order**") shall be subject to the terms of this ¹⁰ section. Before making any such disclosure, the Recipient shall make ¹¹ commercially reasonable efforts to provide the Disclosing Party with:

(a) ¹² prompt written notice of ¹³ such requirement so that the Disclosing Party may seek, at its sole cost and expense, a protective order or other remedy; and

(b) ¹⁴ reasonable assistance, at the Disclosing Party's sole cost and expense, in opposing such disclosure or seeking a protective order or other limitations on disclosure.

¹⁵ If, after providing such notice and assistance as required ¹⁶ herein, the Recipient remains subject to a Legal Order to disclose any Confidential Information, the Recipient (or its Representatives or other persons to whom such Legal Order is directed) shall disclose no more than that portion of the Confidential Information which, on the advice of the Recipient's legal counsel, such Legal Order ¹⁷ specifically requires the Recipient to disclose and, on the Disclosing Party's request, shall ¹⁸ use commercially reasonable efforts to obtain assurances from the applicable court or agency that such Confidential Information will ¹⁹ be afforded confidential treatment.

6. ²⁰ **Return or Destruction of Confidential Information.** ²¹ At any time during or after the term of this Agreement, at the Disclosing Party's written request, the Recipient and its Representatives shall promptly return to the Disclosing Party all copies, whether in written, electronic, or other form or media, of the Disclosing Party's Confidential Information, or destroy all such copies and certify in writing to the Disclosing Party that such Confidential Information has been destroyed. In addition, the Recipient shall also destroy all copies of any Notes created by the Recipient or its Representatives and certify in writing to the Disclosing Party that such copies have been destroyed. Notwithstanding the foregoing, the Recipient may retain copies of Confidential Information that are stored on the Recipient's IT backup and disaster recovery

Number: 1	Author: kadam	Subject: Comment on Text	Date: 10/5/2022 11:16:18 AM -04'00'
A clearer alternative: <i>If a representative of the Recipient discloses or uses Confidential Information other than as authorized in this agreement, the Recipient will be liable to the Disclosing Party for that disclosure or use to the same extent that the Recipient would have been had the Recipient disclosed or used that Confidential Information.</i>			
Number: 2	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 7:52:35 PM -04'00'
This assumes that the purpose is conduct of due diligence in advance of a transaction, but the purpose could instead relate to an ongoing commercial relationship.			
Number: 3	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 7:53:07 PM -04'00'
Redundant. See MSCD 13.583.			
Number: 4	Author: kadam	Subject: Comment on Text	Date: 10/5/2022 11:46:24 AM -04'00'
It would be more economical to combine the two clauses by saying, for example, <i>the existence and content of any discussions the parties have held or hold in the future.</i>			
Number: 5	Author: kadam	Subject: Comment on Text	Date: 10/4/2022 1:59:54 PM -04'00'
It would be simpler to express this first paragraph as one sentence.			
Number: 6	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 7:54:13 PM -04'00'
See previous comment.			
Number: 7	Author: kadam	Subject: Comment on Text	Date: 10/5/2022 11:47:52 AM -04'00'
Redundant. See MSCD 13.33.			
Number: 8	Author: kadam	Subject: Comment on Text	Date: 10/4/2022 2:08:26 PM -04'00'
Odd choice of defined term.			
Number: 9	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 7:56:30 PM -04'00'
<i>The Chicago Manual of Style</i> recommends not using an initial capital when referring to a part of a document. See MSCD 4.105, 17.35.			
Number: 10	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:00:41 PM -04'00'
The <i>efforts</i> standard doesn't make sense. It should instead be an unqualified obligation.			
Number: 11	Author: kadam	Subject: Comment on Text	Date: 10/4/2022 2:47:15 PM -04'00'
By law the recipient might not be permitted to notify the disclosing party.			
Number: 12	Author: kadam	Subject: Comment on Text	Date: 10/4/2022 2:01:03 PM -04'00'
Redundant, given that the notices provision requires that notices be in writing.			
Number: 13	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:02:05 PM -04'00'
It's unnecessarily legalistic to use <i>such</i> to mean "that". See MSCD 13.816–.818. (This also occurs elsewhere in this contract.)			
Number: 14	Author: kadam	Subject: Comment on Text	Date: 10/4/2022 2:03:35 PM -04'00'
It would be more concise to combine this with the previous clause.			
Number: 15	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:02:31 PM -04'00'
Don't use unenumerated paragraphs within a section. See MSCD 4.28.			
Number: 16	Author: kadam	Subject: Comment on Text	Date: 10/5/2022 11:53:18 AM -04'00'
Using <i>herein</i> invites a fight over whether it refers to the entire contract or part of the contract. See MSCD 7.24.			
Number: 17	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:03:26 PM -04'00'
This is rhetorical emphasis—it's redundant. See MSCD 1.64–.65.			
Number: 18	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:07:19 PM -04'00'
The word <i>commercially</i> is redundant. But more to the point, the <i>efforts</i> standard is unnecessary. Instead, say <i>ask the court or agency in question to keep that Confidential Information confidential.</i>			
Number: 19	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:10:15 PM -04'00'
Use the active voice. See MSCD 3.13.			
Number: 20	Author: kadam	Subject: Comment on Text	Date: 10/4/2022 2:49:29 PM -04'00'
Generally, it's not realistic to expect to apply this kind of provision to digital information.			
Number: 21	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:10:40 PM -04'00'
Redundant. See MSCD 10.132.			

(d) be responsible for any breach of this Agreement caused by any of its Representatives.

4. **Additional Confidentiality Obligations.** Except as required by applicable federal, state, or local law or regulation, or otherwise as mutually agreed in writing by the Parties, neither Party shall itself disclose, nor permit any of its Representatives to disclose to any person:

(a) that the Confidential Information has been made available to it or its Representatives, or that it has inspected any portion of the Confidential Information;

(b) that discussions or negotiations may be, or are, underway between the Parties regarding the Confidential Information or the Purpose, including the status thereof; or

(c) any terms, conditions, or other arrangements that are being discussed or negotiated in relation to the Confidential Information or the Purpose.

5. **Required Disclosure.** Any disclosure by the Recipient or its Representatives of any of the Disclosing Party's Confidential Information under applicable federal, state, or local law, regulation, or a valid order issued by a court or governmental agency of competent jurisdiction (a "**Legal Order**") shall be subject to the terms of this Section. Before making any such disclosure, the Recipient shall make commercially reasonable efforts to provide the Disclosing Party with:

(a) prompt written notice of such requirement so that the Disclosing Party may seek, at its sole cost and expense, a protective order or other remedy; and

(b) reasonable assistance, at the Disclosing Party's sole cost and expense, in opposing such disclosure or seeking a protective order or other limitations on disclosure.

If, after providing such notice and assistance as required herein, the Recipient remains subject to a Legal Order to disclose any Confidential Information, the Recipient (or its Representatives or other persons to whom such Legal Order is directed) shall disclose no more than that portion of the Confidential Information which, on the advice of the Recipient's legal counsel, such Legal Order specifically requires the Recipient to disclose and, on the Disclosing Party's request, shall use commercially reasonable efforts to obtain assurances from the applicable court or agency that such Confidential Information will be afforded confidential treatment.

6. **Return or Destruction of Confidential Information.** At any time during or after the term of this Agreement, at the Disclosing Party's written request, the Recipient and ²²its Representatives shall promptly return to the Disclosing Party all copies, whether in written, electronic, or other form or media, of the Disclosing Party's Confidential Information, or destroy all such copies and ²³certify in writing to the Disclosing Party that such Confidential Information has been destroyed. ²⁴In addition, the Recipient shall also destroy all copies of any Notes created by the Recipient or its Representatives and certify in writing to the Disclosing Party that such copies have been destroyed. Notwithstanding the foregoing, the Recipient may retain copies of Confidential Information that are stored on the Recipient's IT backup and disaster recovery

Number: 22 Author: kadam Subject: Comment on Text Date: 10/5/2022 12:20:36 PM -04'00'

The recipient's representatives aren't party to this contract, so it doesn't make sense to impose an obligation on them. They would be covered by the alternative proposed for section 3(d); delete.

Number: 23 Author: kadam Subject: Comment on Text Date: 11/2/2023 8:12:04 PM -04'00'

Legalistic. See MSCD 13.125-.27.

Number: 24 Author: kadam Subject: Comment on Text Date: 10/4/2022 2:52:02 PM -04'00'

Redundant, given the following *also*.

systems¹ until the ordinary course deletion thereof. The Recipient shall continue to be bound by the terms and conditions of this Agreement with respect to such retained Confidential Information.

7. Term and Termination.² The term of this Agreement shall commence on the Effective Date and shall expire 5 years from the Effective Date, provided that with respect to Confidential Information that constitutes a trade secret under applicable law, such rights and obligations will survive such expiration until, if ever, such Confidential Information loses its trade secret protection other than due to an act or omission of Recipient or its Representatives, and,⁴ provided that either Party may terminate this Agreement at any time by providing written notice to the other Party. Notwithstanding anything to the contrary herein,⁵ each Party's rights and obligations under this Agreement shall survive any expiration or termination of this Agreement for a period of 1 years⁶ from the date of such expiration or termination, even after the return or destruction of Confidential Information by the Recipient.

8. No Representations or Warranties. Neither the Disclosing Party nor any of its Representatives make any⁷ representation or warranty, expressed or implied, as to the accuracy or completeness of the Confidential Information disclosed to the Recipient hereunder. Neither the Disclosing Party nor any of its Representatives shall be liable to the Recipient or any of its Representatives relating to or resulting from the Recipient's use of any of the Confidential Information or any errors therein or omissions therefrom.

9. No Transfer of Rights, Title, or Interest. Each Party hereby retains its entire⁸ right, title, and interest,⁹ including all intellectual property rights, in and to all of its Confidential Information. Any disclosure of such Confidential Information hereunder shall not be construed as an assignment, grant, option, license, or other transfer of any such right, title, or interest¹⁰ whatsoever to the Recipient or any of its Representatives.

10. No Other Obligation. The Parties agree that neither Party shall be under any legal obligation of any kind whatsoever, or otherwise be obligated to enter into any business or contractual relationship, investment, or transaction, by virtue of this Agreement, except for the matters specifically agreed to herein. Either Party may¹¹ at any time, at its sole discretion with or without cause, terminate discussions and negotiations with the other Party, in connection with the Purpose or otherwise.

11. Remedies. Each Party acknowledges¹² and agrees that money damages might not be a sufficient remedy for any breach or threatened breach of this Agreement by such Party or its Representatives. Therefore, in addition to all other remedies available at law (which neither Party waives by the exercise of any rights hereunder), the non-breaching Party shall be entitled to seek specific performance and injunctive and other equitable relief as a remedy for any such breach or threatened breach, and the Parties hereby waive any requirement for the securing or posting of any bond or the showing of actual monetary damages in connection with such claim.

12. Governing Law, Jurisdiction, and Venue. This Agreement shall be¹³ governed by and construed in accordance with¹⁴ the internal laws of the State of Delaware without giving effect to any choice or conflict of law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of laws of any jurisdiction other than those of the

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- 1** Number: 1 Author: kadam Subject: Comment on Text Date: 11/2/2023 8:12:33 PM -04'00'
Say instead *until they are deleted in the ordinary course of business*. That allows you to eliminate the abstract noun *deletion* (see MSCD 17.7) and the legalistic *thereof* (see MSCD 13.355).
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- 2** Number: 2 Author: kadam Subject: Comment on Text Date: 11/2/2023 8:13:03 PM -04'00'
Giving a confidentiality agreement a term doesn't reflect what's going on. Instead, provide for a period during which disclosed information is covered by the contract and a period during which the recipient may not disclose or use confidential information except as provided in the contract. See this 2011 blog post, <https://www.adamsdrafting.com/the-notion-of-term-and-termination-in-confidentiality-agreements/>.
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- 3** Number: 3 Author: kadam Subject: Comment on Text Date: 11/2/2023 8:13:33 PM -04'00'
Referring to trade secrets like this doesn't make sense—the recipient isn't in a position to distinguish a trade secret of the disclosing party from other confidential information. Instead, say what information is covered. See this 2012 blog post, <https://www.adamsdrafting.com/how-to-state-the-duration-of-the-obligation-to-keep-information-confidential/>.
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- 4** Number: 4 Author: kadam Subject: Comment on Text Date: 10/4/2022 7:32:01 PM -04'00'
For the same reason that a term doesn't make sense, it's not clear what the implications are of this.
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- 5** Number: 5 Author: kadam Subject: Comment on Text Date: 11/2/2023 8:33:01 PM -04'00'
This adds to the confusion.
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- 6** Number: 6 Author: kadam Subject: Comment on Text Date: 11/2/2023 8:29:48 PM -04'00'
This is a document-assembly glitch: *years* should be *year*. And use of the digit *1* is another document-assembly glitch. I supplied this number as part of the document-assembly interview. Guides on English usage recommend using words initially, then switching to digits. See, e.g., Garner's *Modern English Usage* 762 (5th ed. 2022). So to be consistent with standard English usage, the *1* should have been *one*. Contract Express (the document-assembly software used by Practical Law) is capable of applying a rule that, for example, numbers up to ten are in words, after which they're in digits.
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- 7** Number: 7 Author: kadam Subject: Comment on Text Date: 11/2/2023 8:37:44 PM -04'00'
This phrase is standard, but it's hopelessly legalistic. Instead, say that neither party is making any statement to accuracy. See MSCD 3.413–.73 and this 2015 article, <https://www.adamsdrafting.com/wp-content/uploads/2015/06/Adams-Eliminating-the-Phrase-Represents-and-Warrants-from-Contracts.pdf>.
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- 8** Number: 8 Author: kadam Subject: Comment on Text Date: 11/2/2023 8:38:04 PM -04'00'
Redundancy. See 13.753.
-
- 9** Number: 9 Author: kadam Subject: Comment on Text Date: 11/2/2023 8:38:42 PM -04'00'
Redundant. See MSCD 13.376.
-
- 10** Number: 10 Author: kadam Subject: Comment on Text Date: 11/2/2023 8:39:13 PM -04'00'
This is rhetorical emphasis, so it's redundant. See MSCD 1.64–.65.
-
- 11** Number: 11 Author: kadam Subject: Comment on Text Date: 11/2/2023 8:40:28 PM -04'00'
Say instead *for any reason*. See MSCD 3.249, 13.296.
-
- 12** Number: 12 Author: kadam Subject: Comment on Text Date: 11/2/2023 8:40:36 PM -04'00'
Redundant. See MSCD 3.490.
-
- 13** Number: 13 Author: kadam Subject: Comment on Text Date: 10/5/2022 12:38:50 PM -04'00'
Redundancy. See this 2015 blog post, <https://www.adamsdrafting.com/simplifying-governing-law-provisions-part-3-governs/>.
-
- 14** Number: 14 Author: kadam Subject: Comment on Text Date: 10/5/2022 12:39:20 PM -04'00'
Expresses in two different ways, and with a lot of words, a concept that poses no real risk, namely the doctrine of *renvoi*. See this 2015 blog post, <https://www.adamsdrafting.com/simplifying-governing-law-provisions-part-2-renvoi/>.

State of Delaware. Any ¹ legal suit, action, or proceeding ² arising out of or related to this Agreement or the matters contemplated hereunder ³ shall be instituted exclusively in the federal courts of the United States or the courts of the State of Delaware in each case located in the city of Wilmington and County of Wilmington, ⁴ and each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding and ⁵ waives any objection based on improper venue or forum non conveniens. Service of process, summons, notice, or other document by mail to such Party's address set out herein shall be effective service of process for any suit, action, or other proceeding brought in any such court.

13. ⁶ Notices. All notices, ⁷ requests, consents, claims, demands, waivers, and other communications hereunder shall be in writing and shall be deemed to have been given: (a) when ⁹ delivered by hand (with written confirmation of receipt); (b) when received by the addressee if sent by a ¹⁰ nationally recognized overnight courier (receipt requested); (c) on the date sent by ¹¹ facsimile or ¹² email (with confirmation of transmission) if sent during normal business hours of the recipient, and on the next business day if sent after normal business hours of the recipient; or (d) on the third day after the date mailed, by ¹³ certified or registered mail, return receipt requested, postage prepaid. Such communications must be sent to the respective parties at the addresses set out on the first page of this Agreement (or to such other address ¹⁴ that may be designated by a Party ¹⁵ from time to time in accordance with this Section).

14. Entire Agreement. This Agreement constitutes the sole and entire agreement of the Parties regarding the subject matter contained herein, and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, regarding such subject matter. This Agreement may only be amended, modified, or supplemented by an agreement in writing signed by each Party ¹⁶ hereto.

15. Severability. If any ¹⁸ term or provision of this Agreement is ¹⁷ invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability ¹⁹ shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction.

16. ²⁰ Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, email, or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

17. ²¹ Assignment. Neither Party may assign any of its rights or delegate any of its obligations hereunder without the prior written consent of the other Party. Any purported assignment or delegation in violation of this Section shall be null and void. No assignment or delegation shall relieve the assigning or delegating Party of any of its obligations hereunder. This Agreement is for the sole benefit of the parties hereto and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer on any other person or entity any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.

1	Number: 1	Author: kadam	Subject: Comment on Text	Date: 10/4/2022 7:58:39 PM -04'00'
	Redundancy.			
1	Number: 2	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:42:42 PM -04'00'
	Say instead <i>arising out of this agreement or the Recipient's handling, disclosure, or use of Confidential Information</i> . See MSCD 13.41--.52.			
1	Number: 3	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:46:19 PM -04'00'
	Use <i>may</i> instead of <i>shall</i> . See this 2020 blog post, https://www.adamsdrafting.com/williams-sonoma-stores-inc-v-ddk-we-hospitality-partners-llc/ . Use instead the active voice. See MSCD 3.13. And <i>instituted</i> is legalistic.			
1	Number: 4	Author: kadam	Subject: Comment on Text	Date: 10/5/2022 12:43:20 PM -04'00'
	This is redundant. See this 2019 blog post, https://www.adamsdrafting.com/stop-using-consent-to-jurisdiction-provisions/ .			
1	Number: 5	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:47:42 PM -04'00'
	This seems redundant. See this 2020 blog post, https://www.adamsdrafting.com/stop-using-no-objecting-to-jurisdiction-provisions/ .			
1	Number: 6	Author: kadam	Subject: Comment on Text	Date: 10/5/2022 12:44:28 PM -04'00'
	For a Word document with Ken Adams's form of notices provision, go to https://www.adamsdrafting.com/wp-content/uploads/2021/10/Notices-Provision-28-July-2021.docx .			
1	Number: 7	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:48:51 PM -04'00'
	Redundant.			
1	Number: 8	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:49:26 PM -04'00'
	This doesn't make sense as an obligation; it should be expressed as a condition. See MSCD 3.548.			
1	Number: 9	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:50:40 PM -04'00'
	This is confusing. See MSCD 13.228--229.			
1	Number: 10	Author: kadam	Subject: Comment on Text	Date: 10/5/2022 12:46:27 PM -04'00'
	This is confusing. See this 2009 blog post, https://www.adamsdrafting.com/referring-to-fedex-and-its-competitors/ .			
1	Number: 11	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:51:23 PM -04'00'
	Obsolete. See MSCD 13.292--.293.			
1	Number: 12	Author: kadam	Subject: Comment on Text	Date: 10/5/2022 1:14:36 PM -04'00'
	Regarding issues with notice by email, see this 2020 blog post, https://www.adamsdrafting.com/giving-notice-by-email-only/ .			
1	Number: 13	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:52:25 PM -04'00'
	Too narrow.			
1	Number: 14	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:53:02 PM -04'00'
	The <i>may</i> is extraneous. See MSCD 3.509. And why use the passive voice? See MSCD 3.13.			
1	Number: 15	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:56:21 PM -04'00'
	This doesn't accurately express what's intended. See MSCD 10.135--.140.			
1	Number: 16	Author: kadam	Subject: Comment on Text	Date: 11/2/2023 8:59:15 PM -04'00'
	Redundant. See MSCD 2.110.			
1	Number: 17	Author: kadam	Subject: Comment on Text	Date: 10/4/2022 8:59:15 PM -04'00'
	Redundancy.			
1	Number: 18	Author: kadam	Subject: Comment on Text	Date: 10/4/2022 8:58:52 PM -04'00'
	Redundancy.			
1	Number: 19	Author: kadam	Subject: Comment on Text	Date: 10/4/2022 9:20:34 PM -04'00'
	It's more usual to say that the rest of the contract (as a whole) won't be affected, unless modifying or disregarding the unenforceable provision would result in failure of an essential purpose of the contract. See https://www.adamsdrafting.com/revisiting-my-severability-provision/ .			
1	Number: 20	Author: kadam	Subject: Comment on Text	Date: 10/5/2022 12:52:03 PM -04'00'
	Not worth including, and legalistic.			
1	Number: 21	Author: kadam	Subject: Comment on Text	Date: 11/3/2023 12:44:38 PM -04'00'
	Not worth including, legalistic, and a waste of space and the reader's time. If anything resembling an assignment happens, the other party could simply stop disclosing and stop receiving confidential information. It would be even better if the contract provided for a disclosure period that either party could terminate early.			

State of Delaware. Any legal suit, action, or proceeding arising out of or related to this Agreement or the matters contemplated hereunder shall be instituted exclusively in the federal courts of the United States or the courts of the State of Delaware in each case located in the city of Wilmington and County of Wilmington, and each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding and waives any objection based on improper venue or forum non conveniens. Service of process, summons, notice, or other document by mail to such Party's address set out herein shall be effective service of process for any suit, action, or other proceeding brought in any such court.

13. Notices. All notices, requests, consents, claims, demands, waivers, and other communications hereunder shall be in writing and shall be deemed to have been given: (a) when delivered by hand (with written confirmation of receipt); (b) when received by the addressee if sent by a nationally recognized overnight courier (receipt requested); (c) on the date sent by facsimile or email (with confirmation of transmission) if sent during normal business hours of the recipient, and on the next business day if sent after normal business hours of the recipient; or (d) on the third day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Such communications must be sent to the respective parties at the addresses set out on the first page of this Agreement (or to such other address that may be designated by a Party from time to time in accordance with this Section).

14. Entire Agreement. This Agreement constitutes the sole and entire agreement of the Parties regarding the subject matter contained herein, and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, regarding such subject matter. This Agreement may only be amended, modified, or supplemented by an agreement in writing signed by each Party hereto.

15. Severability. If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction.

16. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, email, or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

17. Assignment. Neither Party may assign any of its rights or delegate any of its obligations hereunder without the prior written consent of the other Party. Any purported assignment or delegation in violation of this Section shall be null and void. No assignment or delegation shall relieve the assigning or delegating Party of any of its obligations hereunder. This Agreement is for the sole benefit of the parties hereto and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer on any other person or entity any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.

18. **Waivers.** No waiver by any Party of any of the provisions hereof shall be effective unless explicitly set out in writing and signed by the Party so waiving. No waiver by any Party shall operate or be construed as a waiver in respect of any failure, breach, or default not expressly identified by such written waiver, whether of a similar or different character, and whether occurring before or after that waiver. No failure to exercise, or delay in exercising, any right, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

[SIGNATURE PAGE FOLLOWS]

 Number: 1 Author: kadam Subject: Comment on Text Date: 11/2/2023 9:10:09 PM -04'00'

Not worth including, and legalistic.

IN WITNESS WHEREOF, the parties have executed this Agreement to be effective as of the Effective Date.

ACME CORPORATION

By _____

Name:

Title:

WIDGETCO, INC.

By _____

Name:

Title:

 Number: 1 Author: kadam Subject: Comment on Text Date: 11/2/2023 9:15:28 PM -04'00'

IN WITNESS WHEREOF is archaic. See MSCD 5.24. Instead of *have executed*, say *are signing*. See MSCD 5.8–11. And *Effective Date* is an unhelpful concept (see comment above).