



PROCUREMENT AND ENFORCEMENT
OF INTELLECTUAL PROPERTY

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Non-Disclosure Agreements

What is an NDA?

NDAs, or non-disclosure agreements, are legally enforceable contracts that create a confidential relationship between a person who has sensitive information and a person who will gain access to that information. A confidential relationship means one or both parties has a duty not to share that information.

Non-disclosure agreements are also known as confidentiality agreements. You may encounter one at the beginning of a business or employment relationship or large financial exchange.

An NDA specifically focuses on an individual's or organization's information privacy, which differs from other business contracts like service or sales agreements that focus on the terms and conditions of service or transactions.

The purpose of a non-disclosure agreement is twofold: confidentiality and protection. Information protected by a confidentiality agreement can include everything from technical information, product specifications, manufacturing processes (trade secrets) to client lists, all of which can all be covered by an NDA.

An NDA creates the legal framework to protect ideas and information from being stolen or shared with competitors or third parties. Breaking an NDA agreement gives rise to an action for breach of contract.

The Three Essential Functions of an NDA

- Identifying protected information: By drawing a line between what information is confidential and what can be shared, NDAs classify information. This allows parties to work freely within the boundaries created by the confidentiality agreement.
- Protecting sensitive information: Signing an NDA creates a legal obligation to keep sensitive information confidential. Any leak of that information is a breach of contract.
- Protecting patent rights: Because public disclosure of a pending invention can sometimes void patent rights, an NDA can protect an inventor as they develop their new product or concept.

When is an NDA needed?

- **Products:** When an individual or organization enters into the sale or licensing of a product or technology, you may need an NDA to ensure that all the data you're disclosing—technical, financial or other proprietary material—cannot be shared with third parties.
- **Employees:** Because of their access to confidential and proprietary information, you may need an NDA to ensure that your employees cannot share your organization's sensitive data while on the job or once they leave.
- **Investors:** During negotiations with an investor, you may need to ensure information shared during these talks is protected.
- **Mergers and Acquisitions:** When selling a business, sensitive financial and operations information may need to be shared not just with the entity that's buying the business, but with intermediaries such as banks, brokers and appraisers, as well. An NDA ensures that data is protected.
- NDAs are also commonly when presenting information to vendors and while exploring joint ventures.

Types of NDAs

Generally speaking, non-disclosure agreements fall into two main categories: unilateral and mutual. In a unilateral NDA, one party agrees not to reveal confidential information. In a mutual NDA, both sides agree that they will not share confidential information.

In all other aspects, these two types of confidentiality agreements are identical, especially when it comes to enforcement and the consequences of a breach.

An employment contract is an example of a unilateral NDA. When an employee is hired, they sign a unilateral NDA agreeing not to share information learned on the job. By contrast, if one company is merging or acquiring another company, a mutual NDA ensures none of the parties participating in the process divulge confidential information.

Parts of a Non-Disclosure Agreement

All NDAs should include these specific elements:

- **Identification of Parties:** Also known as “parties to the agreement”, the purpose of this section is to identify the people and/or entities involved in the non-disclosure contract.
- **Definitions:** This section of the NDA lays out the different types of information covered by the agreement and establishes rules regarding how it is handled. It answers the question of what information is confidential.

- **Obligations:** What happens if protected information is shared? An NDA not only sets out the specific behavior expected from each signatory, but it also lays out the consequences of breaching the agreement.
- **Scope:** A clearly defined scope ensures an NDA's enforceability. Using general terms like "proprietary information" is often not specific enough and won't hold up in a legal setting. Scope should lay out what specific information the NDA covers.
- **Time frame:** NDAs should explicitly state the number of years that sensitive information must be kept secret.
- **Return of Information:** After the conclusion of business between the parties, an NDA may require that the recipient confirm that sensitive information has been returned or destroyed.
- **Exclusions:** These are the types of information which do not need to be kept confidential. This might include public knowledge, previously disclosed details, or information someone knew before entering a business or financial relationship with a company or firm.
- **Remedies:** If there's a breach of the confidentiality agreement, what happens? There are many possible courses of action, or remedies. These may include a restraining order, payment for damages, and other actions for breach of fiduciary duty and copyright, patent, or trademark infringement.

Limitations of NDAs

Not all information is protected by a non-disclosure contract. Public records, including SEC filings or company addresses, are not covered by these confidentiality agreements. Courts may also interpret the scope of an NDA in ways that one or more participants may not have initially expected. If the information covered in an NDA is revealed in another way—like through a court proceeding or subpoena—then the NDA no longer applies.

MUTUAL NON-DISCLOSURE AGREEMENT

Effective Date: _____

THIS MUTUAL NON-DISCLOSURE AGREEMENT (this “**Agreement**”) is entered into between _____, A _____ LIMITED LIABILITY COMPANY, (the “**Company**”) and the other parties named on the signature page hereto (collectively, “**Other Party**”) to protect the confidentiality of certain confidential information of Company or of Other Party to be disclosed under this Agreement solely for use in evaluating or pursuing a business relationship or transaction involving the sale of any and all products or services in any offerings among the parties (the “**Permitted Use**”). Company and Other Party may be referred to herein individually as a “**Party**” and collectively as the “**Parties**.”

1. As used herein, the “**Confidential Information**” of a Party will mean any and all technical and non-technical information disclosed by such Party (the “**Disclosing Party**”) to the other Party (the “**Receiving Party**”), which may include without limitation: (a) patent and patent applications; (b) trade secrets; (c) proprietary and confidential information, ideas, techniques, sketches, drawings, works of authorship, business models, inventions, know-how, processes, apparatuses, equipment, algorithms, software programs, software source documents, formulae, and contracts related to the current, future, and proposed products, services and other operations of each of the Parties, such as information concerning research, experimental work, development, design details and specifications, engineering, financial information, procurement requirements, purchasing, manufacturing, customer/patient lists, investors, employees, contractual relationships, business forecasts, sales and merchandising, and marketing plans; (d) all of the Disclosing Party’s active business relationships or opportunities (“**Business Opportunities**”); and (e) all other information that the Receiving Party knew, or reasonably should have known, was the Confidential Information of the Disclosing Party.
2. Subject to Section 3 of this Agreement, the Receiving Party agrees that at all times, and notwithstanding any termination or expiration of this Agreement, it will hold in strict confidence and not disclose to any third party any Confidential Information of the Disclosing Party, except as approved in writing by the Disclosing Party, and will use the Confidential Information of the Disclosing Party for no purpose other than the Permitted Use. The Receiving Party will also protect such Confidential Information with at least the same degree of care that the Receiving Party uses to protect its own Confidential Information, but in no case, less than reasonable care. The Receiving Party will limit access to the Confidential Information of the Disclosing Party to only those of the Receiving Party’s employees or authorized representatives having a need to know and who have signed confidentiality agreements containing, or are otherwise bound by, confidentiality and non-use obligations at least as restrictive as those contained herein.

3. The Receiving Party will not have any obligations under this Agreement with respect to a specific portion of the Confidential Information of the Disclosing Party if such Receiving Party can demonstrate with competent evidence that such portion of Confidential Information:
 - (a) was in the public domain at the time it was disclosed to the Receiving Party;
 - (b) entered the public domain subsequent to the time it was disclosed to the Receiving Party, through no fault of the Receiving Party;
 - (c) was in the Receiving Party's possession free of any obligation of confidence at the time it was disclosed to the Receiving Party;
 - (d) was rightfully communicated to the Receiving Party free of any obligation of confidence subsequent to the time it was disclosed to the Receiving Party; or
 - (e) was developed by employees or agents of the Receiving Party who had no access to any Confidential Information.
4. Notwithstanding the above, the Receiving Party may disclose certain Confidential Information of the Disclosing Party, without violating the obligations of this Agreement, to the extent such disclosure is required by a valid order of a court or other governmental body having jurisdiction, provided that the Receiving Party provides the Disclosing Party with reasonable prior written notice of such disclosure and, at Disclosing Party's expense, makes a reasonable effort to obtain, or to assist the Disclosing Party in obtaining, a protective order preventing or limiting the disclosure and/or requiring that the Confidential Information so disclosed be used only for the purposes for which the law or regulation required, or for which the order was issued.
5. The Receiving Party will immediately notify the Disclosing Party upon discovery of any loss or unauthorized disclosure of the Confidential Information of the Disclosing Party.
6. Upon termination or expiration of this Agreement, or upon written request of either Party, each Party will promptly return to the Disclosing Party or destroy all documents and other tangible materials representing the Disclosing Party's Confidential Information and all copies thereof; *provided, however*, that the Receiving Party may retain one copy of such Confidential Information in the Receiving Party's archives for the sole purpose of monitoring compliance with its obligations hereunder or as required by applicable law, rule or regulation and such Confidential Information shall be subject to an indefinite confidentiality obligation according to the terms and conditions set forth herein until returned or destroyed, as the case may be.
7. Confidential Information is and shall remain the sole property of the Disclosing Party. The Receiving Party recognizes and agrees that nothing contained in this Agreement will be construed as granting any property rights, by license or otherwise, to any Confidential Information of the Disclosing Party, or to any invention or any patent, copyright, trademark, or other intellectual property right that has issued or that may issue, based on such Confidential Information. The Receiving Party will not make, have made, use or sell for any purpose any product or other item using, incorporating or derived from any Confidential Information of the Disclosing Party. Neither this Agreement nor the disclosure of any Confidential Information hereunder shall result in any obligation on the part of either Party to enter into any further agreement with the other, license any products or services to the other, or to require either Party to disclose any particular Confidential Information. Nothing in this Agreement creates or shall be deemed to create any employment, joint venture, or agency between the Parties.
8. The Receiving Party will not reproduce the Confidential Information of the Disclosing Party in any form except as required to accomplish the intent of this Agreement. Any reproduction by a Receiving Party of any Confidential Information of the Disclosing Party will remain the property of the Disclosing Party and will contain any and all confidential or proprietary notices or legends that appear on the original, unless otherwise authorized in writing by the Disclosing Party.

9. This Agreement will terminate five (5) years after the Effective Date, or may be terminated by either Party at any time upon thirty (30) days written notice to the other Party. Each Party's obligations under this Agreement will survive termination of this Agreement and will be binding upon such Party's heirs, successors, and assigns, except that each Party's obligations with respect to the Confidential Information of the other Party will terminate pursuant to Section 3 of this Agreement.
10. THE DISCLOSING PARTY IS PROVIDING CONFIDENTIAL INFORMATION ON AN "AS IS" BASIS FOR USE BY THE RECEIVING PARTY AT ITS OWN RISK. THE DISCLOSING PARTY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF TITLE, NON-INFRINGEMENT OF THIRD-PARTY RIGHTS, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE.
11. Each Party acknowledges that its breach of this Agreement may cause irreparable damage to the other Party and hereby agrees that the other Party will be entitled to seek injunctive relief under this Agreement, as well as such further relief as may be granted by a court of competent jurisdiction.
12. If any provision of this Agreement is found by a proper authority to be unenforceable or invalid, such unenforceability or invalidity will not render this Agreement unenforceable or invalid as a whole and, in such event, such provision will be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law or applicable court decisions. Any waiver or failure to enforce any provision of this Agreement on one occasion will not be deemed a waiver of any other provision or of such provision on any other occasion.
13. Neither Party will communicate any information to the other Party in violation of the proprietary rights of any third party.
14. Neither Party will assign or transfer any rights or obligations under this Agreement without the prior written consent of the other Party, and any attempted assignment, subcontract, delegation, or transfer in violation of the foregoing will be null and void, except that a Party may assign this Agreement without such consent to its successor in interest by way of merger, acquisition or sale of all or substantially all of its assets. The terms of this Agreement shall be binding upon assignees.
15. The Receiving Party will not export, directly or indirectly, any U.S. technical data acquired pursuant to this Agreement, or any products utilizing such data, in violation of the United States export laws or regulations.
16. All notices or reports permitted or required under this Agreement will be in writing and will be delivered by personal delivery, electronic mail, facsimile transmission or by certified or registered mail, return receipt requested, and will be deemed given upon personal delivery, five days after deposit in the mail, or upon acknowledgment of receipt of electronic transmission. Notices will be sent to the addresses set forth at the end of this Agreement or such other address as either Party may specify in writing.
17. Each Party agrees that his/her/its respective software and other intellectual property contains valuable Confidential Information. Accordingly, each Party shall not adapt, alter, translate, reverse-engineer, reverse-assemble, replicate, disassemble, decompile, unlock, modify, or separate, or decompose any prototypes, software, or intellectual property, or any other objects that in any way embody the Disclosing Party's Confidential Information.
18. This Agreement is the final, complete and exclusive agreement of the Parties with respect to the subject matters hereof and supersedes and merges all prior discussions between the Parties with

respect to such matters. No modification of or amendment to this Agreement will be effective unless in writing and signed by the Party to be charged.

19. Notwithstanding anything stated to the contrary in this Agreement, no individual shall be held criminally or civilly liable under any federal or state trade secret law for a disclosure of a trade secret, as long as the disclosure is made: (i) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney solely for the purpose of reporting or investigating a suspected violation of law; or (ii) in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. This Section is intended to comply with the immunity provided by the United States Code from liability resulting from disclosures of trade secrets under the conditions described in this Section. Nothing in this Agreement is intended to conflict with 18 U.S.C. § 1833(b). If there is a conflict between this Section 19 and any other provision of this Agreement, this Section 19 will control.
20. Receiving Party agrees to use the Confidential Information only for work related to the Permitted Use. The Receiving Party shall not use Confidential Information to solicit or call upon any person or entity or generate any revenues for Receiving Party's or any third party's business(es) for any purpose other than for the benefit of the Disclosing Party, nor shall Receiving Party circumvent any opportunities disclosed and/or the entities or individuals identified by the Disclosing Party, either actual or envisaged. For example, Disclosing Party may disclose the identity of its manufacturing relationships, Business Opportunities, or the identities of potential purchasers or sellers of goods. In such case, the Receiving Party shall not circumvent, avoid or bypass the Disclosing Party, either directly or indirectly, with respect to any transactions involving such persons or entities. Notwithstanding anything stated to the contrary in this Agreement, Receiving Party shall not enter into any negotiations or transactions of any kind with any Business Opportunities, unless written permission has been obtained from the Disclosing Party to do so.
21. This Agreement shall be governed by and construed in accordance with the laws of the State of California , without giving effect to its choice of law doctrine.
22. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via facsimile, electronic mail (including pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, Uniform Electronic Transactions Act or other applicable law) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.
23. Non-Circumvention. Each Party hereby agrees for their officers, directors, agents, associates and any related individuals or companies where the Party has affiliation or ownership, that they will not, directly or indirectly, contact, deal with or otherwise become involved with any entity or any other entities or parties introduced, directly or indirectly, by or through the other Party to this Agreement or its officers, directors, agents or associates, for the purpose of avoiding the payment to the Company of profits, fees or otherwise, without the specific written approval of the Company.

[Remainder of page intentionally left blank]

The Parties have executed this Non-Disclosure Agreement as of the Effective Date.

COMPANY		COMPANY	Sponge11e LLC
By			
Title	-	Name	
Address	-	Title	Authorized Representative
		Address	
COMPANY		COMPANY	
By		By	
Name		Name	
Title		Title	
Address		Address	
COMPANY		COMPANY	
By		By	
Name		Name	
Title		Title	
Address		Address	
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