

# PRECUT™ Confidentiality Provisions

The provisions below and their numbering are from the e-book, "CURATOR'S NOTES FOR THE PRECUT™ NONDISCLOSURE AGREEMENT," version 2010-09-02, which contains additional clauses and commentary, available as a free download at [www.precut.org](http://www.precut.org). **LICENSE:** The PDF version of this document may be copied and distributed, but only in its entirety; all other rights are reserved. **CAUTION:** This document is made available **AS IS, WITH ALL FAULTS, WITH NO WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED;** it is not intended and is not to be relied on as a substitute for legal advice, and its use does not evidence or imply an attorney-client relationship.

## **EXCEPT TO THE EXTENT, IF ANY, EXPRESSLY STATED OTHERWISE IN THIS AGREEMENT:**

### 2.1 Confidentiality definitions & requirements

#### 2.101 *Disclosing Party* refers to [EACH PARTY]

(a) *Receiving Party* refers to any party to this Agreement that, pursuant to this Agreement, accesses Confidential Information owned or maintained by a Disclosing Party. (b) For the avoidance of doubt, only Confidential Information owned or maintained by a Disclosing Party is protected by this Agreement.

#### 2.102 Confidential Information definition

(a) "*Confidential Information*" refers to information that: (i) is shown to have been the subject of reasonable efforts by the Disclosing Party to preserve the information in confidence; (ii) is shown to have been initially disclosed or otherwise made available to the Receiving Party by, or on behalf of, the Disclosing Party (x) during the *term* of this Agreement, and (y) in compliance with any marking requirement imposed by this Agreement; and (iii) is not shown to be within one of this Agreement's exclusions from Confidential Information status.

(b) For the avoidance of doubt, all confidentiality obligations of this Agreement apply to any copies, notes, summaries, etc., made by the

Receiving Party to the extent they contain Confidential Information.

#### 2.104 Exclusions from confidentiality status

(a) The term Confidential Information does not include information that is shown to have been, at the relevant time: (i) published or otherwise generally known by relevant segments of the public; or (ii) known by the Receiving Party before obtaining access to it under this Agreement; or (iii) provided to the Receiving Party by a third party not under an obligation of confidence benefiting the Disclosing Party; or (iv) independently developed by the Receiving Party without use of the Disclosing Party's Confidential Information; or (v) disclosed to a third party, by the Disclosing Party or with its authorization, without confidentiality obligations comparable to those of this Agreement.

(b) For the avoidance of doubt, a specific selection or combination of information will NOT be excluded from Confidential-Information status solely by virtue of the fact that some or all of its component parts are themselves so excluded, UNLESS the selection or combination itself, along with its economic value and principles of operation, are themselves within such an exclusion.

#### 2.107 Marking of Confidential Information [IS REQUIRED].

(a) Any marking required by this section 2.107 must include a reasonably prominent, visually-readable notice such as, for example, "Confidential information of [name]" or "Subject to NDA."

(b) Confidential Information not marked in accordance with this section 2.107 is not subject to the confidentiality obligations of this Agreement (but see also section 2.108 concerning catch-up marking).

#### 2.108 The *catch-up marking period* is [10 BUSINESS DAYS] after an initial unmarked disclosure.

IF: Particular Confidential Information is initially disclosed without the marking required by section 2.107, for example in an unmarked writing or via a demonstration, oral presentation, or other manner not conducive to marking; THEN: The information in question will be deemed to comply with section 2.107 if the Disclosing Party (i) identifies the information as confidential at the time of or promptly after the initial disclosure, and (ii) within the stated *catch-up marking period* thereafter, causes a copy or written summary of the Confidential Information, marked as required by section 2.107, to be provided to the Receiving Party.

## 2.2 Protection of Confidential Information

### 2.201 Precautions

The Receiving Party shall take reasonable precautions to protect Confidential Information from unauthorized use or disclosure. Such precautions are to be not less than those the Receiving Party uses for its own information of comparable nature and value.

### 2.202 Use of Confidential Information.

(a) The Receiving Party must obtain the Disclosing Party's prior written consent to any use by it of Confidential Information (each type of such use, a "*Permitted Use*").

(b) IF: As clearly shown by written evidence, the parties are entering into this Agreement in conjunction with any activity listed below in this subparagraph (b); THEN: The Disclosing Party consents to the Receiving Party's use of Confidential Information during the term of this Agreement to the extent reasonably necessary for the corresponding Permitted Use.

(1) PARTIES' ACTIVITY: Exploring and/or negotiating a potential business relationship between the parties. PERMITTED USE: Assessing the Receiving Party's interest in, and/or negotiating the terms of, such a relationship.

(2) PARTIES' ACTIVITY: Entering into another agreement between the parties. PERMITTED USE: The Receiving Party's (i) performance of its own obligations, and (ii) exercise of its right to require performance by the Disclosing Party, under such other agreement

### 2.203 Disclosure of confidential information

(a) The Receiving Party may not disclose Confidential Information except (i) as specified in this Agreement or (ii) with the Disclosing Party's prior written consent. Each such disclosure is referred to as a "*Permitted Disclosure*."

(b) As one illustrative example of a disclosure of Confidential Information, the Receiving Party may not confirm, to any third party, any correlation or similarity between Confidential Information and information from any other source, except as otherwise permitted by this Agreement or with the Disclosing Party's prior written consent.

### 2.204 Need-to-know disclosures to Receiving-Party employees are permitted.

For the avoidance of doubt, during the term of this Agreement the Receiving Party may disclose Confidential Information to those of its officers, directors, and employees who (i) have a need to know for a Permitted Use and (ii) either (x) have signed a confidentiality agreement with the Receiving Party, or (y) are otherwise bound by legally-enforceable confi-

confidentiality obligations to the Receiving Party, in either case sufficient to enable the Receiving Party to comply with the confidentiality obligations of this Agreement.

#### **2.206 Disclosures compelled by law**

The Receiving Party may disclose confidential information when compelled by law, for example in response to a subpoena or a search warrant, in a securities filing, subject to the conditions that the Receiving Party must:

(i) advise the Disclosing Party as far in advance of such a disclosure as practicable; and (ii) provide reasonable cooperation with any efforts by the Disclosing Party, at the Disclosing Party's request and expense, to limit the disclosure and/or to obtain legal protection for the information to be disclosed.

#### **2.207 Compliance with law governing disclosures and uses**

For the avoidance of doubt:

(a) Compliance with law is required for all Receiving-Party disclosures and uses of Confidential Information, including for example all applicable laws governing disclosures of export controls, personal financial information, or personal health information.

(b) This provision does not itself authorize any particular disclosure or use of Confidential Information by the Receiving Party.

#### **2.208 Copying of Confidential Information**

(a) Copying of Confidential Information is permitted only (i) as necessary for Permitted Disclosures and Permitted Uses or (ii) with the Disclosing Party's prior written consent.

(b) For the avoidance of doubt, any copies of Confidential Information made by or with the authorization of the Receiving Party are subject to the confidentiality obligations of this Agreement.

### **2.3 Post-termination confidentiality obligations**

#### **2.301 Return or destruction of copies of Confidential Information [IS REQUIRED UPON WRITTEN REQUEST] after termination or expiration.**

If so stated, subject to the exceptions below (if any), upon any termination of this Agreement or expiration of its term, the Receiving Party will cause to be returned to the Disclosing Party, or destroyed, all copies of Confidential Information — including, for example, notes and summaries containing such information — that are in the possession, custody, or control of (i) the Receiving Party, or (ii) any individual or organization to which the Receiving Party provided such Confidential Information.

#### **2.302 Backup tapes, etc., [NEED NOT BE] returned or destroyed.**

If so specified, the return-or-destroy obligation does not apply to copies of Confidential Information stored in system-type media, such as for example server system caches and backup tapes, PROVIDED THAT such media (i) are not readily accessible to users, and (ii) in the ordinary course of business are periodically, and systematically, overwritten.

#### **2.303 The Receiving Party, upon written request, shall certify completion of return or destruction within [30 DAYS] after termination or expiration.**

(a) Upon written request by the Disclosing Party, the Receiving Party shall certify completion of any required return or destruction of copies of Confidential Information within the stated time after the termination of this Agreement or expiration of its term. (b) The certificate of return or destruction must (1) be sent to the Disclosing Party, and (2) note any known exceptions and, for each, whether or not the exception is authorized by this Agreement.

#### **2.305 Confidentiality obligations continue after termination or expiration.**

For the avoidance of doubt, the confidentiality requirements of this Agreement will continue to apply, notwithstanding any termination of this Agreement or expiration of its term, to any copies of Confidential Information that, for whatever reason, are not returned or destroyed, until such time, if any, as the information in question becomes subject to an exclusion from confidentiality stated in this Agreement.

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