

Prepared by the Corporation Law Committee of the New York City Bar Association<sup>1</sup>

[Name of the Company]<sup>2</sup>  
[Address of the Company]

[Date]

[Name and Address of Potential Buyer]  
Attention: [Name]

Dear [Name]:

[Potential Buyer] (“Buyer”) has requested certain non-public information regarding [Target Company] and its subsidiaries (collectively, the “Company”) in connection with a potential [negotiated]<sup>3</sup> transaction (the “Transaction”) between or among Buyer, the Company and/or one or more Affiliates of Buyer. As a condition to furnishing such information to Buyer, the Company and Buyer hereby agree to the following provisions:<sup>4</sup>

**1. Certain Definitions.** As used in this letter agreement (this “Agreement”):

(a) “Affiliate” means, with respect to any Person, any other Person that is [now, or in the future,]<sup>5</sup> directly or indirectly Controlling, Controlled by or under common Control with such Person, where “Control” and derivative terms mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or

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<sup>1</sup> This form was prepared in January 2015 (and revised in April 2017) by the Corporation Law Committee of the New York City Bar Association as a model for a unilateral confidentiality agreement (*i.e.*, to be used when confidential information is being disclosed by only one party). The draft attempts to reflect the Committee’s view of terms that may be acceptable to both a buyer and a seller, with additional commentary provided on often-negotiated provisions. Of course, careful attention to specific facts and client needs is always advisable.

<sup>2</sup> This form has been drafted assuming the target company is the disclosing party. If a selling equityholder is also a disclosing party, conforming changes should be made throughout to also reference the selling equityholder, as appropriate.

<sup>3</sup> The disclosing party may want to insert the word “negotiated” to make clear that the information may only be used in a consensual transaction (particularly if a standstill is not included). *See Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A 3d 1072 (Del Ch. 2012) and *Goodrich Capital, LLC and Windsor Sheffield & Co. Inc. v. Vector Capital Corporation* (S.D.N.Y. June 26, 2012).

<sup>4</sup> If the potential Buyer is a competitor of the Company, the parties often will establish a “clean team” or “attorneys eyes only” protocol for dealing with competitively sensitive information and will enter into a “Common Interest Agreement.” Parties are encouraged to coordinate the provisions of any Common Interest Agreement with the provisions of their confidentiality agreement. Discontinuity between the terms of the two agreements created issues for the parties in *Martin Marietta Materials*. In addition, please see the footnote to Section 13 regarding an additional covenant to consider in the event that Buyer and the Company are competitors.

<sup>5</sup> This bracketed language should be included where the intent is to bind future affiliates of a party, as the default New York state law is that, absent explicit language demonstrating the parties’ intent, a contractual provision referring to “affiliates” refers only to then-existing affiliates and does not include future affiliates. *See Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239 (2014).

otherwise. [Notwithstanding the foregoing, for purposes of Section 7, any such Person that is a portfolio company of, or an investment fund that is advised or managed by, [Buyer] [Buyer's Parent Company] or any of its Affiliates shall not be considered an Affiliate of Buyer unless Evaluation Material or Discussions Disclosure is made available or actually provided or disclosed to such Person by or on behalf of Buyer; *provided* that Evaluation Material or Discussions Disclosure shall not be deemed to have been made available or actually provided or disclosed to any such Person solely as a result of the fact that a Representative of the Buyer with knowledge of any Evaluation Material or Discussions Disclosure is serving on the board of directors (or similar governing body) or as an officer of such Person.]<sup>6</sup>

(b) "Evaluation Material" means any information or data concerning the Company or any of its Affiliates, whether in oral, visual, written, electronic or other form, that is disclosed to Buyer or any of its Representatives [before the date hereof,]<sup>7</sup> now or in the future by or on behalf of the Company or any of its Representatives, together with all notes, memoranda, forecasts, summaries, analyses, compilations and other writings relating thereto that are prepared by or on behalf of Buyer or any of its Representatives to the extent that they use, contain, reflect or are derived from or incorporate, in whole or in part, any such information or data. Notwithstanding the foregoing, "Evaluation Material" does not include any information or data that: (i) is or was independently developed by Buyer or any of its Representatives without the benefit of any Evaluation Material;<sup>8</sup> (ii) is or becomes generally available to the public, other than as a result of disclosure by or on behalf of Buyer or any of its Representatives in breach of this Agreement; (iii) is or becomes available to Buyer [on a non-confidential basis]<sup>9</sup> from a source other than the Company or any of its Representatives, so long as that source[, to Buyer's knowledge after reasonable inquiry,]<sup>10</sup> is not bound by a legal, contractual or fiduciary obligation of confidentiality to the Company; or (iv) is already in Buyer's possession at the time of disclosure by or on behalf of the Company or any of its Representatives[ as shown by Buyer's records immediately prior to the time of disclosure]<sup>11</sup> from a source other than the Company or any of its Representatives, so long

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<sup>6</sup> This bracketed language is only applicable for private equity-type buyers that have other portfolio companies (or to buyers that are themselves portfolio companies).

<sup>7</sup> Receiving parties may resist including information disclosed prior to the date of the Confidentiality Agreement depending upon the facts and circumstances.

<sup>8</sup> Disclosing parties may wish to state that "Buyer shall have the burden of proof to demonstrate the absence of reliance on Evaluation Material."

<sup>9</sup> Receiving parties may resist including this bracketed language because they may receive information from sources on a confidential basis (e.g., information may be received from a consultant and there may be an obligation of confidentiality in the engagement letter with such consultant).

<sup>10</sup> Disclosing parties may resist any knowledge qualifier, and where one is included, receiving parties may resist an inquiry obligation.

<sup>11</sup> Receiving parties may wish to exclude an evidentiary requirement.

as that source[, to Buyer's knowledge after reasonable inquiry,]<sup>12</sup> is not bound by a legal, contractual or fiduciary obligation of confidentiality to the Company.

(c) "including" means "including, without limitation."

(d) "Person" means any natural person, business, corporation, company, association, limited liability company, partnership, limited partnership, limited liability partnership, joint venture, business enterprise, trust, governmental authority or other legal entity.

(e) "Representatives" means, with respect to any Person, the Affiliates of such Person and any of its and their respective directors, officers, employees, managing members, general partners, attorneys, accountants, investment bankers, financial advisors, consultants and other advisors[, and any actual or potential sources of debt financing for such Person or its Affiliates]<sup>13</sup>; *provided* that, for the avoidance of doubt, in no event shall any actual or potential sources of equity financing for Buyer or its Affiliates be considered a "Representative" of Buyer for purposes of this Agreement without the prior written consent of the Company.

## 2. Confidentiality, Use and Disclosure of Evaluation Material.

(a) Confidentiality and Use of Evaluation Material. Buyer agrees that Buyer and its Representatives shall (i) use the Evaluation Material solely for the purpose of evaluating, negotiating and consummating the Transaction (or other legal, audit or compliance purposes permitted by this Agreement);<sup>14</sup> (ii) except as otherwise permitted by this Section 2, keep all Evaluation Material strictly confidential; and (iii) disclose Evaluation Material only to Representatives of Buyer to whom disclosure is needed to facilitate the evaluation, negotiation and/or consummation of the Transaction. Before Buyer or any of its Representatives provides access to any Evaluation Material to any of its Representatives, Buyer agrees that it or one of its Representatives shall inform such Representative of the provisions of this Agreement and instruct it to comply with the provisions hereof applicable to its Representatives. Buyer shall be liable for any breaches of this Agreement by its Representatives, except for breaches committed by any Representative that is party to either (a) a separate joinder agreement in the form set forth

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<sup>12</sup> Disclosing parties may resist any knowledge qualifier, and where one is included, receiving parties may resist an inquiry obligation.

<sup>13</sup> Parties to consider whether it is appropriate to include debt financing sources in the definition of Representatives. To the extent debt financing sources are included, it should be considered whether reference should be generic or whether specific "approved" debt financing sources should be listed on an exhibit. Similarly, if the Buyer is contemplating having potential co-bidders, consider including a concept of "Permitted Co-Bidders" and allowing for disclosure of Evaluation Material to Permitted Co-Bidders. Potential definition of "Permitted Co-Bidder" would be as follows: "Permitted Co-Bidder" means any Person (and any Affiliates of such Person) who may invest in the Transaction on a side-by-side basis with Buyer, if such Person (or its Affiliate) [(i)] has executed its own confidentiality agreement with respect to the Transaction with the Company [and (ii) is listed on Exhibit \_\_\_]. Note that if the "Permitted Co-Bidder" concept is included, the last proviso in the definition should be deleted.

<sup>14</sup> Disclosing party should consider whether specific exceptions to the use restriction are appropriate.

as Exhibit C hereto or (b) a separate mutually acceptable confidentiality agreement between such Representative and the Company with respect to the Evaluation Material.

(b) Discussions Disclosure. Without the prior written consent of the Company, neither the Buyer nor any of its Representatives shall: (i) make any disclosure to any other Person (other than its Representatives to whom disclosure is needed to facilitate the evaluation, negotiation and/or consummation of the Transaction) of (A) the fact that investigations, discussions or negotiations are taking or have taken place concerning the Transaction, (B) the existence or contents of this Agreement, (C) the fact that Buyer or any of its Representatives has requested or received Evaluation Material, conducted due diligence or attended management meetings or site visits with the Company or any of its Representatives or is otherwise considering the Transaction or (D) any of the terms, conditions or facts relating to the Transaction, including the status thereof; or (ii) make any public statement concerning the Transaction. Without the prior written consent of Buyer, neither the Company nor any of its Representatives shall make any disclosure to any other Person (other than its Representatives) of the fact that Buyer or any of its Representatives has requested or received Evaluation Material, conducted due diligence or attended management meetings or site visits with the Company or any of its Representatives or is otherwise considering the Transaction (other than on an anonymous basis) or any other information that may reasonably be expected to lead to disclosure of Buyer's identity (any disclosure or statement prohibited by the two preceding sentences being "Discussions Disclosure").

(c) Compulsory Disclosure.

(i) If Buyer or any of its Representatives or the Company or any of its Representatives (in the case of Discussions Disclosure) is requested or required by interrogatories, requests for information from a governmental, regulatory or supervisory authority, deposition, subpoena or similar legal process to disclose any Evaluation Material or Discussions Disclosure, or disclosure of Evaluation Material or Discussions Disclosure is required [based on the advice of counsel]<sup>15</sup> for Buyer or any of its Representatives or the Company or any of its Representatives in order 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 (collectively, "Applicable Law" and such required disclosing party, the "Compulsory Disclosing Party"), the Compulsory Disclosing Party shall provide the other party with prompt prior written notice thereof, to the extent not prohibited by Applicable Law, so that the other party may seek an appropriate protective order and/or, in the sole discretion of the other party, waive compliance by the Compulsory Disclosing Party with the applicable provisions of this Agreement.

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<sup>15</sup> Disclosing party may resist including the ability to rely on counsel's advice in determining whether disclosure is required. If the counsel concept is included, the disclosing party may alternatively request an opinion, or even a written opinion.

(ii) If, in the absence of such a protective order or waiver, the Compulsory Disclosing Party is nonetheless legally compelled to disclose any Evaluation Material or Discussions Disclosure [based on the advice of counsel], then the Compulsory Disclosing Party may, without liability under this Agreement, disclose only such portion of the Evaluation Material or make only such Discussions Disclosure as is legally required to be disclosed [based on the advice of counsel]; *provided* that the Compulsory Disclosing Party agrees to use reasonable efforts, at the other party's expense, to obtain assurances that any such disclosed Evaluation Material and Discussions Disclosure will be afforded confidential treatment.

(iii) Notwithstanding the foregoing and for the avoidance of doubt, none of Buyer or any of its Representatives shall be permitted to make any disclosure of Evaluation Material or Discussions Disclosure if Buyer or any of its Representatives has, without the prior written consent of the Company's board of directors, initiated any proxy contest, tender offer, other effort to enter into a business combination with the Company, or any plan or proposal described in Item 4 of Schedule 13D, or taken any other action in violation of Section 8, that would reasonably be expected to trigger such requirement of disclosure.<sup>16</sup>

(iv) The Company acknowledges that Buyer has advised the Company that [Buyer is, and] certain of its Representatives may be, registered investment advisers or regulated financial institutions and thus subject to routine examinations, investigations, regulatory sweeps or other regulatory inquiries. Buyer and its Representatives shall not be required to comply with the process described in paragraphs (i) and (ii) above in respect of disclosures made to a regulatory agency, self-regulatory organization, governmental agency or examiner thereof in the course of any such routine examinations, investigations, sweeps or inquiries, and any such disclosure shall be permitted.

(d) Disclosure Permitted to Defend Dispute. Notwithstanding the foregoing provisions of this Section 2, Buyer or any of its Representatives and the Company or any of its Representatives (in the case of Discussions Disclosure) may disclose Evaluation Material or Discussions Disclosure to the extent necessary to defend any litigation claim or cause of action brought against it by the other party relating to the Transaction; *provided* that the disclosing party agrees to use (and to cause its applicable Representatives to use) reasonable efforts, at the other party's expense, to obtain assurances that any such disclosed Evaluation Material and Discussions Disclosure will be afforded confidential treatment.

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This provision is designed to prevent circumvention of the anti-use provision that would result if Buyer were to take action that put it in a position where it was subject to a legal obligation to disclose Evaluation Material. Similarly, Buyer may wish to prevent a "backdoor standstill" as a result of the anti-use provision through language along the lines of the following: "*Notwithstanding anything to the contrary contained in this Section 2, following the expiration of the Standstill Period nothing in this Agreement shall restrict, Buyer's disclosure of Evaluation Material or any Discussions Disclosure in connection with any of the actions described in Section 8(a)-(c) to the extent required by Applicable Law or the applicable rules or regulations of any national securities exchange.*"

3. **[Securities Law Restrictions.**<sup>17</sup> Buyer acknowledges that: (a) the Evaluation Material and information that, if disclosed, would constitute Discussions Disclosure may contain material non-public information concerning the Company and its Affiliates; and (b) Buyer is aware of the restrictions imposed by U.S. federal and state securities laws, and the rules and regulations promulgated thereunder, on Persons in possession of material non-public information. Nothing herein shall constitute an admission by either party that any Evaluation Material or other such information in fact contains material non-public information concerning the Company or any of its Affiliates.]<sup>18</sup>
4. **No Representations or Warranties.** Buyer acknowledges and agrees that: (a) no representation or warranty, express or implied, is made by the Company or any of its Representatives as to the accuracy or completeness of any of the Evaluation Material; and (b) Buyer shall be entitled to rely only on those representations and warranties that are expressly set forth in any definitive written agreement that is hereafter executed and delivered by both Buyer or its Affiliate and the Company in connection with the Transaction (a “Definitive Transaction Agreement”). Except as may be expressly set forth in a Definitive Transaction Agreement, none of the Company or any of its Representatives shall have any liability to Buyer or any of its Representatives on account of the use of any Evaluation Material by Buyer or any of its Representatives or any inaccuracy therein or omission therefrom.
5. **Destruction or Erasure of Evaluation Material.** At any time upon the Company’s written request (including by email), Buyer agrees that Buyer and its Representatives shall promptly destroy or erase all Evaluation Material (including any Evaluation Material held electronically) in the possession or control of Buyer or any of its Representatives, and Buyer shall, if requested in writing (including by email) by the Company, certify such destruction or erasure to the Company; *provided* that (a) neither Buyer nor any of its Representatives shall be required to destroy or erase 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) and [(b) Buyer and its Representatives may each retain (i) 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 to comply with its established document retention policies and (ii) such copies of the Evaluation Material to the extent required to comply with requirements of

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<sup>17</sup> Delete if neither the Company nor any of its Affiliates has any publicly traded securities. If both parties have publicly traded securities, consider making this a reciprocal acknowledgement.

<sup>18</sup> Some recipients of confidential information, particularly institutional holders of distressed securities negotiating with respect to potential restructurings, make it a priority to obtain agreement from the Company to a “cleansing provision” under which the Company will publicize, through a Securities Act filing, press release or otherwise, no later than a date certain, any information provided which, at the relevant date, remains material and non-public, in order that they may trade in securities of the Company. A sample cleansing provision is included as Exhibit D to this letter.

Applicable Law.]<sup>19</sup> All such Evaluation Material retained in accordance with the foregoing proviso shall continue to be subject to Section 2 [for so long as any Evaluation Material is so retained].<sup>20</sup>

- 6. Communications Regarding the Transaction.** Buyer agrees that all communications by it or any of its Representatives with the other Party concerning the Transaction and its due diligence investigation (including requests for additional Evaluation Material, meetings with management and site visits) shall be directed solely to [\_\_\_\_\_], except as may otherwise be approved in advance and in writing (including by email) by the Company. Buyer agrees that neither Buyer nor any of its Representatives will contact or communicate with any of the directors, officers, employees, customers, suppliers, distributors, licensees, licensors and clients of the Company, and other persons, including governmental agencies, having business relations with the Company, regarding the Company or the Transaction, in each case except to the extent such contacts and communications are (i) made in the ordinary course of business of Buyer or the applicable Representatives and are unrelated to the Transaction and the evaluation of the Transaction conducted by Buyer and its Representatives or (ii) approved in advance and in writing (including by email) by the Company.<sup>21</sup>
- 7. [No Solicitation or Hiring.** Buyer agrees that, except with the prior written consent of the Company, it will not, and it will not permit any of its controlled Affiliates to, directly or indirectly, solicit for employment or hire any [employees/officers/senior management of the Company [first introduced to Buyer or any of its controlled Affiliates in connection with the evaluation of the Transaction][that first become known to Buyer or any of its controlled Affiliates in connection with Buyer’s evaluation of the Transaction][listed on Exhibit A]] for a period of [\_\_\_] year[s] after the date of this Agreement; *provided* that this Section 7 shall not restrict Buyer or any of its controlled Affiliates from (i) making any general solicitation for employment that is not specifically directed at any such Persons, including through use of a recruiting website or employment search firm (so long as the firm is not instructed to solicit such Persons) or from hiring any Person as a

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<sup>19</sup> Disclosing parties may reject the right to retain any copies.

<sup>20</sup> Receiving parties will often take the position that any Evaluation Material that is retained should be subject to the obligation of confidentiality only for the remainder of the term of the Agreement, with the argument being that the information becomes stale and the receiving party does not want lingering contractual obligations. In that case, the bracketed language would be replaced with: “during the term of this Agreement.”

<sup>21</sup> In certain instances, disclosing parties may insist on including a provision regarding the use of social media websites to obtain information about the Company and its employees such as the following:

Buyer agrees that neither it nor any of its Representatives shall use any third party or social media websites to obtain information about the Company or its employees unless it takes reasonable precautions to preserve the confidentiality of the Transaction and to avoid detection of the Transaction or disclosure of any Evaluation Material or any information that if disclosed would constitute a Discussions Disclosure other than as permitted by this Agreement. Reasonable precautions shall include (but are not limited to): (i) selecting privacy settings that will protect the confidentiality of Buyer’s due diligence investigation on such websites, (ii) restricting the use of such websites for the purpose of evaluating the Transaction to as limited a working group as reasonably possible, (iii) avoiding the use of fictional accounts or similar practices (whether or not there is any intent to deceive or harm the Company or its employees), and (iv) otherwise complying with the contractual terms of use of such websites and any applicable federal and state laws.”

result thereof or (ii) soliciting or hiring any such Person who [has left the employment of the Company][was terminated by the Company] at least [\_\_\_\_] months prior to such solicitation or being hired.<sup>22</sup>

8. **[Standstill.** Unless approved in advance in writing by the board of directors of the Company, Buyer agrees that neither Buyer nor any of its Representatives acting on behalf of or in concert with Buyer in this regard will, for a period of [\_\_\_\_] year[s] after the date of this Agreement (the “Standstill Period”)<sup>23</sup>, directly or indirectly:

(a) make any statement or proposal to the board of directors of the Company, any of the Company’s Representatives or any of the Company’s stockholders regarding, or make any public announcement, proposal or offer (including any “solicitation” of “proxies” as such terms are defined or used in Regulation 14A of the Securities Exchange Act of 1934, as amended (the “Exchange Act”)) with respect to, or otherwise solicit, seek or offer to effect (including, for the avoidance of doubt, indirectly by means of communication with the press or media) (i) any business combination, merger, tender offer, exchange offer or similar transaction involving the Company, (ii) any restructuring, recapitalization, liquidation or similar transaction involving the Company, (iii) any acquisition<sup>24</sup> (or proposal or agreement to acquire), of record or beneficially, by purchase or otherwise, any [loans, debt securities,] equity securities or assets of the Company, or rights or options to acquire interests in, or any swap or other arrangement that results in the economic consequences of ownership of, the Company’s [loans, debt securities,] equity securities or assets, except that Buyer may beneficially own up to [\_\_\_\_]% [of each class] [in the aggregate] of the Company’s outstanding [loans, debt securities and] equity securities and may own an amount in excess of such percentage solely to the extent resulting exclusively from actions taken by the Company (*e.g.*, a repurchase of securities by the Company), (iv) any proposal to seek representation on the board of directors of the Company or otherwise control or influence the management, board of directors or policies of the Company, (v) any request or proposal to waive, terminate or amend the provisions of this Agreement<sup>25</sup> or (vi) any proposal, arrangement or other statement that is inconsistent with the terms of this Agreement, including this Section 8(a);

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<sup>22</sup> Receiving parties may wish to provide an additional exception for “soliciting or hiring any such Person who initially approaches the Buyer or its controlled Affiliate of his or her own accord.”

<sup>23</sup> Note that even after the standstill expires, the use restriction set forth in Section 2(a)(i) could be used as an implicit standstill. See the footnote to Section 2(c)(iii) for a potential means to avoid such a “back door” standstill.

<sup>24</sup> If Buyer or an Affiliate already owns a significant amount of the target’s securities or loans, consider also restricting sales.

<sup>25</sup> The interplay of this clause (v) with the fall away provisions in Section 8(d) should be reviewed in light of recent Delaware case law regarding “don’t ask/don’t waive” standstill provisions and whether other interested parties who may have signed a Confidentiality Agreement with the Company that includes a standstill will be allowed to make a competing proposal after Buyer and the Company enter into a definitive agreement. See *In re Complete Genomics, Inc. Shareholder Litigation*, C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012) and *In re Ancestry.com Inc. Shareholder Litigation*, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012).



(b) instigate, encourage or assist any third party (including forming a “group” (as such term is used under the Exchange Act) with any such third party) to do, or enter into any discussions or agreements with any third party with respect to, any of the actions set forth in clause (a) above; or

(c) take any action which would reasonably be expected to require the Company or any of its Affiliates to make a public announcement regarding any of the actions set forth in clause (a) above.

[As of the date of this Agreement, Buyer and its Affiliates own no equity or debt of the Company]<sup>26</sup>

(d) [Notwithstanding the foregoing provisions of this Section 8:

(i) the restrictions set forth in this Section 8 shall terminate and be of no further force and effect if the Company enters into a definitive agreement with respect to, or publicly announces that it plans to enter into, or otherwise has recommended that the Company’s stockholders accept or approve, a transaction involving the acquisition by any Person or “group” of beneficial ownership of all or a controlling portion of the Company’s equity securities or all or substantially all of the Companies’ assets (whether by merger, consolidation, business combination, tender or exchange offer, recapitalization, restructuring, sale, equity issuance or otherwise);]<sup>27</sup>

(ii) nothing in this Section 8 shall restrict Buyer or any of its Representatives from making any proposal regarding a possible Transaction directly to the board of directors of the Company on a confidential basis if such proposal does not require the Company to make a public announcement regarding this Agreement, a possible Transaction or any of the matters described in this Section 8; and

(iii) Buyer and its Representatives may purchase goods or services of the Company or submit proposals for the purchase or sale of goods or services to or otherwise deal with the Company in the ordinary course of business.]

**9. Remedies.** Each party agrees that money damages would not be a sufficient remedy for a breach or a threatened breach of this Agreement and that each party shall be entitled to specific performance and injunctive or other equitable relief, without the posting of a bond or other security, as a remedy for any such breach or threatened breach, in addition

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<sup>26</sup> This representation is particularly helpful in an auction context with actual or potential co-bidders to gain visibility into the ownership percentages of potential purchasers. This representation can be negotiated (i.e., a representation that not more than 1% of equity is owned) or qualified by a disclosure schedule.

<sup>27</sup> This “fall away” provision is one of the most heavily debated issues in public company NDAs. On the one hand, a prospective buyer does not want to have its hands tied if it fails to win the auction and wants to submit a topping bid later. On the other hand, the target’s board of directors wants to obtain the best and final offers from each bidder during the auction process and ensure nothing is being left in reserve by a bidder.

to all other remedies available at law or in equity.<sup>28</sup> Such injunctive or other equitable relief shall be available without the obligation to prove any damages underlying such breach or threatened breach. [In the event of any legal proceedings for the enforcement of this Agreement, the reasonable costs and expenses incurred by the prevailing party and its Representatives as determined by a final, non-appealable judgment of a court of competent jurisdiction in connection with such proceedings, including attorney fees and disbursements, shall be reimbursed by the non-prevailing party.]

- 10. No Waiver of Privilege.** To the extent that any Evaluation Material includes materials subject to the attorney-client privilege, such disclosure is inadvertent and the Company is not 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 Buyer or any of its Representatives.
- 11. Residual Knowledge.** The parties acknowledge and agree that Representatives of Buyer who have received or have been exposed to Evaluation Material may further develop their general knowledge, skills and experience (including general ideas, concepts, know-how and techniques), which may be based in whole or in part on such Evaluation Material. Notwithstanding anything in this Agreement to the contrary, the subsequent use by such Representative of such general knowledge, skills and experience, as retained in their unaided memories, will not in itself constitute a breach of this Agreement.<sup>29</sup>
- 12. Term.** Except for Sections 13(i) (Governing Law; Forum), 13(j) (WAIVER OF JURY TRIAL) and 13(k) (Conflict Waiver), which shall be binding in perpetuity or until the latest date permitted by Applicable Law, [the last sentence of Section 5]<sup>30</sup> and Sections 7 and 8 which shall survive in accordance with their respective terms, this Agreement shall expire upon the date that is [\_\_\_] year[s] after the date of this Agreement.<sup>31</sup>
- 13. Miscellaneous.**<sup>32</sup>

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<sup>28</sup> Receiving parties will often insist that equitable relief is at the discretion of the courts and that money damages “may not” (as opposed to “would not”) be a sufficient remedy for a breach of the Agreement and the disclosing party should be entitled to “seek” specific performance (as opposed to being entitled to specific performance). It should be noted that, if a disclosing party were to agree to this alternative formulation, the usefulness of this provision is limited because there is no explicit right to equitable relief.

<sup>29</sup> Disclosing parties may choose not to include this provision in a first draft.

<sup>30</sup> This bracketed language is only necessary if using the formulation that the confidentiality obligations last for so long as the Evaluation Material is retained, as opposed to for the term of the Agreement.

<sup>31</sup> The most common term is in the range of 12 to 24 months, because the information is likely to be stale thereafter. However, if any of the Evaluation Material will be particularly sensitive, a longer term may be appropriate for at least that portion of the Evaluation Material.

<sup>32</sup> If the transaction involves direct competitors, consider including a provision as follows:

Competing Activities. Subject to Buyer’s compliance with the express provisions of this Agreement, nothing in this Agreement shall prevent Buyer or any of its Representatives from (a) evaluating a possible investment in and/or collaborating with, or entering into any transaction with (including an investment in), or monitoring, managing, maintaining or otherwise acting with respect to an investment in, any Person whose business is

(a) Entire Agreement. This Agreement contains the sole and entire agreement between the parties with respect to the matters set forth herein.

(b) Data Site Provision. 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 Buyer 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 the confidentiality obligations with respect to Evaluation Material are exclusively governed by this Agreement and may not be enlarged except in accordance with Section 13(f).

(c) Ownership of Evaluation Material; No License. All Evaluation Material is and shall remain property of the Company. Buyer acknowledges and agrees that none of the Company nor any of its Representatives grants any license to or other property right or interest in, by implication or otherwise, any copyright, patent, trademark, mask work, database or other intellectual or intangible property or proprietary information disclosed, embodied, fixed, comprised or contained in any Evaluation Material.

(d) No Financing Exclusivity. Buyer hereby represents and warrants that it is not party to any agreement, arrangement or understanding (whether written or oral) that would restrict the ability of any other person to provide financing (debt, equity or otherwise) to any other person for the Transaction or any similar transaction, and Buyer hereby agrees that it will not directly or indirectly restrict the ability of any other person to provide any such financing.

(e) Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither this Agreement nor any of the rights or obligations hereunder may be assigned by any party without the prior written consent of the non-assigning party. Any purported assignment without such consent shall be void and unenforceable.

(f) Amendment and Waiver. This Agreement may be amended or modified only by a separate written instrument duly signed and delivered by or on behalf of both Buyer and the Company. No failure or delay by any party in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege hereunder.

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similar to or competitive with the business of the Company and/or (b) engaging in, conducting or operating any business that is similar to or competitive with the business of the Company. The Company acknowledges that Buyer and its Representatives conduct business with many Persons, some of which may engage in or pursue businesses and strategies that are similar to or competitive with those of the Company. Although Buyer is subject to the obligations set forth in this Agreement, the occurrence or existence of such similar or competitive activities shall not by itself be cause for any action or allegation by the Company that Buyer or any of its Representatives has failed to observe any of the obligations set forth in this Agreement.

(g) Severability. The invalidity or unenforceability of any provision of this Agreement shall not impair or affect the validity or enforceability of any other provision of this Agreement, unless the enforcement of such other provision in such circumstances would be inequitable.

(h) No Obligation to Complete a Transaction. This Agreement is not intended to, and does not, constitute an agreement or impose any obligation on either party to (i) consummate a Transaction, (ii) conduct or continue discussions or negotiations concerning a Transaction, (iii) enter into a joint venture or other business relationship of any kind or (iv) enter into or negotiate a Definitive Transaction Agreement. Except with respect to the matters specifically set forth herein, neither party shall have any rights or obligations of any kind whatsoever with respect to a Transaction by virtue of this Agreement or any other written or oral expression by the parties or their respective Representatives unless and until a Definitive Transaction Agreement is executed and delivered. Buyer acknowledges that the Company reserves the right to (A) provide or not provide Evaluation Material to, and request the destruction or erasure of Evaluation Material by, Buyer or any of its Representatives, (B) reject any proposals made by Buyer or any of its Representatives, (C) terminate discussions or negotiations with Buyer or any of its Representatives and (D) engage in discussions and/or negotiations, and to enter into any agreement, with any other Person, in each case in the Company's sole discretion, without notice to Buyer or any of its Representatives, at any time and for any reason or no reason. Buyer shall not have any claim or cause of action against the Company or any of its Representatives in respect of the foregoing, except as specifically set forth in any Definitive Transaction Agreement, if any, that is hereafter executed.

(i) Governing Law; Forum. This Agreement, and all claims or causes of action (whether in contract, tort or otherwise) that may be based upon, arise out of or relate to this Agreement, or the negotiation, execution or performance of this Agreement, shall be governed by, and construed in accordance with, the laws of the State of [New York]<sup>33</sup> without regard to the principles of conflicts of laws in any jurisdiction. Each party consents and submits to the exclusive jurisdiction of the courts of the [State of New York located in the Borough of Manhattan in New York City and the courts of the United States located in the Borough of Manhattan in New York City in the State of New York] for the adjudication of any action or legal proceeding relating to or arising out of this Agreement and the transactions contemplated hereby (and each party agrees not to commence any action or legal proceeding relating thereto except in any such court). Each party hereby irrevocably and unconditionally waives any objection which it may now or hereafter have to the laying of venue in such courts and agrees not to plead or claim in any such court that any such action or legal proceeding brought in any such court has been brought in an inconvenient forum. Each party hereby agrees that service of any process, summons, notice or document by U.S. certified mail addressed to such party at the address set forth above (or such other address as notified by either party to the other party in writing) shall be effective service of process for any such suit, action or proceeding brought against such party in any such court. Each party hereto agrees that a

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The Company may want the governing law and forum to be the state where it is located.

final judgment in any such suit, action or proceeding brought in any such court shall be conclusive and binding upon such party and may be enforced in any other courts to whose jurisdiction such party is or may be subject by suit upon such judgment.

(j) WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THIS AGREEMENT.

(k) Conflict Waiver. This Agreement also constitutes notice to Buyer that the Company has engaged [LAW FIRM] as its legal counsel in connection with the Transaction, and Buyer hereby (i) consents to the continued representation of the Company by [LAW FIRM] in connection with the Transaction notwithstanding the fact that [LAW FIRM] may have represented, and may currently or in the future represent, Buyer and/or any of its Affiliates with respect to unrelated matters and (ii) waives any actual or alleged conflict and actual or alleged violation of ethical or comparable rules applicable to [LAW FIRM] that may arise from its representation of the Company in connection with the Transaction, including but not limited to representing the Company against Buyer and/or any of its Affiliates (or any Person acting on behalf of or in concert with Buyer or any such Affiliates who receives Evaluation Material from Buyer and/or its Representatives) in litigation, arbitration or mediation in connection therewith. In addition, Buyer hereby acknowledges that its consent and waiver under this Section 13(k) is voluntary and informed, and that Buyer has obtained independent legal advice with respect to this consent and waiver. If Buyer has any questions regarding this Section 13(k), please contact [NAME] at [LAW FIRM] at [PHONE NUMBER] or [EMAIL ADDRESS]. Each party hereto agrees that [LAW FIRM] is an express third party beneficiary of this Section 13(k).

(l) Counterparts. This Agreement may be signed in any number of counterparts (including by PDF) with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts together shall be deemed an original of this Agreement.

[Signature page follows]

If the foregoing correctly sets forth our agreement, please sign and return one copy of this Agreement to [CONTACT] by PDF at [EMAIL ADDRESS], whereupon this Agreement shall constitute our binding agreement with respect to the matters set forth herein.

Very truly yours,

**[THE COMPANY]**

By: \_\_\_\_\_

Name:

Title:

Accepted and agreed to  
as of the date first written above:

**[POTENTIAL BUYER]**

By: \_\_\_\_\_

Name:

Title:

**Exhibit A**

[List of Restricted Employees/Officers/Management]

**Exhibit B**

[Ownership of [Securities] [Loans] of the Company]

| Person | Company [Security] [Loan] | Amount Beneficially Owned |
|--------|---------------------------|---------------------------|
|        |                           |                           |
|        |                           |                           |
|        |                           |                           |



**JOINDER AGREEMENT**

[Date]

[Name of Representative]  
[Name of the Company]  
[Name of Potential Buyer]

Ladies and Gentlemen:

We refer to the attached confidentiality agreement dated \_\_\_\_\_, 20\_\_ (the “Confidentiality Agreement”) between [Name of Potential Buyer] (“Buyer”) and [Name of Target Company] (the “Company”). Capitalized terms used below that are defined in the Confidentiality Agreement are used with the meanings given such terms in the Confidentiality Agreement.

The undersigned is a Representative of Buyer (“Buyer’s Representative”). Buyer’s Representative hereby agrees, for the benefit of Buyer and the Company (an explicit third-party beneficiary to this Agreement), to be bound on behalf of itself and its Representatives by the obligations with respect to Buyer’s Representatives contained in the Confidentiality Agreement (the “Obligations”) as if it were a party thereto.

The parties hereto acknowledge and agree that the signing of this agreement (this “Agreement”) does not obligate any Person to enter into the Transaction or to provide financing for the Transaction. Buyer acknowledges and agrees that Buyer’s Representative shall not be restricted from being engaged or mandated by, or otherwise assisting or participating with, any other Person in any transaction that is similar to or competitive with the Transaction, but Buyer’s Representative must comply with the Obligations as provided herein. Additionally, nothing herein or in the Confidentiality Agreement shall prohibit Buyer’s Representative from disclosing to any third party who contacts Buyer’s Representative with respect to a transaction that is similar to or competitive with the Transaction, the fact that it is working with another Person with respect to a transaction with the Company, so long as it keeps confidential the identity of Buyer and otherwise complies with the Obligations.

No failure or delay by Buyer or the Company in exercising any right, power or privilege hereunder shall operate as a waiver thereof or preclude any other or further exercise thereof or the exercise of any other right, power or privilege hereunder.

[Buyer’s Representative agrees that money damages would not be a sufficient remedy for a breach or a threatened breach of this Agreement and that Buyer and the Company shall be entitled to specific performance and injunctive or other equitable relief without the posting of a bond or other security as a remedy for any such breach or threatened breach, in addition to all other remedies available at law or in equity.] Such injunctive or other equitable relief shall be available without the obligation to prove any damages underlying such breach or threatened breach. [In the event of any legal proceedings for the enforcement of this Agreement, the

reasonable costs and expenses incurred by the prevailing party and its Representatives as determined by a final, non-appealable judgment of a court of competent jurisdiction in connection with such proceedings, including attorney fees and disbursements, shall be reimbursed by the non-prevailing party.]

This Agreement, and all claims or causes of action (whether in contract or tort) that may be based upon, arise out of or relate to this Agreement, or the negotiation, execution or performance of this Agreement, shall be governed by, and construed in accordance with, the laws of the State of New York without regard to the principles of conflicts of laws in any jurisdiction. Each party consents and submits to the exclusive jurisdiction of the courts of the [State of New York] located in the [Borough of Manhattan in New York City and the courts of the United States located in the Borough of Manhattan in New York City in the State of New York] for the adjudication of any action or legal proceeding relating to or arising out of this Agreement and the transactions contemplated hereby (and each party agrees not to commence any action or legal proceeding relating thereto except in any such court). Each party hereby irrevocably and unconditionally waives any objection which it may now or hereafter have to the laying of venue in such courts and agrees not to plead or claim in any such court that any such action or legal proceeding brought in any such court has been brought in an inconvenient forum. Each party hereby agrees that service of any process, summons, notice or document by U.S. registered mail addressed to such party shall be effective service of process for any such suit, action or proceeding brought against such party in any such court. Each party hereto agrees that a final judgment in any such suit, action or proceeding brought in any such court shall be conclusive and binding upon such party and may be enforced in any other courts to whose jurisdiction such party is or may be subject by suit upon such judgment.

**EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THIS AGREEMENT.**

This Agreement may be signed in any number of counterparts (including by PDF) with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts together shall be deemed an original of this Agreement.

[Signature page follows]

If the foregoing correctly sets forth our agreement, please sign and return one copy of this Agreement to [CONTACT] by PDF at [EMAIL ADDRESS], whereupon this Agreement shall constitute our binding agreement with respect to the matters set forth herein.

Very truly yours,

**[BUYER'S REPRESENTATIVE]**

By: \_\_\_\_\_

Name:

Title:

Accepted and agreed:

**[BUYER]**

By: \_\_\_\_\_

Name:

Title:

**SAMPLE “CLEANSING” PROVISION**

(a) On the earlier of (i) \_\_\_\_\_, and (ii) [an event, such as the date of filing of a bankruptcy petition under title 11 of the United States Code by the Company] (such earlier date, the “Disclosure Date”), the Company shall publicly file a summary document (the “Cleansing Document”) which contains all written or oral Evaluation Material that constitutes material non-public information concerning the Company, its related parties and/or their respective securities that was provided at any time by the Company or its Representatives to Buyer or any of its Representatives (all such Evaluation Material being the “Disclosure Information”); provided that such Cleansing Document need not include any written information that was disclosed only to [counsel] pursuant to non-disclosure agreements with the Company shared on the basis of “professionals’ eyes only” or similar designation by the Company at the time of such disclosure. In the event that clause (ii) of the first sentence of this paragraph (a) applies, the Company shall publicly file the Cleansing Document reasonably contemporaneously with the occurrence of the event referenced in such clause (ii).

(b) As promptly as practicable and, in any event, by 5:30 p.m. New York City time on the second business day prior to the Disclosure Date, the Company will provide Buyer with a draft of the Cleansing Document. The Cleansing Document shall be on Form 8-K or any periodic report required or permitted to be filed under the Exchange Act with the Securities and Exchange Commission (the “SEC”) or, if the SEC’s EDGAR filing system is not available, in such other manner that the Company determines in good faith will result in public dissemination of such information. In the event that the Company fails to file the required Cleansing Document by the Disclosure Date or such Cleansing Document does not contain all of the Disclosure Information as determined by Buyer in its good faith judgment after consultation with internal or external counsel with regard to the requirements of applicable securities laws [and after consultation with the Company], then the Company agrees that, automatically and requiring no further act hereunder, and effective immediately on the Disclosure Date and for so long as such filing has not occurred (and notwithstanding if this Agreement has been terminated), Buyer or its Representatives (each an “Authorized Cleansing Party”) shall be authorized to make available to the public (with the reasonable fees of [counsel firm] and other reasonable expenses directly associated with such disclosure in connection therewith to be paid by the Company) a summary that reflects, in the Buyer’s good faith judgment after consultation with internal or external counsel with regard to the requirements of applicable securities laws, the Disclosure Information; provided that the Company has complied with its obligations as set forth in the first sentence of this paragraph (b), Buyer shall provide prior written notice to the Company of such disclosure by 5:30 p.m. New York City time on the second business day prior to such disclosure. The Company’s obligation for the payment of legal fees hereunder shall be limited to the reasonable fees of [counsel firm] only.

(c) None of Buyer or its Representatives shall have any liability to the Company in connection with the disclosure of the Disclosure Information as set forth in this Section.

(d) The Company shall, simultaneously with its filing of the Cleansing Document, represent in writing to Buyer that all information that the Company deems to be Disclosure Information has been publicly disclosed, and Buyer shall be entitled to rely upon such representation in all respects.

(e) Without limiting the parties' rights under this Section, it is the parties' current expectation that, with respect to business plans, term sheets, proposals and similar documents relating to a Transaction, only the most recent versions in any transactional construct (as such most recent versions may be orally supplemented) exchanged by each party to any negotiations would be included in the Disclosure Information.

(f) Buyer acknowledges and agrees that Buyer's sole and exclusive remedy for any breach by the Company of any representation, warranty, or covenant in this Section, except with respect to the Company's obligation for the reasonable fees of counsel and other reasonable expenses directly associated with disclosure as set forth in paragraph (b), is to disclose the Disclosure Information as provided hereunder in accordance with the terms of paragraph (b), and neither the Company nor any of its Affiliates or Representatives shall have any liability at law or in equity for any breach by the Company of its obligations pursuant to this Section.