CONFIDENTIALITY AGREEMENTS: A BASE CASE AND MANY BELLS & WHISTLES

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As soon as discussions about any potential transaction start to get serious, one side often asks the other to sign a Confidentiality Agreement.

Any Confidentiality Agreement starts from the proposition that information about a "Transaction" that one party ("Discloser") shares with the other ("Recipient") should stay confidential (the "Confidential Information"). If Discloser shares Confidential Information but doesn't bother to require Recipient to keep it confidential, then Discloser can hardly complain when Recipient lets the cat out of the bag.

Confidentiality Agreements often go far beyond that. They sometimes specify measures that Recipient should take to preserve confidentiality. They sometimes include the word "indemnify." They sometimes have elaborate language consenting to injunctions and other extreme remedies—which is sort of pointless, since it's unlikely that the victim of a wrongful disclosure will file suit or a court will be able to do much about the violation. And it would be too late, anyway.

Once Discloser has signed any Confidentiality Agreement, regardless of its boilerplate terms, Discloser has gotten almost all the value any Confidentiality Agreement will ever deliver: a recognition that Discloser wants to keep the Confidential Information confidential. For any responsible Recipient, that should do it.

Adding more verbiage to a Confidentiality Agreement makes it more complex, triggering more negotiations, often without producing much more practical value. Much of the additional legalese relates to hypothetical eventualities that rarely if ever occur or seeks to impose oppressive obligations and remedies dreamed up by creative counsel in previous deals.

For better or worse, that process plays itself out daily in all kinds of legal documents. In the context of Confidentiality Agreements, it slows down Transactions and creates spurious issues. Once in a while, inability to resolve a Confidentiality Agreement actually causes a Recipient to walk away from a possible Transaction.

Beyond delivering a recognition that certain information is to be kept confidential, a Confidentiality Agreement, even a very short one, can serve several other purposes.

It may give a party insight into the negotiation style and mindset of its contemplated counterparties. Are they practical? Are they overly legalistic? Do they nitpick? Make silly comments? Do the lawyers or the business people run the show? Do they worry about their own shadow? Do they know how to get deals done? This is potentially as true for Recipient as it is for Discloser.

Asking a prospective counterparty to sign a Confidentiality Agreement can help determine if the counterparty is serious about a potential Transaction. Legal review isn't free. Discloser's request for a signed Confidentiality Agreement can filter out possible counterparties who don't take the Transaction seriously enough to pay for that review. Of course, one of those counterparties might have ultimately taken the Transaction seriously enough to submit the highest bid. So

any Confidentiality Agreement should not be written in a way that scares away too many people.

The most important piece of any Confidentiality Agreement, though, has nothing to do with confidentiality. Instead, it relates to defining what it takes to create a binding agreement. Any Confidentiality Agreement usually makes very clear that no one can become legally obligated to close a Transaction unless the parties agree on Deal Documents and then execute and exchange them.

Without protective language like that, any discussions of a possible Transaction can create risk. Today, those discussions often take the form of extended email conversations. They often go into significant detail and include careless expressions of enthusiasm. After the fact, a court can easily interpret these communications as a legal commitment to proceed. They can have the power of a written contract without having been reviewed by lawyers.

If one party thinks they reached a deal but the other party doesn't think so, the disappointed party will sometimes file suit. The judges who hear those claims rarely know much about real estate negotiations or what industry participants expect when they discuss possible Transactions. Sometimes, when judges "go to the email," they can find binding agreements when one party didn't really anticipate one.

A Confidentiality Agreement can help prevent that problem. It can also immunize a seller from claims arising from the Transaction process itself, such as a claim that someone was supposed to get a "last look" or the seller had an obligation to conduct an auction or other marketing activities in a certain way.

A Confidentiality Agreement can also help prevent claims that a counterparty relied on anything Discloser said—a variation on the idea that no one has any liability unless the parties actually negotiate and sign final Transaction Documents.

Liability prevention doesn't have much to do with confidentiality. But a good Confidentiality Agreement can quite effectively protect against liability, claims, and litigation, with no need for huge amounts of fierce legal boilerplate.

This article offers a template for a Confidentiality Agreement. It begins with a Base Case, consisting of the basic standard provisions one would expect to see for a bare-bones Confidentiality Agreement without glaring omissions. The Base Case includes language to try to prevent premature liability.

Recipient should have no reasonable basis to refuse to sign a Base Case Confidentiality Agreement. The Base Case is designed to be comment-proof, market-standard, and unobjectionable. It covers the main bases for Discloser. It also covers the points that any Recipient would almost always want to see in a Confidentiality Agreement.

After the Base Case, this document offers many optional provisions that sometimes appear in Confidentiality Agreements—"stuff we could add" if the parties wanted to be really thorough or really tough or wanted to pick a fight. The Bells & Whistles come in three flavors: (i) provisions Discloser might request; (ii) provisions Recipient might request; and (iii) neutral optional provisions. One can easily adjust the Bells & Whistles as appropriate. Brackets suggest some but not all possible adjustments, particularly within the Bells & Whistles.

The use of a Base Case plus Bells & Whistles represents a reasonable structure for template documents, if one wants to try to keep documents short, or at least shorter than otherwise. This structure makes it easy to cover the basics without overcomplicating a document unless necessary. Confidentiality Agreements show up all the time in any commercial transactional practice, not just real estate, so they offer a good testing ground for this approach to documents. Not coincidentally, whenever anyone has demonstrated an automated document assembly system to the author, the first sample document has usually consisted of a Confidentiality Agreement with optional clauses.

For some Confidentiality Agreements, some Bells & Whistles will make sense. That should, however, reflect a judgment call. It will rarely make sense to automatically throw in all (or even many) Bells & Whistles. It depends on circumstances, e.g., sensitivity of the Transaction, publicity to date, the parties, other context, etc. Overuse of Bells & Whistles will result in excessive negotiations, delays, and legal fees, with little benefit in the typical case.

To the contrary, if the Transaction moves on an urgent timeline (as typical in practically every real estate

transaction, whether or not truly necessary), then overuse of Bells & Whistles will delay and complicate negotiations of Confidentiality Agreements. That could, in turn, interfere with schedules or even produce substantively bad results by deterring, delaying, or even eliminating bidders in a competitive bidding process.

As a variation on Confidentiality Agreement negotiations, when some Recipients are asked to sign Confidentiality Agreements, they mostly respond by requiring Discloser to attach a standard rider to the Confidentiality Agreement, to protect Recipient (a "Rider"). So instead of negotiating the entire Confidentiality Agreement, Recipient might adjust a few provisions and then add a paragraph at the end referring to the attached Rider, and saying the Rider governs to the extent inconsistent with the Confidentiality Agreement itself. Riders are sometimes longer than the Confidentiality Agreements they modify.

A Rider typically covers at least some or all of these points: (i) a one-year survival period; (ii) permission to share Confidential Information with certain "Additional Recipients"; (iii) permission to keep an archival copy of Confidential Information; (iv) waiver of consequential and similar damages; (v) nullification of any restrictions on recruiting Discloser's employees; (vi) limits on Recipient's obligations if any authority seeks to compel disclosure of Confidential Information; (vii) invalidation of clickthrough or other Confidentiality Agreements, beyond this one; and (viii) other favorite nuggets from Recipient's Bells & Whistles.

Then Discloser and Recipient will negotiate the Rider, in addition to dealing with Recipient's comments on the Confidentiality Agreement itself. By the time the parties finish those negotiations, the Transaction might still remain relevant and timely, or it might not.

In using this Model Confidentiality Agreement, consider these issues, among others:

- Additional Recipients. Any Confidentiality Agreement should include Discloser's consent to sharing the confidential information with Additional Recipients of certain types. Discloser would, in a perfect world, like to have those Additional Recipients sign their own Confidentiality Agreements. But it's not a perfect world, so that's not likely to happen—especially when Additional Recipients are institutional lenders, institutional investors, or law firms. So the initial Recipient will not want to agree to obtain Confidentiality Agreements from (at least) those three groups. More likely, Recipient won't want to obtain Confidentiality Agreements from any Additional Recipients at all. Therefore, the Base Case omits that requirement, but it remains available as a Bell & Whistle.

- Employment. This Confidentiality Agreement is not designed for use with employees or independent contractors. Such use requires, among other things, consideration of 18 U.S.C. § 1833(b)(3). Under that federal statute, confidentiality agreements must disclose that anyone who shares confidential information in confidence with government authorities to fight crime is immune from liability. Omission of that disclosure precludes recovery of exemplary damages or attorneys' fees. This paragraph does not purport to cover all employment law issues raised by confidentiality agreements.

- Inconsistencies. Some Bells & Whistles are inconsistent with others and with the Base Case. Any user of Bells & Whistles will need to harmonize the entire document.

- Responsibilities. In any case, Discloser will want the initial Recipient to be "responsible" for any disclosure made by its Additional Recipients. Does that expose the initial Recipient to unreasonable liability? Should the initial Recipient merely agree to direct each Additional Recipient to maintain confidentiality, without assuming liability for the Additional Recipient's misdeeds? Can the initial Recipient rely on informal confidentiality commitments (an exchange of email) from Additional Recipients? Does that give the initial Recipient enough comfort about exposure from unauthorized disclosure by an Additional Recipient? Those are good questions.

- Signer. Who signs the Confidentiality Agreement? If it's signed by an asset-free single-purpose entity (SPE), it's worthless as a credit matter but should still achieve the desired goals of: (i) getting Recipient to focus on confidentiality; (ii) showing Discloser cared about confidentiality; and (iii) preventing premature liability. Discloser might nevertheless want the parent company to sign the Confidentiality Agreement. Usually that's not a problem

because the deal-specific SPE is not formed until later in the process.

- Survival. Traditionally, Confidentiality Agreements survive for only a year, measured from the signature date, delivery of Confidential Information, or the end of discussions. Any effort to impose a longer survival period will encounter headwinds with most Recipients. It is also true that a one-year survival period makes no sense as it relates to, e.g., sensitive financial statements.

- Timing. Discloser should ask Recipient to sign a Confidentiality Agreement early in the process, certainly before Discloser provides any due diligence information, and ideally before substantive discussions begin.

- Transactional Preparations. If a Transaction has reached the point where Discloser may share Confidential Information, Discloser should also think about other transactional preparations (e.g., performing its own due diligence about the Property) that go far beyond the Confidentiality Agreement.

- Transition to Transaction Documents. If the parties sign Transaction Documents, then any Confidentiality Agreement should terminate. This one does. The Transaction Documents should contain their own confidentiality provisions, which might, e.g., relate to the terms of any actual Transaction.

The template Confidentiality Agreement that follows (Base Case and Bells & Whistles) can be obtained in editable/electronic form by sending email to joshua@joshuastein.com. That version will also reflect any further improvements made to the template since this publication.

BASE CASE CONFIDENTIALITY AGREEMENT

[LETTERHEAD OF DISCLOSER]

_____, 20__

[Name and Address of Recipient]

[Email Address of Recipient]

Confidentiality Agreement (this "Agreement") on _____ (the "Property")

Ladies and Gen tlemen:

_____ ("Recipient") and _____ ("Discloser") may discuss a possible transaction (the "Transaction") involving the Property or some part of it or interest in it. The Transaction could involve development, financing, investment, joint venture, leasing, loan modification, management, ownership, purchase, recapitalization, redevelopment, sale, or some combination of those. It could involve acquisition of a direct or indirect interest in the Property owner.

1. Confidential Information. In this Agreement, "Confidential Information" means all information and documents of any kind Discloser gives [or previously gave] Recipient on the Property or a possible Transaction. Confidential Information excludes, however, information Recipient shows was: (i) publicly known (e.g., court records or land records) or publicly available without breach of this Agreement; (ii) in Recipient's rightful possession before Discloser gave it to Recipient; (iii) rightfully received from a third party without Discloser's involvement, unless Recipient knew the third party had a duty of confidentiality to Discloser; or (iv) developed by Recipient entirely independently of Confidential Information from Discloser.
2. Maintenance of Confidentiality. All Confidential Information is proprietary and confidential. Recipient shall keep all Confidential Information confidential, using commercially reasonable measures and at least those Recipient would use for its own confidential information.
3. Additional Recipients. Recipient may share Confidential Information with its accountants, affiliates, agents, board members, clients, directors, employees, engineers, family members, investors (actual and prospective), lenders (actual and prospective), officers, parent organization, partners, potential lenders and investors, principals, professional advisers, representatives, shareholders, subsidiaries, and other similar parties (all, collectively, "Additional Recipients"), but only if Recipient directs each to comply with this Agreement and not to disclose the Confidential Information any further except to legal counsel. Recipient will be responsible for disclosures by Additional Recipients.
4. Compelled Disclosure. Recipient can disclose Confidential Information as law requires. If possible, Recipient will let Discloser know a reasonable time before that disclosure, so Discloser can try to stop it. If Recipient still must disclose Confidential Information, Recipient shall diligently seek confidential treatment.
5. No Obligations. Discloser makes no representation, warranty, or covenant on any Confidential Information or anything else about a possible Transaction or the Property. Discloser has no liability for information it gives Recipient. Discloser does not guarantee its accuracy or completeness. Unless Recipient and Discloser enter into further written agreements for a Transaction ("Transaction Documents"), this Agreement embodies the parties' entire agreement on the Property, any possible Transaction, and Confidential Information. No one has any obligations on any Transaction, including any bidding or marketing process, unless the parties negotiate, sign, and

exchange Transaction Documents. Any Transaction Documents will supersede this Agreement, which shall no longer apply.

6. Some Legal Matters. New York law governs this Agreement. The parties waive jury trial and consent to New York jurisdiction.

Discloser looks forward to sharing Confidential Information with Recipient and discussing a possible Transaction after Recipient has signed and returned this Agreement.

Very truly yours,

DISCLOSER:

_____

By: _____

Agreed.

RECIPIENT:

_____

By: _____

DISCLOSER'S BELLS & WHISTLES

7. Additional Agreements. Before Recipient discloses Confidential Information to each Additional Recipient (except employees, professional advisers, and actual or prospective institutional lenders), Recipient will: (i) require that Additional Recipient to sign a Confidentiality Agreement [in substantially the same form as this one, but] prohibiting any further disclosure or circulation of Confidential Information except to employees and professional advisers; and (ii) promptly send Discloser a copy of each such additional agreement.[1]

8. Broker. Discloser confirms that _____ ("Broker") acts as Discloser's broker in this matter. Discloser shall be solely responsible for compensating Broker. Recipient shall have no responsibility to compensate Broker. Discloser shall indemnify, defend, and hold harmless Recipient against any claims by Broker, including reasonable attorneys' fees.

9. Brokerage. Recipient shall indemnify Discloser (including payment of Discloser's reasonable attorneys' fees) from and against any claim for compensation made by any broker, consultant, finder, investment banker, or salesperson with whom Recipient dealt for a possible Transaction (a "Broker"), except to the extent Discloser agrees in writing to compensate a Broker.[2]

10. Certain Communications. Recipient shall not communicate about the Property (or a possible Transaction) with any tenant, service provider, or other party with a contractual or other relationship to the Property without Discloser's prior written discretionary consent.

11. Continued Effect. Notwithstanding the return or destruction of Confidential Information, Recipient shall continue to be bound by this Agreement.

12. Disclosure Laws. Recipient shall comply with any law that limits disclosure or use of any information Discloser gives Recipient.[3]

13. Investor Disclosures. Although this Agreement allows disclosure of Confidential Information to actual or prospective investors as Additional Recipients under certain conditions, no such disclosure shall occur unless: (i) Recipient has a preexisting personal or business relationship with each such Additional Recipient; (ii) Recipient gives the Confidential Information directly to the Additional Recipient; and (iii) no broker, finder, consultant, or other intermediary is involved in any way.

14. More Confidential Information. "Confidential Information" includes all of these for the Property or a possible Transaction: agreements, leases, and other documents; direct or indirect ownership and financing structure; approval requirements; information obtained from Property access; financial, environmental, and physical information; development program or plans; online data room credentials (usernames, passwords, and URL addresses); offering memorandum; brochures; communications and statements by Discloser or anyone it brings into these discussions; draft Transaction Documents, including exhibits; information developed from any of the foregoing (including analyses, summaries, notes, memos, and other communications related to or prepared from any of the foregoing); and any other information Discloser provides that a reasonable person would recognize as confidential and proprietary. "Confidential Information" also includes the facts that the Property may be available, a Transaction may occur, and Recipient and Discloser are discussing or sharing information on the Property.

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1 Recipient will rarely want to share with Discloser the identity of all Additional Recipients.

2 If Discloser expects to pay Broker, then Broker should confirm to Discloser that no payment is due absent a closing. At some point early in the process Discloser and Broker should sign a brokerage agreement. That issue lies beyond this Agreement.

3 This paragraph may seem extraneous. It does sometimes appear in Confidentiality Agreements. It might make sense for Transactions where Discloser will release personally identifiable information on customers or other counterparties. Recipient may ask for more detail on exactly what Recipient can and cannot do. Discloser will respond by saying Recipient shouldn't get involved in this sort of Transaction without understanding the ordinary ground rules in the industry.

15. Need to Know. Recipient will not share Confidential Information with anyone, even in Recipient's own organization, who does not reasonably need it to help Recipient consider or consummate a Transaction or enter into Transaction Documents.

16. No Obligations. Recipient will not rely on any Confidential Information, any of Discloser's oral or written communications, or on Discloser's performance of due diligence. Delivery of any information or draft Transaction Documents, entry into this Agreement, and discussions about a Transaction do not obligate anyone to enter into a Transaction; negotiate; entertain proposals; conduct negotiations for a Transaction in any particular way; or do anything else beyond the express obligations in this Agreement.

17. No Recruitment. Whether or not a Transaction occurs, Recipient shall not recruit or seek to recruit any [key] employee of Discloser. Discloser and Recipient agree this restriction on recruitment is necessary: (i) to protect Discloser's legitimate business interests; (ii) to prevent competitive use of Confidential Information; and (iii) to protect other proprietary information or relationships that Discloser's employees developed while employed by Discloser.[4]

18. Other Uses of Information. Except with Discloser's written consent, Recipient shall not, directly or indirectly, or through any other person, such as any Additional Recipient: (i) enter into, agree to enter into, facilitate anyone else's entering into or considering, or introduce anyone to, an actual or potential Transaction; (ii) communicate with anyone except Discloser (or as this Agreement permits) about any Confidential Information or the Property; (iii) inspect, visit, tour, or conduct any on-site due diligence regarding the Property; (iv) undertake, participate in or facilitate any purchase or financing of any debt or equity interest in (or otherwise affecting) the Property or in any entity, except a public company, that holds a direct or indirect interest in the Property; or (v) use any Confidential Information in any manner detrimental to Discloser.

19. Payment of Fee. [If Discloser or any of its related parties close a Transaction, Discloser will pay (or cause another party to the Transaction to pay)] [The Transaction Documents will require _____to pay] Recipient a cash brokerage fee equal to _____ (the "Fee"). Discloser will cause the Fee to be paid in full at Closing. "Closing" means _____. If Discloser terminates this Agreement for any reason, Discloser will pay (or cause another party to pay) the Fee to Recipient if Discloser (or any of its related parties) closes any Transaction within 12 months after termination of this Agreement.[5]

20. Principal, Not Broker. Recipient confirms Recipient acts in these discussions, and any possible Transaction, as a principal and not as a broker or consultant. Recipient will not introduce any other person to the Transaction or the Property, except (as Additional Recipients) prospective investors and lenders for a Transaction sponsored by Recipient.

21. Prohibited Participants. Recipient represents and warrants that none of these persons, directly or indirectly, has or will have any interest in Recipient's entity or group, will participate in any way with Recipient (including as a consultant or adviser with no equity interest) in any possible Transaction, introduced Recipient to the Property, or will directly or indirectly receive any Confidential Information (or payment related to the Property or the Transaction) from Recipient, including as an Additional Recipient: _____.

22. Record-Keeping. Recipient will track who has received Confidential Information, giving Discloser those records on Discloser's written request. Recipient will use Confidential Information only to consider a possible Transaction with Discloser, and for nothing else.

23. References to Agreement. Any communication of Confidential Information need not refer to this Agreement or label the Confidential Information as such.

4 Whether or not necessary, enforceable, or likely to be enforced, this clause sometimes shows up in Confidentiality Agreements. It shows up much more often as a clause that Recipients seek to nullify when they serve up Riders.

5 Consider adding this paragraph if Discloser also acts as Broker.

24. Remedies. Recipient acknowledges Discloser could suffer irreparable injury from any breach of this Agreement. Therefore, Discloser may obtain equitable relief to enjoin any such breach. Recipient shall indemnify, defend, and hold Discloser harmless from and against any loss, cost, liability, or expense, including payment of reasonable attorneys' fees, that Discloser suffers from Recipient's breach of this Agreement.

25. Reserved Rights. Discloser reserves the right, at any time, to discontinue discussions about a possible Transaction, to remove the Property from the market, or to enter into any Transaction with anyone on any terms.

26. Securities Laws. Recipient recognizes, and shall advise its Additional Recipients, that: (i) Confidential Information constitutes material nonpublic information about Discloser; (ii) any trading of securities based on that knowledge may violate securities laws; and (iii) securities laws may also prohibit further communication of Confidential Information to any person if it is reasonably foreseeable that such person is likely to purchase or sell securities of Discloser.

27. Termination of Discussions. If discussions between the parties end without execution of Transaction Documents [and Discloser so requests in writing], Recipient shall promptly: (i) return (and cause all Additional Recipients to return) to Discloser[6] all Confidential Information and, to the extent reasonably possible, delete it from computer systems; and (ii) confirm in writing that Recipient and all Additional Recipients have done that. [Recipient and each Additional Recipient may, however, each keep one copy (including any backup or archival copies of that copy) of Confidential Information to comply with legal requirements or company-wide policies on data retention. This Agreement will continue to apply to that copy.][7]

28. Third Parties. To the extent any third parties provided any Confidential Information, they have no liability for it, including its accuracy or completeness. Recipient releases them from any such liability. This does not limit the effect of any written agreement Recipient signs with them.

RECIPIENT'S BELLS & WHISTLES

29. Additional Recipients. Recipient has no obligation to disclose the names of any Additional Recipient.

30. Advisory Capacity. Recipient has disclosed that it acts on behalf of various clients, funds, or fund managers, and might not act as a principal in any possible Transaction. Discloser acknowledges it has no objection to that.

31. Compelled Disclosure. If any court or other governmental authority seeks to compel disclosure of Confidential Information, Recipient's obligations shall be limited to: (i) promptly notifying Discloser, unless Recipient determines such notice would violate law or be detrimental to Recipient; and (ii) using commercially reasonable efforts, at Discloser's sole cost and expense, to help Discloser seek a protective order or similar protections. Recipient may, however, make disclosure to the extent outside counsel advises [in writing] that Recipient must do so to comply with law or any securities exchange rules.

32. Confidentiality of Recipient. Discloser shall keep confidential the fact that Recipient and its related parties have expressed interest in the Property or a possible Transaction. Recipient and Discloser shall have the same rights and obligations regarding that information as Recipient and Discloser have for the Confidential Information that Discloser gives Recipient, except that the roles and responsibilities shall be reversed.

33. Excluded Damages. In no event shall Recipient have any liability for consequential, exemplary, indirect, punitive, special, speculative, treble, or other similar damages as a result of any breach of this Agreement. Discloser's sole and exclusive remedy shall be recovery of actual damages and the ability to seek injunctive relief or specific performance.

6 Recipient might prefer: "return or destroy (or cause all Additional Recipients to return or destroy)."

7 Recipient will often request the bracketed language. How does it interact with the one-year survival period of a typical Confidentiality Agreement?

34. Financial Transactions. Nothing in this Agreement limits, restricts, or impairs Recipient's ability to engage in any transactions involving securities, bank debt, instruments, and interests of Discloser or any other person or entity, subject only to securities law compliance

35. General Knowledge. Confidential Information may enhance Recipient's general knowledge of marketplace conditions and real estate matters. That deeper knowledge and understanding may not be capable of separation from other knowledge. Nothing in this Agreement prevents that enhancement or precludes Recipient and its personnel from using that general knowledge in other transactions or for Recipient's internal purposes, subject only to securities law compliance.

36. Other Confidentiality Obligations. This Agreement supersedes, and Recipient shall not be bound by, any past, present, or future "click-through" confidentiality language (or any online confidentiality legend or other electronic or similar acknowledgment of confidentiality, regardless of date) that purports to govern Recipient's receipt, review, and use of any Confidential Information.[8]

37. Regulatory Disclosures. Nothing in this Agreement prevents Recipient from disclosing Confidential Information to regulatory (including self-regulatory) authorities in the ordinary course of regulatory audits or examinations in the ordinary course of business, or in response to any regulatory sweep or other regulatory inquiry.

38. Remarketing. If Discloser is marketing the Property through an investment sales program using a third-party broker, Discloser terminates the engagement of that broker, and Discloser engages another broker to conduct an investment sales program for the Property, then Recipient may use the Confidential Information in evaluating whether to enter into a Transaction through that later investment sales program.

39. Securities Laws. If Discloser is a public company or otherwise subject to United States securities laws, then Discloser: (i) shall not disclose to Recipient, and the Confidential Information shall never include, any material nonpublic information; and (ii) represents and warrants to Recipient that any Transaction would not constitute a material transaction that Discloser (or any related party) would need to report.

40. Survival. Recipient's obligations under this Agreement shall continue until, and end upon, the earlier of: (i) the date when the parties, in their sole and absolute discretion, sign Transaction Documents; and (ii) 12 months[9] after the date [of this Agreement] [of the first disclosure of Confidential Information pursuant to this Agreement] [when either party has notified the other, by email, that discussions about a Transaction have ended] [when discussions between the parties about a Transaction have ended].[10]

GENERAL BELLS & WHISTLES

41. Circulation of Drafts. Any delivery of, or circulation of comments on, any draft Transaction Document does not bind any party in any way, whether or not the person making the distribution includes a caveat on its nonbinding nature.

42. Consultant. By signing this Agreement, Discloser authorizes and directs _____ ("Consultant") to share with Recipient all information, analyses, studies, reports and notes in Consultant's possession about the Property, including any information of an adverse nature (the "Consultant File"), subject only to the conditions in this paragraph. Only for that disclosure, Discloser waives any confidentiality obligation Consultant may owe Discloser for the Consultant File. Discloser imposes only these conditions on Consultant's release of the Consultant File: (i) as between Recipient and Discloser, the Consultant File constitutes Confidential Information, subject only to the express exclusions from Confidential Information stated in this Agreement; (ii) Consultant and Recipient must

8 How might this language interact with the terms of access or terms of service for any data room that Discloser or a broker establishes?

9 Twelve months is probably too short for at least some Confidential Information, but remains the strongly held industry standard and expectation. If Discloser will provide particularly sensitive Confidential Information, Discloser should be able to extend the survival period just for that.

10 Adjust based on taste and circumstances, including, e.g., whether Discloser is speaking only to Recipient about a possible Transaction or instead to multiple possible counterparties.

copy Discloser on every written or emailed communication between them on the Property or the Consultant File; (iii) as with any other Confidential Information, Discloser makes no representation and warranty at all about the Consultant File; and (iv) Recipient must compensate Consultant at its regular rates for any time spent consulting with Recipient or dealing with release of the Consultant File. Consultant is a third-party beneficiary of this paragraph.

43. Email. Email messages between Discloser and Recipient shall not bind anyone, establish any obligation or modify this Agreement. As the only exceptions, if an email message: (i) transmits a scanned image of a manually signed document, then that document shall be legally effective as against the signer; or (ii) confirms that discussions about a Transaction have ended, then that email message shall end those discussions.

44. Execution. This Agreement may be executed in counterparts or through scanned images sent by email.

45. Inquiries. If any reporter (or other writer of any kind) contacts either party to inquire about the possibility of a Transaction, then the party receiving that communication shall respond "No comment," and shall promptly notify the other party.

46. Limitation of Liability. No direct or indirect advisor, agent, employee, member, officer, owner, principal, or shareholder of either party shall have any liability under this Agreement.

47. Limited Role. _____ acts solely as a [licensed real estate broker] [principal] for the Property and the Transaction. _____ will not provide legal services, paid or unpaid, to anyone for the Property or any Transaction. _____ will not rely on _____ to represent or advise on legal matters. If _____ works on any term sheet or letter of intent, that is done only in the capacity stated in this paragraph, and not as a lawyer.[11]

48. Litigation. In the event of any litigation over this Agreement: (i), the prevailing party shall recover its reasonable attorneys' fees; and (ii) the parties shall promptly enter into and submit to the court, with a request to be "so-ordered," a Stipulation and Order for the Production and Exchange of Confidential Information as promulgated by the New York City Bar Association Committee on State Courts of Superior Jurisdiction. If any such litigation is heard in the Commercial Division, New York State Supreme Court, then the parties agree to application of the Court's accelerated procedures, Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division, Section 202.70(g), Rule 9).

49. Miscellaneous. This Agreement binds the parties and their successors and assigns. It can be modified or waived only in writing. Neither party may assign any or all rights or obligations under this Agreement without the other party's consent.

11 Consider adding this paragraph if Broker or one of the parties is also a lawyer or law firm.