

# GROWTH ACADEMY

BACK TO BASICS - NDA'S

## LEXIA



# CONFIDENTIALITY

- NDA Agreements and NDA clauses as a part of a larger agreement
- NDA Agreement as a stand alone agreement
  - Mutual or one-way agreements/clauses



# WHY USE AN NDA

- Receiving proprietary information
  - Technical, commercial, etc.
  - To test a product or technology to be used in a game, to demo the game, in a merger or acquisition, in a co-operation process etc.
- Disclosing proprietary information
  - To provide safety when distributing your own proprietary information
- A necessity for initiating cooperation or discussions
- Other agreements and arrangements



# BASIC CONTENT

- Parties
- Purpose of the NDA
- Definition of Confidential Information
- Allowed usage of protected material
- Standard of care
- Exemptions
- IPR protection, declaration of ownership, license etc.
- Returning and destroying of material
- Auditing rights – seldomly used
- Term of the Agreement and non-disclosure
- Sanctions
- Assignment & Amendments
- Invalidity or unenforceability
- Dispute Resolution & Governing Law



# PURPOSE OF THE NDA

- Be clear with the purpose
- Define why the NDA is needed and what it will be used for
- Essential to protect your proprietary information – do not provide information not covered by the NDA



# CONFIDENTIAL INFORMATION

- Does the definition of Confidential Information cover all necessary matters?
  - Specifications, documentation, manuals
  - Software
  - Presentation and commercial material
  - Intellectual Property in general
  - includes ideas/Know-how
- How is Confidential Information provided
  - Oral information vs written (– difficulty to prove)
  - Marked as confidential vs all information provided for the Purpose

- Definition often made to be very broad to cover all possible disclosed information

*“Confidential Information” shall mean any information or data, which is disclosed in any form (whether or not expressly marked or stated to be confidential) by the Discloser to the Recipient, and which relates to the Discloser and/or its business partners, including but not limited to information regarding the Discloser’s products, services, operations, intentions, customers, suppliers, personnel, concepts, plans, business affairs, statistics, trade secrets, know-how and contracts.*

# EXCEPTIONS: INFORMATION NOT UNDER NDA

The foregoing obligations **shall not apply** to any Information which

- Is in the **public domain** at the time of disclosure or later becomes part of the public domain through no fault of the Receiving Party; or
- was **known** to the Receiving Party **prior to** disclosure by the Disclosing Party as proven by written records of the Receiving Party; or
- is **disclosed to the Receiving Party by a third party** who did not obtain such Information, directly or indirectly, from the Disclosing Party; or
- was **independently developed** (by **personnel having no access to the Information**) by the Receiving Party as proven by the written records of the Receiving Party.
- Mandatory disclosure

# ALLOWED AND RESTRICTED USAGE



- Restricted/Allowed use should be strictly defined
  - Information used only for the defined Purpose
    - Testing
    - Interoperability with other party's technology and products
    - Subcontracting purposes
    - Etc.
- Who is allowed to access/use/test the information
- Note: to be considered eg. Right to reference/Right to publicize



# PROTECTION

- Respective standard of care - equivalent to at least a reasonable skill and care
- Information not to be used for any other purpose
- Restriction of access to Information
  - Employees (Affiliates)
  - Advisors
  - Subcontractors?



# NO OTHER OBLIGATIONS - NO LICENSE

**Neither** this Agreement nor disclosure of Information shall constitute or imply **any promise or intention to make any purchase of products or services** by either Party or **any commitment** by either Party with respect to the present or future marketing of any product or service or any promise or intention to enter into any other business arrangement with the other Party with regard to the Purpose.

The Receiving Party acknowledges and agrees that all property, including the intellectual property, in connection with the Confidential Information disclosed to it by the Disclosing Party shall remain and be vested in the Disclosing Party, and by using or disclosing that Confidential Information, **no licence, trademark, patent, copyright or any other intellectual property right is granted, whether express or implied.**

# SANCTIONS FOR BREACH

- Losses - Costs
- Fixed amount/Liquidated damages
- Direct damages - Costs involved with fixing the damage
- Indirect damages (e.g. expenses incurred as a result of the breach for example non-performance or lost profits) - often excluded
- Court to decide the actual damages



# TERM & TERMINATION

- When will the agreement enter into force?
- When can it be terminated?
- Which clauses survive?
- What should be done with the information?

# PROBLEMS AND RISKS

- Information defined or marked – Information by its nature to be considered confidential
- Information known prior by the other party
- Present and future ideas – how to justify the need to keep confidential
- Control (material to be destroyed, etc.) – How to verify
- Sanctions
- Too long or undefined time for disclosure – perpetuality of the NDA
- Legislation – generally relating trial and enforceability

# NO NDA – WHAT DO I DO???

- Trade Secret Act provides some level of protection for confidential information
  - Implemented based on the EU Trade Secrets Directive
  - Information has to fulfill the criteria set forth in the Act in order to be protected
  - Unlawful acquisition, use and disclosure is prohibited
  - Civil remedies e.g. injunctions, compensation



# CASE STUDY

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# CASE - RESQ

- The founder of the food-waste reducing app ResQ Club copied the service concept and business plan from another company, Lunchie, who originally created the concept
  - He had previously worked for the company but was kicked out due to ideological differences
- The ResQ app launched a couple of weeks before Lunchie's app
- The ResQ founder claimed he had not signed a non-disclosure agreement
  - As the Trade Secret Act is mandatory legislation in Finland, it governed the information disclosure even though there was no NDA in place at the time
  - Thus, he was found guilty of infringing and abusing trade secrets and sentenced to probation







# LEXIA ATTORNEYS LTD