

The Plain & Simple

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Confidentiality Agreements: Don't Take Them Too Lightly

Another day - another confidentiality agreement - ho hum. No reason to have a lawyer look at it. After all, they really don't mean anything. And who would want to waste time (and money) having a lawyer review a "confi" when you don't even know if you are moving forward with the transaction in the first place. No one ever sues anyone on a "confi" do they?

Actually, quite recently, a court ordered Mesa Air Group to pay Hawaiian Airlines \$80 million dollars in damages for a breach of a confidentiality agreement. [Hawaiian Airlines, Inc. v. Mesa Air Group, Inc.](#), (*In re Hawaiian Airlines, Inc.*), Ch. 11 Case No. 03-00817, Adv. Pro. No. 06-90026, (Bankr. D. Haw. Oct. 30, 2007). After the parties exchanged information, multiple issues arose as to whether certain information was confidential and misused or was "generally available to the public" thus not confidential. The court determined that Mesa Air expanded its business using confidential information obtained from Hawaiian Airlines and was thus found to be in breach of the confidentiality agreement signed between the parties.

Disputes such as this one are not unique, and a recent Southern District of New York case is just another example of where a jury concluded that a party had breached the terms of a confidentiality agreement (albeit with a smaller award). See [Health Alliance Network, Inc. v. Continental Cas. Co.](#), 245 F.R.D. 121 (S.D.N.Y. 2007). In light of the potential for substantial liability, it is important to pay special attention to issues that can arise with respect to confidentiality agreements.

In addition to questions as to whether the information at issue is confidential or not, there are all sorts of other issues that can arise with respect to these agreements; for example:

- How long does it last?
- Who is bound by it (i.e. are affiliates of the signing party bound)? This becomes especially tricky if the company signing it is a large company where it is not possible for, say, Division A, to be aware that, say, Division B has bound the entire company to the agreement

- Do you have the right to disclose to your agents, investors, lenders, etc.?
- If the agreement permits disclosure to agents, investors, lenders, etc. of the signing party, is the signing party liable for the wrongful disclosures by the agents to whom the signing party renders a permitted disclosure?
- Are you liable for consequential or speculative damages from a wrongful disclosure?
- Is the confidential information defined carefully or vaguely and does it have a carveout for (i) information that ultimately becomes part of the public domain and (ii) disclosure of information that is required by law or subpoena?
- Are there so-called “standstill” arrangements in the document?

And the foregoing are to name but a few of the issues of importance. Matters get even trickier if the agreement pertains to processes or intellectual property or if public companies are involved.

It is beyond the scope of this “plain and simple” article to get into the nuances. Suffice it to say that the points here are (i) don’t take confidentiality agreements lightly and assume they are legally meaningless, (ii) if your company is of sufficient size that different departments do not necessarily know what is going on in other departments, provide for specified and careful policies and procedures for clearing and reviewing confidentiality agreements, and (iii) to have confidentiality agreements reviewed by your counsel before you sign them.

For assistance in matters pertaining to confidentiality agreements, please contact:

Allan N. Taffet
Litigation Chair
(212) 692-5523
ataffet@dslip.com

Patrick W. Duval
Corporate Chair
(212) 692-5555
pduval@dslip.com

Bruce M. Stachenfeld
Real Estate Co-Chair
(212) 692-5550
bstachenfeld@dslip.com

Firm Facts

Terri Adler (co-chair of the real estate department) gave birth to a baby girl on January 24, 2008 – Aimee Rose Goldstein weighed in at 5 pounds 12 ounces.

Please contact Caitlin Velez at (212) 672-3747 or newsletter@dslip.com with any questions or comments.

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