

## Project Reno: NDA Issues List

Issue	Our Initial Position	Sano's Revised Position	Recommended Response
Definition of "Confidential Information"	"Confidential Information" includes all information "relating, directly or indirectly, to Denove or its business, including, without limitation, information related to Denove's products, product candidates, markets, condition (financial or other), operations, assets, liabilities, results of operations, cash flows or prospects of Denove."	Deleted the inclusive list of information that should be treated as confidential (e.g. "information related to Denove's products, product candidates, markets, condition (financial or other), operations, assets, liabilities, results of operations, cash flows or prospects of Denove")	Consider accepting. While the deleted list is helpful in terms of giving examples and avoiding potential ambiguity, the scope of what is or is not "Confidential Information" is likely not impacted by the change, since "all information relating, directly or indirectly, to Denove or its business" is still included in the definition.
	Information does not need to be marked as "confidential" to be considered "Confidential Information."	"Confidential Information" only includes information " <i>expressly marked to indicate that such material is 'confidential'.</i> "	Resist. This would potentially create a significant administrative burden on ensuring everything that is confidential is so marked, and would, by definition, prevent any unwritten materials from being treated as Confidential Information (e.g., oral communications), which is inconsistent with the intent behind the NDA.
	Any information furnished to Sano by Denove can be "Confidential Information," regardless of when it was furnished.	Only information provided after the date of the NDA can be considered "Confidential Information."	Consider proposing a look-back to the date upon which potential Confidential Information was first provided to Sano (likely, when discussions with Sano first began). While an indefinite period would arguably be beneficial to Denove, Sano would likely argue that it would be too burdensome to have to review all of its records throughout its history to identify any potential information related to Denove. A reasonable compromise is to select a date from which all of the current discussions began, since that would most likely cover anything provided as part of those discussions.

Limitations on Use of Confidential Information	Sano agrees not to use Confidential Information in any way that is detrimental to Denove.	Deleted by Sano.	Consider accepting. While this is favorable, “catch-all” language that would be helpful to include, the limitations on use are already clear (e.g., Sano can only use the information to evaluate the potential transaction), and Sano is likely, and justifiably, concerned about the vagueness of what “detrimental use” could include (for example, it could be argued that a reduction in price as a result of due diligence could be seen as a “detrimental” use of Confidential Information).
	Requires Representatives who are provided access to Confidential Information to be, among other things, provided with a copy of the NDA and agree to be bound by the terms thereof.	Requires Representatives who are provided access to Confidential Information to be, among other things, <i>made aware of the general terms of</i> the NDA, and removed requirement that representatives are provided with a copy of the NDA.	Resist. It is important to Denove that anyone who receives Confidential Information understands the specific obligations of confidentiality and limitations on use that will apply to them. If Sano continues to push, consider revising their language to state that they must be “made aware of the terms of the NDA applicable to such Representative.”
	Sano must maintain a list of representatives who have been provided ‘Confidential Information’ (which must be produced where Denove requests it).	Deleted by Sano.	Consider accepting. Maintaining such a list, while theoretically helpful for Denove in terms of monitoring who has access to their Confidential Information, would create significant administrative burdens on Sano. In an M&A transaction, there may be hundreds of entities and individuals who may need to review diligence materials in the transaction, and maintaining an accurate list of those people is likely impracticable. In addition, the deletion does not diminish the obligations of Sano or its Representatives to keep the information confidential.

Return or Destruction of Confidential Information	Sano must inform Denove promptly if they decide not to proceed with the transaction.	Deleted by Sano.	Consider accepting. While helpful to obligate Sano to affirmatively inform Denove when Sano decides not to proceed with the transaction, it may be difficult to pinpoint when that decision is made, and Denove will likely know when discussions cease regardless. In addition, as revised, Denove can still request the destruction of Confidential Information at its sole discretion.
	Upon request by Denove, Sano can, at its expense, elect to return or destroy all Confidential Information.	Limited requirement to only destroy all Confidential Information upon request from Denove.	Consider accepting, unless Denove intends to provide original copies of Confidential Information that need to be returned (which seems unlikely). Otherwise, Sano is effectively pre-selecting the option to destroy Confidential Information, which it would have been able to do regardless.
	Notwithstanding a request from Denove to return/destroy all Confidential Information, Sano may retain one copy of the Confidential Information to the extent required to comply with applicable law.	Added ability to retain Confidential Information subject to automatic archiving and back-up procedures.	Resist. While potentially burdensome for Sano to have to potentially undo automatic archiving and back-up procedures to delete Confidential Information, the risk is that all Confidential Information may be retained in such a way (and potentially at Sano's discretion), and it seems like an appropriate expectation that Sano keep any Confidential Information isolated from such procedures).
	Sano will continue to be bound by its confidentiality obligations as set out in the NDA notwithstanding the return/destruction of Confidential Information.	Deleted by Sano.	Resist. To the extent Sano retains any Confidential Information (including, e.g., any recollection of the contents of any Confidential Information), such information should remain protected by the terms of the NDA.
Acknowledgement	N/A.	Included an acknowledgement that neither the execution of the NDA nor receipt of Confidential Information restricts or precludes the ability of Sano (or its affiliates to evaluate, invest or do business with competitors or potential competitors of Denove in any way.	Strongly resist, or, at minimum, include an exception for any provision of the NDA (e.g., "except as otherwise provided in this Agreement..."). As drafted, this acknowledgement could be read to potentially override or supersede many of the key provisions otherwise negotiated in the NDA (for example, based on Sano's proposed

			language, Sano could make the argument that it could share Confidential Information with a competitor of Denove, if that was related to “doing business” with that competitor). While acceptable to acknowledge that Sano may do business with competitors of Denove, the expectation should be that Sano must still comply with the terms of the NDA.
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