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UNITED STATES DISTRICT COURT
DISTRICT OF _____

_____,
Plaintiff,
v.
_____,
Defendant.

CASE NO. _____

**CONFIDENTIALITY
AGREEMENT AND
MODEL STIPULATED
PROTECTIVE ORDER**

1. PURPOSES AND LIMITATIONS

Discovery in this action is likely to involve production of confidential, proprietary, or private information for which special protection may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this agreement is consistent with Local Civil Rule 26(c). It does not confer blanket protection on all disclosures or responses to discovery, the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles, and it does not presumptively entitle parties to file confidential information under seal.

1 2. “CONFIDENTIAL” MATERIAL

2 “Confidential” material shall include the following documents and tangible things
3 produced or otherwise exchanged: any such nonpublic information of the parties like financial
4 information, concepts, designs, processes, methodologies and development information, names
5 of actual and potential investors, investment plans or strategies, operating agreements, product
6 plans and/or specifications, software object and/or source code, product and/or business models
7 or strategies, customer and/or potential customer information, identities of parties with which
8 the parties do or proposes to do business, employee information and other business information
9 concerning the business plans, or operations and prospects of the parties that the parties’
10 respective counsel believes, in good faith, warrants protection under trade secret laws or similar
11 legal protections.

12 3. SCOPE

13 The protections conferred by this agreement cover not only confidential material (as
14 defined above), but also (1) any information copied or extracted from confidential material; (2)
15 all copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony,
16 conversations, or presentations by parties or their counsel that might reveal confidential
17 material. However, the protections conferred by this agreement do not cover information that
18 is in the public domain or becomes part of the public domain through trial or otherwise.

19 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

20 4.1 Basic Principles. A receiving party may use confidential material that is
21 disclosed or produced by another party or by a non-party in connection with this case only for
22 prosecuting, defending, or attempting to settle this litigation. Confidential material may be
23 disclosed only to the categories of persons and under the conditions described in this agreement.
24 Confidential material must be stored and maintained by a receiving party at a location and in a
25 secure manner that ensures that access is limited to the persons authorized under this agreement.
26

1 4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise
2 ordered by the court or permitted in writing by the designating party, a receiving party may
3 disclose any confidential material only to:

4 (a) the receiving party’s counsel of record in this action, as well as
5 employees of counsel to whom it is reasonably necessary to disclose the information for this
6 litigation;

7 (b) the officers, directors, and employees (including in house counsel) of the
8 receiving party to whom disclosure is reasonably necessary for this litigation;

9 (c) experts and consultants to whom disclosure is reasonably necessary for
10 this litigation and who have signed the “Acknowledgment and Agreement to Be Bound”
11 (Exhibit A);

12 (d) the court, court personnel, and court reporters and their staff;

13 (e) copy or imaging services retained by counsel to assist in the duplication
14 of confidential material, provided that counsel for the party retaining the copy or imaging
15 service instructs the service not to disclose any confidential material to third parties and to
16 immediately return all originals and copies of any confidential material;

17 (f) during their depositions, witnesses in the action to whom disclosure is
18 reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound”
19 (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of
20 transcribed deposition testimony or exhibits to depositions that reveal confidential material
21 must be separately bound by the court reporter and may not be disclosed to anyone except as
22 permitted under this agreement;

23 (g) the author or recipient of a document containing the information or a
24 custodian or other person who otherwise possessed or knew the information.

25 4.3 Filing Confidential Material. Before filing confidential material or discussing or
26 referencing such material in court filings, the filing party shall confer with the designating party

1 to determine whether the designating party will remove the confidential designation, whether
2 the document can be redacted, or whether a motion to seal or stipulation and proposed order is
3 warranted. Local Civil Rule 5(g) sets forth the procedures that must be followed and the
4 standards that will be applied when a party seeks permission from the court to file material
5 under seal.

6 5. DESIGNATING PROTECTED MATERIAL

7 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each
8 party or non-party that designates information or items for protection under this agreement must
9 take care to limit any such designation to specific material that qualifies under the appropriate
10 standards. The designating party must designate for protection only those parts of material,
11 documents, items, or oral or written communications that qualify, so that other portions of the
12 material, documents, items, or communications for which protection is not warranted are not
13 swept unjustifiably within the ambit of this agreement.

14 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
15 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to
16 unnecessarily encumber or delay the case development process or to impose unnecessary
17 expenses and burdens on other parties) expose the designating party to sanctions.

18 If it comes to a designating party's attention that information or items that it designated
19 for protection do not qualify for protection, the designating party must promptly notify all other
20 parties that it is withdrawing the mistaken designation.

21 5.2 Manner and Timing of Designations. Except as otherwise provided in this
22 agreement (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or
23 ordered, disclosure or discovery material that qualifies for protection under this agreement must
24 be clearly so designated before or when the material is disclosed or produced.

25 (a) Information in documentary form: (e.g., paper or electronic documents
26 and deposition exhibits, but excluding transcripts of depositions or other pretrial or trial

1 proceedings), the designating party must affix the word “CONFIDENTIAL” to each page that
2 contains confidential material. If only a portion or portions of the material on a page qualifies
3 for protection, the producing party also must clearly identify the protected portion(s) (e.g., by
4 making appropriate markings in the margins).

5 (b) Testimony given in deposition or in other pretrial or trial proceedings:
6 the parties must identify on the record, during the deposition, hearing, or other proceeding, all
7 protected testimony, without prejudice to their right to so designate other testimony after
8 reviewing the transcript. Any party or non-party may, within fifteen days after receiving a
9 deposition transcript, designate portions of the transcript, or exhibits thereto, as confidential.

10 (c) Other tangible items: the producing party must affix in a prominent place
11 on the exterior of the container or containers in which the information or item is stored the word
12 “CONFIDENTIAL.” If only a portion or portions of the information or item warrant protection,
13 the producing party, to the extent practicable, shall identify the protected portion(s).

14 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
15 designate qualified information or items does not, standing alone, waive the designating party’s
16 right to secure protection under this agreement for such material. Upon timely correction of a
17 designation, the receiving party must make reasonable efforts to ensure that the material is
18 treated in accordance with the provisions of this agreement.

19 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

20 6.1 Timing of Challenges. Any party or non-party may challenge a designation of
21 confidentiality at any time. Unless a prompt challenge to a designating party’s confidentiality
22 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
23 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
24 challenge a confidentiality designation by electing not to mount a challenge promptly after the
25 original designation is disclosed.

1 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
2 regarding confidential designations without court involvement. Any motion regarding
3 confidential designations or for a protective order must include a certification, in the motion or
4 in a declaration or affidavit, that the movant has engaged in a good faith meet and confer
5 conference with other affected parties in an effort to resolve the dispute without court action.
6 The certification must list the date, manner, and participants to the conference. A good faith
7 effort to confer requires a face-to-face meeting or a telephone conference.

8 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
9 intervention, the designating party may file and serve a motion to retain confidentiality under
10 Local Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of
11 persuasion in any such motion shall be on the designating party. Frivolous challenges, and those
12 made for an improper purpose (e.g., to harass or impose unnecessary expenses and burdens on
13 other parties) may expose the challenging party to sanctions. All parties shall continue to
14 maintain the material in question as confidential until the court rules on the challenge.

15 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
16 LITIGATION

17 If a party is served with a subpoena or a court order issued in other litigation that
18 compels disclosure of any information or items designated in this action as
19 “CONFIDENTIAL,” that party must:

20 (a) promptly notify the designating party in writing and include a copy of
21 the subpoena or court order;

22 (b) promptly notify in writing the party who caused the subpoena or order to
23 issue in the other litigation that some or all of the material covered by the subpoena or order is
24 subject to this agreement. Such notification shall include a copy of this agreement; and

25 (c) cooperate with respect to all reasonable procedures sought to be pursued
26 by the designating party whose confidential material may be affected.

1 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

2 If a receiving party learns that, by inadvertence or otherwise, it has disclosed
3 confidential material to any person or in any circumstance not authorized under this agreement,
4 the receiving party must immediately (a) notify in writing the designating party of the
5 unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the
6 protected material, (c) inform the person or persons to whom unauthorized disclosures were
7 made of all the terms of this agreement, and (d) request that such person or persons execute the
8 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

9 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
10 MATERIAL

11 When a producing party gives notice to receiving parties that certain inadvertently
12 produced material is subject to a claim of privilege or other protection, the obligations of the
13 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This
14 provision is not intended to modify whatever procedure may be established in an e-discovery
15 order or agreement that provides for production without prior privilege review. Parties shall
16 confer on an appropriate non-waiver order under Fed. R. Evid. 502.

17 10. NON TERMINATION AND RETURN OF DOCUMENTS

18 Within 60 days after the termination of this action, including all appeals, each receiving
19 party must use best reasonable efforts to destroy all confidential material including all copies,
20 extracts and summaries thereof. The parties recognize that electronically produced information
21 (ESI) results in copies made due to back up and archive protocols and no party can guaranty
22 that every copy has been found and deleted. Therefore, the parties commit to use best
23 reasonable efforts to delete confidential information instead of returning it. The parties will use
24 best reasonable efforts to delete confidential information from Concordance or Summation or
25 similar document review/management programs and will use best reasonable efforts to destroy
26 any hard copies made of confidential information, as well as confidential ESI stored in other

1 locations. Notwithstanding this provision, counsel are entitled to retain one archival copy of
2 all documents filed with the court, trial, deposition, and hearing transcripts, correspondence,
3 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert
4 work product, even if such materials contain confidential material.

5 The confidentiality obligations imposed by this agreement shall remain in effect until a
6 designating party agrees otherwise in writing or a Court orders otherwise.

7 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

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9 DATED: _____

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Attorneys for Plaintiff

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16 DATED: _____

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Attorneys for Defendant

1 PURSUANT TO STIPULATION, IT IS SO ORDERED.

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1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____ [print or type full name], of
4 _____ [print or type full address], declare under penalty of perjury
5 that I have read in its entirety and understand the Stipulated Protective Order that was issued
6 by the United States District Court for the District of _____ on
7 _____ in the case of _____.

8 I agree to comply with and to be bound by all the terms of this Stipulated Protective Order
9 and I understand and acknowledge that failure to so comply could expose me to sanctions
10 and punishment in the nature of contempt. I solemnly promise that I will not disclose in
11 any manner any information or item that is subject to this Stipulated Protective Order to any
12 person or entity except in strict compliance with the provisions of this Order.

13 I further agree to submit to the jurisdiction of the United States District Court for
14 the _____ for the purpose of enforcing the terms of this Stipulated
15 Protective Order, even if such enforcement proceedings occur after termination of this action.

16
17
18 Date: _____

19 City and State where sworn and signed: _____

20 Printed name: _____

21 Signature: _____