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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RUFO FABRICANTE, an individual,

Plaintiff,

v.

BANK OF AMERICA, NATIONAL ASSOCIATION; BANK OF AMERICA CORPORATION; MERRILL LYNCH PIERCE, FENNER & SMITH INCORPORATED; and DOES 1 through 100, inclusive,

Defendants.

CASE NO. CV 13-00456-R (JCx)
[Hon. Manuel L. Real, Courtroom 8]

ORDER GRANTING JOINT STIPULATION FOR ENTRY OF A PROTECTIVE ORDER RE: CONFIDENTIAL INFORMATION

Final Pretrial Conference:
February 3, 2014, 11:00 a.m.

Trial:
March 4, 2014, 9:00 a.m.

[Action Filed: October 25, 2012]
[Removed: January 22, 2013]

1 **ORDER**

2 **1. PURPOSES AND LIMITATIONS**

3 Disclosure and discovery activity in this action are likely to involve
4 production of confidential, proprietary, or private information for which special
5 protection from public disclosure and from use for any purpose other than
6 prosecuting this litigation may be warranted. Accordingly, the parties hereby
7 stipulate to and petition the court to enter the following Stipulated Protective
8 Order. The parties acknowledge that this Order does not confer blanket protections
9 on all disclosures or responses to discovery and that the protection it affords from
10 public disclosure and use extends only to the limited information or items that are
11 entitled to confidential treatment under the applicable legal principles. The parties
12 further acknowledge, as set forth in Section 12.3, below, that this Stipulated
13 Protective Order does not entitle them to file confidential information under seal;
14 Civil Local Rule 79-5 sets forth the procedures that must be followed and the
15 standards that will be applied when a party seeks permission from the court to file
16 material under seal.

17 **2. DEFINITIONS**

18 2.1 Challenging Party: a Party or Non-Party that challenges the
19 designation of information or items under this Order.

20 2.2 “CONFIDENTIAL” Information or Items: information
21 (regardless of how it is generated, stored or maintained) or tangible things that
22 qualify for protection under Federal Rule of Civil Procedure 26(c).

23 2.3 Counsel (without qualifier): Outside Counsel of Record and
24 House Counsel (as well as their support staff).

25 2.4 Designating Party: a Party or Non-Party that designates
26 information or items that it produces in disclosures or in responses to discovery as
27 **“CONFIDENTIAL.”**

1 2.5 Disclosure or Discovery Material: all items or information,
2 regardless of the medium or manner in which it is generated, stored, or maintained
3 (including, among other things, testimony, transcripts, and tangible things), that are
4 produced or generated in disclosures or responses to discovery in this matter.

5 2.6 Expert: a person with specialized knowledge or experience in a
6 matter pertinent to the litigation who has been retained by a Party or its counsel to
7 serve as an expert witness or as a consultant in this action.

8 2.7 House Counsel: attorneys who are employees of a party to this
9 action. House Counsel does not include Outside Counsel of Record or any other
10 outside counsel.

11 2.8 Non-Party: any natural person, partnership, corporation,
12 association, or other legal entity not named as a Party to this action.

13 2.9 Outside Counsel of Record: attorneys who are not employees
14 of a party to this action but are retained to represent or advise a party to this action
15 and have appeared in this action on behalf of that party or are affiliated with a law
16 firm which has appeared on behalf of that party.

17 2.10 Party: any party to this action, including all of its officers,
18 directors, employees, consultants, retained experts, and Outside Counsel of Record
19 (and their support staffs).

20 2.11 Producing Party: a Party or Non-Party that produces Disclosure
21 or Discovery Material in this action.

22 2.12 Professional Vendors: persons or entities that provide litigation
23 support services (*e.g.*, photocopying, videotaping, translating, preparing exhibits or
24 demonstrations, and organizing, storing, or retrieving data in any form or medium)
25 and their employees and subcontractors.

26 2.13 Protected Material: any Disclosure or Discovery Material that
27 is designated as “**CONFIDENTIAL.**”

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1 2.14 Receiving Party: a Party that receives Disclosure or Discovery
2 Material from a Producing Party.

3 **3. SCOPE**

4 The protections conferred by this Stipulation and Order cover not only
5 Protected Material (as defined above), but also (1) any information copied or
6 extracted from Protected Material; (2) all copies, excerpts, summaries, or
7 compilations of Protected Material; and (3) any testimony, conversations, or
8 presentations by Parties or their Counsel that might reveal Protected Material.
9 However, the protections conferred by this Stipulation and Order do not cover the
10 following information: (a) any information that is in the public domain at the time
11 of disclosure to a Receiving Party or becomes part of the public domain after its
12 disclosure to a Receiving Party as a result of publication not involving a violation
13 of this Order, including becoming part of the public record through trial or
14 otherwise; and (b) any information known to the Receiving Party prior to the
15 disclosure or obtained by the Receiving Party after the disclosure from a source
16 who obtained the information lawfully and under no obligation of confidentiality to
17 the Designating Party. Any use of Protected Material at trial shall be governed by a
18 separate agreement or order.

19 **4. DURATION**

20 Even after final disposition of this litigation, the confidentiality obligations
21 imposed by this Order shall remain in effect until a Designating Party agrees
22 otherwise in writing or a court order otherwise directs. Final disposition shall be
23 deemed to be the later of (1) dismissal of all claims and defenses in this action,
24 with or without prejudice; and (2) final judgment herein after the completion and
25 exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,
26 including the time limits for filing any motions or applications for extension of
27 time pursuant to applicable law.

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1 **5. DESIGNATING PROTECTED MATERIAL**

2 5.1 Exercise of Restraint and Care in Designating Material for
3 Protection. Each Party or Non-Party that designates information or items for
4 protection under this Order must take care to limit any such designation to specific
5 material that qualifies under the appropriate standards. The Designating Party must
6 designate for protection only those parts of material, documents, items, or oral or
7 written communications that qualify – so that other portions of the material,
8 documents, items, or communications for which protection is not warranted are not
9 swept unjustifiably within the ambit of this Order.

10 Mass, indiscriminate, or routinized designations are prohibited. Designations
11 that are shown to be clearly unjustified or that have been made for an improper
12 purpose (*e.g.*, to unnecessarily encumber or retard the case development process or
13 to impose unnecessary expenses and burdens on other parties) expose the
14 Designating Party to sanctions.

15 If it comes to a Designating Party’s attention that information or items that it
16 designated for protection do not qualify for protection, that Designating Party must
17 promptly notify all other Parties that it is withdrawing the mistaken designation.

18 5.2 Manner and Timing of Designations. Except as otherwise
19 provided in this Order (*see, e.g.*, second paragraph of section 5.2(a) below), or as
20 otherwise stipulated or ordered, Disclosure or Discovery Material that qualifies for
21 protection under this Order must be clearly so designated before the material is
22 disclosed or produced.

23 Designation in conformity with this Order requires:

24 (a) for information in documentary form (*e.g.*, paper or electronic
25 documents, but excluding transcripts of depositions or other pretrial or trial
26 proceedings), that the Producing Party affix the legend “**CONFIDENTIAL**” to
27 each page that contains protected material. If only a portion or portions of the
28 material on a page qualifies for protection, the Producing Party also must clearly

1 identify the protected portion(s) (e.g., by making appropriate markings in the
2 margins).

3 A Party or Non-Party that makes original documents or materials available
4 for inspection need not designate them for protection until after the inspecting
5 Party has indicated which material it would like copied and produced. During the
6 inspection and before the designation, all of the material made available for
7 inspection shall be deemed “**CONFIDENTIAL.**” After the inspecting Party has
8 identified the documents it wants copied and produced, the Producing Party must
9 determine which documents, or portions thereof, qualify for protection under this
10 Order. Then, before producing the specified documents, the Producing Party must
11 affix the “**CONFIDENTIAL**” legend to each page that contains Protected
12 Material. If only a portion or portions of the material on a page qualifies for
13 protection, the Producing Party also must clearly identify the protected portion(s)
14 (e.g., by making appropriate markings in the margins).

15 (b) for testimony given in deposition or in other pretrial or trial
16 proceedings, that the Designating Party identify on the record, before the close of
17 the deposition, hearing, or other proceeding, all protected testimony.

18 (c) for information produced in some form other than documentary and
19 for any other tangible items, that the Producing Party affix in a prominent place on
20 the exterior of the container or containers in which the information or item is
21 stored the legend “**CONFIDENTIAL.**” If only a portion or portions of the
22 information or item warrant protection, the Producing Party, to the extent
23 practicable, shall identify the protected portion(s).

24 5.3 Inadvertent Failures to Designate. If timely corrected, an
25 inadvertent failure to designate qualified information or items does not, standing
26 alone, waive the Designating Party’s right to secure protection under this Order for
27 such material. Upon timely correction of a designation, the Receiving Party must

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1 make reasonable efforts to assure that the material is treated in accordance with the
2 provisions of this Order.

3 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

4 6.1 Timing of Challenges. Any Party or Non-Party may challenge
5 a designation of confidentiality at any time. Unless a prompt challenge to a
6 Designating Party's confidentiality designation is necessary to avoid foreseeable,
7 substantial unfairness, unnecessary economic burdens, or a significant disruption
8 or delay of the litigation, a Party does not waive its right to challenge a
9 confidentiality designation by electing not to mount a challenge promptly after the
10 original designation is disclosed.

11 6.2 Meet and Confer. The Challenging Party shall initiate the
12 dispute resolution process by providing written notice of each designation it is
13 challenging and describing the basis for each challenge. To avoid ambiguity as to
14 whether a challenge has been made, the written notice must recite that the
15 challenge to confidentiality is being made in accordance with this specific
16 paragraph of the Protective Order. The parties shall attempt to resolve each
17 challenge in good faith and must begin the process by conferring directly (in voice
18 to voice dialogue; other forms of communication are not sufficient) within 14 days
19 of the date of service of notice. In conferring, the Challenging Party must explain
20 the basis for its belief that the confidentiality designation was not proper and must
21 give the Designating Party an opportunity to review the designated material, to
22 reconsider the circumstances, and, if no change in designation is offered, to explain
23 the basis for the chosen designation. A Challenging Party may proceed to the next
24 stage of the challenge process only if it has engaged in this meet and confer
25 process first or establishes that the Designating Party is unwilling to participate in
26 the meet and confer process in a timely manner.

27 6.3 Judicial Intervention. If the Parties cannot resolve a challenge
28 without court intervention, the Designating Party shall file and serve a motion to

1 retain confidentiality under Civil Local Rule 7 (and in compliance with Civil Local
2 Rule 79-5, if applicable) within 21 days of the initial notice of challenge or within
3 14 days of the parties agreeing that the meet and confer process will not resolve
4 their dispute, whichever is earlier. Each such motion must be accompanied by a
5 competent declaration affirming that the movant has complied with the meet and
6 confer requirements imposed in the preceding paragraph. Failure by the
7 Designating Party to make such a motion including the required declaration within
8 21 days (or 14 days, if applicable) shall automatically waive the confidentiality
9 designation for each challenged designation. In addition, the Challenging Party
10 may file a motion challenging a confidentiality designation at any time if there is
11 good cause for doing so, including a challenge to the designation of a deposition
12 transcript or any portions thereof. Any motion brought pursuant to this provision
13 must be accompanied by a competent declaration affirming that the movant has
14 complied with the meet and confer requirements imposed by the preceding
15 paragraph.

16 The burden of persuasion in any such challenge proceeding shall be on the
17 Designating Party. Frivolous challenges, and those made for an improper purpose
18 (*e.g.*, to harass or impose unnecessary expenses and burdens on other parties) may
19 expose the Challenging Party to sanctions. Unless the Designating Party has
20 waived the confidentiality designation by failing to file a motion to retain
21 confidentiality as described above, all parties shall continue to afford the material
22 in question the level of protection to which it is entitled under the Producing
23 Party's designation until the court rules on the challenge.

24 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

25 7.1 Basic Principles. A Receiving Party may use Protected Material
26 that is disclosed or produced by another Party or by a Non-Party in connection
27 with this case only for prosecuting, defending, or attempting to settle this litigation.
28 Such Protected Material may be disclosed only to the categories of persons and

1 under the conditions described in this Order. When the litigation has been
2 terminated, a Receiving Party must comply with the provisions of section 13 below
3 (FINAL DISPOSITION).

4 Protected Material must be stored and maintained by a Receiving Party at a
5 location and in a secure manner that ensures that access is limited to the persons
6 authorized under this Order.

7 7.2 Disclosure of “CONFIDENTIAL” Information or Items.

8 Unless otherwise ordered by the court or permitted in writing by the Designating
9 Party, a Receiving Party may disclose any information or item designated
10 “CONFIDENTIAL” only to:

11 (a) the Receiving Party’s Outside Counsel of Record in this action, as
12 well as employees of said Outside Counsel of Record to whom it is reasonably
13 necessary to disclose the information for this litigation and who have signed the
14 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit
15 A;

16 (b) the officers, directors, and employees (including House Counsel) of
17 the Receiving Party to whom disclosure is reasonably necessary for this litigation
18 and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit
19 A);

20 (c) Experts (as defined in this Order) of the Receiving Party to whom
21 disclosure is reasonably necessary for this litigation and who have signed the
22 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

23 (d) the court and its personnel;

24 (e) court reporters and their staff, professional jury or trial consultants,
25 mock jurors, and Professional Vendors to whom disclosure is reasonably necessary
26 for this litigation and who have signed the “Acknowledgment and Agreement to
27 Be Bound” (Exhibit A);

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1 (f) during their depositions, witnesses in the action to whom disclosure is
2 reasonably necessary and who have signed the “Acknowledgment and Agreement
3 to Be Bound” (Exhibit A to the stipulation pursuant to which this order has issued),
4 unless otherwise agreed by the Designating Party or ordered by the court. Pages of
5 transcribed deposition testimony or exhibits to depositions that reveal Protected
6 Material must be separately bound by the court reporter and may not be disclosed
7 to anyone except as permitted under this Stipulated Protective Order.

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

10 **8. PROTECTED MATERIAL SUBPOENAED OR ORDERED**
11 **PRODUCED IN OTHER LITIGATION**

12 If a Party is served with a subpoena or a court order issued in other litigation
13 that compels disclosure of any information or items designated in this action as
14 “**CONFIDENTIAL**,” that Party must:

15 (a) promptly notify in writing the Designating Party. Such notification
16 shall include a copy of the subpoena or court order;

17 (b) promptly notify in writing the party who caused the subpoena or
18 order to issue in the other litigation that some or all of the material covered by the
19 subpoena or order is subject to this Protective Order. Such notification shall
20 include a copy of this Stipulated Protective Order; and

21 (c) cooperate with respect to all reasonable procedures sought to be
22 pursued by the Designating Party whose Protected Material may be affected.

23 If the Designating Party timely seeks a protective order, the Party served
24 with the subpoena or court order shall not produce any information designated in
25 this action as “**CONFIDENTIAL**” before a determination by the court from which
26 the subpoena or order issued, unless the Party has obtained the Designating Party’s
27 permission. The Designating Party shall bear the burden and expense of seeking
28 protection in that court of its confidential material – and nothing in these

1 provisions should be construed as authorizing or encouraging a Receiving Party in
2 this action to disobey a lawful directive from another court.

3 **9. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE**
4 **PRODUCED IN THIS LITIGATION**

5 (a) The terms of this Order are applicable to information produced by a
6 Non-Party in this action and designated as “**CONFIDENTIAL.**” Such information
7 produced by Non-Parties in connection with this litigation is protected by the
8 remedies and relief provided by this Order. Nothing in these provisions should be
9 construed as prohibiting a Non-Party from seeking additional protections.

10 (b) In the event that a Party is required, by a valid discovery request, to
11 produce a Non-Party's confidential information in its possession, and the Party is
12 subject to an agreement with the Non-Party not to produce the Non-Party's
13 confidential information, then the Party shall:

14 (1) promptly notify in writing the Requesting Party and the Non-
15 Party that some or all of the information requested is subject to a confidentiality
16 agreement with a Non-Party;

17 (2) promptly provide the Non-Party with a copy of the Stipulated
18 Protective Order in this litigation, the relevant discovery request(s), and a
19 reasonably specific description of the information requested; and

20 (3) make the information requested available for inspection by the
21 Non-Party.

22 (c) If the Non-Party fails to object or seek a protective order from this
23 court within 14 days of receiving the notice and accompanying information, the
24 Receiving Party may produce the Non-Party's confidential information responsive
25 to the discovery request. If the Non-Party timely seeks a protective order, the
26 Receiving Party shall not produce any information in its possession or control that
27 is subject to the confidentiality agreement with the Non-Party before a
28 determination by the court. Absent a court order to the contrary, the Non-Party

1 shall bear the burden and expense of seeking protection in this court of its
2 Protected Material.

3 **10. UNAUTHORIZED DISCLOSURE OF PROTECTED**
4 **MATERIAL**

5 If a Receiving Party learns that, by inadvertence or otherwise, it has
6 disclosed Protected Material to any person or in any circumstance not authorized
7 under this Stipulated Protective Order, the Receiving Party must immediately (a)
8 notify in writing the Designating Party of the unauthorized disclosures, (b) use its
9 best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform
10 the person or persons to whom unauthorized disclosures were made of all the terms
11 of this Order, and (d) request such person or persons to execute the
12 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit
13 A.

14 **11. INADVERTENT PRODUCTION OF PRIVILEGED OR**
15 **OTHERWISE PROTECTED MATERIAL**

16 When a Producing Party gives notice to Receiving Parties that certain
17 inadvertently produced material is subject to a claim of privilege or other
18 protection, the obligations of the Receiving Parties are those set forth in *Federal*
19 *Rule of Civil Procedure* 26(b)(5)(B). This provision is not intended to modify
20 whatever procedure may be established in an e-discovery order that provides for
21 production without prior privilege review. Pursuant to *Federal Rule of Evidence*
22 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure
23 of a communication or information covered by the attorney-client privilege or
24 work product protection, the parties may incorporate their agreement in the
25 stipulated protective order submitted to the court.

26 **12. MISCELLANEOUS**

27 12.1 Right to Further Relief. Nothing in this Order abridges the right
28 of any person to seek its modification by the court in the future.

1 12.2 Right to Assert Other Objections. By stipulating to the entry of
2 this Protective Order no Party waives any right it otherwise would have to object to
3 disclosing or producing any information or item on any ground not addressed in
4 this Stipulated Protective Order. Similarly, no Party waives any right to object on
5 any ground to use in evidence of any of the material covered by this Protective
6 Order.

7 12.3 Filing Protected Material. Without written permission from the
8 Designating Party or a court order secured after appropriate notice to all interested
9 persons, a Party may not file in the public record in this action any Protected
10 Material. A Party that seeks to file under seal any Protected Material must comply
11 with Civil Local Rule 79-5. Protected Material may only be filed under seal
12 pursuant to a court order authorizing the sealing of the specific Protected Material
13 at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a
14 request establishing that the Protected Material at issue is privileged, protectable as
15 a trade secret, or otherwise entitled to protection under the law. If a Receiving
16 Party's request to file Protected Material under seal pursuant to Civil Local Rule
17 79-5(d) is denied by the court, then the Receiving Party may file the information in
18 the public record pursuant to Civil Local Rule 79-5(e) unless otherwise instructed
19 by the court.

20 **13. FINAL DISPOSITION**

21 Within 60 days after the final disposition of this action, as defined in
22 paragraph 4, each Receiving Party must return all Protected Material to the
23 Producing Party or destroy such material. As used in this subdivision, “all
24 Protected Material” includes all copies, abstracts, compilations, summaries, and
25 any other format reproducing or capturing any of the Protected Material. Whether
26 the Protected Material is returned or destroyed, the Receiving Party must submit a
27 written certification to the Producing Party (and, if not the same person or entity, to
28 the Designating Party) by the 60 day deadline that (1) identifies (by category,

1 where appropriate) all the Protected Material that was returned or destroyed and
2 (2) affirms that the Receiving Party has not retained any copies, abstracts,
3 compilations, summaries or any other format reproducing or capturing any of the
4 Protected Material. Notwithstanding this provision, Counsel are entitled to retain
5 an archival copy of all pleadings, motion papers, trial, deposition, and hearing
6 transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert
7 reports, attorney work product, and consultant and expert work product, even if
8 such materials contain Protected Material. Any such archival copies that contain or
9 constitute Protected Material remain subject to this Protective Order as set forth in
10 Section 4 (DURATION).

11 **PURSUANT TO THE STIPULATION OF THE PARTIES, IT IS SO**
12 **ORDERED.**

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15 Dated: Oct. 21, 2013



16 _____
17 Hon. Manuel L. Real, Judge
18 United States District Court
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