

No. 13-80223

In the
United States Court Of Appeals
For the
Ninth Circuit

IN RE HIGH-TECH EMPLOYEE ANTITRUST LITIGATION

Petition for permission to appeal
from the United States District Court
Northern District of California
The Honorable Lucy H. Koh, Presiding
Case No. 5:11-2509-LHK

**PLAINTIFFS-RESPONDENTS' MOTION TO SEAL PORTIONS OF
THEIR SUPPLEMENTAL EXCERPTS OF RECORD**

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Pursuant to the Ninth Circuit Rule 27-13(b), Plaintiffs-Respondents hereby move to seal portions of the supplemental excerpts of record filed in connection with Plaintiffs' Response to Defendants' Petition for Permission to Appeal from Class Certification Order. Plaintiffs seek to maintain under seal only those portions of the record that the district court has ordered sealed or that are the subject of a pending motion to seal.

All of the information that is subject to the pending motions to seal is information that Defendants-Petitioners have designated Confidential and/or Confidential-Attorneys Eyes Only under the Stipulated Protective Order (Modified by the Court) entered in the district court on January 24, 2012. This Protective Order, attached hereto as Exhibit A to this motion, mandates that a party may not file in the public record in this action any material protected under the terms of the Protective Order. Protective Order at ¶ 12.3. *See id* at ¶ 1.1. To comply with this Protective Order, Plaintiffs submit the present motion to seal.

Plaintiffs do not seek to seal this motion itself. Rather, Plaintiffs request to seal portions of the following expert reports submitted in support of their motion for class certification and their supplemental motion for class certification:

- October 1, 2012 Expert Report of Edward E. Leamer, Ph.D.;

- December 10, 2012 Reply Expert Report of Edward E. Leamer, Ph.D.;
- May 10, 2013 Supplemental Expert Report of Edward E. Leamer, Ph.D.;
- May 10, 2013 Expert Witness Report of Kevin F. Hallock, Ph.D.; and
- July 12, 2013 Rebuttal Supplemental Expert Report of Edward E. Leamer, Ph.D.

In connection with this motion to seal, Plaintiffs have provided redacted versions of the expert reports in the public portion of their Supplemental Excerpts of Record. Defendants have supplied the redacted versions of the expert reports in the course of their filings to support the motions to seal that were submitted before the district court. Plaintiffs have electronically filed the public portion of their Supplemental Excerpts of Record and will submit the public portion and confidential portion of their Supplemental Excerpts of Record in paper form to the Court upon receiving the Court's instructions for submitting paper copies.¹

¹ This procedure is described in this Court's instructions provided at the following webpage: <http://www.ca9.uscourts.gov/cmecf/faqs/er/#ecfers-partlysealed>.

Defendants have already moved to seal various items in their Excerpts of the Record, submitted in connection with their Petition for Permission to Appeal from Class Certification Order. Defendants' motion to seal describes the applicable standards for their requests to seal information from the public record and provides supporting declarations describing the nature of the information. Plaintiffs do not take a position as to whether the redacted information merits sealing under this Circuit's legal standard.

Respectfully submitted,

Dated: November 18, 2013 By: /s/ Brendan P. Glackin

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 18, 2013

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EXHIBIT A

**** E-filed January 24, 2012 ****

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

Master Docket No. 11-CV-2509-LHK

THIS DOCUMENT RELATES TO:
ALL ACTIONS

STIPULATED ~~PROPOSED~~
PROTECTIVE ORDER
(MODIFIED BY THE COURT)

1. PURPOSES AND LIMITATIONS

1.1 Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted.

Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order (“Order”).

The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protections it affords them from public disclosure and use extends only to the information or items entitled to confidential treatment under applicable legal principles. The Stipulated Protective Order does not entitle the parties to file confidential information under seal; Civil L. R. 79-5 governs requests to file under seal.

2. DEFINITIONS

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

2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule

1 of Civil Procedure 26(c), including without limitation: (1) information protected pursuant to
2 Federal Rule of Civil Procedure 5.2; (2) information protected by any federal, California, or other
3 privacy statute, such as the California Right to Financial Privacy Act; and (3) information
4 protected by an existing contractual obligation requiring the Designating Party to maintain the
5 confidentiality of the information. Nothing in this paragraph shall preclude a Party from redacting
6 personal information, including social security numbers or dates of birth, as required by
7 governing law or contract or otherwise pursuant to the applicable policies of the Party.

8 2.3 ~~“CONFIDENTIAL – ATTORNEYS’ EYES ONLY”~~ Information or Items:
9 extremely sensitive “Confidential Information or Items,” production of which on a
10 “CONFIDENTIAL” basis to another Party would create a substantial risk of serious harm that
11 could not be avoided by less restrictive means.

12 2.4 Counsel (without qualifier): Outside Counsel of Record and House Counsel, as
13 well as their support staff, including but not limited to attorneys, paralegals, secretaries, law
14 clerks, and investigators.

15 2.5 Designating Party: a Party or Non-Party that designates information or items that it
16 produces in disclosures or in responses to discovery as “CONFIDENTIAL” or
17 “CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

18 2.6 Disclosure or Discovery Material: all items or information, including from any
19 non-party, regardless of the medium or manner in which it is generated, stored, or maintained
20 (including, among other things, testimony, transcripts, and tangible things), that are produced or
21 generated in disclosures or responses to discovery in this matter.

22 2.7 Expert: a person with specialized knowledge or experience in a matter pertinent to
23 the litigation, along with his or her employees and support personnel, who has been retained by a
24 Party or its Counsel to serve as an expert witness or as a consultant in this action.

25 2.8 House Counsel: attorneys who are employees of a Party to this action. House
26 Counsel does not include Outside Counsel of Record or any other outside counsel.

27 2.9 Non-Party: any natural person, partnership, corporation, association, or other legal
28 entity not named as a Party to this action.

2.10 Outside Counsel of Record: attorneys, as well as their support staff (including but not limited to paralegals, secretaries, law clerks, and investigators) who are not employees of a Party to this action but are retained by a Party to represent or advise a party to this action and (1) have appeared in this action on behalf of that party, (2) are affiliated with a law firm which has appeared on behalf of that Party, or (3) represented a Party in connection with the related Department of Justice Investigation.

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

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

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

2.14 Protected Material: any Disclosure or Discovery Material that is designated as “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

2.15 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

3. SCOPE

3.1 The protections conferred by this Stipulation and Order cover not only Protected Material (as defined above), but also (a) any information copied or extracted from Protected Material; (b) all copies, excerpts, summaries, or compilations of Protected Material; and (c) any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material.

However, the protections conferred by this Stipulation and Order do not cover the following information: (i) any information that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of publication not involving a violation of this Order, including becoming part of the

1 public record through trial or otherwise; (ii) any information known to the Receiving Party prior
2 to the disclosure or obtained by the Receiving Party after the disclosure from a source who
3 obtained the information lawfully and under no obligation of confidentiality to the Designating
4 Party; and (iii) any information obtained outside of litigation with the consent of the Producing
5 Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.

6 3.2 Nothing in this Order shall prevent or restrict a Producing Party's own disclosure
7 or use of its own Protected Material for any purpose.

8 3.3 Nothing in this Order shall be construed to prejudice any Party's right to use any
9 Protected Material in court or in any court filing with the written consent of the Designating Party
10 or by order of the Court.

11 3.4 This Order is without prejudice to the right of any Party to seek further or
12 additional protection of any Discovery Material or to modify this Order in any way, including,
13 without limitation, an order that certain matter not be produced at all.

14 3.5 Nothing in this Order shall be construed to prevent Counsel from advising their
15 clients with respect to this case based in whole or in part upon Protected Materials, provided
16 counsel does not disclose the Protected Material itself except as provided in this Order.

17 4. DURATION

18 4.1 Even after final disposition of this litigation, the confidentiality obligations
19 imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing
20 or a court order otherwise directs. Final Disposition shall be deemed to be the later of (1)
21 dismissal of all claims and defenses in this action, with or without prejudice; and (2) final
22 judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or
23 reviews of this action, including the time limits for filing any motions or applications for
24 extension of time pursuant to applicable law.

25 5. DESIGNATING PROTECTED MATERIAL

26 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party
27 or Non-Party that designates information or items for protection under this Order must take care
28 to limit any such designation to specific material that qualifies under this Order. If only a portion

1 or portions of material, documents, items, or oral or written communications qualify under this
2 Order, the Designating Party, to the extent practicable, shall designate only the portion or portions
3 for protection - so that other portions of the material, documents, items, or communications for
4 which protection is not warranted are not swept unjustifiably within the ambit of this Order.

5 5.2 A Designating Party may not designate as Confidential information that has been
6 shared with any other party, unless the Designating Party has a good faith belief that the other
7 party has a current statutory, regulatory, common law, contractual, or other obligation or right to
8 maintain the confidentiality of the information at issue. The foregoing sentence shall not be
9 construed to enlarge, diminish, or otherwise alter the criteria for determining whether such
10 information has been properly designated Confidential.

11 5.3 Mass or indiscriminate designations are prohibited. Designations that are shown to
12 be clearly unjustified or that have been made for an improper purpose (e.g., to unnecessarily
13 encumber or retard the case development process or to impose unnecessary expenses and burdens
14 on other parties) expose the Designating Party to sanctions.

15 If it comes to a Designating Party's attention that information or items that it designated
16 for protection do not qualify for protection at all or do not qualify for the level of protection
17 initially asserted, that Designating Party must within a reasonable time notify all other parties that
18 it is withdrawing the mistaken designation.

19 5.4 Manner and Timing of Designations. Except as otherwise provided in this Order
20 (see, e.g., second paragraph of section 5.2(a) and 5.2(b) below), or as otherwise stipulated or
21 ordered, Disclosure or Discovery Material that qualifies for protection under this Order must be
22 clearly so designated before the material is disclosed or produced.

23 Designation in conformity with this Order requires:

24 (a) for information in documentary form (e.g., paper or electronic documents,
25 but excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing
26 Party affix the legend "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES
27 ONLY" to each page that contains protected material. A Party or Non-Party that makes original
28 documents or materials available for inspection need not designate them for protection until after

1 the inspecting Party has indicated which material it would like copied and produced. During the
2 inspection and before the designation, all of the material made available for inspection shall be
3 deemed "CONFIDENTIAL - ATTORNEYS' EYES ONLY." After the inspecting Party has
4 identified the documents it wants copied and produced, the Producing Party must determine
5 which documents, or portions thereof, qualify for protection under this Order. Then, before
6 producing the specified documents, the Producing Party must affix the "CONFIDENTIAL" or
7 "CONFIDENTIAL - ATTORNEYS' EYES ONLY" legend to each page that contains Protected
8 Material. If only a portion or portions of the material on a page qualifies for protection, the
9 Producing Party to the extent practicable shall identify the protected portion(s) and specify the
10 level of protection being asserted.

11 (b) for testimony given in deposition, any party or testifying persons or entities
12 may designate any portion of the testimony or exhibits "CONFIDENTIAL" or
13 "CONFIDENTIAL - ATTORNEYS' EYES ONLY" either on the record before the close of the
14 deposition or in writing on or before the later of thirty (30) days after receipt of the final transcript
15 or the date by which any review by the witness and corrections to the transcript are to be
16 completed under Federal Rule of Civil Procedure 30. Only those portions of the testimony that
17 are designated for protection shall be covered by the provisions of this Protective Order. If any
18 portion of a videotaped deposition is designated, the original and all copies of any videocassette,
19 videotape, DVD or other media container shall be labeled with the appropriate legend. Pending
20 designation as set forth above, the entire transcript, including exhibits, shall be deemed
21 "CONFIDENTIAL," unless exhibits or testimony are identified on the record during the
22 deposition as "CONFIDENTIAL - ATTORNEYS' EYES ONLY," in which case the entire
23 transcript, including exhibits shall be deemed "CONFIDENTIAL - ATTORNEYS' EYES
24 ONLY" information. If no designation is made within the time period above, the transcript shall
25 be considered not to contain any "CONFIDENTIAL" or "CONFIDENTIAL - ATTORNEYS'
26 EYES ONLY" information.

27 Transcript pages containing Protected Material must be separately bound by the court
28 reporter, who must affix to each such page the legend "CONFIDENTIAL" or "CONFIDENTIAL

1 - ATTORNEYS' EYES ONLY," as instructed by the Designating Party.

2 Any Protected Material that is used in the taking of a deposition shall remain subject to
3 the provisions of this Order, along with the transcript pages and videotape of the deposition
4 testimony dealing with such Protected Material. Counsel for any Producing Party shall have the
5 right to exclude from oral depositions, other than the deponent and deponent's counsel any person
6 who is not authorized by this Protective Order to receive or access Protected Material based on
7 the designation of such Protected Material. Such right of exclusion shall be applicable only
8 during periods of examination or testimony regarding such Protected Material.

9 (c) for all other information or tangible items, that the Producing Party affix in
10 a prominent place on the exterior of the container or containers in which the information or item
11 is stored the legend "CONFIDENTIAL" or "CONFIDENTIAL - ATTORNEYS' EYES ONLY."
12 If only a portion or portions of the information or item warrant protection, the Producing Party, to
13 the extent practicable, shall identify the protected portion(s) and specify the level of protection
14 being asserted.

15 5.5 Inadvertent Failures to Designate. If a Producing Party discovers that
16 "CONFIDENTIAL" or "CONFIDENTIAL - ATTORNEYS' EYES ONLY" information or items
17 that it produced was not designated as Protected Material, or that it produced information or items
18 that were designated as Protected Material but had designated it in the incorrect category, the
19 Producing Party may notify all other Parties of the error and identify the affected information or
20 items and their new designation or re-designation. Thereafter, the information or items so
21 designated or re-designated will be treated as Protected Material. After providing such notice, the
22 Producing Party shall provide re-labeled copies of the information or items to each Receiving
23 Party reflecting the change in designation.

24 An inadvertent failure to designate qualified information or items does not, standing
25 alone, waive the Designating Party's right to secure protection under this Order for such material.
26 Upon correction of a designation, the Receiving Party must make reasonable efforts to assure that
27 the material is treated in accordance with the provisions of this Order. Upon receiving the
28 Protected Material with the correct confidentiality designation, the Receiving Parties shall return

1 or securely destroy, at the Receiving Parties' option, all Discovery Material reasonably accessible
 2 to the Receiving Party that was not designated properly. Unauthorized or inadvertent disclosure
 3 does not change the status of Discovery Material or waive the right to hold the disclosed
 4 document or information as Protected Material.

5 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6 6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of
 7 confidentiality at any time. A Party does not waive its right to challenge a confidentiality
 8 designation by not challenging a designation promptly after the original designation is disclosed.

9 6.2 Meet and Confer. The Challenging Party shall initiate a designation of
 10 confidentiality challenge by providing written notice of each designation it is challenging and
 11 describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been
 12 made, the written notice must recite that the challenge to confidentiality is being made in
 13 accordance with this specific paragraph of the Protective Order. The parties shall attempt to
 14 resolve each challenge in good faith and must begin the process by conferring directly (in voice to
 15 voice dialogue; other forms of communication are not sufficient) within fourteen (14) days of the
 16 date of service of the written notice. In conferring, the Challenging Party must explain the basis
 17 for its belief that the confidentiality designation was not proper and must give the Designating
 18 Party a reasonable opportunity to review the designated material, to reconsider the circumstances,
 19 and, if no change in designation is offered, to explain the basis for the chosen designation.

20 6.3 Judicial Intervention. ^{See page 8.1, below} ~~If the Parties cannot resolve a challenge without court~~
 21 ~~intervention, the Designating Party shall file and serve a motion to retain confidentiality under~~
 22 ~~Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5 and General Order 62, if~~
 23 ~~applicable) within 45 days of the initial notice of challenge or within 14 days of the parties~~
 24 ~~agreeing that the meet and confer process will not resolve their dispute, whichever is earlier.~~
 25 ~~Each such motion must be accompanied by a competent declaration affirming that the movant has~~
 26 ~~complied with the meet and confer requirements imposed in the preceding paragraph. Failure by~~
 27 ~~the Designating Party to make such a motion including the required declaration within 45 days (or~~
 28 ~~14 days, if applicable) shall automatically waive the confidentiality designation for each~~

unless a prompt
 challenge is necessary
 to avoid foreseeable,
 substantial unfairness,
 unnecessary economic
 burdens, or a
 significant disruption
 or delay of the
 litigation

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2 6.3 Judicial Intervention. If the Parties cannot resolve a challenge after complying with the
3 meet and confer requirements above, the parties shall file a Discovery Dispute Joint Report
4 (“DDJR”), pursuant to the undersigned’s Standing Order re Civil Discovery Disputes. The DDJR
5 shall affirm that the above meet and confer requirements have been satisfied. The DDJR must be
6 filed within 5 business days after the conclusion of the meet and confer sessions (or 5 business days
7 after reaching impasse as to a particular issue). In no event may a DDJR be filed later than 7 days
8 after the discovery cut-off date(s) as prescribed in Civil L.R. 37-3. Failure by the Designating Party
9 to defend its confidentiality designation(s) through the DDJR shall automatically waive the
10 confidentiality designation for each challenged designation.
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~~challenged designation. The parties may stipulate without court order to amend the time period within which a motion shall be filed. In addition, the Challenging Party may file a motion challenging a confidentiality designation at any time if there is good cause for doing so, including a challenge to the designation of a deposition transcript or any portions thereof. Any motion brought pursuant to this provision must be accompanied by a competent declaration affirming that the movant has complied with the meet and confer requirements imposed by the preceding paragraph.~~

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

7. ACCESS TO AND USE OF PROTECTED MATERIAL

7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this case only for prosecuting, defending, or attempting to settle this litigation or related appellate proceeding, and not for any other purpose whatsoever. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the litigation has been terminated, a Receiving Party must comply with the provisions of section 13 below (FINAL DISPOSITION).

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

7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated "CONFIDENTIAL" only to:

1 (a) the Receiving Party's Outside Counsel of Record in this action, including
2 attorneys who are principals of, employed by, or working for said Outside Counsel of Record
3 who have signed the "Acknowledgment and Agreement to Be Bound" that is attached hereto as
4 Exhibit A, as well as non-attorney employees and contractors of said Outside Counsel of Record
5 to whom it is reasonably necessary to disclose the information for this litigation;

6 (b) current or former officers, directors, and current employees (including
7 House Counsel) of the Receiving Party, to whom disclosure is reasonably necessary for this
8 litigation, and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit
9 A), as well as their immediate paralegals and staff;

10 (c) Experts (as defined in this Order) retained by the Receiving Party to assist
11 in this action, provided that disclosure is only to the extent reasonably necessary to perform such
12 work and provided that (i) such Expert has signed the "Acknowledgment and Agreement to Be
13 Bound" (Exhibit A); and (ii) such Expert is not a current officer, director, or employee of a Party
14 or of a competitor of a Party, nor is anticipated at the time of retention to become an officer,
15 director, or employee of a Party or of a competitor of a Party;

16 (d) the court and its personnel;

17 (e) court reporters, stenographers, and videographers retained to record
18 testimony in this action and their staff, professional jury or trial consultants, and Professional
19 Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the
20 "Acknowledgment and Agreement to Be Bound" (Exhibit A);

21 (f) during their testimony or preparation for their testimony, witnesses in the
22 action to whom disclosure is reasonably necessary. Such witnesses shall be bound by the terms
23 of this stipulated order and shall be given a copy of it at the outset of a deposition. Pages of
24 transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be
25 separately bound by the court reporter and may not be disclosed to anyone except as permitted
26 under this Stipulated Protective Order.

27 (g) the author or recipient of a document containing the information or a
28 custodian or other person who otherwise possessed or knew the information;

1 (h) mock jurors who have signed the “Acknowledgement and Agreement to Be
2 Bound” (Exhibit A);

3 (i) any mediator who is assigned to hear this matter, and his or her staff, who
4 have signed the “Acknowledgement and Agreement to Be Bound” (Exhibit A);

5 (j) any other person with the prior written consent of the Producing Party.

6 7.3 Disclosure of “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or
7 Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a
8 Receiving Party may disclose any information or item designated “CONFIDENTIAL –
9 ATTORNEYS’ EYES ONLY” only to the following:

10 (a) Persons designated in Paragraphs 7.2 (d), (e), (f), (g), (h) and (i);

11 (b) the Receiving Party’s Outside Counsel of Record in this action, including
12 attorneys who are principals of, employed by, or working for said Outside Counsel of Record,
13 provided that such Outside Counsel is not involved in competitive decision-making, as defined by
14 *U.S. Steel v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984), on behalf of a Party or a
15 competitor of a Party, to whom it is reasonably necessary to disclose the information for this
16 litigation and who have signed the “Acknowledgement and Agreement to Be Bound” that is
17 attached hereto as Exhibit A, as well as non-attorney employees of said Outside Counsel of
18 Record to whom it is reasonably necessary to disclose the information for this litigation;

19 (c) no more than five (5) House Counsel of the Receiving Party, to whom
20 disclosure is reasonably necessary for this case, who are permitted by the Producing Party to have
21 access to such materials, and who have signed the “Acknowledgement and Agreement to Be
22 Bound” that is attached hereto as Exhibit A, as well as their immediate paralegals and staff;

23 (d) Experts (as defined in this Order) retained by the Receiving Party to assist
24 in this action, provided that disclosure is only to the extent reasonably necessary to perform such
25 work, and provided that (i) such Expert is not a current officer, director, or employee of a Party or
26 of a competitor of a Party, nor anticipated at the time of retention to become an officer, director,
27 or employee of a Party or of a competitor to a Party; (ii) such Expert is not involved in
28 competitive decision-making, as defined by *U.S. Steel v. United States*, 730 F.2d 1465, 1468 n.3

(Fed. Cir. 1984) on behalf of a Party or a competitor of a Party; and (iii) such Expert has signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A).

Such Experts shall not be permitted to provide advice, analysis, or recommendations to a competitor of the Designating Party that concern the matters at issue in the above-entitled litigation, while the above-entitled litigation is pending, absent consent of the Designating Party. Consent of the Designating Party shall not be withheld absent compelling ground. Experts are hereby specifically advised that their written work product which contains or discloses the substance of “CONFIDENTIAL - ATTORNEYS’ EYES ONLY” information is subject to all the provisions of this Protective Order. Outside Counsel of Record disclosing “CONFIDENTIAL” and “CONFIDENTIAL- ATTORNEYS’ EYES ONLY” information to Experts shall be responsible for obtaining the executed undertakings in advance of such disclosure and also shall retain the original executed copy of said undertaking; and

- (e) any other person with the prior written consent of the Producing Party.; and
- (f) the court and its personnel.

8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION OR GOVERNMENT INVESTIGATION

8.1 If a Party is served with a document request, investigatory demand for documents, subpoena or a court order (“Document Demand”) issued in other litigation or government investigation that compels disclosure of any information or items designated in this action as “CONFIDENTIAL” or “CONFIDENTIAL - ATTORNEYS’ EYES ONLY,” that Party must:

- (a) within three business days notify in writing the Designating Party;
- (b) promptly notify in writing the party who caused the Document Demand to issue in the other litigation that some or all of the material covered by the Document Demand is subject to this Order. Such notification shall include a copy of this Order; and
- (c) cooperate with respect to all reasonable procedures sought to be pursued by the Designating Party whose Protected Material may be affected. If the Designating Party timely seeks a protective order, the Party served with the Document Demand shall not produce any information designated in this action as “CONFIDENTIAL” or “CONFIDENTIAL - ATTORNEYS’ EYES ONLY” before a determination by the court from which the subpoena or

1 order issued, unless the Party has obtained the Designating Party's permission. The Designating
 2 Party shall bear the burden and expense of seeking protection in that court of its Protected
 3 Material.

4 (d) Nothing in these provisions should be construed as authorizing or requiring
 5 a Receiving Party in this action to disobey a lawful order of any court.

6 9. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS
 7 LITIGATION

8 9.1 The terms of this Order are applicable to information produced by a Non-Party in
 9 this action and designated as "CONFIDENTIAL" or "CONFIDENTIAL - ATTORNEYS' EYES
 10 ONLY." Such information produced by Non-Parties in connection with this litigation is
 11 protected by the remedies and relief provided by this Order. Nothing in these provisions should
 12 be construed as prohibiting a Non-Party from seeking additional protections.

13 9.2 In the event that a Party is required, by a valid discovery request, to produce a
 14 Non-Party's confidential information in its possession or control, and the Party is subject to an
 15 agreement with the Non-Party not to produce the Non-Party's confidential information, then the
 16 Party shall:

17 (a) notify in writing the Requesting Party and the Non-Party that some or all of
 18 the information requested is subject to a confidentiality agreement with a Nonparty;

19 (b) provide the Non-Party with a copy of the Order in this litigation, and the
 20 relevant discovery request(s). ; and (c) make the information requested available for inspection by
 21 the Non-Party.

22 9.3 If the Non-Party fails to seek a protective order from this court within fourteen
 23 (14) days of receiving the notice and accompanying information, the Receiving Party may
 24 produce the Non-Party's confidential information responsive to the discovery request. If the
 25 Non-Party timely seeks a protective order, the Receiving Party shall not produce any information
 26 in its possession or control that is subject to the confidentiality agreement with the Non-Party
 27 before a determination by the court.¹ Absent a court order to the contrary, the Non-Party shall
 28 bear the burden and expense of seeking protection in this court of its Protected Material. See Section 14.

¹ The purpose of this provision is to alert the interested parties to the existence of confidentiality
Footnote continued on next page

10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

11.1 If information subject to a claim of attorney-client privilege, work product protection or other privilege or protection is inadvertently produced, such production shall not constitute automatic waiver of such privilege or protection pursuant to Federal Rules of Evidence 502. When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in the Federal Rules of Civil Procedure and the Federal Rules of Evidence. *See Fed. R. Civ. P. 26(b)(5)(B); Fed. R. Evid. 502(d)-(e).*

12. MISCELLANEOUS

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

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

12.3 Filing Protected Material. Without written permission from the Designating Party or a court order secured after appropriate notice to all interested persons, a Party may not file in

Footnote continued from previous page

rights of a Non-Party and to afford the Non-Party an opportunity to protect its confidentiality.

1 the public record in this action any Protected Material. A Party that seeks to file under seal any
2 Protected Material must comply with Civil Local Rule 79-5.

3 12.4 Termination of Matter and Retention of Jurisdiction. The Parties agree that the
4 terms of this Protective Order shall survive and remain in effect after the Final Disposition of the
5 above-captioned matter. The Court shall retain jurisdiction after Final Disposition of this matter
6 to hear and resolve any disputes arising out of this Protective Order- for a period of six months.

7 12.5 Successors. This Order shall be binding upon the Parties hereto, their attorneys,
8 and their successors, executors, personal representatives, administrators, legal representatives,
9 assigns, subsidiaries, divisions, employees, agents, retained consultants and experts, and any
10 persons or organizations over which they have direct control.

11 12.6 Burdens of Proof. Notwithstanding anything to the contrary above, nothing in this
12 Protective Order shall be construed to change the burdens of proof or legal standards applicable in
13 disputes regarding whether particular Discovery Material is confidential, which level of
14 confidentiality is appropriate, whether disclosure should be restricted, and if so, what restrictions
15 should apply.

16 12.7 Modification by Court. This Order is subject to further court order based upon
17 public policy or other considerations, and the Court may modify this Order sua sponte in the
18 interests of justice. The United States District Court for the Northern District of California is
19 responsible for the interpretation and enforcement of this Order. All disputes concerning
20 Protected Material, however designated, produced under the protection of this Order shall be
21 resolved by the United States District Court for the Northern District of California.

22 12.8 Discovery Rules Remain Unchanged. Identification of any individual pursuant to
23 this Order does not make that individual available for deposition or any other form of discovery
24 outside of the restrictions and procedures of the Federal Rules of Civil Procedure, the Local Rules
25 for the United States District Court for the Northern District of California, or the Court's own
26 orders.

13. FINAL DISPOSITION.

13.1 Within 60 days after the final disposition of this action, as defined in Section 4, each Receiving Party must return all Protected Material to the Producing Party or destroy such material. As used in this subdivision, "all Protected Material" includes all copies, abstracts, compilations, summaries, and any other format reproducing or capturing any of the Protected Material. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the 60 day deadline that (a) identifies (by category, where appropriate) all the Protected Material that was returned or destroyed; and (b) affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or any other format reproducing or capturing any of the Protected Material. Notwithstanding this provision, the Parties are not required to delete information that may reside on their respective electronic back-up systems that are over-written in the normal course of business. Notwithstanding the foregoing, Counsel are entitled to retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in Section 4.

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

Dated: November 30, 2011 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

By: /s/ Brendan P. Glackin
Brendan P. Glackin

Interim Lead Counsel for Plaintiff Class

Dated: November 30, 2011 O'MELVENY & MYERS LLP

By: /s/ Michael F. Tubach
Michael F. Tubach

Attorneys for Defendant APPLE INC.

14. In the event of any discovery or disclosure dispute, the parties and any affected non-parties shall comply with the undersigned's Standing Order re Civil Discovery Disputes.

1 Dated: November 30, 2011 KEKER & VAN NEST LLP
2 By: /s/ Daniel Purcell
3 Daniel Purcell

4 Attorneys for Defendant LUCASFILM LTD.

5 Dated: November 30, 2011 JONES DAY
6 By: /s/ David C. Kiernan
7 David C. Kiernan

8 Attorneys for Defendant ADOBE SYSTEMS INC.

9 Dated: November 30, 2011 MAYER BROWN
10 By: /s/ Lee H. Rubin
11 Lee H. Rubin

12 Attorneys for Defendant GOOGLE INC.

13 Dated: November 30, 2011 BINGHAM McCUTCHEN LLP
14 By: /s/ Frank Hinman
15 Frank Hinman

16 Attorneys for Defendant INTEL CORPORATION

17 Dated: November 30, 2011 JONES DAY
18 By: /s/ Robert A. Mittelstaedt
19 Robert A. Mittelstaedt

20 Attorneys for Defendant INTUIT INC.

21 Dated: November 30, 2011 COVINGTON & BURLING LLP
22 By: /s/ Emily Johnson Henn
23 Emily Johnson Henn

24 Attorneys for Defendant PIXAR
25
26
27
28

Filer's Attestation

Pursuant to General Order No. 45, § X(B), I attest under penalty of perjury that concurrence in the filing of the document has been obtained from all the signatories.

Dated: November 30, 2011

/s/ Dean M. Harvey
Dean M. Harvey

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: January 24, ~~2011~~ ²⁰¹²

By:


UNITED STATES ~~DISTRICT~~
MAGISTRATE JUDGE
HOWARD R. LLOYD