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16 UNITED STATES DISTRICT COURT
17 CENTRAL DISTRICT OF CALIFORNIA

18 POM WONDERFUL LLC, a
19 Delaware limited liability company,
20 Plaintiff,

21 vs.

22 TROPICANA PRODUCTS, INC., a
23 Delaware corporation; and DOES 1-
24 10, inclusive
25 Defendants.

Case No. 2:09-CV-00566 DSF (CTx)

~~PROPOSED~~ PROTECTIVE
ORDER (AS MODIFIED BY THE COURT)
for Discovery

Judge: Hon. Dale S. Fischer

Magistrate Judge: Hon. Carolyn
Turchin

1 The parties have stipulated to a Protective Order as follows:

2 **A. LIMITED SCOPE OF ORDER**

3 1. In the above-captioned action (the “Action”), the parties expect
4 to exchange confidential and highly confidential information regarding their
5 respective products that are the subject of this Action. The parties have stipulated
6 to the entry of this protective order (the “Order”) governing the exchange and use
7 of confidential and highly confidential documents and information in discovery.
8 This Order does not govern or restrict the use of any document or information
9 (including information designated as “Confidential” or “Highly Confidential” under
10 this Order) at trial in any manner whatsoever. When and if the case proceeds to
11 trial, all of the documents and information to be used at trial will be presumptively
12 available to all members of the public, including the press, unless good cause is
13 shown to the district judge in advance of the trial.

14 2. Further, this Order does not affect the burden of proof that must
15 be met by a party seeking to protect confidential documents or information that is
16 filed in the court records in this case. A party seeking to protect information to be
17 filed in the public records must prove that the documents or information meets the
18 standards set forth in *Pintos v. Pacific Creditors Association*, 565 F.3d 1106 (9th
19 Cir. 2009) and other relevant authority. In meeting that burden, a party may not
20 rely on its own designation of material as “Confidential” or “Highly Confidential”
21 under this Order.

22 3. Nothing in this order shall impose any restrictions on the use or
23 disclosure by a party of material obtained by such party independent of discovery in
24 this action, whether or not such material is also obtained through discovery in this
25 action, or from the use or disclosure of information that is publicly known. Further,
26 nothing in this Order restricts the ability of any party to use or disclose its own
27 confidential material as it deems appropriate.

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1 **B. GOOD CAUSE STATEMENT**

2 4. In discovery in this Lanham Act case, the parties will be
3 required to exchange competitively sensitive information about the opposing
4 parties' business activities to which they and third parties would not otherwise have
5 access, including information regarding the parties' forward-looking plans and
6 strategies, and analyses of competitive markets. Allowing the parties or third
7 parties to use such competitively sensitive information would cause harm to the
8 competitive position of the disclosing party. The parties seek the entry of this order
9 to prevent the unauthorized use or dissemination of confidential information
10 produced in discovery during this Action.

11 5. No document, information or thing shall be designated
12 "Confidential" or "Highly Confidential" unless good cause exists for such
13 designation under the standards set forth in *Pintos v. Pacific Creditors Association*,
14 565 F.3d 1106 (9th Cir. 2009) and other relevant authority. Good cause exists for
15 the designation of information as "Highly Confidential" when it the information has
16 not been made public and falls into one of the following categories:

17 (a) confidential future business, marketing or sales plans,
18 including specific business plans, strategies and projections, future marketing plans
19 and strategies, future sales plans and strategies, forward-looking pricing strategies;
20 the development of new product concepts, extensions of existing product lines, and
21 other similar forward-looking information that is kept confidential by the party.

22 (b) specific financial information at a level of detail beyond
23 that disclosed in sources available to the public.

24 (c) results of research, studies or other complex analyses that
25 the parties expended money to develop or obtain and that would be useful to current
26 or potential competitors. This category includes, among other things, consumer
27 research studies that the parties commissioned at considerable expense from third

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1 parties, complex market analyses provided by third parties under contracts with
2 non-disclosure clauses, and analyses of other competitors in the market.

3 (d) terms of contracts with the companies' suppliers or
4 customers that could be used by current or potential competitors in their own
5 negotiations with suppliers or customers.

6 (e) specific proprietary product formulas or proprietary
7 manufacturing processes.

8 (f) product concepts in development that have not been
9 launched into the market.

10 6. Good cause exists for the designation of information as
11 "Confidential" when the information has not been revealed to the public and the
12 information falls into one of the following categories:

13 (a) the information is contained in a document or is presented
14 in a form that, when analyzed in conjunction with other information produced in the
15 Action, would reveal information in categories set forth in paragraph 5(a) to (e)
16 above;

17 (b) private information about any officer, employee or other
18 individual;

19 (c) commercially sensitive information regarding the
20 development, production, marketing, branding, sales or promotion of the entity's
21 products or finances, the disclosure of which would have the effect of causing harm
22 to the competitive position of the person or entity from which the information is
23 obtained.

24 7. The parties shall use reasonable efforts to minimize the amount
25 of material designated as "Confidential" or "Highly Confidential."

26 8. This Order applies to such "Confidential" and "Highly
27 Confidential" information furnished in this litigation regardless of the form in
28 which it is transmitted and regardless whether the information is furnished by a

1 party or third party. Such information may be contained in documents, written
2 discovery responses, declarations, deposition testimony, exhibits, and other
3 materials or testimony provided by any party or third party during this Action.
4 Such materials are collectively referred to as “Discovery Materials” in this Order.

5 **C. PROCEDURE FOR DESIGNATION**

6 9. “Designating Party” may designate Discovery Materials
7 “Confidential” or “Highly Confidential” meeting the standards set forth in
8 paragraphs 6 and 7 by taking the following actions:

9 (a) With respect to documents, discovery responses or other
10 written materials furnished by the Designating Party in paper, as .tiff images, or in
11 any other form in which it is possible to add a legend to each page, the Designating
12 Party may designate the material “Confidential” by stamping, inscribing or
13 otherwise marking or designating on each page of a document containing
14 Confidential Information the words “**CONFIDENTIAL, SUBJECT TO**
15 **PROTECTIVE ORDER.**” The Designating Party may designate the material
16 “Highly Confidential” by marking each page of the document with the words
17 “**HIGHLY CONFIDENTIAL-ATTORNEYS’ EYES ONLY, SUBJECT TO**
18 **PROTECTIVE ORDER.**” Electronic documents produced as .tiff images shall be
19 marked in accordance with this paragraph 9(a).

20 (b) With respect to “Confidential” or “Highly Confidential
21 Information” furnished by the Designating Party in a non-paper medium, including,
22 without limitation, video or audio tape, computer discs, CD-ROMs, and DVDs,
23 etc., the Designating Party may designate all information therein as “Confidential”
24 or “Highly Confidential” by affixing the appropriate legend to the outside of the
25 medium or container.

26 10. With respect to deposition testimony or other oral testimony to
27 be recorded in a written transcript, the Designating Party may designate information
28 as “Confidential” or “Highly Confidential” by making a statement on the record to

1 that effect during the deposition or proceeding at issue. The court reporter shall
2 separately bind the designated portion of the deposition transcript and all designated
3 exhibits. The separately bound deposition material shall be marked in accordance
4 with its designation, as either "CONFIDENTIAL, SUBJECT TO A PROTECTIVE
5 ORDER" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY,
6 SUBJECT TO A PROTECTIVE ORDER." Alternatively, the Designating Party
7 may, within a reasonable time after the deposition transcript is delivered to the
8 Designating Party, provide to all counsel written notice identifying the specific
9 portion (by page and line numbers) that the Designating Party seeks to protect, and
10 all parties to the litigation will mark the pages with the appropriate legends.

11 **D. USE AND DISCLOSURE OF DESIGNATED MATERIAL**

12 11. Information and materials designated "Confidential" or "Highly
13 Confidential" shall be used only for prosecuting or defending this Action, except
14 that a party may use its own "Confidential" or "Highly Confidential Information"
15 for whatever purposes it chooses. A party using, disseminating or distributing
16 "Confidential" or "Highly Confidential Information" for any purpose other than for
17 use in connection with this Action may be subject to sanctions (including, without
18 limitation, monetary, evidentiary or terminating sanctions, in the Court's
19 discretion), as well as being potentially subject to any disciplinary or other
20 applicable legal proceedings.

21 12. Information and materials designated "**CONFIDENTIAL,**
22 **SUBJECT TO A PROTECTIVE ORDER**" may only be disclosed to the
23 following individuals:

24 (a) The recipient party and officers, directors and/or
25 employees of the recipient party who have direct responsibility for assisting such
26 counsel in the preparation and trial of the action;

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1 (b) Counsel representing the parties in the Action, and
2 paralegal and clerical staff (whether employees or independent contractors) who are
3 assisting in this litigation;

4 (c) Court staff, court reporters and videographers involved in
5 this litigation;

6 (d) Independent consultants or experts retained by any party
7 in this case who are expected to testify at trial or employed by counsel in order to
8 assist in preparation for trial or for deposition, so long as they sign a statement
9 agreeing to abide by the terms of this Order, in the form set forth in Exhibit A;

10 (e) Third-party witnesses during the course of their
11 depositions and otherwise provided that (1) the third party or witness previously
12 created, generated or received the Discovery Material before the Action
13 commenced; or (2) before disclosure of the "Confidential Information" counsel for
14 the parties agree the "Confidential Information" may be shown to the deponent; or
15 (3) the Court has determined that the "Confidential Information" may be shown to
16 the deponent in ruling on a party's objection pursuant to Central District Local Rule
17 37. Unless the third party or witness previously created, generated or received the
18 Discovery Material, a third-party witness shall not be shown the Discovery Material
19 unless or until the witness signs a statement agreeing to abide by the terms of this
20 order, in the form set forth in Exhibit A. This requirement for party agreement or
21 Court determination does not apply to expert witnesses or consultants.

22 13. Information and materials designated "**HIGHLY**
23 **CONFIDENTIAL-ATTORNEYS' EYES ONLY, SUBJECT TO A**
24 **PROTECTIVE ORDER**" may only be disclosed to:

25 (a) Outside Counsel representing the parties in the Action,
26 and paralegal and clerical staff (whether employees or independent contractors)
27 who are assisting in this litigation;

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1 (b) Litigation counsel employed directly by the parties and
2 representing the parties in the Action, so long as the counsel provides the opposing
3 counsel with a declaration under penalty of perjury in the form of Exhibit B that
4 counsel has not, does not, and does not anticipate having any involvement
5 whatsoever in the parties' competitive or business decision making, including but
6 not limited to decisions regarding contracts, marketing, employment, pricing,
7 product design, product research or development, and has not, does not, and does
8 not anticipate providing non-legal advice to the party regarding any such decisions;

9 (c) Paralegal or clerical staff employed directly by the parties
10 who provide support to the litigation counsel described in subparagraph (b), so long
11 as the staff member has not, does not, and does not anticipate having any role
12 whatsoever in supporting or assisting any person with any involvement whatsoever
13 in the parties' business decision making, including but not limited to decisions
14 regarding contracts, marketing, employment, pricing, product development,
15 competition or other business decisions;

16 (d) Court staff, court reporters and videographers involved in
17 this litigation;

18 (e) Independent consultants or experts retained by any party
19 in this case who are expected to testify at trial or employed by counsel in order to
20 assist in preparation for trial or for deposition, so long as they sign a statement
21 agreeing to abide by the terms of this order, in the form set forth in Exhibit A.
22 "Highly Confidential" information shall not be shared with an expert or consultant
23 retained by the non-designating party who has provided, is providing, or is expected
24 to provide any services to any business unit of the retaining party, unless one of the
25 three conditions set forth in subparagraph (f) is met.

26 (f) Party or third-party witnesses during the course of their
27 depositions and otherwise provided that (1) the third party or witness previously
28 created, generated or received the Discovery Material before the Action

1 commenced; or (2) before disclosure of the “Highly Confidential” information
2 counsel for the parties agree the “Highly Confidential” information may be shown
3 to the deponent; or (3) the Court has determined that the “Highly Confidential”
4 information may be shown to the deponent in ruling on a party’s objection pursuant
5 to Central District Local Rule 37. Unless the third party or witness previously
6 created, generated or received the Discovery Material, a third-party witness shall
7 not be shown the Discovery Material unless or until the witness signs a statement
8 agreeing to abide by the terms of this order, in the form set forth in Exhibit A. This
9 requirement for party agreement or Court determination does not apply to expert
10 witnesses or consultants of the non-designating party, except for those who have
11 ever provided, are currently providing, or are expected to provide any services to
12 any business unit of the retaining party.

13 14. No person or entity receiving “Confidential” information shall
14 discuss, disseminate, or disclose the “Confidential” information to any person or
15 entity not listed above in paragraph 12. No person or entity receiving “Highly
16 Confidential” information shall discuss, disseminate, or disclose the “Highly
17 Confidential” information to any person or entity not listed above in paragraph 13.
18 Any person or entity receiving “Confidential” or “Highly Confidential” information
19 shall take measures available to him or her to ensure that no unauthorized person or
20 entity is able to obtain access to the “Confidential” or “Highly Confidential”
21 information. The provisions of this paragraph, however, do not apply to the Court
22 or to Court personnel.

23 15. Nothing in this Order affects or limits the producing party’s use
24 of its own “Confidential” or “Highly Confidential” information or “Confidential” or
25 “Highly Confidential” information it has created, lawfully possessed or
26 independently generated or discovered, regardless of whether the information is
27 thereafter designated as **“CONFIDENTIAL, SUBJECT TO A PROTECTIVE**

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1 **ORDER” or “HIGHLY CONFIDENTIAL-ATTORNEYS’ EYES ONLY,**
2 **SUBJECT TO A PROTECTIVE ORDER.”**

3 **E. FILING OF DESIGNATED MATERIAL IN PRE-TRIAL**
4 **PROCEEDINGS**

5 16. The parties must comply with Local Rule 79-5 for filing
6 “Confidential” or “Highly Confidential” information with the Court in any pre-trial
7 proceeding in this action. Such filings must be in accordance with the standards set
8 forth in Kamakana v. City & County of Honolulu, 447 F.3d 1172, 1178-81 (9th Cir.
9 2006). If a party files or seeks to file with the Court material that another party has
10 designated “Confidential” or “Highly Confidential” under this Order, the filing
11 party shall simultaneously file an application to seal the records pursuant to Local
12 Rule 79-5 ^{Local Rule 37 and any other applicable rules and orders,} that references this Order and that specifically sets forth the terms of this
13 paragraph. In doing so, the filing party shall only seek to file under seal the portion
14 of such material that is “Confidential” or “Highly Confidential.” An application
15 which seeks to file materials under seal in proceedings before the district judge will
16 be made to the district judge.

17 17. ~~Within five business days after service of the application to seal~~
18 ~~(or within such other time as may be ordered by the Court), the Designating Party~~
19 ~~must either: (a) inform the recipient party that it does not object to the filing of the~~
20 ~~information in the public record, at which point the filing party must withdraw the~~
21 ~~application; or (b) file papers in support of the application setting forth the factual~~
22 ~~and legal basis for the request to seal the records. The Designating Party bears the~~
23 ~~burden of proving that the materials meet the standards for sealing the records as set~~
24 ~~forth in *Pintos v. Pacific Creditors Association*, 565 F.3d 1106 (9th Cir. 2009) and~~
25 ~~other relevant authority. In meeting that burden, a party may not rely on its own~~
26 ~~designation of material as “Confidential” or “Highly Confidential” under this~~
27 ~~Order.~~

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1 **F. CHALLENGES TO DESIGNATION**

2 18. A party may challenge the designation of any material as
3 “Confidential” or “Highly Confidential” under this Order under the procedures set
4 forth in Local Rules 37-1 through 37-4. If the parties are unable to resolve the issue
5 informally pursuant to 37-1, the challenging party may move for an order granting
6 access to the information under less burdensome conditions pursuant to the
7 procedures set forth in Local Rule 37-2 through 37-4. In making or opposing any
8 motion relating to the designation of confidential information, the party seeking to
9 maintain a document as confidential shall bear the burden of showing specific
10 prejudice or harm will result if a protective order is not granted.

11 19. This Order is without waiver of or prejudice to, and specifically
12 reserves the rights and remedies of any party to apply in writing to the Court for a
13 determination, for good cause shown, that: (a) persons not provided for in this
14 Order may or may not receive “Confidential” or “Highly Confidential” information;
15 or (b) this Order be modified or vacated. Any application for relief pursuant to this
16 section shall be made only after reasonable efforts to meet and confer in good faith
17 have been unsuccessful, and must comply with Local Rules 37-1 to 37-4 or other
18 applicable rule.

19 **G. SUBPOENA IN ANOTHER ACTION**

20 20. In the event any person, party or entity having possession,
21 custody or control of any “Confidential” or “Highly Confidential” information
22 receives a subpoena or other process or order to produce the “Confidential” or
23 “Highly Confidential” information, that person or party shall promptly, within five
24 (5) business days:

25 (a) notify, in writing, the attorneys of record of the
26 Designating Party;

27 (b) notify, in writing, the attorneys of record, or other
28 representatives if there is no attorney of record, of all persons having an interest in

1 maintaining the confidentiality of the “Confidential” or “Highly Confidential”
2 information and who are known to the recipient of the subpoena, process or order;

3 (c) furnish all persons notified pursuant to subsections a and
4 b, above, a copy of the subpoena or other process or order; and

5 (d) provide reasonable cooperation with respect to all
6 procedures set forth in the Order for the protection of the “Confidential” or “Highly
7 Confidential” information.

8 21. If after receiving the notification set forth in paragraph 20 the
9 Designating Party desires to prevent or limit the requested production of
10 “Confidential” or “Highly Confidential” information, it will be the responsibility of
11 the Designating Party to move to quash or modify the subpoena, or otherwise
12 resolve the issue with the subpoenaing party.

13 **H. TERM OF ORDER**

14 22. This Order does not govern or restrict the use of any document
15 or information (including information designated as “Confidential” or “Highly
16 Confidential” under this order) at trial in any manner whatsoever. When and if the
17 Action proceeds to trial, all of the documents and information to be used at trial will
18 be presumptively available to all members of the public, including the press, unless
19 good cause is shown to the district judge in advance of the trial.

20 23. The designation of any information, documents, or things as
21 “Confidential” or “Highly Confidential” information pursuant to this Order shall
22 not, in and of itself, raise any inference as to the confidentiality of any information,
23 documents, exhibits, or things marked for identification purposes or introduced into
24 evidence at the trial of this litigation. Nothing in this Order shall preclude any party
25 from seeking confidential treatment from the Court with respect to such
26 information, documents, exhibits, or things or from raising any available objections,
27 including without limitation objections concerning admissibility, materiality, and
28 privilege. The parties to this Order expressly reserve their rights to object to the

1 manner in which “Confidential” or “Highly Confidential” information may be used
2 in an evidentiary hearing or at trial. Special procedures or in camera treatment, if
3 any, shall be determined in the future, *in compliance with any applicable rules*
and orders.

4 **I. NO WAIVER**

5 24. The disclosure of “Confidential” or “Highly Confidential”
6 information pursuant to discovery or the procedures set forth in this Order shall not
7 constitute a waiver of any trade secret or any intellectual property, proprietary,
8 privacy or other rights to or in such information.

9 25. The inadvertent disclosure of information protected by the
10 attorney-client, work product, or other applicable privilege or protection in this
11 Action shall not constitute a waiver of any valid claim of privilege. Further, failure
12 to assert a privilege in this Action as to one document or communication shall not
13 be deemed to constitute a waiver of the privilege as to any other document or
14 communication allegedly so protected, even involving the same subject matter,
15 unless the producing party seeks to use or rely upon the privileged material in this
16 Action. A party that discovers that it has inadvertently produced privileged
17 information shall promptly request its return. The privileged documents together
18 with all copies thereof shall be returned forthwith to the party claiming privilege.
19 Any notes or other work product made from the documents in question (or their
20 contents) shall be returned along with the documents themselves or destroyed,
21 pursuant to paragraph 26 below. The party claiming privilege shall thereafter
22 promptly produce a privilege log listing the documents in question and any other
23 party shall thereafter have the right to challenge the assertion of privilege by motion
24 or any other appropriate means.

25 26. A party who receives apparently privileged materials from the
26 producing party, upon understanding that the document may be privileged or
27 contain confidential attorney work product, must act as follows:

- 28 (a) Cease review of the document.

1 (b) Immediately notify opposing counsel by phone and email
2 of the potentially privileged document, taking all reasonable measures to reach
3 opposing counsel. The reviewer must follow such counsel's instructions regarding
4 the disposition of the material. The reviewer must also completely refrain from
5 using the material until instruction by opposing counsel is received, which may
6 include returning the document and all copies, and removal of the document from
7 electronic databases with confirmation by the producing party.

8 (c) Until such time that the reviewer receives instructions
9 from opposing counsel, the reviewer may not share the document or its contents
10 with other persons. The reviewer may notify supervising attorneys that a
11 potentially privileged document may exist, without sharing its contents, and
12 otherwise advise them or receive advice from them regarding the circumstances.

13 (d) If the producing party claims the privilege it shall
14 thereafter promptly add the document(s) in question to its privilege log and any
15 other party shall thereafter have the right to challenge the assertion of privilege by
16 motion or any other appropriate means.

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PROTECTIVE ORDER EXHIBIT A

My name is _____.

I work for _____.

My business contact information is:

I have read the attached Stipulated Protective Order (“Order”) entered by the Court in the matter of POM WONDERFUL LLC v. TROPICANA PRODUCTS, INC., et al., United States District Court, Central District of California, Case No. 2:09 CV-00566 DSF (CTx).

I understand the responsibilities and obligations the Order imposes on me regarding “Confidential” or “Highly Confidential” information I obtain in this action.

I agree to be bound by all of the provisions of the Order.

I certify that (strike the inaccurate sections of this clause, if any):

I did not receive any “Confidential” or “Highly Confidential” information before signing this Exhibit A;

I meet all requirements for receipt of information and other material designated as “Confidential” or “Highly Confidential” information, pursuant to the Order;

I am not directly employed by any party to this action;

I am not under contract with any party to this action for any purpose other than this action.

I have received a copy of the Order, including an executed copy of this Exhibit A, for my personal use and reference.

I understand that the Court in this matter has the power to enforce the Order, including but not limited to imposing penalties and/or sanctions on anyone who violates the Order.

I agree to submit to the jurisdiction of the United States District Court, Central District of California in matters relating to this Order.

Signature: _____

Date: _____

Print Name: _____

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**PROTECTIVE ORDER EXHIBIT B
DECLARATION OF _____**

1. I work for Roll International Corporation as in-house litigation counsel, where I have worked since _____. Prior to that time, I was _____. In my role as in-house litigation counsel, I have responsibility for directing, overseeing, or otherwise participating in the litigation of this matter.

2. I have not had, do not have, and do not anticipate in the future having any involvement in the business decisions of Pom Wonderful LLC (“Pom”), including decisions relating to sales, marketing, pricing, product design, product research and development, competition, employment, or any other business decision. I have not, do not, and do not anticipate in the future providing non-legal advice to Pom and its management regarding any such business decisions.

3. I agree to abide by the terms of the Protective Order (“Order”) entered in this action on _____, and I have informed management and other relevant company employees of my duties under that Order.

4. “Highly Confidential” information produced by the opposing party or any third party in this action will be stored in a manner in which it will not be accessible to any person other than those listed in paragraph 13 of the Order. Specifically, all data stored on DVDs, CDs or external drives is password protected accessible only to those persons identified in paragraph 13 of the Order. Similarly, the Concordance database which stores the produced documents is password protected and only accessible to those persons identified in paragraph 13 of the Order. With respect to hard copy documents, there is a dedicated printer physically located on a floor containing the litigation team, which is on a different floor from the Pom business group. I am familiar with the controls that are in place to prevent disclosure to or access by any person other than those listed paragraph 13, and I will take measures available to me to enforce those controls and to ensure that they

1 remain in place, including, but not limited to asking all persons with access to the
2 “Highly Confidential” information to read the Order.

3 5. The following company employees are providing litigation
4 support in this matter and will thus necessarily have access to “Highly
5 Confidential” material from time to time: Pica Icasiano, Sarah Fleming, Jan Henry,
6 Laura Crawford and Bruno Genovese. None of these employees provides support
7 to any person with any involvement in the business decisions of Pom.

8 I declare under penalty of perjury under the laws of the United States that the
9 foregoing is true and correct, and that this Declaration is made on


10 _____ at _____.

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1 The Court approves the foregoing Protective Order submitted by the parties,
2 and its terms shall govern all information disclosed and documents and data
3 produced in this Action.

4 **IT IS SO ORDERED.**

5 Dated: 9/16, 2009


Magistrate Judge Carolyn Turchin

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