

1 Anthony M. Keats (Bar No. 123672)
 2 akeats@kmwlaw.com
 3 David K. Caplan (Bar No. 181174)
 4 dcaplan@kmwlaw.com
 5 Konrad K. Gatien (Bar No. 221770)
 6 kgatien@kmwlaw.com
 7 KEATS McFARLAND & WILSON LLP
 8 9720 Wilshire Boulevard
 9 Penthouse Suite
 10 Beverly Hills, California 90212
 11 Telephone: (310) 248-3830
 12 Facsimile: (310) 860-0363
 13 Attorneys for Plaintiff
 14 GIVENCHY, S.A.

9 Erica S. Alterwitz (Bar No. 240377)
 Erica.Alterwitz@bcbg.com
 10 Maryn L. Miller (Bar No. 161761)
 11 Maryn.Miller@bcbg.com
 12 2761 Fruitland Avenue
 13 Vernon, California 90058
 14 Telephone: (323) 277-6546
 Facsimile: (323) 277-5463
 Attorneys for Defendant
 BCBG MAX AZRIA GROUP, INC.

15 UNITED STATES DISTRICT COURT
 16 CENTRAL DISTRICT OF CALIFORNIA
 17 WESTERN DIVISION
 18

19 GIVENCHY S.A., a *société anonyme*
 20 duly organized and existing under the
 laws of France,

21 Plaintiff,

22 v.

23 BCBG MAX AZRIA GROUP, INC., a
 24 California corporation,

25 Defendant.

Case No.: CV 10-8394 GHK (SHx)

**[PROPOSED]
 PROTECTIVE ORDER**

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1 The parties have requested entry of an order under Rule 26 of the Federal Rules
2 of Civil Procedure (“Federal Rules”) to protect confidential information during
3 discovery and trial. The court has determined that it is appropriate to enter such an
4 Order for that purpose. It is therefore ORDERED as follows:

5 INTRODUCTION

6 The parties agree that they will discuss at the Meeting of Counsel Before Final
7 Pretrial Conference pursuant to Local Rule 16-2 the issue of the use of documents at
8 trial that have been designated as confidential information pursuant to this Order, and
9 will also address this issue with this Court at the Final Pretrial Conference.

10 1. *Applicability.* The confidentiality provisions of this Order shall apply to
11 all depositions, deposition transcripts, productions of documents, answers to
12 interrogatories, responses to requests for admissions, and all other discovery taken
13 pursuant to the Federal Rules, as well as testimony adduced at trial, matters in
14 evidence, and any other information that a disclosing party may designate as
15 Confidential Information or Confidential – Attorney’s Eyes Only in connection with
16 this action.

17 2. *Third parties.* The terms “disclosing party” and “producing party”
18 encompass not only the parties to this action but third parties who may disclose or
19 produce information, *e.g.*, in response to a subpoena.

20 DEFINITIONS

21 3. “*Confidential Information*” and “*Confidential – Attorney’s Eyes Only*”
22 (collectively “*Covered Information*”) means information in written, oral, electronic,
23 graphic/pictorial, audiovisual, or other form, whether it be a document, information
24 contained in a document, information revealed during a deposition, information
25 revealed in an interrogatory answer, or otherwise:

26 (a) which is designated as such by the producing party; and
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- 1 (b) which constitutes or contains a trade secret or other confidential research,
2 development, business transactions, or commercial information; and
3 (c) the disclosure of which information is likely to have the effect of harming
4 the competitive position of the producing party; or the disclosure of
5 which information would violate an obligation of confidentiality to a
6 third person, including a court.

7 4. *Examples of Covered Information.* In appropriate circumstances,
8 Covered Information might include, by way of example but not of limitation, trade
9 secrets, business plans, operations, research, technical or developmental information,
10 know-how or apparatus, customer lists, contact lists, supplier lists, independent
11 contractor lists, or the production, marketing, sales, shipments, purchases, transfers,
12 identification of customers, inventories, or amount or source of any income, profits,
13 losses, or expenditures of the producing party.

14 5. *Exceptions to confidentiality status.* Information will not be deemed
15 Covered Information, and the parties shall use reasonable efforts to ensure that
16 information is not designated as such, if the content or substance thereof:

- 17 (a) is at the time of production or disclosure, or subsequently becomes,
18 through no wrongful act or failure to act on the part of the receiving
19 party, easily available to the public through publication or otherwise; or
20 (b) is already, through no wrongful act or failure to act, in the possession of
21 the receiving party at the time of production.

22 6. *“Other law firm attorneys”* means attorneys (*i.e.*, members in good
23 standing of the bar of the highest court of any state or of any federal district court)
24 who are members or employees of the law firms of the outside attorneys of record for
25 any party but who are not themselves of record and who have signed a document in
26 substantially the form of **Exhibit A** attached hereto.

1 7. “*Law Firm Personnel*” means (i) regular full- or part-time employees of
2 the law firms of the outside attorneys of record for any party; and (ii) non-employee
3 clerical personnel engaged by such law firms on a contract basis (*e.g.*, data clerks)
4 who have signed a document in substantially the form of **Exhibit A** attached hereto;
5 to whom it is necessary that the confidential information in question be disclosed for
6 purposes of any dispute between parties to this lawsuit.

7 8. “*Outside consultants/experts*” means persons who are not employed by
8 the receiving party and who are retained by a party or its attorneys of record in this
9 litigation for the purpose of assisting in preparation of this litigation for trial, such as
10 accountants, statisticians, economists, technical consultants or other technical experts,
11 who have signed a document in substantially the form of **Exhibit A** attached hereto.

12 9. “*Service bureau*” means a company that:

- 13 (a) is independent of the parties, but a company will not be deemed non-
14 independent solely because it does business, regularly or sporadically,
15 with a party;
- 16 (b) is engaged by counsel of record to perform clerical-type services in
17 connection with this litigation, *e.g.*, photocopying, imaging, computer
18 data entry, and the like, or jury consultation services; and
- 19 (c) has executed an undertaking to be bound by the provisions of this Order
20 in substantially the form of **Exhibit A** attached hereto, including the
21 specific undertaking to have its employees who have access to Covered
22 Information sign a document in substantially the form of **Exhibit A**
23 attached hereto agreeing not to use or disclose such information.

24 10. “*Other qualified person*” means any other person (a) who is so
25 designated (i) by order of the court after notice and an opportunity to be heard to all
26 affected parties, or (ii) by agreement of the producing party, and (b) who has signed a
27 document in substantially the form of **Exhibit A** attached hereto.

1 11. “*Qualified persons*” as to Confidential Information means persons who
2 have signed a document in substantially the form of **Exhibit A** attached hereto and
3 includes the following persons identified in this paragraph (except that the Court,
4 Court personnel and counsel of record for any party and their personnel shall not be
5 required to sign such document):

- 6 (a) the Court and its officers, reporters and personnel;
- 7 (b) counsel of record for any party and their personnel;
- 8 (c) other law firm attorneys and their personnel;
- 9 (d) in-house counsel and their staff and paralegals;
- 10 (e) service bureaus, subject to the provisions of paragraph 9;
- 11 (f) outside consultants/experts for plaintiff and outside consultants/experts
12 for each defendant, with prior notice to each producing party as detailed
13 in paragraph 20; and
- 14 (g) other qualified persons, as to the information they are so designated
15 qualified, pursuant to paragraph 10.

16 12. “*Qualified persons*” as to Confidential – Attorney’s Eyes Only means
17 persons who have signed a document in substantially the form of **Exhibit A** attached
18 hereto and includes the following persons identified in this paragraph (except that the
19 court, court personnel and counsel of record shall not be required to sign such
20 document):

- 21 (a) the Court and its officers, reporters and personnel;
- 22 (b) counsel of record for any party and their personnel;
- 23 (c) other law firm attorneys and their personnel;
- 24 (d) in-house counsel and their staff and paralegals;
- 25 (e) outside consultants/experts for plaintiff and outside consultants/experts
26 for defendant, with prior notice to each producing party as detailed in
27 paragraph 20; and

1 (f) witnesses employed by the entity that produced such information.

2 **DESIGNATION AND IDENTIFICATION OF INFORMATION**

3 13. *Labeling of documents.* Information being designated as Covered
4 Information that is in documentary or other tangible form shall be labeled by the
5 producing party, prior to its production, to reflect its designation as Confidential, or
6 Confidential – Attorney’s Eyes Only, as appropriate. If the documents are produced
7 in the form of electronic or magnetic media, the producing source shall place a stamp,
8 label or other clear designation on the disc or tape containing the Covered
9 Information.

10 14. *Designation of other disclosures.* Information being designated as
11 Covered Information that is not in documentary or other tangible form, or that cannot
12 conveniently be labeled, shall be designated and/or categorized by the disclosing party
13 in a writing provided to the receiving party at the time of production.

14 15. *Preliminary designation of documents being inspected.* If a producing
15 party elects to produce documents and things for inspection, it need not label the
16 documents and things in advance of the initial inspection. For purposes of the initial
17 inspection, all documents within the produced files will be considered as having been
18 marked “Confidential – Attorney’s Eyes Only.” Thereafter, on selection of specified
19 documents for copying by the inspecting party, the producing party shall mark either
20 the original documents or the copies of such documents as may contain Covered
21 Information with the appropriate confidentiality marking at the time the copies are
22 produced to the inspecting party.

23 16. *Designation not determinative.* Designation of documents or other
24 specified information as Covered Information by counsel, or receipt of documents or
25 information so designated, shall not be considered as determinative of whether the
26 contents of the documents or the information specified are entitled to be deemed as
27 such.

1 17. *Challenges to confidentiality designations.* A party shall not be obligated
2 to challenge the propriety of a designation of information as Covered Information at
3 the time made, and failure to do so shall not preclude a subsequent challenge thereto.
4 For all such disputes, if any, the parties shall proceed pursuant to Local Rule 37. The
5 burden of proving that the information has been properly designated as Covered
6 Information is on the party making such designation.

7 18. *Designation of deposition testimony.* The following procedures shall be
8 followed if Covered Information of a producing party is discussed or disclosed in a
9 deposition:

- 10 (a) The producing party shall have the right to exclude from attendance at
11 the deposition, during such time as the Covered Information is to be
12 discussed or disclosed, any person other than the deponent, the court
13 reporter, and qualified persons. For the avoidance of doubt, the deponent
14 must be a qualified person who has signed a document in substantially
15 the form of **Exhibit A** or **Exhibit B** attached hereto.
- 16 (b) The Covered Information shall be designated as Confidential or
17 Confidential – Attorney’s Eyes Only at the request of counsel for the
18 producing party (or, if the producing party is not a party to the action and
19 is not represented at the deposition, at the request of counsel for the party
20 disclosing the information or questioning the witness about it).
- 21 (c) If a request under subparagraph (b) is made on the record during the
22 deposition, the reporter shall indicate on the cover page of the transcript
23 that the transcript contains Covered Information and additionally shall
24 list the pages and line numbers of the transcript on which the information
25 in question is contained. If the deposition is recorded on video, the
26 designation shall also be placed on the DVD, CD-ROM, videocassette or
27 other video recording container. Counsel retaining personnel to make the
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1 video recording shall have the responsibility for ensuring their
2 compliance with this subparagraph.

- 3 (d) Alternatively, a request under subparagraph (b) may be made in writing
4 within thirty (30) days after the requesting counsel receives a copy of the
5 transcript of the deposition. During this 30-day period, all deposition
6 transcripts and the information contained therein shall be deemed
7 Confidential - Attorney's Eyes Only. The request shall contain a list of
8 the numbers of the pages and lines of the transcript that are to be
9 designated as containing Covered Information, and specific designations
10 for each item or group of items on the list. The list shall be set forth on
11 one or more separate pieces of paper, the first one of which shall bear the
12 caption of the action and identifying information about the deposition.
13 The requesting counsel shall insert the list before the cover page of the
14 transcript and shall mail or fax copies of the list to counsel for all parties
15 so that it may be affixed to the face of the transcript and each copy
16 thereof.

17 **ACCESS TO INFORMATION**

18 19. Access to Covered Information disclosed to a receiving party shall be
19 limited to qualified persons except with the prior written agreement of the producing
20 party.

21 20. The following procedure shall be followed for any disclosure of
22 information as to which prior notice to the producing party is required under
23 paragraphs 11(f) and 12(e):

- 24 (a) By facsimile transmission with confirmation by overnight mail, counsel
25 for the receiving party shall (i) notify counsel for the producing party in
26 writing of its intention to make such disclosure ten (10) court days before
27 the intended disclosure; (ii) specify the identity and the current
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1 employment of the individual(s) to whom the proposed disclosure will be
2 made; (iii) identify the particular information proposed to be disclosed;
3 (iv) specify the reasons why the proposed disclosure is believed to be
4 necessary; (v) provide to the producing party at the time of notice under
5 this paragraph, a document in substantially the form of **Exhibit A** or
6 **Exhibit B** attached hereto that has been signed by the party to whom
7 disclosure shall be made.

8 (b) If the producing party makes a written objection setting forth in detail the
9 grounds for such objection within the 10-day period and the objection is
10 not resolved between counsel within five (5) court days thereafter, the
11 party seeking disclosure shall not disclose the information but shall have
12 the right to bring the dispute before the court for its resolution.

13 (c) If the dispute over the proposed disclosure is submitted to the Court by
14 motion, the party objecting to disclosure of the information shall have the
15 burden of persuasion.

16 21. *Disclosure in certain circumstances.* Nothing in this Order shall
17 preclude any party to the lawsuit or their attorneys from disclosing or using by the
18 disclosing party, in any manner or for any purpose, any information or documents
19 from the disclosing party's own files that the party itself has designated as Covered
20 Information.

21 22. *Restrictions on use.* Disclosure of information designated as Covered
22 Information shall be solely for the purposes of resolving this lawsuit between the
23 parties; information so disclosed shall not be used for any other purpose. The persons
24 receiving the information in question are prohibited from disclosing it to any other
25 person except in conformance with this Order.

1 **OTHER PROVISIONS**

2 23. *Inadvertent Disclosure of Covered Information.* The inadvertent or
3 unintentional disclosure or failure to designate documents or material as Confidential
4 or Confidential – Attorney’s Eyes Only shall not be deemed a waiver in whole or in
5 part of a producing party’s claim of confidentiality, either as to the specific
6 information disclosed or as to any other information relating thereto. Upon learning
7 of an inadvertent or unintentional disclosure of Covered Information, the producing
8 party shall provide notice to the parties who have received such Covered Information
9 as to how the information should have been designated and shall thereafter have ten
10 (10) business days to make the appropriate designation. During this ten-day period,
11 the information may not be used in a manner inconsistent with such notice. Upon
12 receipt of properly re-designated documents, counsel for the receiving party shall,
13 within ten (10) business days, either return to counsel for the producing party, at the
14 producing party’s expense, all versions of that information that were not so designated
15 or certify in writing that all versions of that information including without limitation
16 any physical or electronic copies have been destroyed.

17 24. *Documents subject to the attorney-client privilege or work product*
18 *immunity.* To facilitate discovery, the parties may make documents available for
19 inspection by counsel for the receiving party, and such documents may inadvertently
20 include documents subject to the attorney-client privilege, work product immunity, or
21 both. Neither the production for inspection of documents and things by the producing
22 party nor the inspection of such documents and things by the receiving party shall
23 constitute a waiver of the attorney-client privilege or work product immunity. After
24 inspection, the producing party may withhold documents subject to the attorney-client
25 privilege and work product immunity provided proper identification is made on the
26 producing party's list of such documents, and the inspecting party shall not refer to or
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1 rely on the contents of such inspected but withheld documents for any purpose,
2 subject to further order of the Court.

3 25. *Inadvertent production or disclosure of documents subject to the*
4 *attorney-client privilege and/or work product immunity.* Inadvertent production or
5 disclosure of documents or information subject to the attorney-client privilege, work
6 product immunity or both shall not constitute a waiver of, nor a prejudice to, any
7 claim that such documents or related material is privileged or protected by the work
8 product immunity, provided that the producing party notifies the receiving party in
9 writing promptly after discovery of such inadvertent production. Such inadvertently
10 produced documents and all copies thereof shall promptly be returned to the
11 producing party upon request. No use shall be made of such documents during
12 deposition or at trial, nor shall they be shown to anyone who has not already been
13 given access to them subsequent to the request to return them. If the parties are
14 unable to reach agreement within ten (10) days of such notice, the producing party
15 may seek relief from the Court pursuant to the requirements of Local Rule 37. The
16 receiving party shall not disclose a document for which a claim of privilege or
17 immunity is made pursuant to this paragraph to any person, other than those persons
18 who had it in their possession prior to receipt of the notice from the producing party,
19 until the expiration of the 10-day period identified in this paragraph or, if application
20 is made to the Court, until disposition of that application by the Court.

21 26. *Filing under seal.* The Parties shall follow the filing procedures set forth
22 in Local Rule 79.5, which provides:

23 Except when authorized by statute or federal rule, or the
24 Judicial Conference of the United States, no case or
25 document shall be filed under seal without prior approval by
26 the Court. Where approval is required, a written application
27 and a proposed order shall be presented to the judge along
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1 with the document submitted for filing under seal. The
2 proposed order shall address both the sealing of the
3 application and order itself, if appropriate. The original and
4 judge's copy of the document shall be sealed in separate
5 envelopes with a copy of the title page attached to the front
6 of each envelope. Conformed copies need not be placed in
7 sealed envelopes. Where under-seal filings are authorized by
8 statute or rule, the authority therefor shall appear on the title
9 page of the proposed filing. Applications and Orders to Seal,
10 along with the material to be placed under seal, shall not be
11 electronically filed but shall be filed manually in the manner
12 prescribed by Local Rule 79-5. A Notice of Manual Filing
13 shall also be electronically filed identifying materials being
14 manually filed.

15 27. *Use of information in court proceedings.* Any receiving party that knows
16 that it intends to present Covered Information of another party in oral form at trial, or
17 during any pre- or post-trial hearing, shall first notify the Court and the producing
18 party within a reasonable amount of time in advance. Because of the policy favoring
19 public attendance at judicial proceedings, the parties are strongly encouraged to agree
20 on procedures that will minimize the presentation of Covered Information in open
21 court. In appropriate circumstances such procedures might include, *e.g.*, submission
22 of written testimony under seal, presentation of "declassified" summaries of
23 confidential information, and the like. The Court does not here determine which if
24 any such procedures might be suitable in particular situations. Absent a stipulation of
25 all parties, the fact that information has been designated as Covered Information shall
26 not be admissible during the trial of this action, nor shall the jury be advised of such
27 designation.

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28. *Disposition of documents, etc., after final termination*

- (a) Except as set forth below, within 60 days of final termination of this action, the attorneys of record for each receiving party shall return to each producing party or its attorneys of record, at the expense of the producing party, all documents (and copies thereof) and all materials (and any copies thereof) that have been furnished to it by the producing party and that have been identified as Covered Information pursuant to this Order. At the option of the producing party, such documents received by the receiving party may be destroyed in lieu of being returned to the producing party. Counsel for each party must certify compliance with this subparagraph within this 60-day period.
- (b) Notwithstanding subparagraph (a), the attorneys of record for a party may maintain a set of pleadings, briefs, and similar papers filed with the Court, including all exhibits marked in discovery or at trial. The above-described pleadings, briefs and similar papers filed with the Court and exhibits marked in discovery or at trial may be retained in confidence under the terms of this Protective Order by the outside counsel for the party.

29. *No waiver of right or obligation to object to production.* Nothing contained in this Order shall be construed as a waiver by any party of its right to object to the subject matter of any request for production of documents in this action, nor as a waiver by any other party of the first party's obligation to make proper response to discovery requests. The entry of this Order shall not be construed as an agreement by any party to produce any documents or to supply any information and shall not constitute an admission that any such documents that may exist are relevant or material in any way to the issues raised in the pending action or admissible in such action, nor as a waiver of any privilege with respect thereto.

1 30. *Third parties.* In the event that a party seeks discovery from a non-party
2 to this action, the non-party may invoke the terms of this Order in writing to all parties
3 to the action with respect to any Covered Information to be provided to the requesting
4 party by the non-party by signing a document in substantially the form of **Exhibit B**
5 attached hereto. When serving subpoenas on non-parties that potentially call for the
6 disclosure of Covered Information, a copy of this order shall be included, and the
7 subpoena shall expressly incorporate by reference the terms of this Order.

8 31. *Continuing jurisdiction.* This Order shall survive the final conclusion of
9 the action, and this Court retains jurisdiction of the parties hereto, and of any person
10 who executes a copy of **Exhibit A** or **Exhibit B**, indefinitely as to any dispute
11 between any of them regarding improper use of information disclosed pursuant to this
12 Order.

13 32. *Requests for additional protection.* This Order shall be without prejudice
14 to the right of the parties to request additional protection under Fed. R. Civ. P., 26(c),
15 for discovery requests made by any party.

16 33. *Additional Parties.* The terms of this Order shall be binding on all
17 current and future parties to the litigation and their counsel. Plaintiff's counsel shall
18 be responsible for serving a copy of this Order on such new party's counsel, if any.

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20 **IT IS SO ORDERED.**

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23 DATED: _____, 2011 _____

24 THE HON. GEORGE H. KING
25 UNITED STATES DISTRICT JUDGE
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1 **AGREED TO:**

2 KEATS McFARLAND & WILSON, LLP

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4 Dated: February 11, 2011

5 By: _____ /s/
6 Anthony M. Keats, Esq.
7 Attorneys for Plaintiff
8 GIVENCHY, S.A.

9 BCBG MAX AZRIA GROUP, INC.

10
11 Dated: February 11, 2011

12 By: _____ /s/
13 Erica S. Alterwitz, Esq.
14 Attorney for Defendant
15 BCBG MAX AZRIA GROUP, INC.

1 subsequent destruction of such materials shall not relieve me from any of the
2 continuing obligations imposed on me by the Protective Order.

3 5. If I am executing this undertaking on behalf of my employer as indicated
4 above, I agree on its behalf that it too will be bound by the provisions of the Protective
5 Order and that it too will abide by the requirements set out in paragraphs 3 and 4 of
6 this undertaking.

7 6. If my employer is a service bureau as indicated above, I further agree on
8 its behalf that it will instruct all its employees who have access to Covered
9 Information under the Protective Order about their duty to comply with the
10 requirements set out in paragraphs 3 and 4 of this undertaking.

11 EXECUTED UNDER PENALTY OF PERJURY under the laws of the United
12 States of America on _____, 20__, at _____ in the State
13 of _____.

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16 _____
17 (Signature)

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EXHIBIT B:
THIRD PARTY AGREEMENT TO PROTECTIVE ORDER

_____, as a non-party to *Givenchy, S.A. v. BCBG Max Azria Group, Inc.*, Case No. CV 10-8394 GHK (SHx) (the “Civil Action”), has been asked to respond to discovery in that case pursuant to Federal Rules of Civil Procedure 26-37 and 45.

_____, considers certain information that is responsive to discovery to be confidential in nature and to fall under the description “Confidential” or “Confidential – Attorney’s Eyes Only” as defined in the Protective Order entered in the Civil Action.

_____, therefore, agrees, to the terms and conditions of the Protective Order entered in the Civil Action to appropriately protect this information from improper disclosure.

Date: _____

Individual/Company

By: _____
Signature

Its: _____
Title