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16 *Attorneys for Plaintiff JOSE ORELLANA*

17
 18 UNITED STATES DISTRICT COURT
 19 CENTRAL DISTRICT OF CALIFORNIA

20 JOSE ORELLANA, individually,
 21 and on behalf of other members of
 the general public similarly situated,

22 Plaintiff,

23 v.

24 EXPRESS, LLC, a Delaware limited
 liability company; and DOES 1
 25 through 10, inclusive,

26 Defendant.
 27

Case No. CV12-688 SVW (JEMx)

ASSIGNED FOR ALL PURPOSES TO
 JUDGE STEPHEN V. WILSON

PROTECTIVE ORDER

1 Plaintiff Jose Orellana (“Plaintiff”) and Defendant Express, LLC (“Express”),
2 by and through their respective counsel of record, hereby stipulate and agree to the
3 following:

4 **Good Cause Statement**

5 1. Plaintiff’s allegations, including his claims for failure to provide suitable
6 seating and failure to reimburse for business-related expenses, may require disclosure
7 of private and/or confidential information regarding Express’ current and/or former
8 employees, including information about employees’ pay, contact information and/or
9 performance histories. In addition, Express expects that Plaintiff may request and it
10 may need to produce trade secret and/or business confidential information involving
11 Express’ business policies and practices that would likely cause significant harm to
12 Express if made available or accessible publicly or to Express’ competitors. Good
13 cause therefore exists for the issuance of this protective order which will allow the
14 parties to engage in discovery in the above-captioned lawsuit while providing a means
15 for limiting access to, and disclosure of, private, confidential and/or trade secret
16 information. The purpose of this protective order is to protect the confidentiality of
17 such materials as much as practical during the litigation.

18 **Definitions And Designation**

19 2. “Confidential Information” means any information contained in a
20 document that is stamped with a “Confidential” designation. Confidential Information
21 may include, but is not limited to: (a) confidential or sensitive company proprietary
22 business information and (b) information about current, past or prospective employees
23 that is of a confidential or private nature, including current or former employees’
24 names and contact information, wage information and job performance-
25 documentation.

26 3. Stamping “Confidential” on the cover of a multiple page document shall
27 classify all pages of the document with the same designation unless otherwise
28 indicated by the designating party. Marking or stamping “Confidential Information”

1 on a label on any electronic storage medium shall designate the entire contents of such
2 electronic storage medium as Confidential Information.

3 4. Any party that designates material as Confidential Information must take
4 care to limit any such designation to specific material that qualifies under the
5 appropriate standards and, where appropriate, must designate as Confidential
6 Information only those parts of material, documents, items, or oral or written
7 communications that qualify, so that other portions of the material, documents, items,
8 or communications for which protection is not warranted are not unjustifiably
9 designated as Confidential Information. Mass, indiscriminate, or routinized
10 designations of material as Confidential Information are prohibited, and designations
11 that are shown to be clearly unjustified or that have been made for an improper
12 purpose (*i.e.*, to unnecessarily encumber or retard the case development process or to
13 impose unnecessary expenses and burdens on other parties) may expose the party
14 making such designations to sanctions.

15 **Access to Confidential Information**

16 5. Confidential Information produced or received in this action subject to
17 this protective order shall not be disclosed by any person who has received such
18 Confidential Information through this action except to: the Court, including assigned
19 judges, their staff, jurors and other court personnel; court reporters and videographers
20 recording or transcribing testimony in this action; attorneys of record for the parties
21 and their respective associates, paralegals, clerks, and employees involved in the
22 conduct of this litigation and in-house attorneys at Express. Notwithstanding the
23 foregoing, the following designated persons may also receive and review Confidential
24 Information:

25 a. Current or former employees of Express who may serve as
26 witnesses, but only to the extent that the Confidential Information is directly related to
27 their expected testimony;

1 b. Plaintiff Jose Orellana and any other named plaintiff that may be
2 added to the litigation;

3 c. Any person who was involved in the preparation of the document,
4 materials or the discovery responses containing Confidential Information or who
5 lawfully received or reviewed the documents or to whom the Confidential Information
6 has previously been made available other than by one receiving such Confidential
7 Information in connection with this action;

8 d. Experts or consultants who are engaged by counsel for any party to
9 perform investigative work, factual research, or other services relating to this action;

10 e. Mediators used to try to resolve the action;

11 f. Any other person with the prior written consent of the designating
12 party.

13 6. Prior to reviewing any Confidential Information, any person who falls
14 within a category identified in Paragraph 4(a)-(f) shall be provided a copy of this
15 protective order and shall agree to be bound by its terms by executing the non-
16 disclosure agreement in the form set forth in Attachment A.

17 7. The parties shall retain copies of any executed non-disclosure agreements
18 until the end of the action. In the event of a possible violation of this protective order
19 while this action is pending, a party may request that the Court order production of the
20 executed non-disclosure agreements for good cause. Otherwise, the non-disclosure
21 agreements are confidential and are not subject to any discovery request while the
22 action is pending. No more than sixty (60) calendar days after the end of litigation in
23 the action, the party who received the Confidential Information shall provide copies of
24 all executed non-disclosure agreements to the party who produced the Confidential
25 Information.

26 8. The action is at an end when all of the following that are applicable
27 occur: (a) a final judgment has been entered by the Court or the case has otherwise
28 been dismissed with prejudice; (b) the time for any objection to or request for

1 reconsideration of such a judgment or dismissal has expired; (c) all available appeals
2 have concluded or the time for such appeals has expired; and (d) any post appeal
3 proceedings have concluded.

4 **Use Of Confidential Information**

5 9. Confidential Information shall be used solely and exclusively for
6 preparing for, attempting to settle, and prosecuting this case, including the claims
7 brought on behalf of the named plaintiff(s) and hourly or non-exempt employees in
8 California in this case, pending the completion of the judicial process, including
9 appeal. Confidential Information cannot be used for any other purpose in any other
10 matter or proceeding for any reason whatsoever. However, this Agreement is not
11 intended to be an “agreement restricting a member’s practice” in violation of
12 California Rules of Professional Conduct, Rule 1-500.

13 10. Nothing in this protective order shall restrict any party’s counsel from
14 giving advice to its client with respect to this action and, in the course thereof, relying
15 upon Confidential Information and, provided that in giving such advice, counsel shall
16 not disclose the other party’s Confidential Information other than in a manner
17 expressly provided for in this protective order.

18 11. Testimony taken at a deposition that involves Confidential Information or
19 must be designated as “Confidential” by making a statement to that effect on the
20 record at the deposition, identifying the specific testimony or items claimed to be
21 Confidential Information. Arrangements shall be made with the deposition reporter
22 taking and transcribing information designated as Confidential to bind separately such
23 portions of the deposition transcript, and/or to label such portions appropriately. If
24 any portions of the deposition transcript and/or video or audio versions of the
25 depositions contain Confidential Information, or references thereto, they must be filed
26 with the Court in compliance with this protective order.

27 12. A copy of the protective order shall be attached as an exhibit to the
28 deposition transcript and the court reporter shall be subject to the protective order and

1 precluded from providing the original or copies of the deposition transcript or portions
2 thereof, any copies thereof, or portions of copies thereof, to any persons or entities
3 other than counsel of record in the action. Any audiotope and/or videotape of said
4 deposition shall also be subject to this protective order. The deposition videographer
5 shall be subject to this protective order and precluded from providing the original
6 deposition videotape or portions of the videotape to any persons or entities other than
7 counsel of record. Any audiotope shall also be subject to this protective order and all
8 persons shall be precluded from providing the original deposition audiotope or
9 portions of the audiotope, to any persons or entities other than counsel of record in the
10 action.

11 13. Only individuals permitted access to Confidential Information or shall
12 attend any deposition where Confidential Information. Individuals attending any
13 depositions using Confidential Information shall not disclose to any person any
14 statements made by deponents at depositions that reference Confidential Information
15 unless that person is independently allowed access to the information. Nothing in this
16 protective order gives any individual the right to attend a deposition that they would
17 not otherwise be entitled to attend.

18 **No Waiver And Challenges to Designation**

19 14. Whether or not any evidence or testimony is, in fact, designated as
20 "Confidential" shall not be conclusive of whether it is lawfully entitled to trade secret
21 or other confidentiality protections, and the failure to make such a designation shall
22 not constitute a waiver of any such protections.

23 15. By entering into this protective order, the parties do not waive any right
24 to challenge whether any material designated or not designated as Confidential
25 Information is properly designated or not designated as such, and do not waive the
26 right to challenge at any hearing, trial or other proceeding whether such information
27 is, in fact, confidential or private. Unless a prompt challenge to a confidentiality
28 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary

1 economic burdens, or a significant disruption or delay of the litigation, a party does
2 not waive its right to challenge a confidentiality designation by electing not to mount a
3 challenge promptly after the original designation is disclosed.

4 16. The burden of persuasion in any proceeding challenging the designation
5 of any material as Confidential Information shall be on the party making the
6 designation. Frivolous challenges, and those made for an improper purpose (*i.e.*, to
7 harass or impose unnecessary expenses and burdens on other parties) may expose the
8 party making the challenge to sanctions. In the event of a challenge to the designation
9 of material as Confidential Information, all parties shall continue to treat the
10 challenged materials as Confidential Information until the court rules on the challenge.

11 **Filing Under Seal And Handling At Hearings And Trial**

12 17. With regard to any Confidential Information to be filed with the Court,
13 any party seeking to file such documents shall apply to do so under seal, in accordance
14 with Central District Local Rule 79-5.

15 18. Should the need arise to offer testimony at a hearing or trial to present
16 evidence marked as Confidential that cannot be addressed through sealing the
17 evidence, the parties will work in good faith to reach an agreement to use a redacted
18 version of the evidence. If they cannot reach an agreement, then the designating party
19 will be allowed an opportunity to seek an appropriate court order to appropriately
20 restrict what Confidential Information becomes public. Nothing shall prejudice any
21 parties' rights to object to the introduction of any Confidential Information or into
22 evidence, on grounds, including, but not limited to, relevance and privilege.

23 **Inadvertent Failure To Designate**

24 19. If, through inadvertence, any party produces or offers as testimony any
25 Confidential Information without labeling it or otherwise designating it as such, the
26 producing party may, at any time, give written notice designating such information as
27 Confidential Information.

Clawback Provisions

1
2 20. The parties also wish to protect certain privileged and work product
3 documents, information, and electronically stored information against claims of
4 waiver in the event they are produced during the course of this litigation, whether
5 pursuant to a Court order, a discovery request or informal production.

6 21. The inadvertent production of any document in this action shall be
7 without prejudice to any claim that such material is protected by any legally
8 cognizable privilege or evidentiary protection including but not limited to the
9 attorney-client privilege and/or the work product doctrine, and no party shall be held
10 to have waived any rights by such inadvertent production.

11 22. If any document produced by another party is on its face subject to a
12 legally recognizable privilege or evidentiary protection, the receiving party shall: (a)
13 refrain from reading the document any more closely than is necessary to ascertain that
14 it is privileged or protected; (b) immediately notify the producing party in writing that
15 it has discovered documents believed to be privileged or protected; (c) specifically
16 identify the documents by Bates number range or other identifying information; and
17 (d) return all hard and soft copies of the documents and, where the documents have
18 been transferred or stored electronically, delete the documents from the devices on
19 which they are or were stored or accessed or otherwise make them inaccessible. The
20 steps in this paragraph shall be completed within seven (7) days of discovery by the
21 receiving party. The producing party shall preserve all document(s) returned under
22 this paragraph until it confirms that there is no dispute about the privileged and/or
23 work product nature of the document(s) or, if there is a dispute, until the privilege
24 issue is resolved. Notwithstanding the provisions of this paragraph, the receiving
25 party is under no obligation to search or review the producing party's documents to
26 identify potentially privileged or work product protected documents.

27 23. Upon written notice of an unintentional production by the producing
28 party or oral notice if notice is delivered on the record at a deposition, the receiving

1 party must promptly return all hard and soft copies of the specified document(s).
2 Where the document(s) have been transferred or stored electronically or are
3 themselves privileged or attorney work product protected, the receiving party must
4 delete the documents from the devices on which they are or were stored or accessed or
5 otherwise make them inaccessible to the receiving party.

6 24. To the extent that the information contained in a document subject to a
7 claim has already been used in or described in other documents generated or
8 maintained by the receiving party, then the receiving party must delete and/or render
9 inaccessible those portions of the document that refer to the privileged and/or work
10 product information. If the receiving party disclosed the specified document(s) before
11 being notified of its inadvertent production, it must take reasonable steps to retrieve
12 the document(s).

13 25. The receiving party shall have seven (7) days from receipt of notification
14 of the inadvertent production to determine in good faith whether to contest such claim
15 and to notify the producing party in writing of an objection to the claim of privilege
16 and the grounds for that objection.

17 26. The receiving party's return or destruction of such privileged or protected
18 documents as provided herein will not act as a waiver of the requesting party's right to
19 move for the production of the returned or destroyed documents on the grounds that
20 the documents are not in fact subject to a viable claim of privilege or protection.
21 However, the receiving party is prohibited and estopped from arguing that the
22 production of the documents in this matter acts as a waiver of an applicable privilege
23 or evidentiary protection, that the disclosure of the documents was not inadvertent,
24 that the producing party did not take reasonable steps to prevent the disclosure of the
25 privileged documents or that the producing party failed to take reasonable steps to
26 rectify the error.

27 27. The parties shall meet and confer within seven (7) days from the receipt
28 of the objection notice in an effort to resolve the situation by agreement. If an

1 agreement is not reached, the receiving party may file an appropriate motion and, as
2 part of that motion, request that the producing party submit the specified documents to
3 the Court under seal for a determination of the claim and will provide the Court with
4 the grounds for the asserted privilege or protection except where such a submission
5 would violate existing law. Any party may request expedited treatment of any request
6 for the Court's determination of the claim.

7 **Termination Of Case**

8 28. The terms of this protective order shall survive the final termination of
9 this action and shall be binding on all of the parties thereafter.

10 29. Within sixty (60) business days of the termination or settlement of this
11 action, each party must return, make available for pick-up, or destroy Confidential
12 Information received during this litigation from the other party and copies of any
13 deposition transcripts designated as Confidential Information. Where Confidential
14 Information has been transferred or stored electronically, the receiving party must
15 delete the electronic versions from the devices on which they are or were stored or
16 accessed or otherwise make them inaccessible to the receiving party. Notwithstanding
17 these provisions, that counsel of record for the parties may retain an archival copy of
18 all pleadings, motion papers, trial, deposition, and hearing transcripts, legal
19 memoranda, correspondence, deposition and trial exhibits, expert reports, attorney
20 work product, consultant and expert work product, and those copies of any part of the
21 Confidential Information that have become part of the official record of this litigation
22 and may retain abstracts or summaries of such materials, which contain counsel's
23 mental impressions or opinions. Such information shall remain subject to the terms of
24 this protective order.

25 30. Upon returning to the other side all Confidential Information and/or
26 deposition testimony or upon destroying such information, the returning party must
27 also execute and furnish the Certificate of Surrender and Deletion of Confidential
28 Information in the form set forth in Attachment B.

1 Miscellaneous Provisions

2 31. The parties expressly agree that, by entering into this protective order,
3 they do not waive any objections to any discovery requests and, further, that they do
4 not agree to the production of any information or documents, or type or category of
5 information or documents.

6 32. This protective order is subject to modification by stipulation of the
7 parties. The Court may modify the terms and conditions of this protective order for
8 good cause, or in the interest of justice, or on its own order at any time in these
9 proceedings. The parties request that the Court provide them with notice of the
10 Court's intent to modify the protective order and the content of those modifications,
11 prior to incorporate of such modifications.

12 Dated: May 10, 2012

LITTLER MENDELSON

13
14 /s/
15 _____
16 LARA K. STRAUSS
MATTHEW J. SHARBAUGH
Attorneys for Defendant
EXPRESS, LLC

17 Dated: May 10, 2012

INITIATIVE LEGAL GROUP, APC

18
19 /s/
20 _____
21 MELISSA GRANT
SUZY E. LEE
Attorneys for Plaintiff
JOSE ORELLANA and the Putative Class

22 ORDER

23 The Court, having reviewed the Parties' Stipulated Protective Order, and
24 GOOD CAUSE APPEARING THEREFOR, **HEREBY ORDERS** that the above
25 Protective Order is hereby entered and approved by the Court for use in the above-
26 captioned case.

27 Dated: May 11, 2012

28 /s/John E. McDermott

HON. JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

ATTACHMENT A

CONFIDENTIAL INFORMATION NON-DISCLOSURE AGREEMENT

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1. I have had the opportunity to review the protective order in this action, and I agree that I am one of the following: (a) a current or former employee of Express who has been asked to serve as a witness on an issue related to the Confidential Information that I am receiving or being shown; (b) a named plaintiff to the action; (c) a person who was involved in the preparation of the document, materials or the discovery responses containing Confidential Information or who lawfully received or reviewed the documents or to whom the Confidential Information has previously been made available other than by receipt of such Confidential Information in connection with this action; (d) an expert or consultant who has been engaged by counsel for any party to perform investigative work, factual research, or other services relating to this action; (e) a mediator used to try to resolve the action; or (f) a person who the parties to the action have agreed in writing may receive Confidential Information.

3. I agree not to disclose any of the Confidential Information to any third person and further agree that my use of any Confidential Information shall only be for the prosecution, defenses, discovery, mediation and/or settlement of this action, and not for any other purpose. I further agree that on or before the termination or settlement of this action, I will return all Confidential Information which is in my possession, custody, or control to the attorneys involved in the action so that it can be returned as provided in the protective order.

5. By signing this Confidential Information Non-Disclosure Agreement, I stipulate to the jurisdiction of this Court to enforce the terms of this Agreement.

Dated: _____, 2012

SIGNED

PRINT NAME

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ATTACHMENT B
CERTIFICATE OF SURRENDER AND DELETION
OF CONFIDENTIAL INFORMATION

The undersigned hereby represents that, pursuant to the protective order, all Confidential Information within the possession, custody or control of the undersigned has been returned to the producing party to the extent it could be returned either in hard or soft copy, or destroyed. The undersigned further represents that, pursuant to the protective order, and to the extent Confidential Information was transferred or stored electronically, all electronic versions of the material and information have been deleted from the devices on which they were stored or accessed or otherwise rendered inaccessible.

Dated: _____, 2012

SIGNED

PRINT NAME

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